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EDITORIAL

Law has been a dynamic concept all the time. It has various dimensions depending upon the period of time as well as its applicability to the nature of society in which it is to operate. The basic concepts of law remain changing with the changing situation of the social norms, the political strategy and the needs of the common man. The rule of law is the slogan of the day may it be on one side or the other. The act which is legal today may be an offence tomorrow and the vice-versa. At the same time an act which is legal in one part of the world may be a crime in other part of the world. Even in a country a "Law" may be valid in a part of its territory may be illegal and punishable in the other part. The law cannot be studied in isolation. In such a decimal context a common man wonders about to learn what is the true law? The answer of the question cannot be given on looking at the statutory law alone. One has to draw the conspectus of the legislative enactment, judicial interpretation and the opinion of the jurists. It is a sheer paradox that everyone is supposed to know the law of the land while the fact remains that now a days nobody knows the whole law of the land. The Legislators, in general, make law, the judges interpret it and the academics teach it in addition to study analysis and research. Even then the ambiguity remains unclear after repeated amendments. This problem poses a complex issue before a modern man how to know the "law in force". The only solution may be found in deep analysis and research on various aspects of the law. A humble attempt has been made by bringing out the present publication.

The Department of Law, University of North Bengal, although a recent centre of legal education in comparison to others in North India, has played a significant role. The academic excellence of any institution may be judged by the achievements of its students and performance of its teachers in addition to the given infrastructure and the facilities available for such goals. Present shape of the journal has been the product of a long process and initiatives undertaken by our faculty members. The present publication is the testimony to the fact which will go a long way in spreading the inference of multi-faceted research in various fields of law. That may be the source of knowledge on some of the areas of legal discussion.

For a long time we are thinking about to publish a law journal from our department. The ideas were on our mind for a couple of years, to give it a present form that have been possible today. In this academic venture the moral support given by our former Vice-Chancellor Professor Arunabha Basumajumdar is commendable at the same time the journal could see the

light of the day by the support of my esteemed colleagues, in particular, and the whole academic world in general. Over and above to maintain the above spirit, it is not enough, the continual research and publication is necessary. I have firm belief that I would be able to fulfil the need of the hour by your constant support. Such kind of level of confidence in our mind became possible mainly because of successfully completion of number of national and international seminars and conferences by our Department with overwhelming participation and support from every part of our country and also from different countries including SAARC countries.

We firmly believe on one principle that our journal should ideally be a platform for exchange of ideas and dissemination of information not only from established legal luminaries but also for the young faculties and researchers in the field of law and allied subjects who will be the future leaders in the field of legal education in our country.

The present issue of the journal may have some errors and I academically take responsibility for the same in the given circumstances. I would welcome any suggestion and opinion for improvement for the next issue of the journal.

Prof. Rathin Bandyopadhyay
Chief Editor

Sexuality, Law and Constitution Beyond Gender Binary in India: Judicial Approach

Prof. Tarun Arora¹

Abstract

Across the world, discriminatory laws made many years ago continue to affect lives of many people, criminalizing same sex relations and failing to protect women and girls..... I am all too aware that these laws were often put in place by my own country. They were wrong then, and they are wrong now. As the UK's Prime Minister, I deeply regret both the fact that such laws were introduced and the legacy of discrimination, violence and even death that persists today.²

Keywords: Rights of LGBTQ, Law and Constitution

I. Prefatory Statement

Rule of Law or Rule by Law..?

Regret by Theresa May for historic wrongs of criminalizing natural choices and fear of state will certainly fall in later. Freedom from fear and want are the hallmark of civilized state in post-World War era. Equality of status and equal protection of laws are certainly inalienably attached to a dignified life. Nomodern state can afford to deprive of the individuals from these highest aspirations of the humanity. Social contract theory as documented after 2nd World War in the form of UDHR recognizes freedom, justice and peace as the foundations of the world. Furthermore, it unambiguously underscores the inter- relationship among and between freedom of individuals, standards of life, social progress and peace. Designed on the foundations of this edifice of human rights, the Constitution of India also recognizes equality before law to all individuals without any

¹Professor and Dean, School of Legal Studies, Central University of Punjab, Bathinda (IND)

²The Guardian, Mar.17,2018.

discrimination on the grounds of race, religion, caste, place of birth or sex etc. Though the Constitution stood the test of time by serving the people of India during last seventy years yet the failure in infusing life in the letters of the script of the Constitution turned most of the constitutional promises into rhetoric. Skepticism emerged out of the gap between constitutional aspirations, vision and philosophy on one side and ground realities on other. Failure to realize promises enshrined in the Preamble became subject matter of semantics for academics studies. Taking up one of the contemporary aspects of exclusion of individuals beyond the binaries of gender [Lesbian, Gay, Bi-sexual, Trans-gender community (LGBTc), also addressed as homosexuals,³] this contribution aims at unfolding layers of principles expounded and elaborated by the Constitutional Bench of the Supreme Court of India (SUPREME COURT OF INDIA) in *Navtej Singh Johar v. Union of India*.⁴(*Navtej Singh's*)

This judgment being a *magnum opus* infused fresh insights by recognizing individuality within the domain of right to life and dignity guaranteed under Article 21 of the Constitution. Individuality is an innate and natural aspect of one's life and personality. The society should have minimal intervention in one's individualistic affairs, intimate choices and sexual orientation. Addressing the challenges of constant persecution through unequal treatment, disparities, oppression, rule of law and marginalization, the SUPREME COURT OF INDIA attempted to bring LGBTc to mainstream by undoing the rhetoric. The judgment is not less than a Bill of Right for individuals beyond gender binaries to restrain the brutal majoritarian forces. It marks the dawn of the new era recognizing the rights of the LGBTs to equal opportunities as the part of mainstream to live in harmony with others and assure dignity.

In view of above, this contribution intends to underscore the inalienability of sexuality from right to privacy and dignity. The researcher has ventured to

³ "...it encompasses a variety of phenomena related to a same-sex sexual orientation. Although the definition of the term often focuses mainly on sexual acts and attractions between persons of same biological sex, homosexuality also refers to patters of same sex romantic and emotional bonding, identities and communities based on same sex desires and relationships, and the shared cultures created by those communities". Gregory M. Herek, *Homosexuality 1* (Department of Psychology, University of California, 1999).

⁴ AIR 2018 SC 4321.

distinguish constitutional morality from social morality. Furthermore, an attempt has been made to examine *raison d'être* of decriminalization of consensual acts of intimacy between LGBTc on the anvil of constitutional ethos in Indianscenario. The forthcoming study is not exhaustive but inclusive. The scope of this study has been confined to jurisprudential aspects of the issue covering kinds of morality, distinction between constitutional and social morality, theories of rights, multiple aspects of privacy, obligation of state to decriminalize and be inclusive.

II. Sexuality as Personhood v. Moral Dilemmas

I am what I am, so take me as I am.⁵

Individuality is essence of life. Denial of self-expression and natural identity is indispensable part of one's life. Sexual Orientation is innate to human being and important attribute of one's personality and identity. Human sexuality has two natural variants – homosexuality and bi-sexuality. Important thing to understand is that to be a homosexual or bisexual- is not a matter of choice as these are natural traits. Therefore, LGBTs who are placed in category of homosexual are a part with bisexual entitled to complete autonomy over their innate choices and intimate desires concerning the personal domain of their life. They deserve equal freedom to choose their partners.

A glance at the process of criminalizing the homosexuality reveals that in the first half of 20th century, homosexuality was considered as a problem of psychopathology or developmental arrest.⁶ It was assumed that usually child grows as a heterosexual adult and homosexuality was the outcome of arrested development.⁷ Thus, homosexuality was treated as a disorder or mental illness, which was meted out with social ostracism and revulsion.⁸ Gradually, with the development of scientific studies and research, homosexuality started to be labelled as a complex subject but inherent, normal and natural variant of human sexuality.

⁵ Navtej Singh Johar (2018) p. 4337.

⁶ Report: The Committee on Homosexual Offences and Prostitution, 1957. 30.

⁷ Benjamin J. Sadock et al, Kaplan and Sadock's Comprehensive Textbook of Psychiatry 2060-89 (9th Ed. 2009).

⁸ supra note 3. 4513, 516.

On the eve of completion of seven decades of commencement of the Constitution of India, though small yet significant part of Indian masses feels deprived and fearful of disclosing their sexual identity. The script of the Constitution certainly incorporates the dictum *includes all excludes none*⁹. The language of the preamble envisioning equality of status and opportunity, liberty of thought, speech and expression dignity of individual and furthermore various rights recognized in part III certainly treats all persons equal in terms of sexuality. S. 377 of IPC criminalizing consensual homosexuality is a pre- constitution law. It's sustainability in post-constitutional era by virtue of saving clause of Art. 372 resulted into its conflict with the constitutional spirit of rule of law.¹⁰ Law itself deprived of LGBTQ and also HIV infected people of their right to health, medical assistance, equal opportunities etc. marginalized them. Rule by Law eclipsed freedom from fear and want. Narrow interpretation of right to life and personal liberty, right to privacy and right to live with dignity resulting into the sufferings of the individuals of LGBTQ presented a serious challenge before the administration of justice. The Court took note of following real instance of persecution and expulsion culminating into feel of dejection.¹¹

Social realities underlying above dejection are more aggravated in the form of verbal harassment, familial fear, restricted access to public spaces and the lack of safe spaces for consummation resulting into denial of the self and the obliterating the identities as well. An egalitarian society accommodates diversity of linguistics, culture and ideologies- liberal and conservative as well. The people of stereotypes mindset start moral policing and unnecessary interferes in the personal life of others. Compromising of dignity in such an atmosphere of constant exclusion turns society into open prison. Foucault supports 'a state of conSupreme Court of Indiaous and permanent visibility that assures the automatic functioning of power'.¹² Endorsing the effects of such a law in

⁹Arts. 14, 15(1), 16, 17 21-A, 25, 26, 29, 30 of the Constitution of India.

¹⁰ Section 377 of Indian Penal Code.

¹¹ Part of Written Submission by Voice Against S. 377, W.P. (CRL) No. 76/2016 p. 18.

¹² Michel Foucault, *Discipline and Punish: the Birth of the Prison* 201 (Pantheon, 1977).

realities, Ryan Godman opines that private individuals also start exercising policing power to control LGBTs without any authorization by the State.¹³ Henceforth, *prima facie* S.377 appears neutral and loses its neutrality by criminalizing not a natural act but a distinct sense of identities. These identities are certainly none other than LGBTs. Alternatives provided by the Constitution to draw the curtain to cover the law of British era were as under:

- a. the Parliament to repeal old laws;¹⁴
- b. the President to adapt, modify an existing law by Order u/a 372(2) to bring such law in consistence with the Constitution;¹⁵
- c. the judiciary to resolve the quandary.

Following issues were serving as blow on constitutional governance in India since its inception, although the judiciary has attempted to resolve from time to time:¹⁶

Rights and Freedoms Vs. S. 377

(14)	Equality
[19(1)(a)(c)]	Expression & Association
(21)	Fear of state action & persecution
	Reputation & personal security
	Shelter, privacy & Individuality
	Dignity

With the dawn of new millennium, the Millennial¹⁷ and Post Millennial¹⁸ Generations witnessed transition in each domain of life – social, economic, geographical, technology and so on. The revolution in ICT sector turned the whole globe into a single village and a paradigm shift was noticed. Theories in

¹³ Ryan Goodman, 'Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptic', 89 California Law Review 688(2001).

¹⁴ supra note 8. Schedule VII, Arts 245-256.

¹⁵ Id, Arts 372 (2).

¹⁶ Naz Foundation v. Government of NCT of Delhi and Others filed in 2001 W.P(C) No. 7455 and decided on 2nd July 2009, Suresh Kumar Koushal and others v. Union of India AIR 2014 SC 563.

¹⁷ Millennial Generation: Born between 1981-96 (Gen Y).

¹⁸ Post-Millennial Generation: Born between 1996 onwards (Gen Z).

each sphere of life underwent the different phases resulting into diversity of opinions and multiplying the range of ideas. Life of individuals- whether personal, professional or social was not immune from the effects of this rapid transition.

With the passage of time, in context of personhood, public perception also divided into opposing homosexuality is immoral and against nature and favouring autonomy of sexual desires as personal. Ostracizing of sexuality is deprivation of personhood. Here it would not be out of place to mention that seeds of this conundrum of gap in thoughts lies in flexible and dynamic socio- political forces. These forces keep on changing very swiftly in comparison to the mindset of the people. Therefore, a non-receptive part of the society views changes in the social values, habits, life style as negative and mutates stereotype mindset while people with flexible and receptive mindset adapts easily.

III. International Perspectives on Sexual Orientation

UDHR envisions dignity as an equal and inalienable right of all the members of the human family.¹⁹ Art. 2 sets a benchmark for states to ensure availability of rights and freedoms mentioned under the Declaration without any distinction on any ground covering sex in its fold. Term 'sex' has been used as prohibited ground of distinction making any distinction unlawful under International Law.²⁰ Further, WHO has removed homosexuality from the list of diseases in International Classification of Diseases.²¹

In 1957, Wolfenden Committee Report highlighting misuse of anti-sodomy laws as a means of blackmailing homosexuals resulted into passing of Sexual Offences Act, 1967.²²

¹⁹ UDHR, 1948.

²⁰ Id.

²¹ The ICD- 10 Classification of mental and behavioral disorders: clinical descriptions and diagnostic guidelines, WHO, Geneva, 1992, <http://www.who.int/classifications/icd/en/bluebook.pdf>. Mar. 20, 2020.

²² The Report of Departmental Committee on Homosexual Offences and Prostitution, 1957.

Additionally, the Courts on the status of LGBT and their mainstreaming in United States,²³ Canada,²⁴ South Africa,²⁵ U.K.,²⁶ Phillipines²⁷ and other jurisdictions²⁸ have also been active in curbing criminalization of homosexuality. These legal systems endorsed that choice to have intimate human relationship should be protected against social opprobrium and unfair intrusion by the state.

Yogyakarta principles, 2006 and 2017 documented by a special group of international human rights experts to prepare framework concerning sexual orientation and gender identity deserve special mention here. These principles have been taken into account by the SUPREME COURT OF INDIA in *Navtej Singh's* Case. Basically, these are the principles adopted by above distinguished group and encapsulate right to the universal enjoyment of human rights, right to equality and non-discrimination, right to recognition before the law, right to life, protection against medical abuses, freedom of opinion and expression.²⁹

²³ Obergefell et. al v. Hodges, Director, Ohio Department of Health 576 US (2015), Prince Waterhouse v. Hopkins 490 US 228 (1989), Kimberly Hively v. Ivy Tech Community College of Indiana 830 F.3d. (2016), Baldwin v. Foxx EEOC App. No. 0120133080 2015 WL 4397641, Roberts v. US Jaycees 468 US 609, Lawrence v. Texas 539 US 558.

²⁴ Delwin Vriend and Others v. The Queen, Alberta and Others 1998 (1) SCR 493, Egan v. Canada (1995) 2 SCR 513,

²⁵ National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs 2000 (1) BCLR 39.

²⁶ Euan Sutherland v. U.K. 2001 ECHR 234.

²⁷ Ang Ladlad LGBT Party v. Commission of Elections GR No. 190582 (2010)

²⁸ Trinidad and Tobago Judge rules homophobia laws unconstitutional, <https://www.theguardian.com/world/2018/apr/13/trinidad-and-tobago-sexual-offences-act-ruled-unconstitutional> visited on 21.3.2020, see also <https://www.theguardian.com/world/2018/apr/07/caribbean-anti-gay-law-ruling-high-court-trinidad-tobago> visited on Mar. 21,2020, **Nigeria:**<https://www.theguardian.com/globaldevelopment/2018/mar/30/blackmail-prejudice-persecution-gay-rights-nigeria> visited on Mar. 21,2020, **New Zealand**<https://www.theguardian.com/world/2018/mar/19/new-zealand-gay-rights-activists-demand-compensation-over-convictions> visited on Mar. 21,2020.

²⁹ Available at <https://yogyakartaprinciples.org/>, Mar. 21,2020.

Homosexuality has been decriminalized in 124 countries.³⁰ The survey also mentioned that same sex couples have been allowed to marry and enter into partnership in total 24 and 28 countries respectively. Another group of nations have passed legislations to protect the interests of LGBTc against discrimination.

The U.K. once exponent of criminalizing homosexuality as colonial power itself passed a law to prohibit discriminatory treatment in employment, education, social protection and housing on ground of sexual orientation.³¹ In 36 Commonwealth member states, homosexuality is still illegal and nine nations prescribe maximum penalty of life imprisonment. To quote:

..... the UK stands ready to support any Commonwealth member wanting to reform outdated legislation that makes such discrimination possible.

She assured to extend support to any Commonwealth member in bringing about legal reforms. There are 74 countries including India, criminalize same sex sexual conduct till the year, 2017.³²

In recent years, the Human Rights Committee (HRC) of UN General Assembly (UNGA) has also been proactively addressing the issue of individual choices in context of sexual orientation. In its 34³³, 42³⁴ and subsequent meetings³⁵, expressing grave concern at acts of violence and discrimination, it considered the report to revise national legal systems to hold perpetrators accountable, to take protective measures against torture, cruel, inhuman or degrading treatment

³⁰ Aengus Carrol and Lucas Ramon Mendos, "State Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalization, Protection and Recognition", 12 ILGA, 26-36(2017).

³¹ The Guardian, Mar.17,2018, supra note 1.

³² International Lesbian, Gay, Bisexual, Trans and Intersex Association, Sexual Orientation Laws of the World, (2017).

³³ UN Resolution (HRC), Human rights, sexual orientation and gender identity A/HRC/RES/17/19. Adopted on 17 June 2011.

³⁴ UN Resolution (HRC), Human rights, sexual orientation and gender identity A/HRC/RES/27/32. Adopted on 26 Sep. 2014.

³⁵ Report: Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity Pursuant to A/HRC/19/41. Adopted on 17 Nov. 2011.

on grounds of sexual orientation and gender identity, ensure uninterrupted asylum, repealing laws criminalizing homosexuality for engaging in consensual same sex sexual conduct and harmonize the age of consent for heterosexual and homosexual conduct, ensure that criminal laws are not used to harass or detain people based on their sexuality or gender identity and expression, enact comprehensive anti-discrimination legislation covering prohibition on ground of sexual orientation, freedom of speech and expression of LGBTs, capacity building programmes for sensitization for police, prison, border guards, immigration officials and legally recognize LGBTs and trans-genders by the OHCHR for Human Rights.³⁶ Subsequently in 2016, the HRC reiterated its resolution and denounced the violence and discrimination based on sexual orientation and gender identity.³⁷ To follow up the impact of resolutions by the member nations, the UN appointed independent expert on sexual orientation and gender identity for sensitizing and ensuring proper implementation at national levels. The OHCHR issued **a framework document – a must read** for government officials, parliamentarians, judges, officials of NHRCs, human rights defenders to understand fundamental human rights of LGBT and intersex people.³⁸ The recent report depicts that the exploitation, marginalization and exclusion of LGBT and gender diverse persons in education, health care, housing, employment and occupation has not ceased yet.³⁹

The Report of the OHCHR highlighted that there are three types of constitutional scriptures wherein sexual orientation have been covered either directly or indirectly. These can be classified as under:

- a. Explicit constitutional guarantees: Bolivia, Ecuador, Portugal, South Africa, Sweden and Switzerland.
- b. Explicit Guarantees but in the Provincial Constitutions: Argentina, Brazil, British Virgin Islands, Germany and Kosovo.
- c. General Language on non-discrimination interpreted by judiciary to treat LGBTc Equal to others: Canada, Colombia, Hong Kong, China, India and Nepal.

³⁶ Id, p 25.

³⁷ A/HRC/RES/32/2. Adopted on 30 June, 2016.

³⁸ UN Office of Human Rights Commissioner, Living Free and Equal, (2016).

³⁹ A/74/181 adopted on 17 July 2019.

IV. National Perspectives on Sexual Orientation

The report referred above highlighted another angle of persecution of LGBTs in India in context of 'honour killings'.⁴⁰ It spelt out India as one of the countries having repealed law criminalizing homosexual acts between consenting adults.⁴¹ *This fact raises doubt on the authenticity of this Report as Indian Parliament has not repealed S. 377 so far although the SUPREME COURT OF INDIA has declared law criminalizing homosexuality as unconstitutional.* However, it exposed ground realities of Indian society that the act of declaring criminalization as unconstitutional by the court could not improve the situation. The LGBTs were still being deterred by health care institutions and personnel from seeking services affecting adversely to handle HIV/AIDS and other health concerns.⁴²

(a) Sexual Orientation: Inherent and Innate Sense of Identity

*Homosexuality refers to an enduring pattern or disposition to experience sexual, affectional, or romantic attractions primarily to people of the same sex. It implies to an individual's sense of personal and social identity based on those attractions, behaviours, expressing them, and membership in a community of others who share them. It is a condition in which one is attracted and drawn to his/her own gender, which is evidenced by the erotic and emotional involvement with members of his/her own sex.*⁴³ The SUPREME COURT OF INDIA relied on the findings of American Psychological Association and referred that, sexual orientation is a natural condition and attraction towards the same sex or opposite sex are both naturally equal, the only different being that the same sex attraction arises in far lesser numbers. Homosexuality is a natural variant of human sexuality like heterosexuality.⁴⁴

In the beginning of 20th century, it was considered as disorder. The different studies revealed that manifestation of sexual attraction towards person of same

⁴⁰ Report of Commissioner of UN for Human Rights, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, para 25, 9 (2016-17).

⁴¹ Id., para 43, 14.

⁴² Id., para 56, 18.

⁴³ KK Gulia and HN Mallick, 'Homosexuality: a Dilemma in Discourse, 54, Indian Journal of Physiology and Pharmacology, 5-8 (2010).

⁴⁴ Lawrence v. Texas 529 U.S. 558 (2003)

*or opposite sex is a natural condition.*⁴⁵ *Indian Psychiatric Society has also expressed that sexual orientation is not a psychiatric disorder.*⁴⁶

Additionally, S. 3 of the Mental Healthcare Act, 2017 also introduces a new ground of prohibition i.e. sexual orientation against discrimination in providing access to mental health care unambiguously.⁴⁷

(b) Privacy and Autonomy

Sexual relations, choices, inclinations, bonding all are in fact the issues falling within the domain of privacy, in other words, individuality. Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights....⁴⁸ Rights of LGBTc are not so called rights but are real rights founded on sound constitutional ethos. These rights dwell in privacy and dignity. Sexual orientation is an essential component of identity. Thus, it is imperative to widen the scope of the right to privacy to incorporate right to 'sexual privacy' to protect the rights of sexual minorities.

It must be founded on the right to autonomy of a free individual and must capture the right of persons of the community to navigate public places on their own terms, free from state interference.⁴⁹

The SUPREME COURT OF INDIA further underscored that right to privacy under Indian Constitution is quite pervasive covering spatial privacy, decisional

⁴⁵ APA, Diagnostic and Statistics Manual of Psychological Disorders, 1973.

⁴⁶ Indian Psychiatry Society: 'Position Statement on Homosexuality', IPS/statement/02/072018/available at http://www.indianpsychiatricsociety.org/upload_images/imp_download_files/1531125054_1.pdf visited on 21.3.2020; see also T.S.Sathyanarayana Rao and K.S. Jacob, 'Homosexuality and India', Indian J. Psychiatry, Jan-March: 54 (a) 1-3(2012), Gurvinder Kalra, 'Breaking the ice: IJP on homosexuality', Indian J. Psychiatry, July-Sep. 54(d) 299-300 (2012).

⁴⁷ Mental Healthcare Act, 2017 S. 18 (1), (2) read with S. 21(1) (a).

⁴⁸ K.S.PuttaSwamy and Another v. Union of India and Ors. (2018) 5 SCC 1, NALSA v. Union of India and Others AIR 2014 SC 1863

⁴⁹ Id., para 297.

privacy and privacy of choice.⁵⁰ Emanating from the inalienable right to privacy, the right to sexual privacy must be granted the sanctity of a natural right, and be protected under the Constitution as fundamental to liberty and as a soulmate of dignity.⁵¹

(c) Human Dignity-Inseparable constituent of Personality

Dignity, though difficult to define exactly, has been observed as indispensable part of right to life.⁵² The SUPREME COURT OF INDIA preferred to deem it as intrinsic value of every human and the meaningful existence.⁵³ Meaning of ‘dignity’ against the backdrop can be perceived as liberty to self-determine, self-expression, autonomy, bodily integrity, one’s sexual inclinations.⁵⁴ The inter-relationship among above all establishes that a person if becomes homosexual (LGBTc), that person does not cease to be an individual. One’s individuality does not perish. Criminalization of one’s sexual orientation by the society affects one’s mental status as well as one’s family, profession, social and educational life. Absence of dignity for a few even in a minority may certainly, sooner or later, create a chaos and disorder in a society. It may backfire by dividing the society into have and have nots ultimately threat to ideal of fraternity. Civilized societies must inevitably ensure one’s dignity by providing them freedom to exercise their choices within reasonable restraints. Discrimination on the ground of sexual orientation is jural opposite of dignity and self-respect of the individual. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity and dignity of a person. The social values and morals have their space provided consonant with constitutional ethos.

(d) Decriminalization of S. 377: Juridical Analysis

Criminalization of homosexuality has its roots in British history. Revisiting historical approaches towards Greco-Roman times, emergence of Christianity

⁵⁰ Id., para 248,249,371 & 521.

⁵¹ supra note 3. p. 121 para 412.

⁵² Francis Coralie Mullin v. Administrator, UT of Delhi AIR 1981 SC 746.

⁵³ K.S.PuttaSwamy and Another v. Union of India and Ors. (2018) 5 SCC 1, Common Cause v. Union of India and Another AIR 2018 SC 1665.

⁵⁴ NALSA v. Union of India and Others AIR 2014 SC 1863, Shakti Vahini v. Union of India and Others (2018) 7 SCC 192, Shafin Jahan v. Asokan K.M. AIR 2018 SC 1933.

and medieval times can help to understand the mindset behind criminalization of homosexuality.⁵⁵ Much clarity can be gained from position of Catholic Church.⁵⁶ Christianity opposed homosexuality being unnatural. Theologian Thomas Aquinas observed that unnatural sexual practice of homosexuality is having its root causes in the corruption of the soul and distortion of right reason.⁵⁷ He opined that unisexual lust is unnatural crime.⁵⁸

Aquinas as consequentialist examines the validity of sexual intercourse on the basis of outcome. Procreation was the ultimate purpose of sexual intercourse.⁵⁹ Same sex relations not resulting into procreation were addressed by him contrary to nature. Usually, vaginal intercourse is potentially procreative sex act. Thus, oral or anal mode of sex between hetero or homosexual against nature. The social perception arose from the dominance of church that all methods of sexual processes by the use of the organs other than natural - penis to vagina are unnatural.

Now if one evaluates the legitimacy of sexual acts on the basis of consequence of procreation, sexual intimacy between same sexes are forbidden. However, if the purpose is not to procreate but to exercising personal choice, loving and being loved, bonding and inclinations towards the same sex, these should not be treated either harmful or immoral. These feelings are also natural

Continuation of homosexuality as crime in 21st century demanded fresh insights. An act to be punishable needs to be tested on the yardstick of 'Harm Principle'. Relying on Mill, the Supreme Court of India held that the state is authorised to intervene in private life provided harm is caused to others. Power of the civilized state can be used to prevent one from causing harm to others.⁶⁰ So if

⁵⁵ Julian Carter, 'On Mother-Love: History, Queer Theory, and Non-lesbian Identity' 14 *Journal of History of Sexuality* 107-138 (2005).

⁵⁶ John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*, (Chicago, The University of Chicago Press 1980).

⁵⁷ *Summa Theologiae* Ip 2p, q. 31 a 7.

⁵⁸ *Summa Theologiae* Ip 2p, q 94 a 3.

⁵⁹ *Summa Theologiae* Supp. 3, q 65 a 3.

⁶⁰ Mark Strasser, 'Lawrence, Mill, and Same Sex Relationships: on Values, Valuing and the Constitution' 15 *Southern California InterdiSupreme Court of Indiaplinary Law Journal* (2006).

Mill's theory is applied in context of homosexuality, it is a disgust not the harm caused to others. It does not authorize one to govern or dictate others. From Bentham's point of view, 'if homosexuality is viewed outside the realms of morality and religion, is neutral behavior which gives the participants pleasure and does not cause pain to anyone else'. Such acts cannot constitute offence and no merit in punishing at all.⁶¹ He laid down a triple layers test to examine validity of sodomy laws:

- i. any direct harm to another person;
- ii. any harm to the stability and security of the society;
- iii. any danger to society.

The answer is in negative. No harm is cause by the act of sodomy. It just produces pleasure and pleasure is by their perverted taste. Both the individuals are willing. They neither harm any individual nor disturb the peace of the society. The ultimate purpose of law is to augment the total happiness of the community and excluding anyone from happiness by punishing through law is itself an evil.⁶² To sum up the issue of criminalization, it is apt to quote Aristotle:

Justice in relation to the person is defined in two ways. For it is defined either in relation to the community or one of its members what one should or should not do. Accordingly, it is possible to perform just and unjust act in two ways, either towards a defined individual or towards the community.⁶³

Right to privacy has been recognized in post-world war regime while criminalization of homosexuality is injected in colonies during British Rule.⁶⁴ Sexual urge and consent are absolutely individualistic phenomenon. The expression 'Order of nature' used in S. 377 is used and applied by the social and religious analogy. Therefore, conflict between privacy and socio-theological analogies will certainly be resolved in modern world in favour of the former. As endorsed by Nietzsche to extend protection to natural inclinations:

⁶¹ Jeremy Bentham, 'Offences against One's Self', <http://www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/bentham/>, Mar. 21, 2020.

⁶² Jeremy Bentham, 'An Introduction to the Principles of Moral and Legislation, The Liberty of Economics and Liberty', Chapter XII (Oxford: Clarendon Press, 1907).

⁶³ H.C. Lawson Tancred, *The Art of Rhetoric/ Aristotle*, (Penguin 2004).

⁶⁴ *The Guardian*, Mar.17,2018, Supra note 1.

*Same sex love is not a mockery of nature, but rather nature at play...*⁶⁵

Finding no reason to sustain criminalization of homosexuality, the SUPREME COURT OF INDIA resolved in favour of the Article 21 to give paramount important to dignity of life by restoring privacy and autonomy.

V. Constitutional Morality v. Social Morality

Arvind P. Datar, representing the petitioner, submitted that the Supreme Court India in Suresh Koushal was guided by social morality leading on majoritarian perception. He submitted that the issues instead had to be debated and examined on the anvil of constitutional morality. The Supreme Court India while determining the dilemma between constitutional morality and social morality resolved that in the matters concerning privacy, dignity, anti-discrimination approaches against marginalization and deprivation of basic human rights of sexual minority, social morality has to yield to constitutional morality. The constitutional governance in India kept certain rights of individuals and 'discrete and insular minorities' beyond the reach of majoritarian governments.⁶⁶ These rights should be equally available to all to avoid rhetoric. Rights of an individual ought not to be persecuted by dictates or social prejudices. Social transformation envisioned by the framers of the Constitution can become a reality only if all the cultural, linguistic, religious and sex minorities have constitutional safeguards against the tyranny of the majority. Hart cautioned against imposition of majoritarian morals and opined that popular morality or overwhelming majority should not always be marked by widespread 'intolerance, indignation and disgust'⁶⁷ Democratic principles treating all equal should weigh.⁶⁸

The Supreme Court of India removed the fallacies arising out of the unclear difference between social morality and constitutional morality. Social morality is basically contextualized in past and existing factors while constitutional morality is construed not only in context of past and present but futuristic vision also. Societal values and moral ideas are dynamic in nature. It certainly laid a

⁶⁵ James Daley, Great Speeches on Gay Rights 24-30 (Dover Publications, 2010).

⁶⁶ The Constitution of India, Arts. 29-30.

⁶⁷ Peter August Bittlinger, Government enforcement of morality: a critical analysis of the Devlin – Hart Controversy, Doctoral Dissertation, 69-70, 1896- February 2014 (1975).

⁶⁸Supra note 59.

dictum that in case of friction between constitutional morality and social morality, constitutional morality will prevail. Since social morality by nature is scattered due to variable socio-economic and political forces at its foundations. On the other hand, constitutional morality is clearly spelt out and overshadows social morality resulting into withering away the differences. Gradually it becomes part and parcel of the life of the stakeholders provided the constitutional morality is resilient and can mitigate the friction between organic and inorganic forces. Rapid transformation demands timely customization of law and adaptation by institutions of justice. In such a situation, the identification of gap between kinds of morality is very significant to ensure syncin society, morality, law and justice. Administration of justice should respond to the needs of social values, goals and policies to fill up the vacuum by interpreting law in compatible way.

VI. Transformative Constitutionalism- Includes All Excludes None

The beauty of Indian Constitution is that its spirit envisions to include allexclude none.⁶⁹ It is adequately receptive and adaptable to organic socio-politic forces. Besides, it gives due significance to minorities and accommodates pluralism. The foundational principles of the Indian Constitution severed the virus of S.377 to extend inalienable rights beyond gender binaries. Furthermore, the societal notions of heteronormativity should also not be permitted to stand inthe way of enjoying the fundamental freedoms by the stakeholders. By discontinuing the perpetuation of injustices and opprobrium of sexual minorities, the Supreme Court of India realized the dream of ‘TransitionalJustice’ by drawing the curtain on the past.

VII. Conclusion

The upshot of aforesaid discussion is that the Supreme Court of India being the crusader delivered this judgment which cannot be considered less than a Bill of Rights of LGBT. Understanding the limitations of other two organs of the government and giving them due respect, it gave paramount importance to constitutional morality. It acknowledged the prolific observation of Lord

⁶⁹Arts. 14, 15(1), 16, 17 21-A, 25, 26, 29, 30 of the Constitution of India.

Neuberger lightening the path on its adventure to recognize rights of LGBTQ. To quote Lord Neuberger-

We must always remember that Parliament has democratic legitimacy-but that has disadvantages as well as advantages. The need to offer oneself for reelection sometimes makes it hard to make unpopular, but correct, decisions. At times it can be an advantage to have an independent body of people who do not have to worry about short term popularity.⁷⁰

The respondents and intervenors contended that revisiting this matter shall present court as a counter-majoritarian institution. Rejecting this contention, the Court observed that being a watchdog of constitutional morality, it cannot turn a blind eye towards its responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe.⁷¹

Resisting temptation to move on linear tracks appeasing majority unlike other two organs, the Supreme Court of India shown its courage and untiring commitment to restore faith of the stakeholders in the Constitution. It decoded the chores (script of the constitution and legal instruments) and paused on the language to continue its momentum from *volkspele* jurisprudence to *toyitoyi* jurisprudence.⁷² Finally, it is submitted that in contemporary civilized society looking at achieve Agenda for Sustainable Development, 2030 based on inclusive participation and governance, the SUPREME COURT OF INDIA has performed its constitutional obligation to realize the rights progressively. Going beyond the gender binaries, it unfolded a new chapter of constitutional governance to apply balm on the sufferings and pain of millions for sustaining transformative constitutionalism.

VIII. Further Areas of Research

Above contribution was confined to the judicial approach beyond gender binaries in Indian context. Jurisprudential analysis of various foundational concepts directly and indirectly related with the theme has been made through

⁷⁰ Lord Neuberger, UK Supreme Court decisions on Private and Commercial Law: The role of Public Policy and Public Interest, Centre for Commercial Studies Conference (2015).

⁷¹ Navtej Singh (Para 499).

⁷² Van der Walt, "Dancing with Codes-Protecting, developing and deconstructing property rights in a constitutional state, 118 (2) J.S.Apr.L. 258 (2001).

this paper. Therefore, now it is important to conduct a survey of public perception towards the homosexuality and LGBTQ for evaluation of impact of the judgment of Supreme Court of India. The problem with Indian governance is that despite of the efforts of the judiciary to protect and enforce human rights in the past, the impact of the decisions remain poor and is not shown on the ground level. The guidelines issued in D.K. Basu, Vishakha, M.C. Mehta and numerous other cases met the similar fate and remain beyond the knowledge of the stakeholders. However, the information society is expected to show some different results. Therefore, evaluation of awareness of people living across the nation regarding the rights of LGBT on the basis of empirical studies can be further area of research. Without the awareness of stakeholders, the society may or may not afford their recognition. To quote Dr. Ambedkar:

The assertion by the individual of his own opinions and beliefs, his own independence and interest--over and against group standards, group authority, and group interests--is the beginning of all reform. But whether the reform will continue depends upon what scope the group affords for such individual assertion.⁷³

⁷³Government of Maharashtra, Dr. Baba Saheb Ambedkar: Writings and Speeches, (1) 56 (2014).

The Singapore Convention on Mediation and India

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Abstract

With the adoption of Singapore Convention on Mediation, mediation is likely to get prominence as the settlement agreement conducted between the parties to the dispute through mediation shall be binding and may be enforced in the Party to Convention where the relief has been sought. At national level also, the countries have also promoted mediation for dispute resolution. India is also promoting mediation in its jurisdiction to bring the backlog of cases down substantially. India is yet to bring out a full-fledged parliamentary statute on mediation like it has in case of arbitration and conciliation. It is in the interest of the country to ratify the Singapore Convention.

Keywords: *Singapore Convention on Mediation, Arbitration and Conciliation*

I. INTRODUCTION

The existence of disputes is as old as human civilization. The disputes will continue to exist so long human beings are present on the Earth, and therefore, it is the responsibility of every society to ensure that the disputes are timely decided or amicably resolved. Mediation has been recognized since time immemorial as one of the best methods to resolve the disputes both at national as well as international level. Examples of mediation can be found in Indian epics “*Ramayana*” and “*Mahabharata*” where Angad and Lord Krishna acted as Mediators respectively to avoid the wars. These wars were waged much before the dawn of Christianity.

At international level, many wars have been averted between States with the mediation of a third person or through collective mediation. Mediation, being a cost effective, time saving and effective method of dispute resolution, has gained importance in the Indian judicial system. Mediation improves the “efficiency of dispute resolution”. Mediation does not mean adjudication. The role of mediator is not one of the adjudicator but that of a facilitator; a third

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party who “facilitates discussion between the disputing parties to arrive at a mutually acceptable solution”.²Mediation, being an informal method of dispute resolution, puts the parties in a comfortable zone as they can put forward their case in an informal manner and in simple language without the assistance of any lawyer as no technicalities are involved in the proceedings. It is due to this reason that the mediation proceedings are also stated to be participative, as the parties to disputes are involved directly in these proceedings.

One of the significant benefits of mediation is that it avoids a situation where a dispute may lead to the “termination of a commercial relationship”. Once a settlement is reached through mediation, not only that it will preserve the commercial relationship between the parties to the disputes, but also help the parties to strengthen this relationship further.

In the fast increasing international trade, arbitration was considered as an alternative to litigation. The litigation used to be and still is a very time consuming, expensive and cumbersome procedure for deciding the disputes. With the changing time, it was not considered a preferable choice for dispute resolution. The litigations were subsequently replaced by arbitration in most of the cases. It became a trend to have arbitration clause in every commercial agreement where the parties from different countries. Arbitration was considered as most effective, less expensive and less time consuming procedure. However, over the years, arbitration as a method of dispute resolution also started losing its charm and the parties to the case started seeing mediation as an alternative to litigation and arbitration. Timothy Schnabel brings out the distinction between arbitration and mediation in a beautiful manner:

“[I]n arbitration, the disputing parties consent only to the process for resolving their dispute, but not to the ultimate outcome, yet the agreement to arbitrate and the arbitral award—which otherwise would only be private acts governed by contract law—are given privileged status under the New York Convention. In mediation, by contrast, the parties have agreed to not only the process for resolving their dispute but also to the ultimate outcome— thus suggesting a far stronger

² “What is the Singapore Convention on Mediation?” available at <https://www.singaporeconvention.org/convention/the-convention-text/> (05.06.2020 5 P.M)

justification for according a privileged status to the mediated settlement agreement.”³

Until recently, international commercial mediation primarily existed as a form of “soft law.”⁴ With the adoption of Singapore Convention, mediation is likely to get prominence as the settlement agreement conducted between the parties to the dispute through mediation shall be binding and may be enforced in the Party to Convention where the relief has been sought. At national level also, the countries have also promoted mediation for dispute resolution. India is also promoting mediation in its jurisdiction in various types of cases to bring the backlog of cases down substantially. India is yet to bring out a full-fledged parliamentary statute on mediation like it has in case of arbitration and conciliation.

This paper gives an overview of the Singapore Convention on Mediation and also discusses the initiative taken by Parliament and Supreme Court in promoting mediation as a mode of dispute resolution in India.

II. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL MEDIATION, 2018

The UNCITRAL Model Law was “initially adopted in 2002” as the “Model Law on International Commercial Conciliation”. It only covered the “conciliation procedure” in 2002. It was amended in 2018 and few new provisions were added in it on “international settlement agreements and their enforcement”. The Model Law of 2002 so amended was renamed as “Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation” of 2018. It is noteworthy that UNCITRAL used the term “conciliation” and “mediation” interchangeably in the Model Law of 2002. Article 1 para 3 of the Model Law of 2002 defines “conciliation” to mean “a process, whether referred to by the expression conciliation, mediation or an expression of similar import ...” However, while

³ Timothy Schnabel, “The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements”, 19 *Pepperdine Dispute Resolution Law Journal* 11 (2019)

⁴ Andrew Guzman and Timothy L. Meyer, “International Soft Law”, 2 *Journal of Legal Analysis* 117 (2010)

amending it, the UNCITRAL used the term “mediation” in “an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law” as amended in 2018. It was, however made clear that the change in terminology from “conciliation” to “mediation” would not have “any substantive or conceptual implications”.⁵

The Model Law of 2018 deals with “procedural aspects of mediation” such as appointment of mediators; “commencement”, conduct and “termination of mediation” proceedings; “communication between mediator and parties”; “confidentiality”; and “admissibility of evidence in other proceedings”. It also deals with “post-mediation issues”, such as the “mediator acting as arbitrator”, “enforceability of settlement agreements” and grounds of refusal to grant relief.

The Singapore Convention on Mediation is consistent with the UNCITRAL Model Law of 2018. States can use Model Law of 2018 as a basis for the enactment of national legislation on mediation in their territories for implementing the Singapore Convention.

III. SINGAPORE CONVENTION ON MEDIATION: AN OVERVIEW

In international trade, the importance of mediation as “a method for settling commercial disputes” has been recognized by international community as “an alternative to litigation”. Keeping that in mind, the “United Nations Convention on International Settlement Agreements Resulting from Mediation” (hereinafter “Singapore Convention”) was adopted on December 20, 2018. It was signed by 46 countries on 7 August 2019. The Singapore Convention establishes an effective “framework for international settlement agreements” which may result from mediation and which are also acceptable to the State Parties having “different legal, social and economic systems”. Such a framework will ultimately contribute to the “development of international economic relations” among States Parties.⁶

⁵https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation. (07.06.2020 7 P.M.)

⁶ Preamble, Singapore Convention on Mediation.

Article 1 of the Singapore Convention deals with the scope of applicability of the settlement agreements. The Convention applies to a written⁷ international settlement agreement which results from mediation and concluded by parties “to resolve a commercial dispute”. The Convention is not applicable to those settlement agreements which are concluded “to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes”. The Convention will also not be applicable to settlement agreements which are related to “family, inheritance or employment law”. The Convention is also not applicable to settlement agreements which are enforceable as a “judgment” or as an “arbitral award”.

The Singapore Convention defines “Mediation” as a process “whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute”.⁸ The so called third person is known as “Mediator”.

Every State party to Singapore Convention is obligated to “enforce a settlement agreement in accordance with its own rules of procedure” as applicable in its territory and as per the Convention. The Convention also deals with a situation where a dispute arises regarding “a matter that has already been resolved by a settlement agreement” as claimed by one of the parties, then a State Party to the Convention is obligated to allow such party “to invoke the settlement agreement” in accordance with its own “rules of procedure” and under the conditions provided in the Convention, “in order to prove that the matter has already been resolved”.⁹

It is important to note that like “Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (the “**New York Convention**”), the Singapore Convention also “facilitates the recognition and enforcement of settlement agreements”. Thus, “a settlement agreement will be enforced directly

⁷ According to Article 2 para 2 of the Convention, a settlement agreement is considered to be “in writing” if “its content is recorded in any form” including electronic form.

⁸ Article 2 para 3, Singapore Convention on Mediation.

⁹ Article 3, *id.*

by a court instead of it being treated only as a contract, with a civil suit having to be filed for its enforcement”.¹⁰

The settlement agreements concluded through mediation are entered into by parties to dispute on the basis of mutual consent. It is therefore expected that both the parties will honour the settlement agreement. One can very well argue that in such a situation, where is the need to enforce the settlement agreements so reached in the State Parties to the Convention? The argument seems to be sound only for those cases where one of the parties to the dispute does not default. Therefore, “the value of the Convention lies in providing certainty to parties that settlement agreements effected through mediation will ultimately be enforceable in an efficient manner and that they will not be relegated back to a full-blown arbitration or litigation, should the other party default”.¹¹

A party which relies on a “settlement agreement” under the Singapore Convention is obligated to supply to State Party’s “competent authority” where it is seeking relief (i) “the settlement agreement signed by the parties”; and (ii) evidences with respect to settlement agreement that it has resulted from mediation. The evidences may include (a) the settlement agreement duly signed by mediator; (b) a mediator signed document which may indicate that mediation took place between the parties; (c) “institution administering the mediation” making an attestation; or (d) in absence of above, any other evidence which maybe acceptable to the competent authority of that State Party.

The Convention also lays down provisions with respect to the situation where the settlement agreement shall be deemed to have been signed by the parties or the mediator in case of “an electronic communication”. In order to verify the fact that the parties have complied with the requirements of the Convention, the competent authority of the State Party may ask for any necessary document. The “competent authority” of the Party to Convention is required to act expeditiously while considering the “request for relief”.¹²

¹⁰Shaneen Parikh and Ifrah Shaikh, “India: The Singapore Convention on Mediation – India’s Pro-Enforcement Run Continues, (10.06.2020 10 P.M.)<https://www.mondaq.com/india/arbitration-dispute-resolution/838414/the-singapore-convention-on-mediation-india39s-pro-enforcement-run-continues>

¹¹*Ibid.*

¹² Article 4, Singapore Convention on Mediation.

The grounds for refusal of relief have been laid down in Article 5 of the Convention which enables the competent authority of a State Party to “refuse to grant relief at the request of the party” seeking it if the other party against whom relief is sought furnishes any of the following proofs:

- (i) “A party to the settlement agreement was under some incapacity”;
- (ii) The settlement agreement in question – (1) “is null and void, inoperative or incapable of being performed” under the applicable law; (2) “is not binding, or is not final, according to its terms”; or (3) “has been subsequently modified”;
- (iii) “The obligations in the settlement agreement – (1) have been performed; or (2) are not clear or comprehensible”;
- (iv) It “would be contrary to the terms of the settlement agreement” to grant relief;
- (v) “There was a serious breach by the mediator of standards applicable to the mediator or the mediation” which formed the very basis for that party to enter into the settlement agreement; or
- (vi) “There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement”.

In addition, the relief sought on the basis of settlement agreement is also to be denied by the “competent authority” of the State Party if it is found that – (i) “granting relief would be contrary to the public policy” of that State Party; or (ii) “the subject matter of the dispute is not capable of settlement by mediation under the law of that Party”.

Article 6 of the Convention deals with the issue of parallel applications/claims. The Convention provides that where “an application/claim relating to a settlement agreement has been made to a court/arbitral tribunal/other competent authority” which may affect the relief, the competent authority of the State Party where such relief is sought may adjourn the decision and may also order the other party to give suitable security, if a party so request.

The Convention is not to deprive “any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties” of the State Party to Singapore Convention “where such settlement agreement is sought to be relied upon”.¹³

The Convention enables the State Parties to make reservations under Article 8, if they so desire. The reservations which are not expressly authorized in Article 8 are not permitted. Reservations made by Parties may be withdrawn by it at any point of time. The reservation/withdrawal of reservation is applicable only to those settlement agreements which were concluded after such reservation/withdrawal entered into force for that Party to Convention.¹⁴

The Convention also lays down rules for the regional economic integration organization (“REIO”) which have been duly “constituted by sovereign States”, for becoming Party to it. According to Article 12, an REIO may “sign, ratify, accept, approve or accede” to the Convention like States. It will have the same rights and obligations under the Convention. However, an REIO is not to be counted “as a Party to the Convention in addition to its member States that are Parties to the Convention”. An REIO is required “to make a declaration specifying the matters in respect of which competence has been transferred to [it] by its member States.” The Convention is not to prevail over “conflicting rules of an REIO” (i) if relief is sought in a State that is member of REIO and all the States relevant are members of that REIO; or (ii) “as concerns the recognition or enforcement of judgments between member States” of that REIO.

Article 13 deals with those Parties to the Convention which have “two or more territorial units” with different systems of law. Such Parties may declare that the Convention will “extend to all its territorial units or only to one or more of them”. Where no such declaration is made, the Convention will extend to all territorial units.

To sum up, the cultural predisposition always existed towards adjudicative means of dispute resolution particularly in the West. The Singapore Convention seeks to promote the use of mediation bridging some of the cultural gaps in legal

¹³ Article 7, *id.*

¹⁴ Article 9, *id.*

systems.¹⁵ Further, it is expected that Singapore Convention will bring “certainty and stability to the international framework on mediation, thereby contributing to the Sustainable Development Goals (SDG), mainly the SDG 16”.¹⁶ The SDG 16 is to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.¹⁷

Since the Singapore Convention is consistent with the “UNCITRAL Model Law” of 2018, the States have been provided with the “flexibility to adopt either the Convention, the Model Law as a standalone text or both the Convention and the Model Law as complementary instruments of a comprehensive legal framework on mediation”.¹⁸

IV. MEDIATION IN INDIA

In this second most populous country of the world, docket explosion is a serious concern. The Indian Law Commission made several studies on the backlog of cases and made its recommendations. For example, in its 129th Report, the Law Commission referred to the huge pendency of cases in the courts. Justice Malimath Committee also conducted a study on “Alternative Modes and Forums for Dispute Resolution” in which it endorsed the recommendations of Law Commission made in 124th and 129th Reports and stated that there should be necessary amendments in law to compel the litigants to resort to arbitration or mediation. The Malimath Committee was of the view that by conferring such powers on courts will reduce the burden of courts right from trial courts to appellate courts.

¹⁵Kennedy Gaston, “The Singapore Convention on Mediation and Disputes Involving Multinational Corporations” in V. K. Ahuja, et.al., *Mediation*, 30 (2020),

¹⁶

See

https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements, (06.6.20 8 P.M)

¹⁷ See <https://sustainabledevelopment.un.org/?menu=1300> (07.06.2020 8 P.M)

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https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (09.06.2020 4P.M)

The impact of the recommendations of Malimath Committee Report, Law Commission's 129th report and the Committee on Subordinate Legislations (11th Lok Sabha) was so strong that on 14th August 1997, the Code of Civil Procedure (Amendment) Bill, 1997 was introduced in the Rajya Sabha, keeping in view *inter alia* "that every effort should be made to expedite the disposal of civil suits and proceedings".¹⁹ The Bill proposed to insert a new provision section 89 in the CPC for "Settlement of Disputes outside the Court".

In 1999, section 89 was finally inserted in Civil Procedure Code, 1908 which came into force on 1 July 2002. Section 89(1) of the CPC provides that "where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for ... mediation." Section 89(2) provides that "where a dispute has been referred ... for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed".

The initiative of legislature of introducing section 89 was a good step in the direction of expeditious disposal of civil cases including commercial cases. Section 89 authorized the courts to refer the cases to mediation where it appeared to them that there existed "elements of a settlement" in the case. The outcome of having section 89 was not very encouraging as the cases kept on mounting and the effect of having mediation as a method of dispute resolution was not very much visible.

Another significant step towards the speedy disposal of commercial cases was taken by legislature in 2015 by the enactment of "The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act". "Commercial dispute" is defined to mean "a dispute arising out of— (i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents; (ii) export or import of merchandise or services; (iii) issues relating to admiralty and maritime law; (iv) transactions relating to aircraft, aircraft

¹⁹ V. K. Ahuja, "Making ADR Techniques Mandatory in India: Proposed CPC Amendment", II *National Capital Law Journal*, 39-39 (1997)

engines, aircraft equipment and helicopters, including sales, leasing and financing of the same; (v) carriage of goods; (vi) construction and infrastructure contracts, including tenders; (vii) agreements relating to immovable property used exclusively in trade or commerce; (viii) franchising agreements; (ix) distribution and licensing agreements; (x) management and consultancy agreements; (xi) joint venture agreements; (xii) shareholders agreements; (xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services; (xiv) mercantile agency and mercantile usage; (xv) partnership agreements; (xvi) technology development agreements; (xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits; (xviii) agreements for sale of goods or provision of services; (xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum; (xx) insurance and re-insurance; (xxi) contracts of agency relating to any of the above; and (xxii) such other commercial disputes as may be notified by the Central Government”.²⁰

It is also important to note that “a commercial dispute shall not cease to be a commercial dispute merely because— (a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property; (b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions”.

The aforesaid definition of “commercial dispute” is quite comprehensive and exhaustive. The last clause (xxii) is residuary in nature and enables Central Government to notify more disputes which may fall in the definition of commercial disputes. Therefore, with the passage of time and requirement, more disputes may be notified as commercial disputes.

Mediation as a mode of settlement of commercial disputes was added in the 2015 Act by an amendment Act of 2018. The amendment, which became effective from 3 May 2018 inserted *inter alia* section 12A which provided for the mandatory “pre-institution mediation and settlement” in commercial disputes. Mediation as such was not included in 2015 Act as originally enacted.

²⁰ Section 2(1)(c), Commercial Courts Act of 2015.

The 2018 amendment filled this void to make justice dispensing system under the 2015 Act more meaningful and effective as far as commercial disputes are concerned.

Section 12A provides that except for a suit which “contemplates any urgent interim relief under the Act”, no suit is to be “instituted unless the plaintiff exhausts the remedy of pre-institution mediation” in accordance with prescribed manner. For the purposes of pre institution mediation, “the Authorities constituted under the Legal Services Authorities Act, 1987” may be authorized. Such Authorities are required to “complete the process of mediation within a period of three months from the date of application made by the plaintiff”. The period of three months, however, may be extended by a “further period of two months with the consent of the parties”. The “period during which the parties remained occupied with the pre-institution mediation”, is not to be “computed for the purpose of limitation under the Limitation Act, 1963”.

Where a settlement is arrived at by the parties, it is to be reduced to writing and shall be “signed by the parties and the mediator”. Such a settlement is to have “the same status and effect as if it is an arbitral award on agreed terms” under Section 30(4) of the “Arbitration and Conciliation Act, 1996”. Section 30(4) of the “Arbitration and Conciliation Act, 1996” provides that “an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.”

The “Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018” were adopted to give effect to the provisions of the Commercial Courts Act, 2015 as amended in 2018. “Mediation” is defined under the Rules to mean “a process undertaken by a Mediator to resolve, reconcile and settle a commercial dispute between the parties thereto.”²¹ “Mediator” means “a person empanelled by the Authority for conducting the mediation”.²²

Detailed procedure for the initiation of mediation process has been laid down in Rule 3 of the 2018 Rules. Rule 3 enables parties to a “commercial dispute” to make an application to the Authority (which is notified under the Act) for the “initiation of mediation process”.

²¹ Rule 2(1)(e), Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018.

²² Rule 2(1)(f), *id.*

The Authority is required to “issue a notice to the opposite party to appear and give consent to participate in the mediation process” within 10 days. If the opposite party does not respond, the Authority is required to issue a final notice to it and where such notice remains “unacknowledged or where the opposite party refuses to participate in the mediation process”, the Authority is to “treat the mediation process to be a non-starter” and make “a report and endorse the same to the applicant and the opposite party”.

“Where both the parties appear before the Authority and give consent to participate in the mediation process, the Authority shall assign the commercial dispute to a Mediator and fix a date for their appearance before the said Mediator”. The Authority is obligated to “ensure that the mediation process is completed within a period of three months” unless an extension is given for two months with the consent of the parties. The premises of the Authority shall be the venue for conducting mediation.²³

The role of Mediator is to “facilitate the voluntary resolution of the commercial dispute between the parties and assist them in reaching a settlement”.²⁴ Parties to commercial dispute are obligated to “appear before the Authority or Mediator, as the case may be, either personally or through their duly authorized representatives or Counsels”.²⁵

Rule 7 of the 2018 Rules lays down detailed provisions for conducting mediation. According to Rule 7, when the mediation commences, the Mediator is duty bound to explain the mediation process to the parties. The Mediator in consultation with parties shall fix the date and time of each mediation sitting. During the course of mediation, the Mediator has the discretion to hold the meetings with the parties jointly or separately. The parties have the discretion to share “their settlement proposals with the Mediator” in separate sittings. They can give specific instructions to the Mediator regarding the part of the settlement proposal which can be shared by him with the other party.

The parties are free to exchange their settlement proposals with each other. The Mediator is duty bound to maintain confidentiality of discussions made in the separate sittings with each party. The Mediator can share “only those facts

²³ Rule 4, *id.*

²⁴ Rule 5, *id.*

²⁵ Rule 6, *id.*

which a party permits” him to share with the other party. “If the parties reach to a mutually agreed settlement”, the same is to be reduced in writing by the Mediator. The settlement shall be signed by the parties and the Mediator. Thereafter, the Mediator is required to “provide the settlement agreement to the parties” and give a copy to the Authority. However, “where no settlement is arrived between the parties” within the stipulated time frame or where “the Mediator is of the opinion that settlement is not possible”, he will submit a report to the Authority citing the reasons.

It is noteworthy that the Authority and the Mediator are not allowed to “retain the hard or soft copies of the documents exchanged between the parties” or notes prepared by the Mediator beyond six months. They can, however, retain the “application for mediation”, “notice issued”, “settlement agreement” and the “failure report”.

Parties to the dispute are obligated to “participate in the mediation process in good faith with an intention to settle the dispute”.²⁶ The Mediator, parties or their authorized representatives or counsel are obligated to “maintain confidentiality about the mediation”. Apart from that, the mediator is not to “allow stenographic or audio or video recording of the mediation sittings”.²⁷

The ethics to be followed by the Mediator are laid down in Rule 12. The Mediator is obligated to “(i) uphold the integrity and fairness of the mediation process; (ii) ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the mediation process; (iii) disclose any financial interest or other interest in the subject matter of the commercial dispute; (iv) avoid any impropriety, while communicating with the parties; (v) be faithful to the relationship of trust and confidentiality reposed in him; (vi) conduct mediation related to the resolution of a commercial dispute, in accordance with the applicable laws for the time being in force; (vii) recognize that the mediation is based on the principles of self-determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary agreement; (viii) refrain from promises or guarantees of results; (ix) not meet the parties, their representatives or their counsels or communicate with them, privately except during the mediation sittings in the premises of the

²⁶Rule 8, *id.*

²⁷Rule 9, *id.*

Authority; (x) not interact with the media or make public the details of the commercial case, being mediated by him or any other allied activity carried out by him as a Mediator, which may prejudice the interests of the parties to the commercial dispute”.

The inclusion of mediation in Commercial Courts Act, 2015 as a method of dispute resolution is a welcome step. To make mediation successful, the parties are required to change their mindset. Sometimes, parties are advised by their counsels that their case is very strong and there is every possibility of winning the case. The parties, therefore do not take interest in mediation. Sometimes, one of the parties is interested in delay in the outcome, it is due to this reason also it does not come forward for mediation. Since the 2018 Rules *inter alia* take care of confidentiality of the mediation proceedings and also provide for the ethics for mediator, mediation is likely to have a promising future provided the parties join the proceedings with positive mindset leaving behind vested interest, if any.

It is also noteworthy that “Mediation and Conciliation Project Committee (MCPC)” of the Supreme Court which was constituted in 2005 is playing a significant role in promoting mediation as a mean of dispute resolution. The MCPC undertakes training of trainers programme, mediation training programme, awareness programme and referral judges training programme. In order to ensure the credibility of the mediation, the MCPC decided that for a mediator, 40 hours training and 10 actual mediations were essential. This means that only those persons who fulfil the criteria laid down by MCPC can mediate. If mediation is resorted to with the positive mindset of parties in all those cases where it is allowed, then there is no reason why backlog of cases will not be dropped significantly.

It is important to note that with the promotion of mediation in India, an effective dispute resolution system is being created as most of the cases are likely to be resolved by the parties themselves. The parties may prefer mediation over litigation or arbitration to resolve disputes. The legislature however is required to bring in place a codified law on mediation as it brought for arbitration and conciliation. Once a full-fledged law on mediation is enacted, India should ratify the Singapore Convention. At present, India is a signatory to the Convention. If we have to attract more FDI in India and if we really want to bring more multinational corporations in India, we need to have mediation as an additional mode of dispute resolution. By becoming a party to Singapore Convention,

India will attract more foreign investors. Further, it will also be in the interest of our companies which have invested abroad. Therefore, it is in the interest of the country to become a party to Singapore Convention.

V. CONCLUSION

The adoption of Singapore Convention on Mediation is an excellent step by the international community. The Convention being an efficient, uniform and harmonized framework to resolve cross border commercial disputes through mediation, has helped the businesses to use mediation as an additional mode of resolving their dispute. Mediation has been proved *inter alia* to be a cost effective, time effective, informal, confidential, and procedure controlled by parties and having potential to maintain healthy relationship between the parties to the disputes after the dispute resolution. Mediation overcomes the flaws of the litigation and arbitration system, i.e. cost and complexity. An international instrument was strongly required to give credibility to mediation at international level and enforceability in the Parties territories. The Singapore Convention has given a boost to the mediation as the settlement agreements concluded between the parties become binding and may be enforced in the State/REIO Party to the Convention in a streamlined procedure. The Singapore Convention has the potential of becoming game changer in the area of commercial cross boundary dispute resolutions. However, the signing of Singapore Convention on 7 August 2019 by 46 countries only shows that most of the States/REIO including the UK, the European Union and Australia did not show interest in it by not signing. It's success, however will depend on how many countries will become parties to it. The countries may take time and see its functioning for some time before ratifying or acceding to it. It may be hoped that large number of countries may become Parties to the Singapore Convention and mediation may become the most preferred choice of the businesses in the near future particularly in cross border disputes.

Crime Against Senior Citizens in India: A Glaring Reality

*Prof. Madhumita Dhar Sarkar*¹

*Ms. Madhumita Acharjee*²

Abstract

With the advent of human civilization a plethora of concepts developed simultaneously such as society, family and property. Another concept that was developing at the same time was crime. Crime has been defined differently by different scholars; one general meaning of crime is an act which is violation of public law and for which punishment is given by the state. Crime can be of different categories as the penal provisions provide for crimes against human body, property, state, public order and so on. The National Crime Record Bureau (NCRB) in India which measures crime rate in India has introduced a new category under the heading crimes against senior citizens since 2014. This new entry makes it evident that senior citizens and parents are also subject to various crimes in our society. Senior citizens and parents are supposed to be maintained and taken care of. Instead, in the present times, many glaring examples of elderly abuse are in the limelight. The fact that NCRB has given entry to crimes against senior citizens only since 2014 does not signify that there was no crime against the elderly people before 2014. Rather, it indicates that there has been a steep rise in the number of reported cases against senior citizens recently. In this paper an attempt will be made to analyze the scenario of crimes against senior citizens by analyzing the statistics of National Crime Record Bureau of five years and by reviewing few leading newspaper articles covering the news of abuse or crime against senior citizens.

Keywords- Senior Citizens, Elderly Abuse, NCRB.

I. Introduction

While discussing crimes against the elderly, it is imperative to talk about the case of Lizzie Borden. She was accused of “killing her elderly parents with an

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axe, in Fall River, Massachusetts” based on circumstantial evidence.³ She was acquitted by the jury in 1892 based on their notion that a ‘daughter’ and a ‘woman’ cannot commit such a heinous crime- let alone to her own parents. The reason this trial is essential in any study related to crimes against the elderly is because these crimes were unthinkable until recently. The crimes of Borden were reduced to “those of a disturbed woman within a dysfunctional family” since ‘normal’ people aren’t capable of such flagitiousness.⁴ On closer examination of this case, it is possible to access how the society perceives family and familial relations. It is absolutely abnormal for a parent to be attacked or assaulted by their own child. Borden's act of barbarity at once attacked legal and moral foundations of the family as we know. It was only a century after the trial that academics in the West began to talk of family tergiversators. However, the method still, for a long time, remained to find faults in the mental state of the accused, rather than accepting that violence within families is indeed a reality.

India, like any other country, is seeing a surge in the number of old people. While India is a relatively new country and has one of the healthiest average ages, with gradual increase in life expectancy and a better module of healthcare, the elderly population of the nation is at a rise. Old age is one of the most delicate parts of a human life and the only thing that prioritizes the support of an elderly person is the affectionate care from their successors, relatives, loved ones and their dependents, at the age of their utmost requirement. Recent incidents validate the negligence of these children, relatives and lawful dependents in rightful performance of their duties towards the elderly. In most of the cases, the elderly is highly disappointed because s/he feels isolated, neglected and disrespected however in extreme cases they face harassment and abuse. Abuse in this context has been addressed as forceful and violent treatment. In extreme cases physical, verbal and sexual abuse have also been reported in case of elderly abuse. In the last few decades, the cases of elderly abuse and increasing rate of crime against them in India has led to a huge world of uncertainty and brutality.

³ Mike Brogden & Preeti Nijhar, *Crime, Abuse and the Elderly*, Willan Publishing, Oregon, USA, (2000).

⁴*Id.*

Almost all religions teach that elderly persons are to be treated like God. Thus, the history of elderly abuse is not very vivid and not many records of elderly abuse can be recovered. An observation of Indian history will narrate traces of unhappy and unhealthy picture of the status of elderly persons. King Dashratha could hardly stop the injustice done to Ram. Even in the Mahabharata, Dhritarashtra, the father of Duryodhana, was helpless and could not stop the harassment on Draupadi. This only goes to show that the old members gradually lose the power of making decisions in a family. They lose their power to be assertive and do not command respect. Old age usually brings loneliness, depression, desertion to the elderly; but sometimes, this situation becomes more difficult because of abuse and an increasing rate of crime against them.

This paper intends to look at the crimes committed on the elderly by their family or their dependents in India.

II. Conceptual Framework

The term 'elderly' in common parlance refers to any person who is above 60 years of age. In India, the rights of the elderly are mainly provided in the Indian Constitution under the Directive Principles of the State Policy. Article 41 of the Constitution of India has made provided for the State to introduce effective provisions and gives the right for doing jobs, education and public help in case of joblessness, old age, sickness and disablement. Whereas Article 46 the State shall encourage special attention and educational and economic interests of the people and protect from communal unfairness and other ways of manipulation.⁵

In India, the provisions for the maintenance of elderly are as follows:

i. Hindu laws

The Statutory provision for maintenance of the aged is provided under Hindu Adoption and Maintenance Act, 1956. It is the first personnel law in India. Section 20 of the Act makes a requisite duty on the children to uphold their father and mother who are not unable to preserve themselves.⁶

⁵Dilip Deshmukh, *Laws for senior citizens in India*(04th Sep, 2020)<https://www.legalservicesindia.com/article/2054/Laws-for-senior-citizens-in-india.html>

⁶ Sakshi Jain, *Legal Provisions for elders under Indian law*(7th Apr, 2020) <https://blog.ipleaders.in/legalprovisions-elders-indian-law/>

ii. Muslim laws

Under Muslim laws, according to Mulla, every child has the duty to maintain old poor parents. According to Tyabji, Under Hanafi law, the child has responsibility to maintain their parents and grandparents.⁷

iii. The Code of Criminal Procedure

Section 125 of Cr.P.C is a secular law and applied to all religions. Under this Section 125, the magistrate may order sons, daughters, including married daughters to maintain their aged parents.⁸ In **Vijaya Manohar Arbat Vs. Kashirao Rajaram Sawari &Anr**⁹ the court held that daughters are also accountable to provide maintenance to their elderly parents.

iv. Maintenance and Welfare of Parents and Senior Citizens Act (2007)

In India, considering the need for the maintenance of aged, besides these above provisions, The Parliament in the year 2007 enacted 'Maintenance and Welfare of Parents and Senior Citizen Act 2007', comprising of 32 sections. Under this Act, the children have the obligation to maintain their older parents. This Act also give the State Govt. to establish one or more maintenance tribunals. The tribunal is vested with the power of civil court and grant maintenance of allowance of Rs. 10,000 and the tribunal can give imprisoned for three months or pay a fine of Rs. 5000 or both.¹⁰ In *M. Venugopal Vs. D.M Kanyakumari*¹¹, it was held by the Court that the only condition to receive maintenance is that if seniors are unable to maintain themselves.

The noticeable legislative step taken in India by the name of Maintenance of Parents and Senior Citizen Act, 2007 under Section 2(h) as any Indian citizen who has attained the age of sixty years or above. Senior citizens or elderly persons deserve the utmost respect but of late it has been seen that many glaring examples of abuse and crime against senior citizens and parents have been witnessed. Elder abuse is a broad term which covers a single act or a repeated

⁷*Id.*

⁸*Id.*

⁹VijayaManohar Arbat v. Kashirao Rajaram Sawari, AIR (1987) 2SCC 278

¹⁰ Mahesh Choudhury & K.S Bhavana, *Law Relating to Parents and Senior Citizens- A Study* (12th May, 2020)SSRN: <https://ssrn.com>

¹¹2014(5) CTC 162,1(2015)DMC202Mad,2014-4-LW412

act or lack of appropriate action which is expected to be trustworthy but instead is causing distress to older person. All the forms of elderly abuse like emotional, physical and sexual are covered in the abuse along with the neglect (Bhatia *et al.*, 2008). The elderly people are an integral part of a population of any country and deserve respect and attention equally like any other section. However, due to changing family structure and modernisation, the elderly population is facing inevitable challenges to live their life respectfully. Loneliness, negligence and less importance and illness due to ageing and against lack of treatment are the most treacherous conditions which elderly persons face. Elder abuse is a broad term which covers a single act or repeated acts of abuse or a lack of appropriate action which is expected to be trustworthy but instead is causing distress to an older person. All the forms of mistreatment to the elderly like emotional, physical and sexual are covered in abuse along with the neglect (Bhatia *et al.*, 2008). The awful truth is that the abusers are their family members, ironically, on whom they depend to the maximum (Kumar and Bhargava, 2014). Reis and Nahmiash (1998) estimated that 3.6% people over 65-years-old within the general population experience elder abuse and the prevalence of elder abuse was illustrated as an appropriate societal problem.

In India, crimes against the elderly have been increasing rapidly. Today, they are mostly the victims of various crimes like murder, serious injuries, cheating and brutality and they are inaccessible to other family members and neighbors due to lack of neighborhood involvement, dependence on others, family violence, vulnerability, defensibility etc. These incidents attracted the academicians as well as the policy makers and they try to pay notice to the various dimensions of these crimes.¹²

III. Crimes Against Elderly Persons as per NCRB

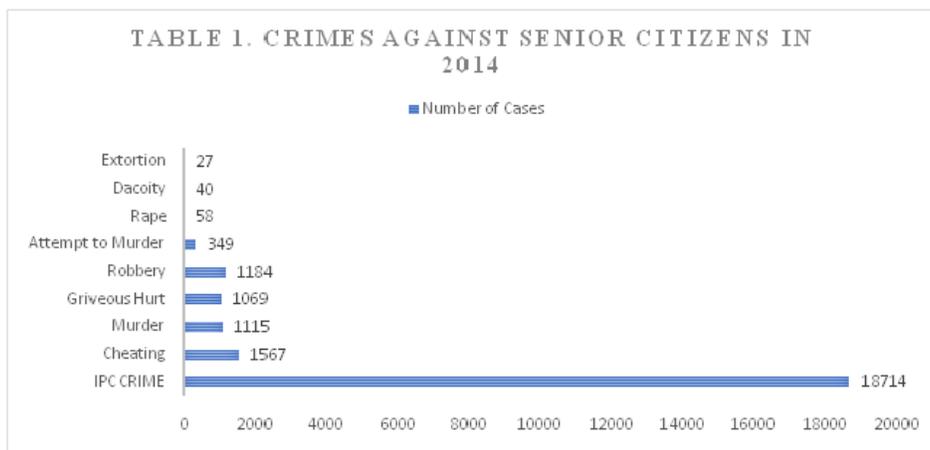
The NCRB is one of the best sources for analysing crime in the country. It not only gives a statistics of existing crime but it is also an indicator of the changes in the society. One common understanding of increasing crime rate in the society is definitely the constant rise of population. Simply put, more the number of people more will be the increase in crime. Another glaring reality

¹²Anindya J. Mishra & Avnish Bhai Patel, Crimes Against the Elderly in India: A Content Analysis on factors causing fear of crime, IJCS (2013).

about the same is that people in the society with time have become more sensitised and they know how to raise their voice and the importance of doing so and thus there is a steep rise in the number of reported cases. Other than the two main observation as mentioned above, another evident fact about NCRB data is that it shows the new forms of crime which are increasing due to different factors. Out of the many new crimes which have found a recent mention in the data of NCRB, crimes against senior citizen is one of them.

In 2014, National Crime Record Bureau for the first time made an effort to analyze the various crimes committed against senior citizens of India under the head ‘Crime Against Senior Citizens’. For better understanding of the various trends and various heads of crime against elderly the ‘Crime in India’ report from 2014 to 2018 is as follows-

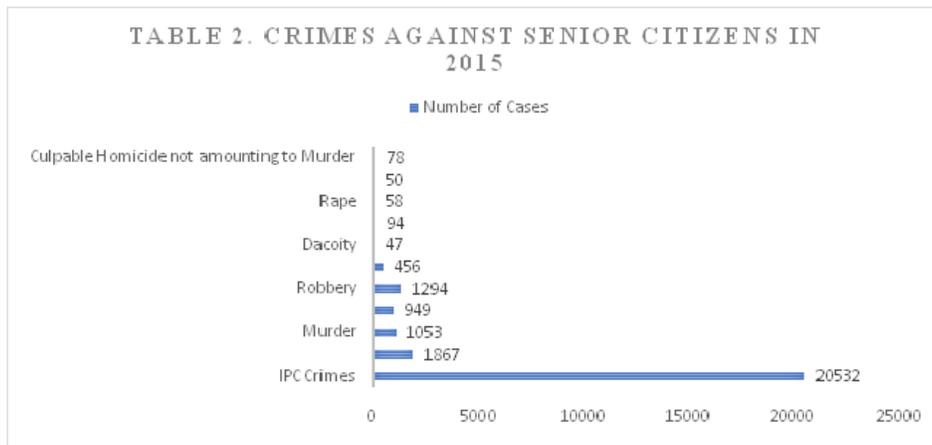
Table 1 below shows some of the major IPC crimes against senior citizens under ‘Crime in India 2014’¹³:



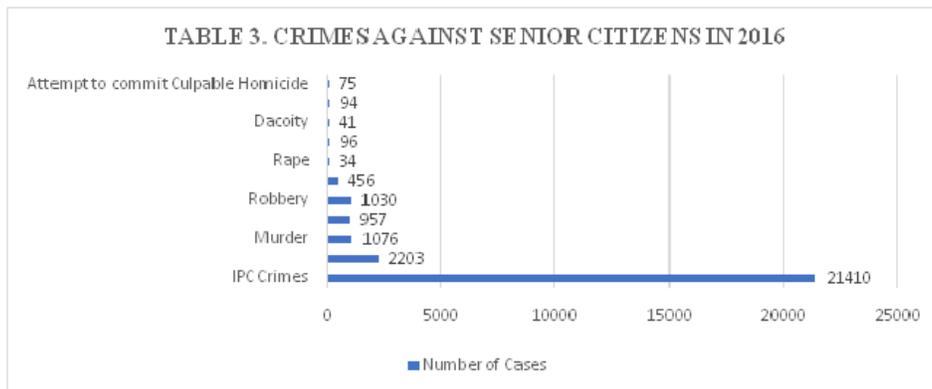
Major crimes committed on the elderly in 2015 can be represented as follows¹⁴:

¹³National Crime Record Bureau, Report: Crime in India 2014 (Ministry of Home Affairs, 2014)

¹⁴National Crime Record Bureau, Report: Crime in India 2015 (Ministry of Home Affairs, 2015)



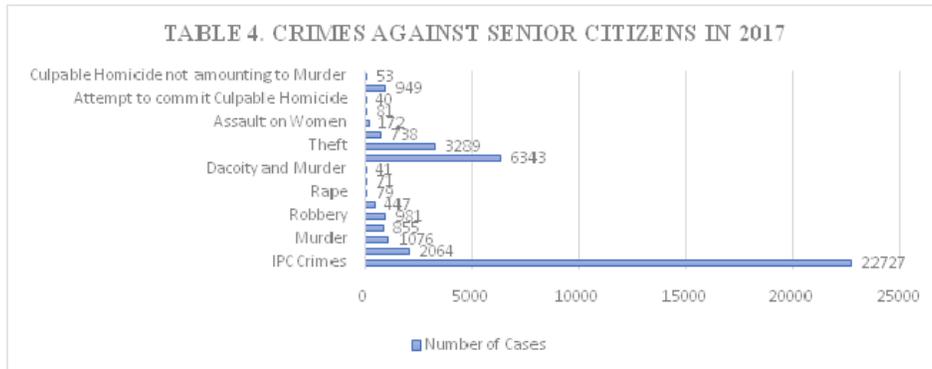
According to ‘Crime in India 2016’ the total number of IPC crimes committed against senior citizens in the year 2016 was 21,410 an increase from 20,532 in the year 2015. Some trends of crimes under ‘Crime in India 2016’ are represented diagrammatically as follows¹⁵



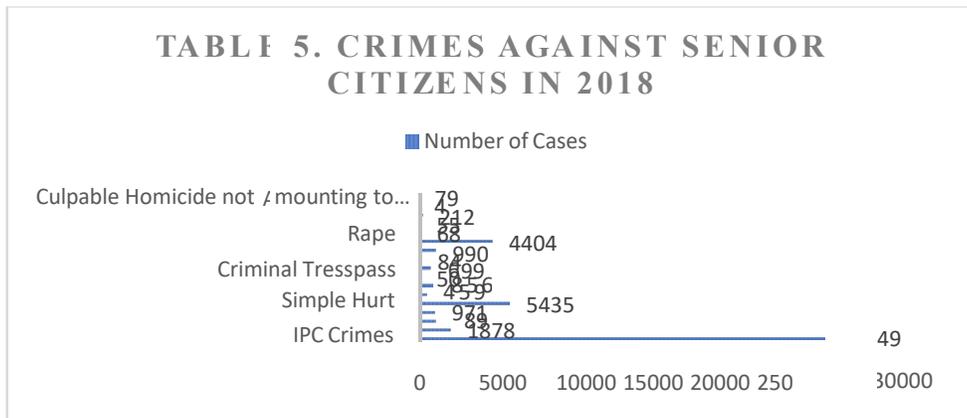
In the year 2017, the total number of IPC crimes against senior citizen were 22,727 wherein the maximum number of crimes were committed respectively in Maharashtra with 5321 cases, Madhya Pradesh with 4716 cases, Tamil Nadu with 2769 cases and Andhra Pradesh with 1823 cases.¹⁶

¹⁵ National Crime Record Bureau, Report: Crime in India 2016 (Ministry of Home Affairs, 2016)

¹⁶ National Crime Record Bureau, Report: Crime in India 2017 (Ministry of Home Affairs, 2017)

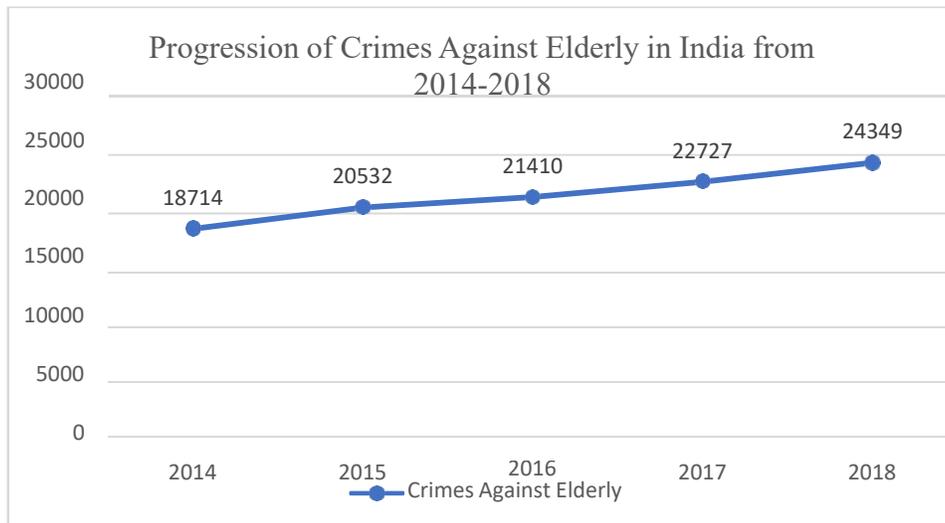


In 2018, the total number of IPC crimes committed against the senior citizens were 24,349 which was 22,727 in the previous year. Some trends of IPC crimes committed against senior citizens during the year 2018 are as follows:¹⁷



Based on the data above, the following graph shows the exponential increase of crimes against the elderly in India from 2014 to 2018:

¹⁷ National Crime Record Bureau, Report: Crime in India 2018 (Ministry of Home Affairs, 2018)



The crime rate against senior citizen has increased at an alarming rate in last few years and thus since 2014, crime against senior citizen is finding a mention in the National Crime and Research Bureau (NCRB).

As per the NCRB reports of 2014, 'murder against senior citizens' were reported high in Tamil Nadu (171 cases), Uttar Pradesh (170 cases), Maharashtra (167 cases) and Madhya Pradesh (116 cases) and these four states were accounted for 56% of the total count. As for that of 'attempt to Murder', 64 cases were reported in Tamil Nadu, 54 cases in Bihar and 52 cases in Maharashtra and all together, these states are accounted for 48.7% of the total.

'Grievous Hurt' against the elderly was high in the states of Maharashtra with 468 cases and 428 cases registered for the state of Madhya Pradesh and together these two states accounted for 51.6%.

For crimes like 'cheating', most of the cases were reported from Maharashtra (654 cases), Andhra Pradesh (156 cases), Rajasthan (138 cases) and Tamil Nadu (127 cases). These four states together accounted for 68.6% of the total number.

For 'robbery', 623 cases were registered in Maharashtra, 129 cases in Tamil Nadu and 100 cases in Delhi and together they are accounted for 72.0%.

As per NCRB report, crimes like robbery are on rise with 72.0%, Cheating 68.6%, Murder 56.0%, Grievous Hurt 51.6% and Attempt to Murder 48.7%.

IV. Factors Responsible for Crimes Against Senior Citizens

Our nation is viewed as interesting as in here we have culture of regarding our older folks however it is likewise a transgression to be old or old. There is a higher danger to the life of the old individuals in our nation; and we talk gladly of acquiring the incredible societies of humanism. The senior individuals have not been tossed out of the standard as far as possible however they are left without any assets and are seen powerless in their homes. Movement, urbanization, industrialization and globalization has driven scrambling of space in the urban communities, in this manner the elderly individuals are abandoned by their little youngsters so they can keep up their ideal ways of life

There are many other reasons why the elderly people become soft targets. The common reason is, elderly people are dependent on others, due to their declining health, infirmity, or due to disabilities. The need of care giving creates a situation where abuse towards the elderly people is more likely to occur. Senior citizen and elderly parents are in need of tender care and love but instead what they face is neglect, humiliation and a lot of abuse in different forms. They face discrimination, isolation and mistreatment. They are mistreated because they are considered useless, redundant and a burden.

Urbanization has also given rise to the increasing numbers of crimes towards the elderly people. Migration is on the rise and young people are moving to different places leaving behind their old parents helpless in their homes. This factor has affected the way of living and wellbeing of the elderly people. Crimes are on rise against elderly people due to nuclear family trend.¹⁸ The nuclear family system is overshadowing the joint family system in our society gradually. A sudden transition from a traditional society to a modern society has left the elderly to live alone and look for themselves.

Criminals consider the elderly people as easy targets because they are physically frail and they are less able to defend or care for themselves. Their vulnerability makes them soft targets for crime. Crime against the elderly people such as murder, financial crimes, fraud, burglary are the most common. Emotional abuse is another mode of violence. It could be verbal abuse; no

¹⁸ Supra 12

proper communication which makes them feel isolated, locking them up, terrorizing, blaming, humiliation, denial of food and so on constitute the same.

The elderly population are considered as the mainstays of our nation. They probably won't be a lot of dynamic like they were in their 20s and 30s, however their experience of life is significant of the current ages on the grounds that our seniors have seen the best and the most noticeably awful of both conventional and present day world.

V. Conclusion

The human society is gradually criminalized. Every day we get to hear news of murder, sensational robberies, rapes, theft, kidnapping etc. to name a few. Crimes against the senior citizens in India is sharply on the rise. Living has become unpleasant, risky and unsafe. Our country India has become the dens of smugglers and criminals.

It is a sad reality that in the society today, the elder people are no more synonymous to love. They are seen as a burden whom nobody wants to carry. So they end up being either getting dumped in one of the old age homes or can be seen on the streets begging. It is extremely sad to see how the younger generation can easily abandon their parents who always supported them whenever they were in need of them.

While it is a revelation of sorts that crimes against the elderly have been on such a steep rise since the report of the NRCB came out in 2014, it is only logical to believe that one of the main reasons for this spike is the accessibility of the law for everyone in the society that has simultaneously gone up. It can be safely assumed that while these crimes have been going on for a long time, it is only now that these are regularly reported. While reportage of crimes is indeed a good sign, the rapid and exponential increase since 2014 is alarming.

The society and the government are equally responsible in the process of making things perfect and avoid crimes. Everything should start from the root level (Jenn, 2016). The best way to reduce crime against the elderly is strengthening joint families, parent and child relationships, social inclusion, spreading love, care, empathy, promoting gender equality and removing negative prejudices and myths against the elder people.

Lockdown and Quarantine during Coronavirus Pandemic in India: Untangling a Tangle of Socio-Economic and Legal Concerns

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Abstract

Coronavirus (COVID-19) outbreak with very little initial information about its origin, symptoms, transmission, incubation and longer term effects has created a population health crisis in the World. Sudden occurrence of this deadly virus, has forced governments across the World to put in action several public health interventions to contain it. In India too, the governments used quarantine, national lockdowns, curfews, isolation, social distancing, and massive screenings at various places, health declarations and wearing mask in public as main public health interventions to prevent spreading of the virus. However, in absence of vaccine and antibiotics to avert this virus, the national lockdowns and quarantine have been important component of infection control preparedness in India. But, forcible quarantine and prolonged lockdowns raised several socio-economic and legal concerns which remained unnoticed and unaddressed while dealing with COVID-19.

Having this background in mind, the present paper aims to understand the meaning and concept of lockdown and quarantine. The study further throws light on social, economic and legal concerns associated with quarantine and lockdowns strategies used to mitigate corona virus pandemic. Attempts have been made to untangle a tangle of social, economic and legal concerns, which were needed sufficient attention in COVID-19 preparedness, planning and response. The last part of the paper deals with conclusion. The study is purely theoretical in nature hence secondary data like books, news clippings, law journals and reports have been trusted for the completion of the study.

Key Words: *Coronavirus, Lockdown, Quarantine, Social, Economic, Legal.*

I. Introduction

‘Coronavirus’ originated in the Wuhan city of China. This virus belongs to a large family of viruses, with some causing less severe common cold to more

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severe diseases such as acute respiratory syndrome in people.² Lakhs of people have come into contact with the virus across the World. Several people have lost their lives and many more are fighting for their lives in hospitals. Realising the alarming levels of spread and severity of the COVID-19 outbreak, the World Health Organisation has declared it a pandemic³ on 11 March, 2020.⁴

The coronavirus disease has now spread almost in all countries of the World. The mortality rate of coronavirus infected people in USA, Brazil, Sweden, France, Russia, Germany, Italy and England is very high.⁵ In India, as on 12 June, 2020, more than 2.50 lakh confirmed cases and approximately 9000 deaths reported from 29 states/UTs. Large number of cases has been reported from Delhi, Mumbai, Maharashtra, Rajasthan, Tamil Nadu, Karnataka, Kerala, Telangana and Uttara Pradesh.

During initial days of occurrence of the virus, very little information was available about its origin, symptoms, transmission, incubation and longer term health effects. However, with the passage of time, more information about the virus started to accumulate with governments. In human, the transmission of the virus can occur via respiratory secretions (directly through droplets from coughing or sneezing, or indirectly through contaminated objects or surfaces as well as close contacts.⁶ Current estimates of the incubation period of COVID-19 range from 2-14 days. Most common symptoms of the virus include fever, dry cough, fatigue and breathing difficulty. Persons infected due to the virus require hospitalisation, ventilator and critical care management depending on the extent and stage of infection developed in human body.

To date, no specific vaccine and antibiotics are available to fight against the virus and hence, the governments in India depended on various public health interventions to control it like complete or partial national lockdowns,

²See, "The Pandemic Notebook" a handy book titled "Understanding the Coronavirus Pandemic and Staying Protected against COVID-19" prepared by The Hindu, *available at*: creatives.thehindu.com (visited on 6 June, 2020).

³According to WHO, the 'Pandemic' is not a word to use lightly or carelessly. It is a word that, if measured can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death.

⁴*Available at*: www.who.int (visited on 6 June, 2020).

⁵*Available at*: www.euronews.com (visited on 6 June, 2020).

⁶See, Guidelines on Clinical Management of COVID-19 issued by Ministry of Health and Family Welfare, Govt. of India, on dated 17th March, 2020.

quarantine of infected people, isolation, social distancing and wearing of mask in public, etc. However, the quarantine and prolonged national lockdowns have been the main strategies of governments to prevent the virus. But both these approaches being coercive strategies of public health interventions reflect conceptions of individuals' rights, public rights and legitimacy of state intrusions in individuals' lives. In liberal democratic state like India where poverty has deepens its roots and where balance between individual rights and public rights tilts more towards individual rights, forcible quarantine and complete lockdown as mitigating strategy has given rise to several social, economic and legal concerns.

Having this background in mind, the paper aims to explain about meaning and concept of lockdown and quarantine. Further, this study describes about the purpose, types and implications of quarantine. The study also attempts to untangle a tangle of social, economic and legal concerns associated with use of lockdowns and enforced quarantine.

II. Lockdowns and Quarantine in India

In India, Central and State governments used lockdowns and quarantine strategies to contain the virus. Till 31 May, 2020, total four national lockdowns were declared. The first lockdown was declared on 24 March 2020, for 21 days,⁷ the second on 14 April until 3 May,⁸ the third on 1 May until 17 May, 2020⁹ and the fourth phase of lockdown began from 17 May until 31 May, 2020¹⁰. The purpose of all lockdowns was to limit the movement of the entire people of India as a preventive measure against the COVID-19 pandemic.

In the course of all these lockdowns, the government also applied plan of quarantine to prevent the spread of the virus. The people having symptoms of

⁷See, Government of India, Ministry of Home Affairs, Order No.40-3/2020-DM-I (A) issued on dated 24.03.2020 regarding lockdown.

⁸See, Government of India, Ministry of Home Affairs Order No.40-3/2020-DM-I (A) issued on dated 14.04.2020 regarding extension of first lockdown till 3 May, 2020.

⁹See, Government of India, Ministry of Home Affairs Order No.40-3/2020-DM-I (A) issued on dated 01.05.2020 to extend lockdown. The order came into effect from 4.05-2020 for two weeks i.e. till 17 May, 2020.

¹⁰ See, Government of India, Ministry of Home Affairs Order No.40-3/2020-DM-I (A) issued on dated 17.05.2020 regarding extension of first lockdown till 31 May, 2020.

the virus or people who might be exposed to the virus were sent either to home quarantine or institutional quarantine.

i. Meaning of Lockdown and Quarantine

‘Lockdown’ is not a legal term. Though, the governments in India can exercise lockdown power under various laws.¹¹The term ‘lockdown’ is used by government for the first time to counter COVID-19 in India. “Lockdown” may be defined as “emergency protocol that prevents people from leaving a given area”. A complete lockdown will mean that people must stay where they are and not exit or enter a building or the given area.¹²In “Lockdown”, free movement of persons and goods was restricted. However, all essential supplies, grocery stores, pharmacies and banks continue to serve the people. All non-essential activities remain closed for the entire period.

The word ‘Quarantine’ is not a new expression. It has been the oldest method to contain communicable diseases. It means “the restriction of activities or separation of suspect persons from others who are not ill in such a manner as to prevent the possible spread of infection or contamination”. In context of COVID-19 word “quarantine” means separation of individuals who are not yet ill but have been exposed to coronavirus and there have a potential to become ill.¹³

ii. Origin of Lockdown and Quarantine

It has stated in preceding discussion that lockdown has not been oldest method to contain virus. It is newly emerged strategy used by governments across the World to contain the rapid spread of COVID-19. Opposite to this, the concept of

¹¹ Certain examples of exercise of lockdown powers of the government can be found in The Delhi Epidemic Diseases COVID 19 Regulations, 2020; The Maharashtra Epidemic Diseases COVID-19 Regulations, 2020; The Punjab Epidemic Diseases COVID-19 Regulations, 2020; The Himachal Pradesh Epidemic Disease (COVID-19) Regulations, 2020, etc. They can, however, enforce a lockdown through the mechanism provided under Section 188 (disobedience to the directions given by a public servant), Section 269 (negligent act likely to spread infection of disease dangerous to life) and Section 270 (malignant act likely to spread infection of disease dangerous to life) of the Indian Penal Code, 1860.

¹² Available at: economictimes.indiatimes.com (visited on 29 May, 2020).

¹³ See, Containment Plan for Large Outbreaks Novel Coronavirus Disease 2019, Ministry of Health and Family Welfare government of India.

quarantine originated in 1377, in response to the threat of plague to the mercantile city state of Venice, all arriving ships, crews and passengers were isolated for a specified period to allow the appearance of infectious disease and subsequent time for infection to dissipate. At first the period was 30 days which later extended to 40 days.¹⁴ In North America quarantine was instituted in Massachusetts in 1701, to prevent importing small pox, yellow fever, and other infections. In Canada, the first Board of health was set up in Quebec City in response to the threat of imported cholera in 1832.¹⁵

Thus, quarantine is considered the oldest mechanism to reduce the rapid spread of bacterial infections and viral onslaughts. Method of quarantine is used when persons are exposed to highly dangerous and contagious diseases, when less restrictive means cannot achieve the public health objectives. It is also used to ensure rapid isolation of infectious persons and separation from those merely exposed. It has been legally sanctioned method by all jurisdictions in the world for the maintenance of public health and to control the transmission of diseases.

In India, those who violate the lockdown orders can face legal action under The Epidemic Disease Act, 1897. This Act, lays down punishment as per sec. 188 of the IPC, 1860.¹⁶ Similarly, penal provisions of IPC, 1860 such as sec. 269¹⁷ and sec. 270¹⁸ can be invoked to enforce lockdown orders in various states. Also, if someone escapes “quarantine” or “disobey quarantine rule” the authorities may invoke provisions of sec. 271 IPC wherein violator shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

¹⁴A.J. Clayton, “Quarantine and Out-Moded Regulations”, 75(4) *Canadian Journal of Public Health*, 261 (1984).

¹⁵*Ibid.*

¹⁶Powers under Section 188 of the IPC can be invoked whereby disobedience to the directions of a public servant is punishable with both imprisonment and fine.

¹⁷ Section 269 provides that “Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both”.

¹⁸ Section 270 of IPC provides that “Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both”.

iii. Types of Quarantine

Central and State Governments used various types of quarantine methods to prevent spread of the virus. All methods of quarantine are enforced on persons who exhibited the symptoms of coronavirus disease depending on their severity (mild or acute). The major types of quarantine practices used are as follows:-

Home Quarantine

The home quarantine is segregating the individual in a separate room at home. It is home based isolation of a person who is either symptomatic or asymptomatic of coronavirus infection. The segregation of separated person will be for 14 days. The other family members of the household will maintain a proper distance from the person in home quarantine. The person in home quarantine will have to follow all medical and administrative instructions given time to time regarding his/her stay at home for 14 days. In case the person develops symptoms that require medical care and support, he/she will be transferred to the hospital for examination and treatment. Public health officials and local administration shall have all the powers to keep check on individual in home quarantine.

Institutional Quarantine

In institutional quarantine a person will have to stay at institution identified by the Government without mixing with family members or the general public for the mandatory period of 14 days. It is enforced at the institution under the supervision of Directorate of Health Services. This is particularly important for persons who may have been in contact with a person who has signs and symptoms of COVID-19 or is suffering from the disease or has travelled from heavy COVID-19 load area.¹⁹ Travellers coming from countries/territories/areas with active transmission of COVID-19 as analysed and designated by the Ministry of Health shall be quarantined for 14 days at a facility identified by Government. Government is providing transport to all travellers from the high risk countries from the point of entry to the designated facility.

In institutional quarantine medical officers and doctors will keep surveillance on health of the individuals. The doctors dressed in appropriate Personal Protective

¹⁹ See, Guidelines on Institutional Quarantine for COVID-1, *available at*: afenet.net (visited on 29 May, 2020).

Equipment (in short PPE) will daily visit to the centre to carry out a medical check-up. Institutional quarantine is intended to facilitate early detection of ill health due to COVID-19 and to prevent its spread in the communities, to loved ones and/or other countries or areas.²⁰

III. Untangling a Tangle of Socio-Economic and Legal concerns

Prolonged lockdown and quarantine have been the most widely and intensively used tactics in combating coronavirus pandemic. Lockdown and quarantine have put several socio-economic and legal impacts on public health, the economy, social cohesion in States and the global geopolitical situation.²¹ The following social, economic and legal concerns associated with lockdown and quarantine come fore.

i. Social Concerns

Amid lockdown and compulsory quarantine, various social issues have come to fore. The enforcement of these two methods to prevent COVID-19, resulted into loss of several constitutional and human rights of individuals like right to live with human dignity, freedom of movement, right to education, right to get timely medical treatment, right to life and personal liberty, right to equality, right against exploitation, right to earn livelihood, cultural rights, right to religion and so on. The mass quarantine and its potential threat to individual rights are widely acknowledged.²² It is true that governments have broad authority to prevent the spread of communicable diseases like COVID-19, but constitutional and human rights of the individuals' must still be upheld and protected. But it did not seem to be protected during lockdown and quarantine. For example, the individuals quarantined at homes were generally instructed by the governments and public health departments not to leave their homes. Such persons could not allow entry of any outside visitors in room. Further, the quarantined person has to wear mask while residing in the same room with other

²⁰*Ibid.*

²¹Roy Schulman and David Siman-Tov, "From Biological Weapons to Miracle Drugs: Fake News about the Coronavirus Pandemic, Institute for national Security Studies, 3 (2020).

²² See, Lesley A. Jacobs, "Rights and Quarantine during the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto," 41 *Law and Society Review*, 513 (2007).

household members and to sleep in separate rooms. It amounts restriction on his/her right to life and personal liberty and freedom of movement.

Likewise, people were randomly picked up and sent to institutional quarantine. The unhygienic or inhospitable conditions in institutional quarantine amounted human rights violation of right to live with human dignity of quarantined persons. Complaints regarding violations of human rights could not be taken to human rights institutions as the offices of all human rights institutions in India were also closed amid lockdown.

Further, limited religious gatherings of people, imposed restrictions on family functions and funeral attendance during lockdown impinge upon religious beliefs and social values and culture lives of the people. Community restrictions during lockdown also raise profound questions about the government's right to interfere in such areas. In a society, in which basic societal traditions and usages are ignored, people will remain highly dissatisfied.

Also, quarantine and lockdown measures did not seem to be applied in a non-discriminatory way on people. Influential people who were advised to remain in quarantine used their power to evade quarantine²³ while common people having no political links were forced to stay in quarantine and when they dared to violate quarantine norms, they were booked as per law. Any quarantine or isolation measures must be applied in non-discriminatory way irrespective of the status of the person in society. But this aspect rarely has been addressed in COVID-19 response.

Migrants and footloose labour²⁴ remained most affected segment of Indian population throughout the lockdown. They face discrimination, hunger, poverty, lack of access to basic amenities like food, water, shelter during lockdown and in government notified quarantine centres. The states in India closed their border

²³ The most visible example of this trend is the Bollywood singer Kanika Kapoor, who arrived in Mumbai from London on March 9, 2020. Unknown to her, she was carrying the coronavirus. But because she had not displayed any symptoms yet, she passed through the airport's detection mechanisms. Since Kapoor was returning from the United Kingdom, as per Union government rules, she should have gone into self-quarantine. Instead, she appeared at parties in Lucknow, attended by Lucknow society-which also included business and political elites from Delhi.

²⁴ 'Foot loose labour' means a person who works on daily wages and is in search of job on daily basis unlike permanent job.

and limited cross border movements intra state and interstate. This move of States' further aggravated the problem of migrants. Restrictions were required to be managed in a manner which respects international human rights of migrants and refugees²⁵but this aspect rarely taken into consideration.

Women, children and old aged persons are the assets of any society. But consecutive lockdowns represents a high risk to them. Women became easy target of abuse, exploitation and neglect²⁶while staying at home with abusers.²⁷ Children were also forced to stay in confined hostile environments with unsupportive family members or co habitants. This increased their exposure to violence, as well as their anxiety and depression. Older people who are quarantined with family members or caregivers faced higher risks of violence, abuse and neglect. These problems of women, children and old aged persons were left unaddressed.

Amid lockdown, various state governments²⁸ stamp the back of the palm of people advised to be on home quarantine, indicating the date they are allowed to come out of their home.²⁹This practice created an atmosphere of suspicion and discrimination in mind of nearby people in locality. The stamping process may also result in public concealment of mild illness for fear of stigmatism. The people might go underground to avoid stamping which could make it difficult to treat them on becoming infected. Thus loss of reputation, integrity, individuality and social stigma associated with forcible quarantine were not addressed.

ii. Economic Concerns

The spread of the virus also impacted the world economy suspending business activities and forcing millions of people to stay at home in quarantine and

²⁵The rights and health of refugees, migrants and stateless must be protected in COVID-19 response: A Joint statement by UNHCR, IOM, OHCHR and WHO, *available at: <https://www.org/EN/NewsEvents>* (visited on 20 May, 2020).

²⁶Sana Malik and Khansa Naeem, "Impact of COVID-19 Pandemic on Women Health, Livelihoods and Domestic Violence, Development Policy Institute, 1 (2020), *available at: <https://www.jstor.org/stable>* (visited on 24 May, 2020).

²⁷COVID-19 and the Human Rights of LGBTI People, *available at: www.ohchr.org* (visited on 22 May, 2020.)

²⁸ For example, Karnataka government's Health and Family Welfare Department has initiated this stamping process in its State.

²⁹*Available at: timesofindia.indiatimes.com*. (visited on 30 May, 2020).

lockdowns. Sectors like tourism and travel, agriculture, entertainment, manufacturing and trade, stock markets etc. are the worst hit. Due to stay at home restrictions, people are more likely to be unemployed and to live in poverty than the general population. The situation becomes worse for those people who work in the informal sector and lack access to paid sick leave, unemployment compensation and coverage. The trade, business and individuals contracts all are hit by the extended lockdowns. People advised to remain in quarantine lost jobs, face reduction in their salaries. The probability of getting new jobs all seemed diminished.

Workplaces are vital to the livelihoods of both employers and employees, so closing them caused several financial hardships. In extreme cases, lost profits caused by closings pushed companies to go out of business, leading to job losses and other economic hardships. The effect of lost income on people living at a subsistence level was far worse. The closing of workplaces for a significant amount of time made people incapable to pay for shelter, food and medicine. These economic repercussions were left unnoticed.

iii. Legal Concerns

COVID-19 has given rise to various legal concerns related with protection of women, labourers, migrants, children, old aged persons, homosexuals, environment and Intellectual property rights. Besides, criminal justice system, trade and commerce, police and health workers are also affected adversely due to corona virus outbreak etc. This paper discusses ten major legal concerns that should have addressed or ponder over before and after declaring lockdowns in the country.

a. Concerns related to Women and Children

Cases of abuse and violence against women increased during lockdown.³⁰In lockdowns women are being told to stay at home. But for victims and survivors of violence stay at home with abusers was not a safe option. According to the data shared by the National Commission for Women, from March 23 till April 10, a total of 370 complaints related to women issues were received by the

³⁰In early April, Rekha Sharma, Chairperson of the National Commission for Women, drew attention to the disturbing phenomenon of a reported increase in violence against women during the first phase of the Nationwide Lockdown in India, *available at*: www.thehindu.com (visited on 4 May 2020).

panel. Out of the 370 complaints, the highest 123 were of domestic violence.³¹ Governments and human rights institutions in the country started online complaints system for protection of women but it was of no use because most government offices either remained closed or run with half-staff amid lockdown. The system of filing on line complaint could not work effectively.

Also, within two weeks of the lockdown, ChildLine centres across India witnessed a surge in calls for protection from abuse and violence in Children.³² According to Karnataka State Commission for Protection of Children between 25 March and April 5, the Karnataka child helpline number received 37 calls reporting child marriages and 32 calls related to physical abuse of children.³³ The child marriage cases was “abnormally high” during lockdown period and needed to be verified³⁴ but negligible heed was paid towards their problem. Perhaps people performed child marriage because they could discretely conduct them during lockdown and nobody in their village or town will get to know. The Courts which is authorised to deal with child marriage complaints under Child Marriage Act, 2006 were also remained closed during lockdown. Thus cases relating child marriage could not be dealt with effectively amid lockdown.

b. Concerns Related to Migrant and Foot Loose Labour

Amid lockdown and quarantine, migrants faced problems of food, shelter and transportation to reach their native places etc. The Central and State governments failed to pay proper attention towards these problems of migrants. The governments should have made proper policy to deal with migrants suffered but it did not do that. Lack of Centre and State co-ordination on issues of migrants further aggravated their problems. Also, workers who were unable to join office or report to work were terminated or laid off in contradiction to the provisions of Indian labour laws. Employees were terminated without offering

³¹ Available at: thewire.in (visited on 4 June, 2020).

³² Available at: <https://thewire.in> (visited on 5 June, 2020).

³³ Amid COVID crisis, Karnataka sees ‘abnormal rise in child marriage, abuse complaints, available at: theprint.in.

³⁴ Rise in Child Marriage, Physical abuse complaints during lockdown, available at: thehindu.com (visited on 30 May, 2020).

any reasonable cause and notice by the employer.³⁵ These acts were in absolute transgression of the advisory issued by the Ministry of Labour and Employment on wake of coronavirus outbreak.³⁶

Also, in post COVID period, the industrial associations requested government to increase working hours of labourers to raise productions and to resume the economic activities.³⁷ Governments entertained the request and relaxed working hours. But the governments did not gauge the repercussions of long hours working. Long working hours has several adverse implications such as increase fatigue and threat to occupational safety and health of the labours. Similarly, during lockdown the employees are directed to work from home. There is no statutory definition or any specific guidelines and Indian employment statutes that may regulate the said concept. Accordingly, there is flexibility available with the employers to allow or not allow its employee work from home. The employers may specify their own guidelines relating work from home which may result in exploitation of the employees. The benefits of statutory provisions relating to working hours and overtime payment etc. may not be given to employee working from home during lockdown.

According to labour laws, the employers are obligated to pay compensation to employees who are injured (which includes partial or permanent disablement) or die due to accidents arising out of or in the course of employment. If COVID-19 infection infects an employee, in the course of employment and it arose out of employment, the employer shall be legally obligated to pay compensation to affected employees. But under such circumstance, the employer may refuse to pay compensation to employees on the ground that injury does not occur during course of employment. This is a major legal issue which stayed unnoticed amid lockdown. In order to deal above labour issues, labour laws needed changes which could be done by passing ordinances by governments during lockdown.

³⁵AITUC condemns staff termination amid lockdown, *available at*: <https://www.economictimes.com> (visited on 5 June, 2020); see also, Bengaluru E-Commerce Firm Terminates Employees amid Lockdown without giving Notice, *available at*: www.news18.com (visited on 13 June, 2020).

³⁶See, advisories on COVID-19 issued on 20.03-2020 by Government of India, Ministry of Labour and Employment. *available at*: <https://labour.gov.in> (visited on 5 June, 2020).

³⁷Working hours increased in lockdown hit industries *available at*: <https://timesofindia.indiatimes.com> (visited on 11 June, 2020).

c. Concerns related to Environment

COVID-19 induced lockdown helped to reduce environmental pollution³⁸ but it has also some negative environmental consequences. Environment related offices remained shuttered during lockdown. The offices could not enforce environment compliance obligations. Even governments cannot implement their already fixed environment protection related obligations. Non-enforcement of environment compliance obligations amid lockdown may put adverse impacts on environment protection programmes and policy in post pandemic period. Take for example, in post COVID-19 period if environmental protection agencies and states decline to enforce the law, citizens may pursue their own actions in court against regulated entities alleging they took advantage of the situation in order to avoid environmental compliance obligations. It would increase litigations in the courts in post COVID period.

Also due to closing of government offices amid lockdown, volumes of unrecyclable waste arose. Impact of waste remained a concern. Local waste problems emerged as many municipalities had suspended their recycling activities over fears of virus propagation in recycling centres. All afore stated environment protection related concerns have rarely been addressed.

d. Concerns related to Right to Information

In lockdown period, governments are being forced to make huge and unprecedented decisions relating coronavirus, quarantine and lockdown. These decisions are vital to public health and therefore public should have right to access decisions taken under RTI Act, 2005. Information sought under the Right to Information Act, 2005 usually takes days, even months, to reach applicants. The entire government's machinery at the centre and in States was combating COVID-19 outbreak and offices of public authorities were shuttered amid the lockdown. The public authorities and governments could not be held accountable for the decisions taken. Thus, the right to information appeared to have been suspended and affected by the COVID-19 crisis. The suspension of RTI obligations must be done so with formal legal changes, it cannot be an informal statement or policy. This brings with it a significant legal and societal

³⁸COVID-19 Pandemic and Environmental Pollution: A Blessing in Disguise, *available at*: www.sciencedirect.com(visited on 5 June, 2020).

shift as people are not expected to criticise authority or hold them to account in their efforts to solve the issue.³⁹

e. Concerns Related to Backlog of Cases

Lockdown crippled the courts across the country as judges, advocates and litigants were forced to stay at home during lockdown. Due to suspension of the functioning of the courts, the numbers of litigations are bound to increase in courts in post pandemic period. The Supreme court of India vide order dated 23-03-2020 issued directions regarding extensions of period of limitation in all proceedings before courts.⁴⁰ The cases which otherwise were listed for hearing during lockdown, could not be heard. Non disposal of listed cases for hearing would increase arrears of cases in post pandemic period. Obviously, more judges, and para legal staff needs to be appointed to deal with possible future litigations. No policy, arrangement or any guidelines have been made to date to deal with this upcoming legal problem.

f. Concerns related releasing of Prisoners

The Supreme Court of India in its order dated 23.03.2020, issued order to constitute a High Powered Committee for the release of prisoners in the wake of the public health crisis related to COVID-19.⁴¹ In Indian jails which are overcrowded and unhygienic, ensuring social distancing norm was difficult task. So, as precautionary measure several prisoners were released on parole or interim bail. But releasing prisoners to minimise overcrowding seems unacceptable idea because released prisoners may get involved in crimes. Further, it was government's responsibility to prevent overcrowding in jail and provide best sanitation facilities for prisoners. Failure on part of the government is nothing except shifting responsibility from the prison system to society. The focus should be on preventing the spread of the disease within the prisons and addressing long term challenge such as biased bail system and long

³⁹ Available at: <https://gfmd.info/right-to-information-in-the-time-of-covid-19> (visited on 26 May, 2020).

⁴⁰ The Supreme Court in its order stated that Appeal, petitions, suits or any other proceedings which are to be time barred if not filed before the respective courts or tribunals shall be deemed to have been extended in this present situation. Available at: <https://www.mondaq.com/india/litigation> (visited on 26 May, 2020).

⁴¹ PUDR demands temporary decongestion of jails in view of COVID-19 public health crisis, see, *Mainstream*, Vol. LVIII No.6 (April 4, 2020).

delays in courts.⁴²This aspect seems unnoticed amid COVID-19 induced lockdown.

g. Concerns Related to Laws to Deal with Virus

There is no specific Coronavirus Act in India which can deal with prevention of coronavirus. A strategy of lockdown to prevent the virus has been carried out by the State governments and district authorities on the directions of the Union Ministry of Home Affairs under the Disaster Management Act, 2005. Under the Act, the National Disaster Management Authority (NDMA) was set up under the leadership of the Prime Minister and the National Executive committee (NEA) was chaired by the Home Secretary.⁴³ On March, 24, 2020 the NDMA and NEA issued orders directing the Union Ministers, State Governments and authorities to take effective measures to prevent the spread of COVID-19. In pursuance of the order, these authorities laid out guidelines illustrating which establishments would be closed and which services suspended during the lockdown period. In compliance of the guidelines, the State governments' exercised powers under the Epidemic Disease Act, 1897(in short EDA) to issue further directions. The legal issue arise whether the Act of 2005 was originally intended to or is sufficiently capable of addressing the threat of a pandemic. Also, the use of the archaic EDA reveals the lack of requisite diligence and responsiveness of government authorities in providing novel and innovative policy solutions to address a 21st century problem.⁴⁴ Another serious failing is that any violation of the orders passed would be prosecuted under sec. 188 of IPC, a very ineffective and broad provision dealing with disobedience of an order issued by a public servant. As such, offences arising out to these guidelines and orders have a weak basis in terms of criminal jurisdiction thereby weakening the objectives of the lockdown.

h. Concerns related to Centre -State Relationship

To deal with the pandemic, ad hoc and reactive rule making by Central and State governments reveal the lack of coordination between the Union and State governments. Issues connected with the virus like registration of healthcare professionals, temporary closure of educational institutions, audio visual

⁴²Available at: <https://www.indiaspend.com>(visited on 26 May, 2020).

⁴³See, *Economic and Political Weekly*, Vol.41 (35).pp.2-8(January, 2006).

⁴⁴Available at: <https://www.thehindu.com>(visited on 23 May, 2020).

facilities for criminal proceedings, powers to restrict gatherings, and financial assistance to industry⁴⁵ were dealt with different orders. The Central government and State governments issued hundreds of orders amid lockdown which created confusion for the people. Union government showed no inclination towards enacting a COVID-19 specific legislation that could address all the issues preemptively. The flip flop of orders regarding inter-state movement has left the fact of hundreds of thousands of migrant workers to be handled by district administration with inadequate resource. This has also exposed the lack of coordination between the Union and State governments.

i. Concerns Related to Corona Warriors

Amid lockdown, police, doctors and other medical staff performed major role in preventing and controlling coronavirus. Doctors who helped to treat the virus infected patients and police, who kept close vigil on movements of people to prevent the virus, were right to special entitlements, Personal Protective Equipment while on duties, boarding and lodging facilities amid lockdown and extra wages for overtime etc. The governments in various States announced incentives for them. But paying compensation was not sufficient. Hospital workers, doctors and police personnel, all have right to a safe workplace and protecting their families from infection. Doctors were forced to stay either in hospitals or at their homes with family members. Same was the case of police personnel who were forced to stay in temporary shelters during duties. Amid such situations, there were likelihoods of spreading infection to them and their family members. But no provision was introduced by governments towards the protection and security of the family members of police personnel, doctors and other health workers on duties except financial security.

j. Concerns Related to Rent Contracts

Amidst the lockdown rift between landlords and tenants relating payment of rent was seen. At various places in States, the tenants were threatened to be evicted. The landlords expressed unwillingness to excuse rent due to their own financial hardships. A deadlock arose between tenants and landlords. The Centre govt. also issued order on March 29 stating that owners cannot ask for the rent for a month. But the basic question is that why landlord should excuse or defer rent in

⁴⁵*The Hindu*, India needs to enact a COVID-19 law, available at: <https://www.thehindu.com> (visited on 23 May, 2020).

contravention of the terms of the rent contract. Such order by government is third party intervention between the contracts of two parties. How the government which was not a party of the rent agreement can jump into the matter and can impact the terms and conditions of the rent contract. Also, what if the owner himself lives hand to mouth? Rent can be adjusted on humanitarian ground and must not be ordered by the government who was not a party to the contract between tenant and landlord. Mere announcements in the absence of government ordinances for deference of rent do not legally absolve tenants from rental dues. Similarly, circular issued by government was misconstrued by tenants. Some tenants across the country approached to court to legally enforce the circular issued. It unnecessary increased litigations in courts because circular was advisory in nature.

IV. Conclusion

The preceding discussions make it clear that COVID-19 induced lockdown and quarantine affected society, economy and legal system of the country. It is true that in absence of vaccine to cure corona virus, lockdown and quarantine were the more appropriate means to prevent the virus. But the question is whether lockdown and quarantine norms are fully adhered to? Whether before declaring lockdowns government was fully prepared to deal with issues such as protection of women, children, medical workers, police personal, old aged persons, environment, migrants, and labours etc.? Answers of these questions are in negative. The government should map out a plan of action before declaring lockdown to combat the short and long term effects of the COVID-19 on women, children, migrants, labour and old aged persons etc. For this purpose large scale consultations with Non-governmental organisations especially with governments, civil society and women rights bodies was needed to be initiated.

Also, norms of quarantine were violated at several places in the country. Influential people infected with virus like politicians, businessman, and film actors were seen of avoiding quarantine and social distancing norms advised to them or their family members. Poor medical facilities in hospitals and in institutional quarantine also raised several questions which need to be answered. It is important that governments implement social-distancing and quarantine policies fairly and with as more involvement in planning as possible. The social,

economic and legal considerations are required to be taken into account well in advance so that public could accept strategies of lockdown and quarantine as a means to slow disease transmission.

The Centre and State relations to deal with any pandemic is significant. The roles of governments need to be defined clearly for the successful prevention of disease transmission. Archaic labour and migrant laws, contract laws, property laws, rent laws, women, children and old aged person related laws are required to be modified keeping in view the problems which these categories of people often faces amid outbreak of any communicable disease.

Besides, the archaic Epidemic Disease Act, 1897 should be obliterated immediately as this law does suit to deal with pandemic of serious nature. The Disaster Management Act, 2005 should also be amended keeping in view the difficulties faced while dealing with prevention of coronavirus pandemic. A specific law should be enacted immediately to deal with communicable diseases, lockdowns and quarantine strategies so that social, economic and legal problems associated with the outbreak of any virus can be minimised. The social, economic and legal considerations can be incorporated into pandemic preparedness plans, laws, policies and decisions making.

Cyber Crime Vis-À-Vis Violation of Massive Human Rights and Legislative Efficacy in India

Dr. Pramod J. Herode¹

Abstract

Cyber crime is the phenomenon in the age of Information and Technology; neither has it geographical boundaries nor typological limit. The enormous growth in I.T. has closely intersected social life of an individual to such an extent that India stands at second number in the array of high numbers of users of internet. Under the garb of paper less governance, it is adopted as e-governance by public and private sectors. It has now close concern with right to privacy a basic human right of individual. Considering the wider amplitude of cyber crime legislative mechanism has been provided by the government as I. T. Act specifically enacted and certain provisions of IPC and Personal Data Protection Bill, 2019 are for additional support. However, epistemological data of ever increasing cyber crime shows inefficiency of legal framework at two places one efficacy of law and implementation of law. Investigating agencies are not equipped with update knowledge and infrastructure, consequently victim is deprived of justice in consequence alarming situation is inevitably warrant for prompt and efficient legal and implementing mechanism which is sine qua non for public security.

Key words: *Cyber crime, I.T., Internet, Legal framework, Justice, E-governance, Privacy right.*

I. Introduction

Present era is known as an age of Information and Technology, as it has closely intersected all sphere of human life. Epistemological data authenticate that, information and technology is being used by members of present society as usual as it has become an essential commodity of their survival. However, their level of awareness of misuse or a crime pertaining thereto is lower. Undoubtedly, considering the magnitude of cyber crime and its impact on society, laws providing penal liabilities are enacted by the government. But in India the laws are seemed to be a matter of compliance of international obligation as cyber laws are ineffective in two ways namely, to combat the cyber crime on the one hand and to do justice to the victim on the other hand.

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Qualitative data proves that the graph of cyber crime is ever increasing and thereby life of individual as well as public is under imminent threat. This paper deals with a two aspects one is regarding legal framework and implementing mechanism available to deal with cyber crime and level of acquaintance of the law among the public is other. Magnitude of cyber is extremely wide, ranging from personal information of user to the property of individual everything is under the domain of cyber; hence, perpetrators are now committing crime through cyber and left traditional typology. In the domain of good governance it is inevitably required such efficacious law and implementing machinery as they would combat cyber crime, of course law and implementing machinery in isolation cannot achieve the goal unless they are supported by individual or public awareness.

II. Intersection Between I.T. and Privacy of Individuals in India

Rationale behind use of computer is multifaceted. One it is helpful for speedy disposal of assigned responsibility in the prevalence of pragmatic concept of global village and another is paperless administration so as to protect environment. The global mandate of e-governance compelled to the Indian government for adopting e-governance which procured changing facets of governance that is from manual to e-governance. It has brought about dynamic changes in documentation as well as official functioning both, consequently encouraged public out of necessity to become techno friendly. In the regime of privatization, e-governance has been implemented voluntarily by the stake holder as it is useful alternate to human resource and cost cutting. Similar scenario is equally visible in the public sector as well, it encompasses banking sector to defense department every public undertaking is under the domain of e-governance. Reportedly 'India stands at second number in the world for using internet having 12% users of total world, and China at first having 21% and America 8%'².

So far as privacy of data is concerned, 'I. T. Act was not comprehensive enough in all privacy dimensions as we were progressing to a digital economy and increased government measures focusing on personal information of citizens for

²VIJAY DARDA, DAILY LOKMAT, Nov.4, 2019.

reportedly percolating benefits, furthering national security versus privacy concerns/risks'³

By virtue of enormous revolution in information and technology Android mobiles are made easily available in the hands of individuals, users have now become netizens. Huge amount of individuals from younger to older irrespective of literacy background are became fond of social media. In order to have an access to social media, it requires to have Apps down loaded on the screen of handset, uncompromisingly, process of down loading APPS compels to provide full particulars of users. Upon compliance of filling up of information further access is allowed. This is usually a mechanical process. Now here comes a question of cyber security of your personal data as user is absolutely unaware of the future use or misuse of his or her information up loaded while downloading the APPs by the receiver. Astonishingly there is no assurance given from receiver about use or purpose behind asking this information is informed to the individual.

III. Gravity of the Problem of Cyber Crime

Slowly and steadily computer became an integral part of administration of public and private offices, and mobile with internet connectivity as part of life of individual. Therefore, numbers of users of it became high. Ranging from literate to illiterate, the problem of cyber crime has become of wide amplitude as it pertains to the quite larger section of the Indian society. Epistemologically speaking, 'with the ease of internet access, the numbers of social media users in India stood at 326. 1 million in India'⁴. Media wise data is also considerable and requires serious concern from the legal point of view as cyber crime is possible to be committed with them at any point of time. 'Face book now has 241 million active users in India—a million more than it does in U. S'⁵. You Tube is also not lagging behind in term of users, 'You Tube now has 265 million users in India

³BHUMESH VERMA, SAYANTAN DEY, UJJWAL AGRAWAL, *PRACTICAL EVOLUTION OF DATA PRIVACY*, Lawyer, 77(Feb. 2020) .

⁴www.statista.com accessed on 23. 1.2019 at 2.08 p.m.

⁵www.investopedia.com accessed on 23.10.2019 at 2.10 p.m.

on April 10, 2019⁶. Case of data leakage by face book is known to everyone. The British Airways was imposed with the penalty of 22.9 million dollar.

So far as internet connectivity is concerned quite large size of population does use of it either private as well as public life, figures speaks, '34.4% of the population is internet users in India 2017. In 2018 India had 483 million internetusers'⁷. Pre requisite condition for using internet-based services is to share user's personal information to be filled in without authentication of any security. In addition to this other Medias like Instagram, Twitter, WhatsApp etc. are also the pick point of popularity in the Indian young as well as middle age population. Social media has quite extensive network either in rural as well as urban society both. It is immaterial whether users are literate or illiterate; in all sections of society use of social media is found to be at high level. It may also be a possibility that due to non acquaintance with the English language user may become victim of cyber crime. 'In India two users out of five are victims of cyber crime of any kind, when they came to know it at this point of time they are very late.'⁸ Reportedly it is complained that, the mobile of Priyanka Gandhi was taped with the help of Israel software, Prafulla Patel was also victim of the same.

Considering this extensive network of use of cyber based Medias, perpetrators are attracted towards it and chosen means of commission of crime. Commission of cyber crime is easier than traditional crimes for multiple reasons. However, few of them are reproduced here, it requires no physical presence at the spot where it is committed, from any place it is possible, it requires very little physical labor and gain is comparatively high. As per governmental record the figures of cyber crimes are as under,

⁶ www.hindustantimes.com accessed on 23.10.2019 at 2.18 p.m.

⁷ www.statista.com accessed on 23.10,2019 at 2.13 p.m.

⁸ VIJAY DARDA, DAILY LOKMAT, Nov. 4, 2019 .

Cyber crime registered under I. T. Act in the year 2016⁹

Publication /transmission of obscene/ sexually explicit act, etc in electronic form	u/s 67A	U/s 67B	u/s 67C	U/s 72&72A	Other cyber crimes under IT Act	Total cyber crimes under IT Act
957	930	17	10	35	713	8613

Cyber crime registered as per IPC (involving computer as a medium) 2016¹⁰

Theft Of data	Criminal breach of trust/fraud u/s 406,408,409	Debit card /credit card	Others	Cheating	Forgery	Counterfeiting	False Evidence/ Destruction Of electronic record for evidence u/s 193,204	Other IPC Cases	Total cyber crime
86	56	26	30	2329	79	10	06	950	3518

IV. Need of Protective Legal Mechanism

In India, to enact Information and Technology Act, 2000 is one sort of compliance done of the international obligation. UNO being apex international body has played active role by taking initiative to frame UNICITRAL model law to assure safety by legislative mechanism to I. T. users. India being member state of UNO it was obligatory on its part to have such law in prevalence which would deal aptly with cyber crime or crime relating to information and technology, therefore based on the UNICITRAL model law on International Commercial Arbitration recommended by the General Assembly of UNO by its resolution on dated 30th January 1997 the Information and Technology Act, 2000 has been enacted. After coming across with shortcomings necessary consequential amendments have also been carried out in Indian

⁹ National Crime Research Bureau Report 2016.

¹⁰Ibid.

Evidence Act so as to maintain its efficacy in present substantive and procedural types of law.

V. Cyber Laws vis-à-vis Information and Technology Act, 2000

Considering the gravity of cyber crimes a special Act that is Information and Technology Act, 2000 has been enacted by the government by having hand in glow with international instrument. It is pertinent to mention that, I. T. Act 2000 has two significant features; first, it has for the first instance recognized a fact that, in the digital world, modalities of commission of crime are different and that is cyber crime, and second it provides punishment for commission of such crime. Of course, cyber crime is such phenomenon which has far greater detrimental repercussions on larger public life than traditional crimes as it has covered larger area of life of individuals particularly privacy of individuals in India. Upon considering it seriously; this Act has laid down rigorous punishment for cyber crimes respectively defined in it. Accordingly there are different offences made punishable under I. T. Act 2000 and I. P. C. as well.

VI. Cursory Review of Penal Provisions Regarding Cyber crimes under I.T. Act 2000 and other Penal Laws

I. T. Act, 2000 being enacted to deal with cyber crime is earmarked specifically as cyber law because of its outstanding feature that it possesses identity of special piece legislation. Whole thrust of combating cyber crime is on this Act. Let us recapitulate few among the others offences made punishable in I. T. Act, 2000 are reproduced here namely, tampering with computer source documents under section 65, however, in order to understand the ambit of this section the court in case of Syed Asifuddin's¹¹ court laid down that Tampering with source code attracts section 65 of I. T. Act 2000. The facts of this case are the accused were employees of the Tata Indicom co. charged for manipulation of the electronic 32-bit number (ESN) programmed into cell phones which were exclusively franchised to Reliance Infocom.

¹¹ 2005 Cr. L. J.4314, decided by A. P. High Court on 29th July 2005.

Hacking with computer systems, data alteration made punishable under section 66 the best example worth quoting is of the case of hacking official website of Maharashtra State Government, it was hacked by Hackers Cool-Al-Jazeera, accused were from Soudi Arabia. Geographically far away from India, but through I. T. modes offence could take place.

Publishing obscene information under section 67 the punishment for first time is imprisonment which may extend to five years and fine up to one lakh for subsequent time imprisonment which may extend up to ten years and fine up to rupees two lakhs. The leading case is 'The State of Tamil Nadu Vs SuhasKatti'¹², the accused was known family friend of the victim and interested to marry with her, but she got married with other and subsequently break down of marriage wedlock of her was also took place, accused being interested in marrying with her started contacting her but she was reluctant, hence he started harassing her through internet, accused was tried and punished u/s 469, 509 of IPC and 67 of IT Act. This case is considered as the first case wherein accused was convicted under Sec 67 of I. T. Act 2000 in India.

Unauthorized access to protected system under section 70 pertaining to this section, in case of Frios VS State of Kerala¹³, the facts of this case that, it was declared the FRIENDS application software as protected system. The author of the application challenged the notification and the constitutional validity of software under section 70, the court upheld the validity of both, and laid down that, Tampering with source and destroying the source code are punishable with three years jail and two lakhs rupees fine for altering, concealing and destroying the source code, causing breach of confidentiality and privacy under section 72 in this context stern step has been taken by the Government of India by preparing the Personal Data Protection Bill, 2019 it was placed on the floor of Lok Sabha on 11.12.2019. Clause 3 of this Bill defines the word "anonymisation". It brings public and private sectors under the tenet of data security. Publishing false digital signature certificates under section 73 Bennett Coleman & Co. VS Union of India¹⁴, in this case publication has been explained as the 'publication means dissemination and circulation' in the digital era, the term publication includes transmission or data in electronic form.

¹² Decided by the chief Metropolitan Magistrate, Egmore, on 5th Nov. 2004.

¹³ A.I.R. 2006 Kerala 279 (India).

¹⁴ 1972 (2) S.C.C. 788 (India).

In addition to these sections, certain sections of IPC are also aptly dealt with cyber crimes, these are as under;

Sending intimidating messages through e-mail under section 503, sending defamatory messages by e-mail under section 499, forgery of electronic records under section 463 and creating bogus websites and committing cyber frauds under section 420, committing e-mail spoofing under section 463, committing web-jacking under section 383, causing e-mail abuse under section 500. In addition to this certain provisions of Narcotic Drugs and Psychotropic Substances Act 1985 and online sale of arms is punishable under Arms Act 1959. This is legal mechanism made available in India to deal with cyber crime. The legal provisions give definitions of offence and punishment for commission of these offences, despite of it; these laws have not created remarkable impression in combating the cyber crime in India.

VII. Personal Data vis-à-vis Protection of Human Rights

Close intersection between human life and use of information technology has generated new discourse regarding violation of human right. As discussed above, receiving personal data for using certain apps or I. T. Services is pre requisite condition. The reported cases regarding misuse of personal data have necessitated thinking on it from the human rights perspective.

i. Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights 1948 was resolved by the General Assembly of United Nations Organisation on 10th December 1948. Article 12 provides that, 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference of attacks'¹⁵. The corresponding provision is found under Article 21 of the Constitution of India. it is a contribution of the Indian judiciary to widen the ambit of this article and bring right to privacy in the ambit of fundamental right.

¹⁵ DR. A. N.SEN, *HUMAN RIGHTS*,554, SRI SAI LAW PUBLICATIONS, Faridabad. (2012).

In the background of emerging globalization during 1980s the possibility of data traversing had created necessity to have regulation, 'this resulted in the OECD (Organisation for Economic Cooperation and Development) to formulate the 1980 Guidelines on the Protection of Privacy and Transborder Flows of Personal Data'¹⁶.

ii. Personal Data Protection Bill, 2019

Considering the gravity of data protection the in '*K. S. Puttaswamy vs. Union of India*'¹⁷ Supreme Court of India recommended as a need of time to have special legislation for protection of the data or right to privacy, having regard to this, a committee under the Chairmanship of Justice B. N. Srikrishna was set up, it recommended positively. Hence, as result, The Personal Data Protection Bill 2019 came into existence, which was introduced in the Lok Sabha on 11.12.2019. It has pioneer feature that it has tune with European Union's General Data Protection Regulation (GDPR). The main object of this Bill is to regulate the data of Indian Citizens. Having synergy with digital economy where personal data of individual is used as commodity has created to have special legal framework. It is a sincere endeavor of the legislature to provide rights and remedies to Indian citizens for protection of its rights.

However, it appears to have covered vague provisions, "most of the provisions lack clarity and proper enforcement mechanism, which if passed as an Act, would end up increasing volumes of petitions and most certainly be raising questions regarding the security of an individual's personal data"¹⁸. The rays of hope of strong protection of data of an individual again set down.

iii. I.T. Act 2000 and Posthumous Scenario of Cyber Crime in India

Present era is known as era of rule of law, in this background it is reasonably expected that, I. T. Act, 2000 must be an effective instrument in extending protection from potential threat of cyber crime and bringing perpetrators to the door of guilt. However, it is a legitimate expectation that when special law is meant for combating cyber crime, it should restrict rather reduce rate of

¹⁶BHUMESH VERMA, SAYANTAN DEY, UJJWAL AGRAWAL, *PRACTICAL EVOLUTION OF DATA PRIVACY*, Lawyer, 75(Feb. 2020) .

¹⁷ (2017) 10 S.C.C. 1(India) .

¹⁸SHUBHODIP CHAKRABORTY, *PERSONAL DATA PROTECTION BILL, 2019-A CRITICAL ANALYSIS: OLD WINE IN NEW BOTTLE* 241 Practical Lawyer 69(Feb. 2020).

commission of crime. But in case of cyber crime total paradoxical reality is visible, as the graph of cyber crime is ever increasing. The data published by government agencies exposes factual realities of offences occurred and accused arrested. Statistical data indicates that, cyber crime cases in India registered under the IT Act, 2000 have increased at the rate of 300% from 2011 and 2014¹⁹. In 2015 there were 11,592 cases of cyber crime registered in India²⁰. These figures are of reported cases, but due to lack of awareness regarding legal mechanism available for combating cyber crimes to the victims most of the cases are remained unreported to the appropriate authority hence they are not included in this figure. It means actual numbers of cases are higher than the shown numbers. In addition “in the report of the Norton Cyber Security Insight it is revealed that, in 2017, Rs. 18.5 Dollar have lost by victims of cyber crime in India”²¹. The worth quoting unique feature of perpetrator in cyber crime is, it is accomplished by either individual alone or by group. The high quantity of gain has attracted to get indulged into cyber crime to certain corporations i. e. artificial persons. Modality of commission crime by corporation has posed challenges in front of available traditional legal as well as investigating mechanism as the criminal liability is individual centric in our prevailing laws including I. T. Act. This scenario confirms *ipso facto* the alarming situation in India which solicits such legal framework containing stringent provisions of punishment. Undoubtedly, it is legal mechanism with efficient implementing agencies can reduce rate of cyber crime and give appropriate relief to the victims.

VIII. Cyber Crime and Efficacy of Investigating Agencies in India

Certainly on papers government has established cyber cells as separate investigating agencies to probe into cyber crime, but, in terms of efficiency they are not performing up to minimum level of reasonable expectation. man may lie but fact does not, during the course of personal interview of Adv. S. S. Quasi²², that, he used his ATM card for making payment of lunch on the hotel counter,

¹⁹ ECONOMIC TIMES, Bennett, Coloman & Co. Ltd, May 8, 2017.

²⁰ NATIONAL CRIME RESEARCH BUREAU, LineMint. H.T. Media Ltd., May 8, 2017.

²¹ VIJAY DARDA, DAILY LOKMAT, Nov. 4, 2019.

²² Practicing lawyer at High Court of Judicature Bombay, Bench at Aurangabad (M.S.).

immediately after half hour Rs. 70,000/- were reported to be withdrawn from his account, he immediately reported the matter to the police, initially place of withdrawal was traced, but tracing accused and recovery of money is yet to be done when one month period of time is over. He approached to the police but, typical reply was given by the police as 'investigation is in progresses'. This case is quoted as representative example, there are myriad of cases wherein no investigation is culminated with fruitful results. This empirical case is worth generalizing to draw an inference of inefficiency of investigating agencies in cases like cyber crimes vis-à-vis violation of human rights. On the contrary 'Vijay Darda has shared information that, his son was serving in America, cyber criminals stolen away all amount from his bank account, he reported the incident to the bank, a speedy investigation was culminated into return his amount within eight days'²³. The narration of both cases necessitated comparison to draw inference as to how legal and investigating mechanism is efficient in India in dealing with cyber crime.

Supporter may say that investigating agencies are well equipped with investigating tools in cyber crime but, reality is extremely harsh. Ordinary police personals are ineligible to investigate into cyber crime as it unavoidably requires cyber expertise. The factual data reveals the background of investigation officer in cyber crime. Majority of the cases are investigated by such police officers those who lack expertise in the field of cyber technology prevailing in up dated version at present.

IX. Conclusion

Cyber crime is a phenomenon which has now become great threat to security of public life either common or individual at large which otherwise amount to violation mass human rights in the realm of globalization. Comparatively level of awareness regarding cyber crime is in the public irrespective of socio-educational background is extremely lower as it is totally a technical functioning which requires expertise in it. On the contrary perpetrators are comparatively highly experts in technological dealings of cyber related issues. The way cyber crime is committed is beyond reach of understanding of man of ordinary

²³VIJAY DARDA, DAILY LOKMAT, Nov. 4, 2019.

prudence or man who is illiterate in cyber related technologies. The ambit of adverse consequences on public are comparatively higher than traditional crime as it ranges from property to personal details everything is subject matter of cyber crime. So far as legal framework is concerned it lacks efficacy in combating or controlling cyber crimes, particularly, data protection is concerned law is ineffective as compare to western legal framework. Therefore, it requires serious attention either of the legislature as well stake holders. Undoubtedly it has become issue of international concern but India as such it has created alarmingly dangerous situation, it has posed threats to every sections of public as well as individual life. Hence it calls for certain more drastic steps either in legal framework which provide stringent punishment or in implementing mechanism equipped well with highly qualified resource persons and infrastructure. In addition to this, public program aiming at generating public awareness regarding cyber crime need to be conducted which would help in up grading the level of acquaintance with cyber crime. Such programs may act as; 'prevention is better than cure' and would help to restrict a public to become a victim of cyber crime. data protection must be treated as human rights protection of Indian citizen, such inculcation ought to be done by public programs in India.

Narco-Analysis in Criminal Investigation and Trial: A Conspectus

Dr. Praveen Mishra¹

Abstract

In the present decade commission of crime has qualitatively changed. Offenders have started using new techniques and methods of commission of crimes. They are also getting technology based logistic support in carrying out their nefarious acts. Perpetrators of crime either leave little evidence or no evidence in the course of the commission of crime. Even if the witnesses are available they do not turn up to help the investigators, prosecutors or depose in courts. Traditional methods of criminal investigation which have been in practice in India for a long time have failed to yield concrete results. All this has resulted in low conviction rate.

For the proper administration of Criminal Justice and to ensure the confidence of the people in the criminal justice system it is necessary that new techniques of crimedetection are employed and the offenders are brought to justice. So, it has become very necessary for the investigators and the criminal courts to resort to the advancement of forensic medicine in administration of Criminal Justice. Narco-Analysis test commonly known as "truth Serum test" is one of such techniques employed by investigators. But the use of Narco- Analysis has been hotly debated at the national as well as International level. Both the sides boast of having support of law enforcement agencies, Social thinkers, Human Right activists and Jurists. Though the issue has been hotly debated, there is a dearth of studies on the jurisprudence of Narco- Analysis. The present study is an attempt to examine the various issues involved in the use of Narco- Analysis in criminal Investigation.

Keywords: *Narco-Analysis, Perpetrators, Criminal Justice, forensic medicine, Human right.*

I. Introduction

The term Narco-analysis is derived from the Greek word meaning 'anesthesia' or 'torpor.'² It is believed that a person lies by employing his power of

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imagination. In Narco- analysis test, barbiturates like “Sodium Pentothal or Sodium Amytal” are administered to the subject³. The dose of barbiturates is dependent on, age, sex, will power, mental capacity and health conditions⁴. Under these conditions it becomes difficult for the accused to lie.⁵ In such sleep-like state the forensic psychologists try to get facts about the crime. The accused under the influence of barbiturates⁶ is not capable of answering the questions thrown out by the experts but can answer simple questions on the basis of suggestions offered in that context.⁷The revelations made by the subject administered the hypnotic substances are video recorded. It is used to connect the missing links in the crime or evidence collection. The success of the Narco analysis is dependent upon the professional skills in putting relevant questions.⁸ In India, Narco-analysis has been used in Godhra carnage case, Arun Bhatt kidnapping case in Gujarat, Telgi stamp paper scam, Nithari serial killings and Arushe’s murder case.⁹

²Narco-. (n.d.) *American Heritage Dictionary of the English Language*, Fifth Edition. (2011). Retrieved November 7 2019 from <https://www.thefreedictionary.com/narco->

³"Truth" Drugs in Interrogation Available at https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol5no2/html/v05i2a09p_0001.htm.(visited on Oct.29,2019).

⁴Barbiturate Abuse, <https://www.webmd.com/mental-health/addiction/barbiturate-abuse#1>(visited on Nov. 2,2019).

⁵Sandhya Verma, (thesis) <https://shodhganga.inflibnet.ac.in/bitstream/10603/70232/9/chapter5.pdf>(visited on **Nov. 2,2019**)

⁶European monitoring centre for drugs and drugs addiction, <http://www.emcdda.europa.eu/publications/drug-profiles/barbiturates>(visited on **Nov. 2,2019**)

⁷ https://shodhganga.inflibnet.ac.in/bitstream/10603/102549/9/09_chapter%202.pdf.(visited on Oct.31.10.2019)

⁸ Barcelona Panda, Narco-Analysis and its Evidentiary Value in India, (2011) PL July.

⁹ .N.D.Gowda, “Role Of Forensic Medicine In the Administration of Criminal Justice With Special Reference to Human Rights” Volume 3, International Journal Of Research And Analysis.

II. Criminal Investigation

The word 'investigation' has been defined in Section 2(h) of the Code of Criminal Procedure (Cr.P.C).¹⁰ The Supreme Court in *H.N. Rishbud vs State of Delhi*¹¹ said the investigation generally consists of the following:

steps: (i) Proceeding to the spot

(ii) Ascertainment of the facts and circumstances of the case

(iii) Discovery and arrest of the suspected offender

(iv) Collection of evidence relating to the commission of the offence which may consist of: (a) Examination of various persons (including accused) and the reduction of their statements into writing, if the officer thinks fit b) Search of places and seizure of things considered necessary for the investigation and to be produced at the trial; and (v) Formation of the opinion as to whether on the materials collected, there is a case to place the accused before a Magistrate for trial and, if so, taking the necessary steps for the same for the filing of a charge sheet u/s 173 Cr.P.C.

Every investigation is a search of truth for justice and to bring the accused to book. In this search every citizen who has knowledge of the commission of cognizable offence or in any way can assist the investigator and has a duty to inform police and co-operate with the investigating officer who is entrusted with a responsibility of collecting evidence. The investigator is expected to adopt scientific methods of crime detection which are permitted in law to unearth the crime.¹² Narco Analysis test fulfils the essential ingredients of section 2(h) of Cr.P.C so it can be inferred that Narco- analysis is a scientific investigation where some sort of information related to the crime is acquired from the accused which may become evidence against him. It is a settled principle of law that police authorities have the statutory right and duty to investigate into a cognizable offence under the scheme of Cr.P.C and the Supreme Court on various occasions, denounced undesired interference by the

¹⁰ All the proceedings under the Code for the collection of evidence by a police officer or by any other person (other than a Magistrate) who is authorized by the Magistrate in this behalf will come under the purview of investigation.

¹¹ AIR 1955 SC 196.

Courts into investigation of crimes by police authorities in due discharge of their statutory functions under the law of the land.¹³ A segment of people comprising of social thinkers, lawyers and human right activists have opposed the application of Narco analysis against a subject without the consent of the subject on the grounds of freedom of speech and expression, privacy rights, individual liberty and human dignity. They contend that the drugs used in narco analysis are harmful to human body. Wrong dose can prove to be fatal. The Supreme Court in the case of Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi)¹⁴ held “in the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime” It further observed “the investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.”

Under the provisions of section 161 Cr. P.C.¹⁵ police officer may examine orally any person whom he considers to be acquainted by the facts of the case. Some of the person examined under section 161 may later be accused. So “any

¹³D.Venkatasubramaniam&Ors vs M.K.MohanKrishnamachari&Ors. In The Supreme Court Of India Criminal Appellate Jurisdiction Criminal Appeal No.1766 Of 2009.

¹⁴ 2010 6 SCC 1.

¹⁵ Section 161 of Code of Criminal procedure provides:

Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

2. Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would tend to expose him to a criminal charge or to a penalty or forfeiture.

3. The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

person” under section 161 includes accused also.¹⁶ Under Section 162 the person so examined is bound to answer all questions except those questions which have the tendency to incriminate him.¹⁷ But if during the examination by a police officer the person so examined answers any question which tends to incriminate him, the answer cannot be proved against him in the enquiry or trial. The information acquired from the accused through performing Narco analysis on him is akin to the statement recorded under section 161 Cr.P.C. which if reduced in writing is not required by the maker to be signed and cannot be proved against him. A person is arrested on a charge of committing an offence can be subjected to medical examination against his consent.¹⁸ In *Ram Lal Narang vs. State (Delhi Administration)*¹⁹ it was held that there is no reason to believe that court in the administration of criminal justice is not empowered to request a medical practitioner under section 53 which empowers a police officer, to request a medical practitioner to examine a person for facts which can be an evidence in the cases investigated by the police for example collecting blood sample, semen from the accused or conducting DNA test for the purpose of further investigation under Section 173(8) of the Code.

¹⁶*Nandini Satpathy vs Dani (P.L.) and anr.* 1978 SCR (3) 608.

¹⁷ Section 162 provides that “statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.”

¹⁸Section 53 Cr.P.C provides that “when a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably for that purpose.”

¹⁹(1979) 2 SCC 322.

III. Constitutional Paradigm

The use of Narco analysis can be very useful, as the conscious mind does not speak out the truth, unconscious mind may reveal vital information about a criminal case.²⁰ But a segment of lawyers and human rights activists view Narco analysis test as a cruel form of investigation and similar to a third-degree treatment, with Constitutional prohibitions against interrogation of an accused in hypnotic or semi conscious state. Narco analysis has been challenged on the ground of violation of Article 21 of Constitution.²¹ Privacy is an essential attribute of right to life and liberty guaranteed to the citizens of India.²² This Article has been judicially expanded to right to live with human dignity. Thus, the state may take away or abridge even right to life in the name of law and public order following the procedure established by Law. However, it is necessary that the procedure must be “due process” as held in *Maneka Gandhi v. Union of India*.²³ Thus the state cannot take away or abridge the right to life by truncating processual justice. Allahabad High Court in *Re Provision of Section 14A of Sc/St(Prevention Of Atrocities) Amendment Act, 2015 vs. Nil*²⁴ observed “Procedure established by law” are words of deep meaning for all lovers of liberty and judicial sentinels. Amplified, activist fashion “procedure” means “fair and reasonable procedure” which comports with civilised norms like natural justice rooted firm in community consciousness -- not primitive processual barbarity or legislated normative mockery.” Narco Analysis has also been challenged on the ground that it violates Article 20(3) of the Constitution.²⁵ The accused is entitled to a fair trial. This right has various dimensions. Firstly, prosecution has to stand on its own leg to prove the guilt of accused. Secondly presumption of innocent till the guilt is proved. Lastly right

²⁰ Barcelona Panda “Narco-Analysis and its Evidentiary Value in India” (2011) PL July.

²¹ No person shall be deprived of his life or personal liberty except according to procedure established by law.

²² *Puttaswamy v. Union of India* known as Rights to Privacy Case. It has been reproduced from (2017) 10 SCC 1

²³ 1978 SCR (2) 621.

²⁴ Criminal Writ-Public Interest Litigation No. 8 of 2018.

against self-incrimination.²⁶ In *M. P. Sharma vs. Satish Chandra*,²⁷ the Supreme Court observed as follows: "Article 20(3) embodies the principle of protection against compulsion of self-incrimination which is one of the fundamental canons of the British system of criminal jurisprudence and which has been adopted by the American system and incorporated as an article of its Constitution. It has also, to a substantial extent, been recognized in the Anglo- Indian Administration of criminal justice in this country by incorporation into various statutory provisions." It further observed "So far as the Indian law is concerned, it may be taken that the protection against self-incrimination continues more or less as in the English common law, so far as the accused and production of documents are concerned, but that it has been modified as regards oral testimony of witnesses, by introducing compulsion and providing immunity from prosecution on the basis of such compelled evidence." It further observed So far as the Indian law is concerned, it may be taken that the protection against self-incrimination continues more or less as in the English common law, so far as the accused and production of documents are concerned, but that it has been modified as regards oral testimony of witnesses, by introducing compulsion and providing immunity from prosecution on the basis of such compelled evidence." In *State of Bombay vs Kathi Kalu Oghad and Others*²⁸ it was held that if a police officer questions an accused and the accused voluntarily offers statements which at any stage become incriminatory cannot be considered to be a statement under compulsion. In the case of *Ramchandra Ram Reddy vs The State of Maharashtra*²⁹ the issue before the court was whether narco analysis test is violative of article 20(3) and the fundamental rights of the person against whom tests are conducted. The court held that Article 20(3) prohibits compelling a person to be a witness against him. The court differentiated brain mapping and P300 with Narco analysis online detector or polygraph test, whatever information comes from the accused cannot be considered to be a statement coming out of the involuntary test. It can be said that in the case of narco analysis the information which is extracted from the accused is a statement. As

²⁶ Article 20(3) provides "No person accused of any offence shall be compelled to be a witness against himself." Every person accused of an offence has a right to remain silent.

²⁸ AIR 1961 SC 1808.

²⁹ 2004 All MR (Cri) 1704.

regards the issue of statements taken from the accused by undergoing involuntary test will attract the provision of article 20 (3) or not will depend upon the fact whether the statement made by the accused by undergoing the test against his will is incriminatory or not. Statements are incriminatory or not can be decided only after the performing of the test. If it turns out to be incriminatory then there are sufficient protections available under Cr.P.C. and Indian Evidence Act come to the rescue of the accused. It was held that the statement acquired in process of narco analysis test is also admissible. In Narco analysis accused is subjected to the tests against his will, but the disclosures or statements made by the subject during such tests are not voluntary.

In *Selvi & Ors vs State of Karnataka*³⁰ in the context of narco-analysis technique, it was observed: "Wrong dose of hypnotic medicine administered to the subject can also result in coma or death. It can be safely concluded that narco-analysis conducted against the consent of accused invades his privacy and is violative of fundamental rights and should be sparingly allowed as a last resort. However, a witness is not the same thing as evidence in wider sense of terms. To be a witness is not equivalent to production of documents or providing certain materials which can be used to determine the guilt or innocence of the accused. Giving thumb impression or fingerprint or specimen of handwriting or exposing any part of the body for examination is not same as that of becoming a witness. To be a witness means giving oral evidence in a Court of law. Taking of thumb, finger and palm impressions of an accused person by a Court does not fall within the prohibition of Article 20(3) of the Constitution."³¹

When all the possibilities are exhausted and the investigating officers do not get any clue or clinching evidence then these tests become essential in order that the criminals are brought to book. The nature of the test which is required under the circumstances depends upon the nature of investigation. These scientific tests have now become part of investigation process and simply because of the fact that the accused does not consent for a test the investigating officer should not be restricted from carrying out the tests. It was also argued that these scientific tests exclude the possibility of third degree to which the investigating officers resort to when they do not find any clue regarding the crime.³² If such tests are

³⁰(2010 (7) SCC 263.

³¹ *Prakhar Singh v. The State* AIR 1958 Punjab 294.

³² *Santokben Sharmanbhai Jadeja vs State Of Gujarat* 2008 Cri.L.J 68Gujrat.

not conducted, the investigating agency will be deprived of clinching evidence as against the accused. The contention that under the influence of barbiturates answers are influenced by suggestions offered by the interviewer and thus there is a likelihood of false results is difficult to be agreed. The scientific value of such tests and its reliability is evaluated during the course of trial. Conducting such scientific tests will not amount to violating his right to silence.

IV. Evidentiary Value of Statement of Accused in Narco- Analysis

In *R. v. Leatham*³³ it was held "it matters not how you get it if you steal it even, it would be admissible in evidence." It seems that the Indian courts have endorsed the view taken in *R. v. Leatham*. In *R. M. Malkani vs State of Maharashtra*³⁴ the evidence of tape recording of a conversation by police was challenged. The challenge was based on the ground that it offended Articles 20(3) and 21 of the Constitution. But the Supreme Court observed that evidence is admissible even if it is illegally obtained unless it is tainted by an inadmissible confession of guilt. The Court took a pragmatic approach and said that the telephonic conversation of an innocent citizen is protected against unreasonable interference by tapping the conversation. The protection cannot be extended to the guilty citizen against the efforts of the police to prevent corruption of public servants. But the Courts will not permit the police to proceed by unlawful or irregular methods and encroach with the safeguards provided to the people.

Confession made to a police officer is not admissible as evidence against accused.³⁵ If confession is made by a person while he is in custody of police it is not admissible.³⁶ But section 27 is an exception to the rule under section 25 and 26 which prohibits the proof of confession made to a police officer or where he

³³(1861). 8 Cox CC 498 at 501.

³⁴1973 SCR (2) 417.

³⁵ Section 25 Indian Evidence Act :No confession made to a police officer, shall be proved as against a person accused of any offence.—No confession made to a police officer, shall be proved as against a person accused of any offence."

³⁶ Section 26: Indian Evidence Act. Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

makes a confession while he is in custody of police.³⁷ The Supreme Court in case of *Madhu vs State Of Kerala*³⁸ stated “the rationale behind Section 27 of the Indian Evidence Act is, the facts in question would have remained unknown but for the disclosure of the same by the accused. Discovery of facts itself, therefore, substantiates the truth of the confessional statement. Since it is truth that a court must endeavour to search. Section 27 has been incorporated as an exception to the mandate contained in Sections 25 and 26 of the Indian Evidence Act.”

V. Extra Judicial Confession of Co-accused

Extra Judicial Confession of a co accused is not evidence under section 3 of Indian Evidence Act in technical sense but still the court can consider it in a trial.³⁹ Section 30 provides a confession can be taken into account against a co-accused also.⁴⁰ In *HaricharanKurmi v. State of Bihar*⁴¹ the Court concluded that an extra-judicial confession cannot be treated as a substantive piece of evidence against the co-accused, the proper judicial approach is to use it only to

³⁷ Section 27 of Indian Evidence Act: How much of information received from accused may be proved.—Provided that, when any fact is proved to be discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

³⁸ (2012) 2 SCC 399.

³⁹ *Kusal Toppa vs The State Of Jharkhand In The Supreme Court Of India Criminal Appellate Jurisdiction Criminal Appeal Nos.1691-1692 OF 2010*

⁴⁰ In *Sahadevan v. State of T.N.*, the Supreme Court culled out certain principles regarding the reliability of an extra judicial confession (i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

⁴¹ AIR. 1964 SC 1184.

strengthen the opinion formed by the Court having regard to other evidence placed on record. In *Ram Lal vs the State of Himachal Pradesh*⁴² the Supreme Court observed “it is well settled that conviction can be based on a voluntarily confession but the rule of prudence requires that wherever possible it should be corroborated by independent evidence. Extra-judicial confession of accused need not in all cases be corroborated..... the rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated.” If extra judicial confession is admissible in evidence against the co- accused which does not fulfill all the essential elements of evidence under section 3, on the similar lines statement acquired through involuntary narco analysis should also be accepted against the accused.

VI. Conclusion and Suggestions

The present criminal justice system is heavily aligned towards the accused. Freedom of speech and expression, individual liberty and freedom are being used as shield by criminals due to weakness in the administration of criminal justice system in general and investigation and trial of criminal cases in particular. Incriminating statement of the accused extracted through involuntary Narco Analysis is akin to the statement of “any person” under section 161 Cr.P.C which can be taken by investigating officer of a criminal case which does not require any permission of court. So, there is no difficulty in using such statements as an aid to investigation. However, if it has to be used as evidence against the accused then it should be done with the prior permission of the court and the court should allow it to be proved if the court is convinced of the genuineness of the statement and it inspires confidence. The criminal justice system of India by making admissible statement of accused under section 27 of Indian Evidence Act has shown the possibility of accepting incriminatory statement of accused the veracity of which is supported by recovery of incriminatory substances. If taking of thumb, finger and palm impressions of an accused person by a Court do not fall within the prohibition of Article 20(3) of the Constitution; there is no reason to treat narco- analysis on a different footing

⁴²In the Supreme Court of India Criminal Appellate Jurisdiction Criminal Appeal No.576 OF 2010.

due to certain amount of risk involved in Narco- analysis. But the test is conducted in forensic laboratories by experts of forensic medicine. So the amount of risk is insignificant. When barbiturates are administered following the procedure prescribed and observing the due safety precautions the risk is minimised. We must be ready to undertake a calculated risk for the larger interest of society. The validity of Narco- analysis has been upheld on various occasions having regard to the circumstances of the cases. If it is carried out with a permission of court in presence of a lawyer of the choice of the accused, possibility of miscarriage of justice is excluded. Narcoanalysis test in crimes of severe nature will improve the quality of administration of criminal justice through strengthening of evidence system.

Role of Special Juvenile Police Unit in Interface with Juvenile in Conflict with Law

Dr. Kavita Singh¹

Abstract

Special Juvenile Police Unit has to shoulder great responsibility while dealing with Child in Conflict with law and Children in need of Care and Protection. While discharging this duty along with other duties it is often seen that they violate human rights principles. The Juvenile Justice (Care and Protection) Act 2015 and Model Rules 2016 provide that these members of Special Juvenile Police Units should take Child Friendly approach. In other words they have to discharge their duties in Children Friendly manner. This paper attempts to give a road map to these officers who are designated as member of Special Juvenile Police Units handling cases relating to children regarding the position of law, judicial trend and also provides dos and don'ts in their approach.

Keywords: *Juvenile in Conflict with Law, Special Juvenile Police Unit, Position of Law and Judicial Trend*

I. Introduction

The United Nations Beijing Rule 1985 emphasised and envisaged special humane treatment of a child who came in contact with the police. The Juvenile Justice Act 2000, incorporated and introduced the Special Juvenile Police Unit (SJPU), which aimed at fostering an atmosphere wherein the interaction between the child in both the categories and the police officer will have undergone massive change. Section 107 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act 2015), provides for creation of a SJPU by State Governments/Union Territories Administrations for every district and city to coordinate all functions of Police related to children.

The police being the sentinel of the criminal justice system, the child in conflict with law (CCL) come into their contact from the very beginning and also in cases of child in need of care and protection (CNCP). If the police are not well

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versed with protectionist principles in dealing with the children then with their enormous power, and consequent lack of sensitization, the child shall be further victimized.

A remarkable feature of the JJ Act, 2015 can be seen in the principle of Diversion. The police acting under this should avoid the apprehended CCL to come and face the judicial proceedings, unless it is in the best interest of the child or the society.

The role of the SJPU does not end here; it has to uphold the constitutional rights of the child in need of care and protection (CNCP). Their interest, wellbeing and dignity have to be safeguarded at all times. For this along with the police there has to be a coordinated effort of the NGOs and the members of the civil society. The endeavour would be to change the form of the police working from controlling stance to constructing child-police relations based on active participation from the community.

The Government of West Bengal has started various schemes which is preventive in nature. One of them is the *Kanyashree* scheme launched in October 2013, wherein monetary grant for education, is accorded to girl child from 13 years, was spearheaded by the State has been put in place to overcome incidence of child marriage, sexual exploitation as well as vagrancy. This effort of the State has been recognised by the Department of International Development, United Kingdom and the United Nations Children Fund (UNICEF).

After setting up Women Police Stations across the State, the West Bengal Government is setting another example by forming Child-friendly Police Stations. Nine police stations in Kolkata and 29 police stations across the State have been shortlisted initially. A model Child Friendly Corner (CFC) was started in Tollygunj Police Station (P.S) with CINI Urban Unit's collaboration and with the help of SANLAAP, at Watgunj P.S. Recently under the JJ Act 2015; CFC has been opened on 14th November 2016 with the help of CINI Urban Unit, at Ultadanga and Karaya P.S in collaboration with Child line Child friendly police corner was created in Electronics Complex, Salt Lake by Save the Children with collaboration of local partner. Such police stations will help the children to file their complaints in a friendlier atmosphere. Also, children, who have committed offences, will be dealt according to their age. Still in some

police stations, the Sub Inspector (SI) or Assistant Sub Inspector (ASI) is not yet designated as CWPO. In most of the cases, the CWPO is not well informed about the child related legislations or child friendly approach and they try to register cases of children as adults to ease the process of enquiry. There are no guidelines or Standard Operating Procedure (SOP) for the functioning of the SJPU as a reason the officers who are deployed for the work are also unable to perform their duties. For correcting this situation the present paper as SOP has been formulated in the absence of a child friendly guideline, the officers deployed are sometimes unable to justify their roles, hence there was a need to develop child friendly SOP for the SJPU which will be a ready reference for the police officials while performing their tasks. Moreover, this is not part of their regular training programme.

Objective

This paper shall aim to provide the Police Department

- With a fundamental base that will govern the actions of the SJPU,
- Information on the planned training programme for police officers who are to be designated as Child Welfare Police Officers (CWPOs) procedures and,
- Protocols needed for the implementation of the SJPU in West Bengal, the trainings required information for police officers that are to be designated as Child Welfare Police Officers (CWPOs).

II. Child Friendly Special Juvenile Police Unit

The objective of Juvenile Justice System is that all children who come in contact with it, be dealt in a child friendly environment where their needs are met. It is important that there is ample scope of reformation and their overall development in the system. The CCL or CNCP invariably come in contact with the police and thus it is imperative that their experience is of a caring child friendly police station. For being child friendly, there is certain Do's and Don'ts enumerated below:²

²http://www.dpju.com/index.php?option=com_content&view=article&id=283&Itemid=209 (Last visited: Feb. 12, 2020)

i. What the Child Friendly Special Juvenile Police Unit Should Do

1. SJPU will have to be readily accessible, with child friendly corner.
2. Child friendly procedure of reporting, recording of evidences, investigation and trial of cases.
3. Police as much as possible, should be in plain clothes.
4. Respect the child's wishes.
5. Provide them with adequate legal aid and counselling.
6. Where required an interpreter if the child has language and understanding issues also if he/she is differently abled child.
7. Follow the Convention on the Rights of the Child (CRC) principles of child participation, non-discrimination, best interest and right to life.
8. Talk to the child in a caring and friendly manner, avoiding derogatory, incriminating and abusive language.
9. Ensure that the environment is conducive for helping the child to talk freely.
10. Child/juvenile should be escorted to Observation Home (OH)/ Juvenile Justice Board (JJB)/Child Welfare Committee (CWC) by police officer in civil dress.
11. Ensure that women police personnel are present when a girl child is taken into custody or escorted.
12. Provide food, safe shelter, water, access to toilet and phone.
13. Provide medical care and attention.
14. In the event of interviewing a child witness, ensure that the investigating officer goes to the house of the child and does not ask the child to come to the police station.
15. Ensure privacy and dignity.

ii. What the Child Friendly Special Juvenile Police Unit Should Not Do

1. As far as possible police officer should not be in uniform when talking to the child/juvenile.
2. Should not detain the child at night in PS.
3. When CWC/JJB is not sitting, the child should be housed in a Children's Home/Fit Institution/Observation Home.
4. A Child/juvenile should not be taken into police custody or kept in the police station between sunset and sunrise.
5. When a juvenile is taken into custody for any alleged offence CWPO to ensure that the juvenile is not beaten/abused/ill-treated.
6. Do not coerce a child to give statement/confession as this will not be valid at the JJB.
7. For children in conflict with law ensure that no dossiers are prepared or fingerprints taken.
8. Do not publish names and photographs of children in print or visual media.
9. When children are released on bail they should not be asked to report and sign at the police station.
10. In the case of children taken into custody for serious offence,
 - Inform the juvenile/parent/guardian their right to legal aid but do not make any reference to a private lawyer.
 - If juvenile is not released on bail, he/she should be sent to the OH.
 - If JJB is not sitting, juvenile should be housed in OH.
 - Offences committed by a juvenile should not be held against him/her when apprehended for offences committed as an adult.

III. Charter of Child Rights

i. **Right to Privacy and Confidentiality** – The name of the child, the family, educational institution wherein s/he is enrolled and other information capable of identifying her/him shall be kept confidential.³

ii. **Right to Dignity**- the child survivor shall be treated with dignity and respect at all stages in the matter and by all players including health care workers, police, judiciary, prosecutor, translators, etc.⁴

iii. **Right to Non-Discrimination** – There shall be no discrimination against any child based on religion, race, sex, or caste. For example, girl children cannot be discriminated against by blaming them for their dress / attire for the incident of sexual offence. At the same time, all stakeholders shall be sensitive to any special needs of a child. For instance, disabled children, medically unfit children or very young children will need to be accorded special treatment.⁵

iv. **Right to express his /her views in all matters**: The wishes of the child shall be given priority when decisions regarding institutionalization, medical examination of the child and appointment of a support person. The views of the child shall be given due weight in accordance with the child's age and level of maturity.⁶

v. **Right to Well-being** – The best interest and well being of the child survivor must be regarded as being of paramount importance at every stage of the trial. Each stakeholder under the Act shall act with sensitivity to the healthy physical, emotional, intellectual and social development of the child.⁷

³Article 3 of the CRC, Preamble to the Protection of Children from Sexual offences (POCSO) Act, *Shankar Kisanrao Khade vs. State of Maharashtra*, 2013 (6) SCALE 277.

⁴Article 39 (f) of the Constitution of India, Preamble to the CRC.

⁵Article 15 (1) of the Constitution of India, Article 2 of the CRC

⁶Article 12 of the CRC

⁷Preamble to the POCSO Act, also in *Shankar Kisanrao Khade vs. State of Maharashtra 2013 (6) SCALE 277*, (the Supreme Court laid down various guidelines for stakeholders under the Act, and held that in cases where the perpetrator of the crime is a family member, utmost care must be taken bearing in mind the best interest of the child is of paramount consideration).

vi. **Right to be protected from all forms of sexual exploitation by the State:**

There can be no exemption for committing sexual intercourse with a child – not even if the accused is married to the child.⁸

vii. **Right to Medical Treatment-** The child survivor shall not be denied medical treatment.⁹

IV. Judicial Pronouncements

i. The Supreme Court on 12.10.11, pronouncing interim order in *SampurnaBehrua v Union of India*¹⁰, has directed States and Union Territories to give full effect to the provisions in Juvenile Justice Act, 2000 related to constitution of Special Juvenile Police Units and Juvenile/ Child Welfare Officers in all districts and all police stations respectively. National Legal Services Authority has been directed to issue guidelines for training and orientation of Special Juvenile Police and State Legal Services Authorities through their district level units will provide these trainings.

ii. In *Court on its own motion v Department of Women and Child Development and others*¹¹, the Delhi High Court opined that an advisory/circular/Standing Order, as may be appropriate, be prepared by the Special Juvenile Police Unit for the assistance of police officer/IOs for the purpose of assistance on matters related to inquiry of age. Such advisory/Circular/Standing Order shall also include the procedure which needsto be followed by the IOs in cases of transfer of cases from adult courts to JJB and vice versa.

iii. In the case of *BachpanBachaoAndolan v Union of India & Other's*¹² the Apex Court in an order dated 17. 01. 2013, directed that in case of any missing children is reported in a Police Station, the same shall be reduced to First

⁸Article 34 of the CRC, Section 42A of the POCSO Act.

⁹Section 27 of the POCSO Act.

¹⁰Writ Petition Civil 473 of 2005, <http://www.hrln.org/hrln/child-rights/pils-a-cases/736-create-special-juvenile-police-for-children-and-train-them-well--supreme-court-of-india.html> (13.2.17)

¹¹Court on its own motion v. Department of women and child development and others, WP(C) No. 8889 OF 2011 , decided on, 11.05.2012,

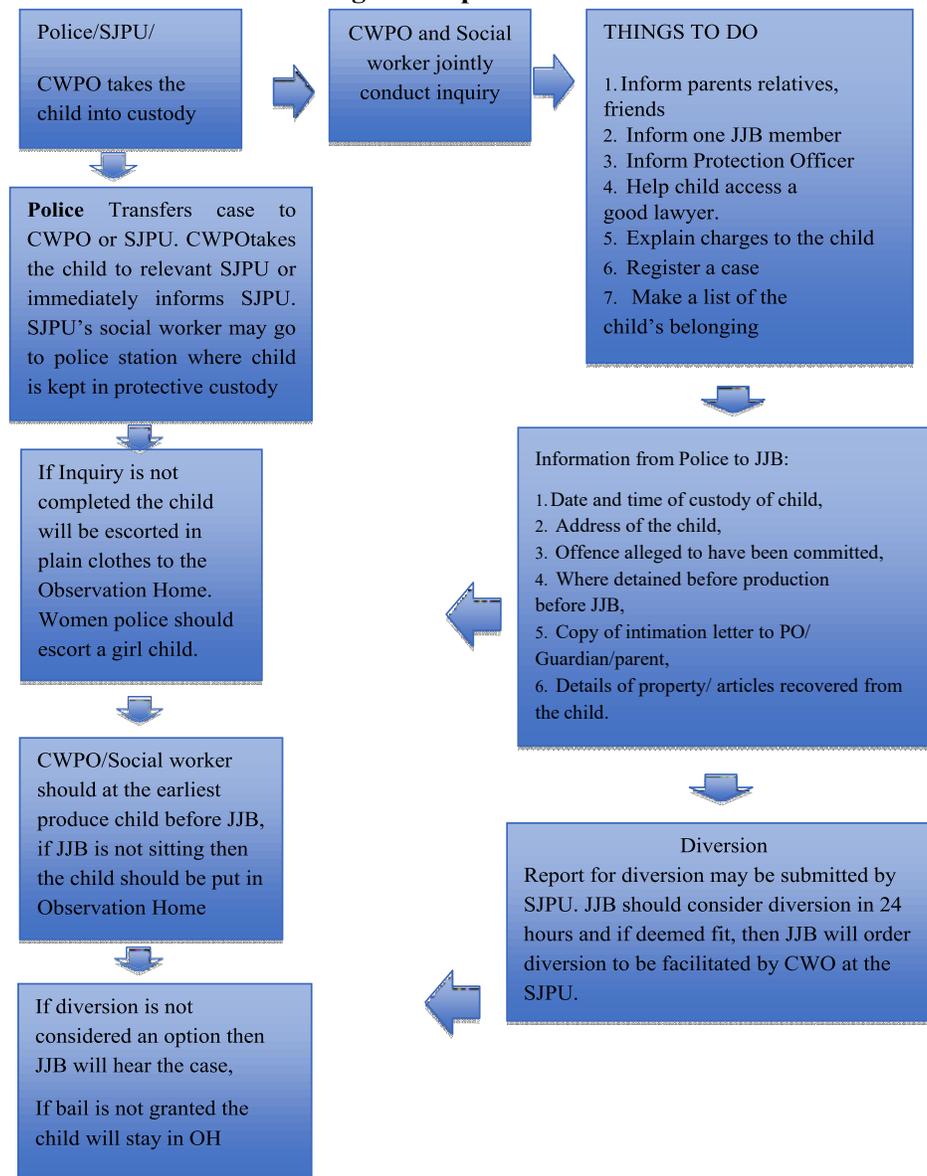
http://ncpcr.gov.in/show_img.php?fid=537(last visited on Feb 13, 2017).

¹²BachpanbachaoAndolan v. Union of India, WP (civil) No 75 of 2012

Information Report (FIR) and appropriate steps be taken to see that follow up investigation is done immediately thereafter. The Court also directed that within two months States who had not yet formed Special Juvenile Police Unit, set up the same and ensure that all police stations have at least one Police officer from the SJP. U.

iv. In the above case, *BachpanBachaoAndolan v Union of India & Other's*, in an order dated 10.05.2013, in dismissing the contempt petition filed by the petitioner, once again cleared that in case of any missing children is reported in a Police Station, the same shall be reduced to First Information Report. They also were inclined to the suggestions that there should be in shifts, a Police officer from the SJP. U. to ensure that the directions contained in the Order be complied with.

V. Flow Chart of Proceedings in Respect to Police



VI. Special Juvenile Police Unit and Their Functions¹³

According to Section 107 of the JJ Act, 2015 speaks about CWPO and SJPU.¹⁴ Any Police officer of ASI or above rank shall work as CWPO. He shall be assisted by two local NGOs. These units are supposed to identify the children who are vulnerable, missing, abused or suspected of committing an offence, their due support.

The following functions of the Special Juvenile police unit (SPJU) are given as under:

- The SJPU and the CWPO will deal with CCL as well as CNCP. The social worker attached to the unit, as far as possible shall be the first contact with the CNCP and CCL.
- The SJPU will make sure that the perpetrators of crime against the children are apprehended quickly and booked and charged under applicable laws.
- Whenever there are reports of missing children the SJPU should take steps to investigate immediately.
- The SJPU will collaborate and work with NGO, local governing bodies, community-based organizations to identify CCL as well as reporting cases of child neglect, abuse, violence and exploitation.

¹³http://www.dpjju.com/index.php?option=com_content&view=article&id=289&Itemid=247 (last visited on Feb 4, 2017)

¹⁴Section 107(1) states “In every police station, at least one officer, not below the rank of assistant sub-inspector, with aptitude, appropriate training and orientation may be designated as the child welfare police officer to exclusively deal with children either as victims or perpetrators, in co-ordination with the police, voluntary and non- governmental organisations”.

(2) “To co-ordinate all functions of police related to children, the State Government shall constitute Special Juvenile Police Units in each district and city, headed by a police officer not below the rank of a Deputy Superintendent of Police or above and consisting of all police officers designated under sub-section (1) and two social workers having experience of working in the field of child welfare, of whom one shall be a woman.”

(3) “All police officers of the Special Juvenile Police Units shall be provided special training, especially at induction as child welfare police officer, to enable them to perform their functions more effectively.”

(4) “Special Juvenile Police Unit also includes Railway police dealing with children, <http://www.indiacode.nic.in/acts-in-pdf/2016/201602.pdf> (last visited on 8.4.17).

- A list of all the NGOs, Homes, voluntary organizations, shall be with the SJPU. They will also have contact with all the reputed people from various fields like psychologist, counsellors, doctors etc. so that any need of the child is met with.

VII. Guidelines for Police Officials Dealing with Children in Need of Care and Protection

1. The Juvenile Justice Act, 2000 and Amendment Act 2006 and Rules 2007 and the latest 2015 Act are the bible of a Police Officer dealing with Children in Need of Care and Protection (CNCP). Along with this they should be conversant with The Child Labour (Prohibition and Regulation) Act, 1986 and The Bonded Labour System (Abolition) Act, 1976, and rules framed under these acts as well as other national and international laws, conventions and Acts which uphold the rights of the child and Protection of Children from Sexual Offences (POCSO) Act, 2012.
2. A Police Officer while dealing with CNCP should always be in plain clothes.
3. The police should be ready with the basic requirements like food, shelter, clothes etc, till a child is under their care and protection.
4. A police officer should be fully aware of the Child Welfare Committee(s) (CWC), its place and days of sittings as well as of the names, addresses and phone numbers of its individual members.
5. List of various governmental and nongovernmental organizations (NGOs) working with children in the area, should be available with the police so that necessary emotional and legal support can be provided to CNCP through these organizations. A copy each of said list should also be kept with the Station House Officer (SHO) and Duty Officer of the concerned police station. They should also have all the list of shelter and homes, fit institutions, child helpline, hospitals, paediatric units, recognised under JJ Act, 2015.

VIII. Procedure To Be Adopted In Case of Different Categories Of Children

i. Found Child¹⁵

This category of children includes street children, child beggars, missing/lost children, homeless children/children with nobody to take care of and runaway children:

- a) As soon as such a child is found, the concerned police officer should make a detailed Daily Diary (DD) entry with his full name and mobile number.
- b) Consequently as soon as information about missing persons is recorded in the DD, a form 'M' will be filled with all the of the necessary details along with the photo of the missing person and the same shall be uploaded in the Portal and transmitted to District Crime Record Bureau (DCRB).
- c) There should be fully fledged efforts to find the parents/ guardians of the child. If the child is found to be from outstation then they should be taken to their state and asked to locate their relatives and house. Wireless message should be sent immediately to the concerned Police station.
- d) A wireless message with particulars of the child should be sent immediately in all the police stations. The record of police station(s) in vicinity of area where child is living should be meticulously checked for missing reports, if any.
- e) Hue and cry notice should be issued and published at the earliest.
- f) Photographs of the child found should be taken for his/her identity.
- g) Seek public help in his/ her identification through media.
- h) The information should be passed on immediately to District Missing Persons Squad as per procedure laid down and efforts of the Squad should be to link it with procedure followed by crime branch for missing children. (Information of missing children should also be in track child portal.)
- i) Form of the Found Child should be filled up.
- j) In the event the child is unable to give information of the parents, he should be produced before CWC within 24 hours, excluding the journey time. CWC

¹⁵, <http://childwelfarecommitteesikar.weebly.com/guidelines-for-police-officers-of-the-special-juvenile-police-unit-in-relation-to-children-in-need-of-care-and-protection-cnep.html> (last visited on Feb 7, 2017)

and the names, addresses, phone numbers etc. of the members of the committee(s) should be known to the concerned police officer.

k) In case the CWC is not sitting, none is available then after a telephonic call to any one member the child should be taken to an appropriate institution of children, registered and certified under the JJAct2015, (as amended up to date). The same institution will produce the child before CWC, within 24 hours, as per Model Rule 27 Sub rule 6.

l) If a child in charge of a police officer needs any medical aid, same should be made available to him/her without any delay.

m) Medico Legal Case (MLC) of a child should be prepared only if any physical or sexual abuse or sickness is suspected or stated by child. Any medical or gynaecological examination is not a prerequisite for production of child before CWC as per Central Model Rules under JJ (Care & Protection of Children) Act 2015, Rule 27 and Sub Rule 8.

n) During the period of the custody of the child, the concerned police officer should take care of the food and other basic amenities that are required by the found child.

o) All expenses incurred for handling Children in Need of Care and Protection, their care, food and transport etc. shall Protection, be claimed under the head of 'Investigation Expenses'.

p) In all cases where adults are seen exploiting or abusing Children in Need of Care and Protection, immediate intervention should be provided to the victim child and help of a social worker of the SJPU or a NGO, counsellor should be sought for any emotional or legal needs of the child.

ii. Children Under 14 Years of Age¹⁶

a) Contact and coordinate with concerned Child Line, Deputy Commissioner of Labour and Child Welfare Committee(s).

b) FIR should be registered under Section

1. 14¹⁷, 16¹⁸ of The Child Labour (Prohibition and Regulation) Act 1986;

¹⁶Sourced from, <http://mphc.gov.in/PDF/JuvenileJustice/j4-060314.pdf> (last visited on Feb 7, 2017).

2. Sections 23,¹⁹ 26²⁰ of The Juvenile Justice Act, 2000 (as amended up to date); and corresponding Sections 76 and 80 of The Juvenile Justice

¹⁷Section 14 States, “(1) Whoever employs any child or permits any child to work in contravention of the provisions of section 3 shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both. (2) Whoever, having been convicted of an offence under section 3, commits a like offence afterwards, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years. 7 (3) Whoever-- (a) fails to give notice as required by section 9; or (b) fails to maintain a register as required by section 11 or makes any false entry in any such register; or (c) fails to display a notice containing an abstract of section 3 and this section as required by section 12; or (d) fails to comply with or contravenes any other provisions of this Act or the rules made there under. shall be punishable with simple imprisonment, which may extend to one month or with fine, which may extend to ten thousand rupees or with both.” available at

<http://bba.org.in/sites/default/files/Child%20Labour%20Prohibition%20%20Regulation%20Act,%201986.pdf> (last Visited on Feb 4, 2017).

¹⁸Section 16 “Procedure relating to offences. -- (1) Any person, police officer or Inspector may file a complaint of the commission of an offence under this Act in any court of competent jurisdiction. (2) Every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whom it relates. (3) No court inferior to that of a Metropolitan Magistrate or a Magistrate of the first class shall try any offence under this Act.” available at

<http://bba.org.in/sites/default/files/Child%20Labour%20Prohibition%20%20Regulation%20Act,%201986.pdf> (last Visited on Feb 4, 2017)

¹⁹Section 23 of JJ Act –“Punishment for cruelty to juvenile or child.- Whoever, having the actual charge of or control over, a juvenile or the child, assaults, abandons, exposes or wilfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile or the child unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or fine, or with both.” available at , <http://www.childlineindia.org.in/cp-cr-downloads/jjact2006.pdf> (last Visited on Feb 5, 2017).

²⁰Section 26 of the JJ Act, “Exploitation of juvenile or child employee.- Whoever ostensibly procures a juvenile or the child for the purpose of any hazardous employment keeps him in bondage and with-holds his earnings or uses such earning for his own purposes shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.” available at , <http://www.childlineindia.org.in/cp-cr-downloads/jjact2006.pdf> (last Visited on Feb 5, 2017).

Act, 2015. 3. Section 16,²¹17²²,18²³ and 19²⁴ of The Bonded Labour System (Abolition) Act 1976 as per circumstances.

3. Get the child medically examined and have his/ her MLC prepared.
4. Produce the child before the concerned CWC.
5. In case provisions of The Bonded Labour System (Abolition) Act, are

²¹Section 16 of Bonded labour Act-Punishment for enforcement of bonded labour.- Whoever, after the commencement of this Act, compels any person to render any bonded labour shall be punishable with imprisonment for term which may extend to three years and also with fine which may extend to two thousand rupees, available at , [http://www.childlineindia.org.in/CP-CR-Downloads/Bonded%20Labour%20System%20\(Abolition\)%20Act%201976%20and%20Rules.pdf](http://www.childlineindia.org.in/CP-CR-Downloads/Bonded%20Labour%20System%20(Abolition)%20Act%201976%20and%20Rules.pdf)(last Visited on Feb 7, 2017).

²²Section 17 of Bonded labour Act-Punishment for advancement of bonded debt.- Whoever advances, after the commencement of this Act, any bonded debt shall be punishable with imprisonment for a term which may extend to three years and also with fine which may extend to two thousand rupees. Available at , [http://www.childlineindia.org.in/CP-CR-Downloads/Bonded%20Labour%20System%20\(Abolition\)%20Act%201976%20and%20Rules.pdf](http://www.childlineindia.org.in/CP-CR-Downloads/Bonded%20Labour%20System%20(Abolition)%20Act%201976%20and%20Rules.pdf)(last Visited on Feb 7, 2017).

²³Section 18 of Bonded labour Act- Punishment for extracting bonded labour under the bonded labour system.- Whoever enforces after the commencement of this Act, any custom, tradition, contract, agreement or other instrument, by virtue of which any person or any member of the family of such person or any dependent of such person is required to render any service under the bonded labour system, shall be punishable with imprisonment for a term which may extend to three years and also with fine which may extend to two thousand rupees; and, out of the fine, if recovered, payment shall be made to the bonded labourer at the rate of rupees five for each day for which the bonded labour was extracted from him. available at , [http://www.childlineindia.org.in/CP-CR-Downloads/Bonded%20Labour%20System%20\(Abolition\)%20Act%201976%20and%20Rules.pdf](http://www.childlineindia.org.in/CP-CR-Downloads/Bonded%20Labour%20System%20(Abolition)%20Act%201976%20and%20Rules.pdf)(last Visited on Feb 7, 2017).

²⁴Section 19 of Bonded labour Act- Punishment for omission or failure to restore possession of property to bonded labourers.-Whoever, being required by this Act to restore any property to the possession of any bonded labourer, omits or fails to do so, within a period of thirty days from the commencement of this Act, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both; and, out of the fine, if recovered, payment shall be made to the bonded labourer at the rate of rupees five for each day during which possession of the property was not restored to him ;available at , [http://www.childlineindia.org.in/CP-CR-Downloads/Bonded%20Labour%20System%20\(Abolition\)%20Act%201976%20and%20Rules.pdf](http://www.childlineindia.org.in/CP-CR-Downloads/Bonded%20Labour%20System%20(Abolition)%20Act%201976%20and%20Rules.pdf)(last Visited on Feb 7, 2017).

attracted the child should be presented before the concerned Sub Divisional Magistrate (SDM) to acquire relevant certification of bonded labour. This would include those children who provide labour or service but are not paid remuneration or are paid remuneration which is less than the minimum wage.

iii. Abused Child

Sexual abuse on a child differs from those of adult sexual abuse. They very rarely disclose sexual abuse immediately after the event. The child shows physical complaint or a change in behaviour before the abuse comes to light. Therefore, the evaluation of children requires special skills and techniques related to consent and reporting of child sexual abuse.²⁵ This category of children includes all children who are subjected to any form of physical/ emotional/ mental harm and includes cases of sexual abuse of children.

IX. Role of Police under Protection of Children from Sexual Offence Act, 2012²⁶

The Act puts in place certain statutory obligations for sensitive handling of the child by the police. Under the Act, the police officer concerned has to have continuous and uninterrupted communication with a child. In this regard, there are specific responsibilities for the police officer to discharge-

- ❖ The police must act in the best interest of a child by protecting the child's freedom and dignity;
- ❖ The police must enable treatment and medical examination, respecting the child's sensitivities at all times;

²⁵World Health Organization, *Guidelines for medico-legal care for victims of sexual violence*, 2003, 75, <http://apps.who.int/iris/bitstream/10665/42788/1/924154628X.pdf> (last visited on Feb 6, 2017)

²⁶ Lawyers Collective Women's Rights Initiative (LCWRI) and UNICEF, *Monitoring Guidelines for NCPCR / SCPCR for Roles and Functions of Various Stakeholders Police, Special Courts, and Special Prosecutors*, 25, <http://ncpcr.gov.in/showfile.php?lang=1&level=1&&sublinkid=407&lid=844> (last visited on Feb 7, 2017)

- ❖ The police must extend help and give relevant information to the child or its parents throughout till the conclusion of the criminal prosecution;
- ❖ The police must respect the right to privacy and confidentiality of the child;

Additionally, the police should also inform the child and his guardian about the following:²⁷

- ❖ Availability of support services including counselling.
 - ❖ Right to legal aid and representation.
 - ❖ Availability of public and private emergency and crisis services.
 - ❖ Availability of victims' compensation benefits.
 - ❖ Developments in the case, including arrest of the accused, applications filed, and court proceedings.
 - ❖ Procedural steps involved in a criminal prosecution.
 - ❖ Status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation.
 - ❖ Rendering of a verdict after trial.
 - ❖ Sentence imposed on an offender.
 - ❖ Filing of charges against a suspected offender.
 - ❖ Bail, release or detention status of an offender or suspected offender.
 - ❖ Schedule of court proceedings that the child is either required to attend or is entitled to attend.
- ⌚ While the Code of Criminal procedure (Cr.P.C) applies to cases under the POCSO Act, this Act introduces additional procedures to be followed by the police and the courts. The police have been entrusted with more responsibility under the POCSO Act than those entrusted by the Cr.P.C or any other Acts relating to police.
- ⌚ Recording relevant information under section 19 of the POCSO Act is mandatory. There are four steps to be followed by police when

²⁷Sourced from, <http://bangalore.citizenmatters.in/articles/how-should-a-case-of-child-abuse-be-dealt-with-under-pocso#sthash.YrypRlF.dpuf> (last visited on february 8, 2017).

information is given about (a) commission of offence or (b) expressing apprehension that such offence is likely to be committed: 1. Record such information in writing. 2. Ascribe an entry number to the recorded information. 3. Read it to the informant. 4. Enter the information in a book kept by the police unit.

- ⌚ The fact that section 19 of the POCSO Act, imposes parallel obligation upon the Special Juvenile Police Unit to make a similar record cannot be used as a justification for the police to direct the informant to the Special Juvenile Police Unit or vice-versa.
- ⌚ The obligation of recording information under section 19 of POCSO Act cannot be avoided by citing provisions of the Cr.P.C. The record under section 19 of the Act can be the basis of further police action including registration of FIR under section 154 of the Cr.P.C. The information recorded under section 19 of POCSO Act, is not automatically an FIR.
- ⌚ When a child gives information to the police under section 19 of POCSO Act, the special procedure of recording it, in the interest of justice, consists the use of:
 - (i) simple sentences in reducing information to enable the child to understand contents of the record [section 19 (3) POCSO Act];
 - (ii) language understood by the child; and
 - (iii) Qualified and experienced translator or interpreter when necessary on payment of fees prescribed [section 19 (4) POCSO Act].
 - (iv) Further, the statement must be recorded in the presence of the parents or any person having the trust and confidence of the child.
 - (v) It is important to follow this procedure as U/s 145 of the Evidence Act, 1872, the victim can be cross-examined by the defence counsel in respect of this record during the trial.
- ⌚ Information given by telephone or cellular phone must be
 - (i) reduced to writing by the police;
 - (ii) ascribed a number and
 - (iii) read-over to the informant, and there is no requirement to take the signature of the informant or to give him copy of the report. Even anonymous information must be recorded under section 19 (2) of POCSO Act.
- ⌚ Police officer reducing information into report under section 19 of POCSO Act, has to immediately give to the informant the details of his

name, designation, address and telephone number and of his supervising officer.

- ⌚ After recording information under section 19 of the Act the police to take steps for care and protection of the child.
- ⌚ If the child has no home or no satisfactory arrangements can be made for his secure stay within the family, or such child already living in care institution apprehends maltreatment, he must immediately be placed by the police temporarily in a children's home or shelter home. Placing the child in a shelter home for his/ her care and protection must be the last option.
- ⌚ Report to the CWC, under Sub-Section (1), section 31 of the Juvenile Justice (Care and Protection of Children) Act, 2015, or the Special Court under Section 19 read with rule 7 (1) of the Protection of Children from Sexual Offences (POCSO) Rules, 2012, to enable financial assistance / interim compensation to be given to a child.
- ⌚ Rule 4 (3) of the POCSO Rules, 2012, and section 19 (6) of the POCSO Act provide for the production of a child by the police before the CWC within 24 hours after the receipt of information under section 19 of the Act.
- ⌚ Under section 47 of the Juvenile Justice (Care and Protection of Children) Act, 2000, and corresponding section 91 of Juvenile Justice (Care and Protection of Children) Act, 2015, dispense with the presence of a disabled, severely injured or a child below 2 years before the CWC in the beginning with the statutory inquiry.
- ⌚ Recording FIR is compulsory under section 154 of the Cr.P.C in cognizable offences. A copy of the FIR shall be given free of cost to the informant.
- ⌚ Police officer recording information under section 19 of the POCSO Act, to record FIR in the following circumstances when it:
 - a) discloses one or more offences under sections 3, 5, 7, 9, 11, 13 and 15 of the POCSO Act;²⁸

²⁸Section 3 deals with penetrative sexual assault; Section 5- aggravated penetrative sexual assault; Section 7- sexual assault, Section 9 -aggravated sexual assault; Section 11- sexual harassment, Section 13- use of child for pornographic purpose and Section 15- punishment for storing pornographic material involving child.

- b) discloses attempt to commit any offence under section 3, section 5, section 9 or section 13 of the POCSO Act;
- c) discloses abetment to commit a cognizable offence under the POCSO Act and any act is committed in consequence of the abetment, as specified under section 17 of POCSO Act; or
- d) Discloses non-cognizable offence under the Act along with any other cognizable offence under the Indian Penal Code.

X. Procedures under Code of Criminal Procedure

- a) Whenever there is a cognizable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately and investigation will be carried out by an officer not below the rank of Sub-Inspector, preferably a sensitized lady officer.
- b) The statement of the victim shall be recorded verbatim.
- c) The officer who is in the presence of the victim while recording the statement should not be in police uniform.
- d) The statement should be recorded promptly and recorded in question answer form at the residence of the victim or any other place where the victim can make a statement freely without fear.
- e) When the victim child due to young age is unable to give details of the act in the presence of parents, inputs from the parents of the child or any other person in whom the child reposes trust and confidence will be taken.
- f) The investigating officer has to ensure that at no point the child victim should come in contact with the accused.
- g) The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination.
- h) The officer investigating (IO) should make the surrounding child friendly so that the victim is comfortable and also see that the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case.
- i) In the event the Investigating Officer should so feel the necessity, he may take the assistance of a counsellor / psychologist/ psychiatrist.
- j) In accordance with Section 164A Cr.P.C , the IO shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours at the nearest government hospital or private hospitals recognized/ empanelled by the government.

- k) The site of the crime also needs to be combed at the earliest by the investigating team and all available evidence gathered.
- l) The IO shall promptly refer for forensic examination clothing and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date.
- m) The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days and supervised by senior officer(s).
- n) The IO shall ensure that the identity of the child victim is protected from publicity.
- o) Detailed DD entry with full name and mobile number of concerned police officer should be recorded.
- p) Concerned CWC should be informed with a copy of DD entry and medical report. If any child is hospitalized, then after discharge by the hospital the child shall be produced before CWC along with all relevant original papers.
- q) In case of abandoned infant, the child shall be placed in an adoption agency u/s 56 and/ or children home, recognized and certified u/s 50 of the JJ Act, 2015 or paediatric unit of a government hospital followed by production of the child before CWC within 24 hours.
- r) In case of surrendered child, the parent(s) who want to surrender a child should be produced before concerned CWC. The rest of the responsibility is that of the CWC. Police Officer's responsibility gets over once the parent(s) and the child is produced before CWC.

XI. Guidelines for Police Officers of SJPU in Relation to Children in Conflict with Law

‘Children in Conflict with the Law’ (CCL) refers to anyone under 18 who has or is suspected of having committed an offence. Most of these used to be petty crimes or minor offences but recently it has taken a turn towards serious offences. Hon’ble Supreme Court observed in *Hari Ram v. State of Rajasthan*²⁹ any infraction of a child should not be dealt as when dealing with adults. The implementation of the Juvenile Justice Act to reach to its objective

²⁹ (2009) 13 SCC 211; MANU/SC/0744/2009.

requires a total change in the mindset of those who are vested with authority of enforcing the same.

The SJPU should have the best interest of child as a prime consideration in all acts done or action taken in respect of a Child in Conflict with Law. Police Officers dealing with CCL should follow the provisions of Juvenile Justice (Care and Protection of Children) Act 2015.

i. Procedure in Relation to Children in Conflict with Law

When a CCL is apprehended then certain procedures are to be followed, among them the first is Pre-Production action of police and other agencies³⁰

- Only in cases where the crime is committed by child above the age of 14 years and below 18 years of age of a crime heinous in nature, apprehension of a child can take place. But in case of petty offences or offences wherein the punishment is up to seven years apprehension is not necessary in the interest of the child. In such cases the SJPU/ CWPO will give the kind of offence committed along with socio-economic background of the CCL to the Board while informing the parents or guardian of the child the date the child is to be produced for hearing before the Board.
- A CCL who has been apprehended by the police shall be handed over to the SJPU/ CWPO under section 10 of the JJ Act, 2015.
- Actions of the SJPU/ CWPO after this would be to immediately inform:
 - the parents or guardian as mentioned above,
 - (ii) the probation officer concerned, so that he can obtain the social background of the child and other material circumstances likely to be of assistance to the Board for conducting the inquiry; and
 - a child welfare officer or a case worker from a registered voluntary or NGO, who shall accompany the SJPU/ CWPO before the Board within twenty four hours as per sub-section (1) of section 10 of the Act.
- The police officer apprehending a child in conflict with law shall:

³⁰Section 7 (1), 8 (3), 10 (2), 12 (2) of the JJ Act, 2015.

- (i) in no case send the child to lock-up or jail or keep him with adult accused;
- (ii) not delay handing over the CCL to the SJPU/ CWPO, though the police officer may under section 12 (2) of the Act send the person apprehended to an observation home only for such period till he is produced before the Board i.e. within 24 hours of his apprehension and appropriate orders are obtained as per Rule 13 of these rules;
- (iii) The CCL shall not be handcuffed or fettered in chain;
- (iv) inform the child as well as his parent/guardian of the charges against him and in case if an FIR is registered or a police report made then the copy of the same should be made available to the child or his parents/guardian free of cost;
- (v) provide appropriate medical assistance, assistance of interpreter if the child cannot understand the language or any other assistance which the child may require;
- (vi) give food to the child if he has not had his meals;
- (vii) not compel the child to confess his guilt and he should be interviewed only at the Special Juvenile Police Unit or at a child-friendly premises or child friendly corner in the police station, which does not give the feel of a police station nor of being under custodial interrogation. The parents may be present during the interview of the child by the police;
- (viii) not ask the child to sign any statement;
- (ix) take immediate action against the perpetrators, if the version of the child reveals that he has been subjected to any neglect/ abuse/ ill treatment by anyone, or any group;
- (x) free legal aid is the right of the child apprehended and services of the District Legal Services Authority for providing free legal aid will be given;
- (xi) it is of utmost importance that the apprehended child is not subject to any cruel or degrading treatment;
- (xii) No coercion should be used on the child; and
- (xiii) inform the parents/guardian about the availability of legal aid.

- The Child Welfare Police Officer shall be in plain clothes and not in uniform.
- The police officer, if found guilty of torturing or cruelty to a child, will be liable to disciplinary action under major penalty procedure besides being prosecuted under section 75 of the JJAct, 2015.
- The CWPO shall record the social background and the circumstances of apprehension in Form 1 which shall be forwarded to the Board forthwith
- A list of all designated CWPO, Child Welfare Officers, Probation Officers, Para legal volunteers, District Legal Services Authorities and registered voluntary and non-governmental organizations in a district, Principal Magistrate and members of Boards and members of SJPU, with contact details shall be prominently displayed in every police station.
- No FIR shall be registered except where the offence alleged to have been committed by the child entails an imprisonment of 7 years and more for adults, or when such offence is alleged to have been committed jointly with adults. In all other matters, the SJPU/ CWPO shall record the information of the offence in the general daily diary followed by a report containing social background of the child in Form 1 and circumstances of apprehension and the alleged offence and forward it to the Board before the first hearing.
- Where the apprehension is not warranted, the child shall be released to the parents/ guardians or a fit persons custody in the interest of the child and who shall furnish an undertaking one non-judicial paper in Form 2 to ensure their presence on the dates during enquiry/proceedings before the Board.
- When a CCL is released on bail and is handed over in custody of his parents / guardian, the Police Officer/ CWPO shall arrange for necessary counselling along with the parents if required, from recognized voluntary organizations and/or probation officers so that possibility of said child coming in a situation of conflict again, in future, is ruled out.
- As per the tenets of fundamental rights, a CCL should be given an opportunity of being heard and to express his/her views/defence freely.

- A CCL has a right to family protection. So right after apprehension the family of the child needs to be contacted at the earliest. For children from outer states, concerned SP/Gram Pradhan/District Welfare Officer/CWC etc should be contacted at the earliest.
- A female Child in CCL should preferably be kept in charge of a female Juvenile/Child Welfare Police Officer. Her privacy is to be fully respected.
- It shall be the responsibility of CWPO concerned to ensure that no harm is caused by stigmatic exposure or publicity or labelling the CCL.
- The concerned Police should collect age proof of CCL at the earliest and in this regard provisions of rule 12(3)(a) of Juvenile Justice (Care and Protection of Children) Rules, 2007 are to be strictly adhered to. The proof of age should be produced before the JJB, at the time of first production of the child before them. In case, for some reasons, beyond the control of the IO, the age proof cannot be collected at the time of apprehension then it should be collected and produced before JJB at the earliest, in any event before filing of the charge sheet and/or final report before the JJB.
- In case no document of age, as prescribed in Rule 12(3)(a) is available then the CCL should be examined by a duly constituted Medical Board for opinion as to the age.
- In all cases where a complaint is filed or FIR is registered or DD entry is made, against a child below the age of 18 years, for an offence punishable with imprisonment of not more than 7 years, the investigations shall be completed by the Investigating Officer within a period of 3 months from the date of filing of the complaint or lodging of FIR/DD entry and if the investigation is not completed within this time the case against the CCL shall be treated as closed.
- All guarantees and protections which are accorded to adult offenders, under any law or rules, have to be made available to every CCL with law upon apprehension.
- Every CCL should be treated in a manner consistent with the promotion of the child's sense of dignity and worth, taking into account the child's age and desirability of promoting the child's reintegration and encouraging his or her constructive role in the society.

- Record of a CCL must be kept strictly confidential and must not be accessible to other than duly authorized authorities.
- A police officer dealing with CCL should also make sincere effort to acquire knowledge of other acts/laws/notifications which recognize and protect rights of children.

ii. Efforts of the State of West Bengal

In the State of West Bengal, by the Police Order No 9/2010,³¹ a missing children tracking portal (MCTP), was made operational at the Missing Persons Bureau (MPB), in Crime investigation Department (CID), West Bengal. As soon as information about missing persons is recorded in the General Diary (G.D), a form M will be filled with all the of the necessary details along with the photo of the missing person and the same shall be uploaded in the Portal and transmitted to District Crime Record Bureau (DCRB).

According to Police Order No. 5/2014,³² there will be a Protection of Women & Children Cell (POWC) in HQ of every District/ Commissionerate headed by one Inspector heading the Missing Persons Bureau will be ex- officio SJPU officer. POWC will act as SJPU and will mandatorily take over cases wherein the child is missing over 4 months (*BachpanBachaoAndolan V Union of India*, WP(C)No 75/2012).

Track Child Portal has been designed and developed and in use from 2011- 2012, adhering to the guidelines provided in the Juvenile Justice (Care and Protection of Children) Act, 2000 and Model Rules 2007 and the provisions laid down in the Integrated Child Protection Scheme (ICPS) facilitate data entry and matching of missing and found children and also enable follow up of the progress of children who are beneficiaries of the scheme.³³

³¹http://trackthemissingchild.gov.in/trackchild/readwrite/publications/police_order_no.9-10-MBP.pdf (last visited on 6.4.2017).

³²http://trackthemissingchild.gov.in/trackchild/readwrite/publications/Police%20Ord_32_0200201Police_Order_05_2014.pdf (last visited on 6.4.2017).

³³http://nceg.gov.in/sites/nceg.gov.in/files/nceg2016/casestudies/Track-Child_CaseStudy.pdf (last visited on 6.4.2017).

XII. Conclusion

The main objective of SJPU is to bring in a human face and friendly touch in the front line interventions relating to all children. SJPU have been mandated to serve all the needs of a child. Their role from an incarcerator has taken a turn towards more humane, integrated and child rights respecting police practices.

The CRC principles will be like a bible to the SJPU who will be guided by the core of child participation, non-discrimination, best interest and right to life. “Child friendly” police stations are much emphasised upon and it implies physical space or a child corner provided, language used, accessibility of SJPU, quality of intervention, legal aid, interpreter, respecting child’s wishes, respecting child and parental rights unless child’s life is at risk.

While referrals are made, it is pertinent to keep the best interest principle. The child should be sent to a service that would best meet his/her needs within the framework of law. As far as possible and bearing in mind the best interest principle, children should be diverted from the Juvenile Justice system. For optimization of the objective of the JJ Act, all the stakeholders need to work in tandem towards the same goal.

Interface Between FRAND Licensing of Standard Essential Patents (SEPS) and Competition Law: Issues and Challenges

Gururaj D. Devarhubli¹

Abstract

Standards play a very important role in our day-to-day lives. Technically, standards are technical specifications that seek to provide a common design for a product or process. Globalisation and the increase in economic transactions between different countries have made it imperative to develop certain international standards for technology manufactured by industries. Patents and standards sever the same purpose, and that is fostering innovation in technology. However, the implementation of these standards through the licensing system must be such that it mutually benefits the patent holder as well as the company that uses the patent and the royalties must be paid on fair and reasonable terms. There is no legislative definition that exists for SEPs and there have been a significant rise in litigation involving SEPs in India, with most of the disputes pertaining to granting of injunction as a result of their infringement.

The present article highlights the conflict of availability of SEPs on FRAND terms without affecting the Competition law and also presents solutions and suggestions for enhanced transparency and accessibility to patented technology that cover standards and the proper functioning of the licensing system on fair and reasonable terms.

Thus, the researcher in the present article highlights the following:

- (a) The various problems that exist in licensing of Standard Essential Patents over Fair, Reasonable and Non-Discriminatory terms*
- (b) The need and method of regulating the obligations of Standard Essential Patent holders and their licenses in return of reasonable royalties*
- (c) The position in various jurisdictions and drawing a comparison with suggestions for solving problems like patent holdups, patent pools, patent stocking, etc.*
- (d) The judicial approach with respect to SEPs and obligations of SEP holders.*

Keywords: *Globalisation, Competition Law, SEPS and FRAND*

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I. Introduction

In our day-to-day activities, we try to sculpt our needs as per certain benchmarks to achieve our desired results. Similarly, in sectors such as Information and Communication Technologies (ICT), every product requires certain targets to abide by in order to facilitate an irreplaceable position in the market. To put it technically, standards are technical specifications that seek to provide a common design for a product or process.² Ensuring that the products conform to standards facilitates almost definite reliability, quality, stability, when purchasing the product and subsequently, an increase in their demand. To lay it down simply, ‘a standard is a document that exhibits certain requisites for a particular product, element, system or service or elaborately describes a specific method’.

Technical Regulations has been defined under the Agreement on Technical Barriers to Trade as follows:

“Document which lays down product characteristics as their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.”³

Some common examples of these standards are the 3G/4G/5G standard for mobile communication technologies and the Blu-ray standard for optical disk storage devices.

The Intellectual Property issues that arise with respect to technical standards are concerned with patents because the subject-matter of patents comprises of these technical standards. Any invention that involves the usage of these technical standards could be blocked by the patent holder of that technical standard. Thus,

²Government of India, Discussion Paper on Standard Essential Patents and Their Availability on FRAND Terms (Department of Industrial Policy and Promotion, Ministry of Commerce & Industry, 2016) *available on*: <https://cis-india.org/a2k/blogs/discussion-paper-on-standard-essential-patents-and-their-availability-on-frand-terms> (last visited October 10, 2019)

³ Agreement on Technical Barriers to Trade, Annexure I, *available at* https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf (Visited on October 10, 2019); *Ibid*

licenses have to be granted by the patent holders on fair and reasonable terms to avoid any conflicts with competition law.⁴ The patents, that involve technical standards as their subject matter and have to be licensed on fair and reasonable terms are called Standard Essential Patents (SEPs).

The Washington District Court in *Microsoft Corp. v. Motorola Mobility Inc and Gen. Instrument Corp.*⁵ defined SEP in the following words:

“A given patent is ‘essential’ to a standard if use of the standard requires infringement of the patent, even if acceptable alternatives of that patent could have been written into the standard.” A patent is also essential *“if the patent only reads onto an optical portion of the standard.”*

Thus, it is impossible to manufacture standard-compliant products without using technologies covered by one or more SEPs.

Formal standards are declared by Standard Setting Organisations (SSOs) and include establishments such as the European Telecommunications Standards Institute (ETSI), Institute for Electrical and Electronics Engineers (IEEE) and various other *ad hoc* informal organisations.⁶ SSOs play a vital role in the interaction between standards and intellectual property rights. The patent-holders, who already enjoy regular exclusionary rights over the patented technologies, have an added advantage by virtue of their technologies being essential to standards. This is because a large number of industry players want to sell standard compliant products and will therefore license SEPs giving the SEP holders a competitive advantage over others. Thus, SSOs are seen implementing IPR Policies that require members to disclose all their IPR and to license their SEPs under FRAND i.e. Fair, Reasonable and Non-discriminatory Terms. However, the varied interpretation of ‘FRAND Terms’ across jurisdictions has

⁴Nicholas Fox (ed.), *Intellectual Property in Electronics and Software* (Globe Law and Business, 2013)

⁵ 104 U.S.P.Q.2d 2000

⁶DIPAK RAO AND NISHI SHABANA, *STANDARD ESSENTIAL PATENTS*, Singhania & Partners, available at:

<http://www.singhania.in/wp-content/uploads/2016/04/Standard-Essential-Patents.pdf>
(Visited October 10, 2019)

led to expensive litigation world over. India too has seen a recent rush of SEP litigations.⁷

Patent Hold-ups and Patent Pools

‘Patent hold-up’ can occur when the owner of a patented technology fails to disclose its patent to an SSO and then later asserts that patent, when access to its patented technology is required to implement the standard. This conduct may provide the patent owner with market power that is derived from its technology being necessary to assess the standard rather than its ex-ante value to buyers. In *MicrosoftCorp. v. MotorolaMobility*⁸, the Court explained that the “ability of a holder of a SEP to demand more than the value of its patented technology and to attempt to capture the value of the standard itself is referred to as patent ‘hold-up’.”

‘Patent pools’ can be defined as an agreement between two or more patent owners to license one or more of their patents to one another or to third parties. Often, patent pools are associated with complex technologies that require complementary patents in order to provide efficient technical solutions. Generally, these patent pools cover mature technologies. Pools, also frequently represent the basis for industry standards that supply firms with the necessary technologies to develop compatible products and services. In that case, they rather concern technologies that are yet to be fully developed.⁹

In general, it is well established that Anti-trust regime does not intervene with the exclusionary Intellectual Property Rights (IPR). While innovation is important for amplified competition, once an enterprise secures IPR protection over its innovated technology, competition laws does not cast a ‘duty to deal’

⁷ROHINI LAKSHANE AND SHWETA MOHANDAS, *Joining the dots in India’s Big-Ticket Mobile Phone SEP Litigation*, Centre for Internet and Society, *available at*: file:///C:/Users/ANMOL_~1/AppData/Local/Temp/SSRN-id3120364.pdf (Visited October 10, 2019)

⁸ 696 F.3d 872

⁹WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO), *PATENT POOLS AND ANTITRUST – A COMPARATIVE ANALYSIS* (March 2014) *available on*: https://www.wipo.int/export/sites/www/ip-competition/en/studies/patent_pools_report.pdf (Visited October 10, 2019)

With SEPs bringing a digital wave that swept the globe has revolutionised the technology that is being used by various industrial sectors. The communication between people around the world has become faster, better and more secure than ever due to the wireless network technology. This transformative digital evolution has drastically affected a wide range of industries, whether it is infrastructure, healthcare, agriculture or industry, etc. These networks run on numerous technical standards. At the epicenter of this lies the patent system which facilitates technological innovation by providing incentive of exclusive negative patent rights. Also there are competition issues playing a key role because the companies would want to implement the best technical standard currently available in the market and therefore will have to utilize the patented technology. This would require them to acquire licenses from the patent owners of such SEPs. A crucial requirement for many products in this industry which are entrenched with such cutting edge and innovative technologies is that they work without any errors across various users. This requirement is called “interoperability” and it has seen a significant rise of demand because of the rapid innovation in communication technology and introduction of a large variety of mobile phones and smart phones.¹⁰ The setting of such technical standard would not have been possible without numerous organizations that exist for the same purpose and for providing access to such SEPs at fair and reasonable royalties in exchange of licenses to various companies i.e. users of such technology. These organizations are the Standard Setting Organizations (SSOs).

II. Evolving Global Legal Perspective of Standard Essential Patents

There are two ways in which technical standards can be formed: *de jure* and *de facto*. *De facto* setting of standards can be construed as the standard setting without any involvement of regulatory bodies or institutions. Instead the market players decide mutually to consider certain technology as a technical standard and therefore, these standards emerge in the market spontaneously.

¹⁰ASHISH BHARADWAJ, VISHWAS H DEVALIAH AND INDRANATH GUPTA (eds.), *Multi-dimensional Approaches Towards New Technology: Insights on Innovation, Patents and Competition* (Springer Open, 2018)

The other way in which standards can be developed or facilitated by the SSO is known as De jure standard setting. These SSOs have been classified further into three types namely, formal, quasi-formal and informal SSOs by the European Union.¹¹

ii. Setting of Standards and SSOs

Formal SSOs

These SSOs develop and formulate standards through institutionalized and consensual formal procedures that takes interests of all major stakeholders involved in the process of standard setting, these could be the technology provider, licensee and the customers who will be the end users of such technology. Following are some of the examples of Formal SSOs:

- International SSO like the International Organization for Standards (ISO)
- European Standard Organization (ESOs) like the European Telecommunications Standardization Institution (ETSI) that develops and facilitate standard setting for the ICT industry in Europe.

Formal SSOs have membership in huge amounts that contribute towards development of technical standards, such as ETSI alone has about 700 members who facilitate and corporate with the SSO for setting of Technical Standards in the ICT Industry.¹²

Quasi-Formal SSOs

These types of SSOs are actually quite similar to the Formal ones with respect to certain features such as, huge membership and well-organized structures. However, they have not been officially recognized by the governments, such as,

¹¹ Technical Standards, Standards Setting Organisations and Intellectual Property: A Survey of the Literature”, Jorge L. Contreras, Research Handbook on the Economics of Intellectual Property Law, Vol. 2- Analytical Methods (2019)
available at

<http://ssrn.com/abstract=2900540> (Visited October 11, 2019)

¹²Nicholos Fox (ed.), Intellectual Property in Electronics and Software (Globe Law and Business, 2013)

the IEEE Standards Association and the Internet Engineering Task Force (IETF).

Informal Standardization Consortia

These SSOs are basically small and privately organized bodies.

The SSOs that are established in USA can be properly placed under the Quasi-Formal SSO category because these SSOs mainly look into the enablement of interoperability of products among all people using such technology. Their significance is that they help in accelerating innovation and also informed customer choices. The American National Standards Institution operates at both national and international level. It basically functions towards strategizing the policies for creation of national SSOs based on American National Standards.

Various companies like Ericsson, Huawei, Qualcomm, ALU, Nokia, etc. have majorly contributed towards the standardization of essential technologies through active collaboration with the Standards Development Organizations. They have voluntarily allowed their standard patented technology to be made available for licensing over FRAND terms, which in turn has created vast number of employments in USA and also led to the development of millions of mobile applications all over the world.

ii. Brief Overview of Various SSOs

International Organization for Standards (ISO)

In 1946, representatives from 25 countries gathered and conducted a meeting at the Institute of Civil Engineers in London for the purpose of “facilitation of the international coordination and unification of industrial standards”. As a result, in 1947, ISO was set up and commenced its operations. It is headquartered in Geneva, Switzerland. The International Organization for Standards (ISO) is an international body for setting of standards and is leading in the world. It is a non-governmental international organization that has members who are the leading standard setting organizations of more than 160 nations. Individuals or companies are not eligible to be a member of ISO and therefore only the national SSOs can be the members of ISO. The functioning of ISO entails the

development and facilitation of standards that are relevant in the international market through mutual and voluntary participation of the members.¹³ The governing structure of ISO consists of the General Assembly, the ISO Council and a Technical Management Board (TMB).¹⁴

- The General Assembly is the organ that has the top and final authority in the organization
- The ISO Council is the governing body and is responsible for the administration of functions of ISO. It constitutes of a Presidential Committed that advises on the decisions made by the Council and further other sub committees that advise on various aspects, such as, commercial matters, customer related issues, information technology issues, advice on developing countries, etc.
- The Technical Management Board or the TMB looks into the management of entire technical work and is responsible for the functioning of the technical committees that assist and contribute towards development and facilitation of Standards.¹⁵

European Technical Standardization Institution (ETSI)

ETSI is basically a Standard Setting Organization that deals with the facilitation of technical standards for the Information and Communication Technology industry. This industry consists of technologies that provide devices connected over networks including but not limited to mobiles, broadcasting technologies, internet connectivity, etc. In 1988, a conference was held called the European Conference of Postal and Telecommunications Administrations and the same led to the establishment of ETSI. It is a very popular standardization body that has been officially recognized by the European Union. The members of ETSI include organisations as well as corporates that are dealing with the production and development of innovative technologies and are substantially focused on

¹³ International Organization for Standardisation, *available at*:
<https://www.iso.org/what-we-do.html> (last visited on October 25, 2019)

¹⁴ International Organization for Standardisation, *available at*:
<https://www.iso.org/structure.html> (last visited October 25, 2019)

¹⁵ *Ibid*

research and development of such technologies.¹⁶ It can also be called a Standard Development Organization because it is not only concerned in solving interoperability issues but also in development of new technology solutions.

The process of making standards at ETSI is systematic and, one can call a diplomatic at the same time. Firstly, the task of creating of development of new standard is proposed and agreed upon through mutual consensus of the members of the institution, which means that they can either vote in favour of the proposal or raise their objections against it with valid reasons. Such proposals for the standards are made by members of the institution or the European Union and it would decide the type of proposal.¹⁷ Either the committees that are concerned to or related with the proposals would then decide on its acceptance or it shall be decided by all the members of ETSI. The minimum number of members required for the acceptance of such proposals is four.¹⁸

The Institute of Electrical and Electronics Engineers Standards Association (IEEE-SA)

The IEEE is the parent organization of which IEEE-SA is a part that is specifically been established for the purpose of setting standards. The IEEE-SA sets standards for products in numerous industries and is now limited to “power and energy, biomedical and health care, information technology and robotics, telecommunication and home automation, transportation nanotechnology, information assurance, etc”.¹⁹ Therefore, the basic function and objective of IEEE-SA is to mutually decide and develop standards recognized globally, by bringing together individuals and organizations from all over the world who have experience and specialized knowledge base of various technological areas. Their mission and goal are to provide for a “high-quality standardisation

¹⁶ European Technical Standardization Institution, *available at*: <https://etsi.org/standards> (last visited October 25, 2019)

¹⁷ Government of India, *Discussion Paper on Standard Essential Patents and Their Availability on FRAND Terms* (Department of Industrial Policy and Promotion, Ministry of Industry and Commerce, 2016) *available at*: <https://cis-india.org/a2k/blogs/discussion-paper-on-standard-essential-patents-and-their-availability-on-frand-terms> (last visited October 25, 2019)

¹⁸ *Ibid* n-5

¹⁹ *Ibid* n-21

environment” and “open, inclusive and transparent environment for market relevant, voluntary consensus standardisation”.²⁰

The government structure of IEEE-SA includes the Board of Governors which may also be called ‘The Standards Board’ (SASB) and its main function is “to encourage and coordinate the development of standards and their revision”.²¹ The SASB is also given the authority to give its final decision on whether a particular standard is to be approved or not. This decision is to be made before the publication of such standards and the appeals to such publication are also taken care by SASB. It therefore can be said that the SASB provides for the commencement of the standard setting process and also sees that there is “consensus, due process, openness, and balance”²²,n throughout the standard setting procedure of IEEE-SA.

The procedure of standard setting in IEEE-SA is such that firstly, an idea is submitted for the process of project approval. The working groups would then create a draft of the standards. The ballot for its approval will be sponsored before the SASB. If the same is approved then it would move forward for publishing. If the SASB allows the standards with few revisions then, such revision is made. If the standards are rejected then they are sent to be archived for future referencing.²³

American National Standards Institute (ANSI)

In 1918, five engineering organizations including the IEEE and three federal agencies got together to form the American Engineering Standards Committee (AESC) which was basically a public-private partnership. The industrialization era in 1920s in USA led AESC to create a standards system that helped

²⁰ Institute of Electrical and Electronics Engineers Standards Association, *available at*: <https://standards.ieee.org/about/strategy.html> (last visited October 25, 2019)

²¹ Institute of Electrical and Electronics Engineers Standards Association, *available at*: <https://standards.ieee.org/about/sasb/index.html> (last visited October 25, 2019)

²² *Ibid*

²³ Government of India, *Discussion Paper on Standard Essential Patents and Their Availability on FRAND Terms*(Department of Industrial Policy and Promotion, Ministry of Industry and Commerce, 2016) *available at*: <https://cis-india.org/a2k/blogs/discussion-paper-on-standard-essential-patents-and-their-availability-on-frand-terms> (last visited October 25, 2019)

modernize the US industry, develop infrastructure and improve the safety of industrial workers. In 1928, the AESC restructured to become the American Standards Association (ASA). Despite the Great Depression of 1930s, ASA continued to grow and focused on standards in household electronic devices. It also became internationally affiliated to US National Committee of the IEC (International Electrotechnical Commission). ASA further played an active role throughout the historical events such as the world wars and the boom of internet technology as well as the development of computers. It paved the way for standardization in the information band internet age. The ASA was further reorganized and became the ANSI in 1970s. The 80s saw the rise of globalization and free trade agreements, making standardization more vital than ever as new foreign markets opened up. The globalization trend only accelerated in the 90s, while domestically the National Technology Transfer and Advancement Act of 1995 mandated that all federal agencies rely upon voluntary consensus standards whenever possible.²⁴ The ANSI thus moved focus on working with government agencies. It broadened its accreditation services offering to serve even more customers such greenhouse gas validation bodies as focus shifted towards climate change. As the new information technologies have entered the market and radically changed our lives. ANSI works closely and is leading in areas such as nanotechnology, 3D Printing and drone technology. ANSI endeavors to continue the setting of technical standards as the new technologies take over the globe. The ANSI has a Board of Directors and various committees as well as sub-committees such as the National Policy Committee, the IPR Committee, the International Policy Committee, etc.

III. Intellectual Property Policies of SSOs

As already mentioned in the foregoing sections, a technical standard is bound to be protected by a patent right. These patents are essential to be implemented and therefore are termed as Standard Essential Patents. For avoidance of infringement, SEPs are licensed by the patent-holders. However, since SEPs are of enormous importance and their demand as well as market value is relatively

²⁴ Through History with Standards, *available at*:
https://www.ansi.org/consumer_affairs/history_standards (last visited October 25, 2019)

high, this fact gives the owner of such SEP exponential power which can be misused leading to anti-competitive market practices.

It is necessary to first understand that patents and standards have similarities as well as distinctiveness in few crucial aspects. While both of them share common objectives of encouraging and incentivizing innovation, patents provide exclusive rights to patent holders, whereas standardization is the enhancement of value and commercial exploitation of such patents due to the wide range of standards. In practicality, the conflict between the two occurs mainly because of two situations. One, where the patent owner of SEP and the licensee who will implement the SEP standards are not able to reach to a mutual agreement because of exorbitant license fees or royalties charged by the patent owner, this situation is called “Patent Holdup”. On the other hand, a situation occurs when the patent holder and the licensee are not able to reach a consensus because of insufficient royalties offered by the licensee for implementation of the standards, and this situation is called “Patent Holdout”.²⁵ Similarly, there are further concepts and issues associated with patents and standards such as “patent pools”, “patent thickets”, etc.

Particularly, the conflict has been aggravated in the ICT industry and in turn the SSOs have certain disclosure and IPR policies and licensing on FRAND terms.

FRAND denotes an acronym for Fair, Reasonable and Non-Discriminatory terms on which the patents are expected to be licensed by the patent holders to the implementers of the standards. As already stated, in order to deal with the threat of patent holdups/holdouts the SSOs have developed their own policies to ensure transparency and avoidance of disputes. These policies entail either disclosure of essential patents or making sure that the patent holders grant licenses to the vendors over FRAND terms so that the exponential market power

²⁵ Interplay between Patents and Standards in the Information and Communication Technology (ICT) Sector and its Relevance to the Implementation of the WTO Agreements, Wu Xiaoping, WTO Working Paper 2017, *available at*: https://www.wto.org/english/res_e/reser_e/ersd201708_e.htm (last visited October 25, 2019)

held by patent holder is not abused and thus anti-competitive practices are avoided.²⁶

The need for implementing IPR policies by SSOs arises chiefly because:

- (1) SSOs engage with intellectual property for two reasons:-
 - (a) standards will be inoperable or won't be implemented if the patent rights over those standards are blocked by patent holders, and
 - (b) the competition law implications of standard essential patents.

Therefore, the SSOs encourage the disclosure of patents that are essential or potentially essential to certain standards and licensing of such patents on fair, reasonable and non-discriminatory terms.²⁷

The requirement for disclosure of patent information can be taken from the Common Patent Policy of three organisations namely “International Telecommunication Union – Radio communication Sector (ITU-R) and Standardisation Sector (ITU-T). International Organization for Standardisation (ISO) and International Electrotechnical Commission (IEC)”. The members or the committees that are involved in the process of standard setting have the obligation to disclose the information on patents or patent applications that are relevant to the proposed standards, so that no patented standards are implemented, thus avoiding patent infringement. VITA standards organisation is the only organization having an “ex-ante” disclosure requirement wherein all the information related to licensing terms and conditions of the standards and including the value of royalty fees to be paid by the licensee is disclosed before the patent is fused along with the standards. This ensures an even more transparent and secure procedure for standard setting; however, it might

²⁶ A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens, Jorge L. Contreras, 80 Antitrust Law Journal 39 (2015) *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374983 (last visited October 25, 2019)

²⁷ Nicholas Fox (ed.), Intellectual Property in Electronics and Software (Globe Law and Business, 2013)

unnecessarily delay the procedure and also undermine the incentivisation objective of the standard setting process for the industry.²⁸

i. Open Standards and Patent Pools

Open Standards

The concept of open standards was developed by the governments to face the problems patent holdups and holdouts and for mitigation of the risk of the same. Open standards deal with technologies that are open source, or in other words made available to the public at large. Based on mutual agreement and consensus of the parties involved in the process of standard setting, it is then evaluated whether the open source technology is capable of becoming a standard. They are also made available on FRAND terms; however, it is not required from the patent holder. Nevertheless, they are encouraged to make available such technologies without charging any royalties to further ensure that standards are implemented in multitudes reducing the inoperability of products in markets. If the standards are available free of cost, then it automatically reduces or removes the risk of patent holdups and holdouts. The problem with this concept is that it fails to incentivize innovation of new technologies.²⁹

Patent Pools

A patent pool includes the involvement of multiple parties who agree to ‘pool’ their technologies and license them to each other or to third parties. Holders of essential patents enter into patent pool agreements or cross licensing agreements when both the parties have the same negotiating powers or when they are owners of such technologies that is useful to both the parties. These types of agreements also help in the reduction of risks of patent holdups and patent

²⁸ Interplay between Patents and Standards in the Information and Communication Technology (ICT) Sector and its Relevance to the Implementation of the WTO Agreements, Wu Xiaoping, WTO Working Paper 2017, *available at*: https://www.wto.org/english/res_e/reser_e/ersd201708_e.htm (last visited October 25, 2019)

²⁹ *Ibid*, n-32

holdouts because there can be a single royalty for all SEPs which would lead to substantial reduction of costs, thereby benefitting both the parties.³⁰

An SEP holder willing to enter into such agreements may appoint an individual authority as an administrator who shall be responsible for systematic conduction of such agreements. The role of such an authority would include but not be limited to analyzing the essentiality of patents, identification of a market for such licenses, collection of royalties and their fair distribution among the parties to such agreements. While patent pools might seem to be an appropriate solution, they will only be possible when there is existence of a bilateral agreement involving benefits for both the parties, otherwise these agreements would be non-incentivising and uneconomical at the same time. There is also competition law implication with respect to such agreements, which can lead to a monopoly in the markets as the technologies are then only limited to the parties who have entered into such agreements.

ii. The Intellectual Property Policies of ETSI and IEEE-SA

ETSI and IEEE-SA have comprehensive IPR policies set-up to ensure transparent and systematic standard setting process. They have developed these policies over a period of time taking into consideration the relevant factors and issues pertinent to the process of standard setting.

i. ETSI IPR Policy

ETSI is not just an SSO, but is also involved in the development of new technology standards and thus can also be called a Standard Developing Organization. Therefore, the focus and directive of ETSI was not just gaining a consensus over which already existing technology is to be accepted as standards in the market, but it was to develop new technological solutions that will be made as standards and are also patent protected. ETSI worked closely on

³⁰ Nicholas Fox (ed.), Intellectual Property in Electronics and Software (Globe Law and Business, 2013)

extracting technical standards from new innovations and technological solutions that were protected under patents or other IPRs.³¹

The ETSI General Assembly was held in 1993 and the first ETSI IPR Policy was drafted. The policy basically focused on mitigating the risk of setting such technical standards that are covered under essential patents and can be exploited by the patent holder through charge of exorbitant royalties. The members concluded the following in the 1993 General Assembly, “investment in the preparation, adoption and applications of standards could be wasted as a result of an Essential IPR for a standard being unavailable”.³² Thus, the ETSI IPR Policy makes sure that access to the technical standards covered under such essential patents are available on FRAND terms and at the same time it ensures that the patent owners are fairly and justly incentivized for their innovations and collaboration with ETSI.

The ETSI IPR Policy works in such a way that makes it mandatory for the members of the organisation to provide all information regarding the essential IPRs or those that have the potential to become essential, by submitting ‘licensing declarations’.³³ These licensing declarations are termed as such because they not only include the information on relevant essential IPRs but also a declaration from the patent holders stating whether they are ready to cooperate and put forward their patent for licensing on FRAND terms. Such declarations result in valid contractual agreements under the French law, which can therefore be enforced by ETSI against the IPR holders, on violation of any terms or not allowing the access to their IPRs to licensees over FRAND terms.³⁴ Such declarations or undertakings are therefore considered to be irrevocable and they could also be enforceable or have some effect at least even if found that the patents are not essential. However, there is not much clarity provided over the

³¹ASHISH BHARADWAJ, VISHWAS H DEVAIAH AND INDRANATH GUPTA (eds.), *MULTI-DIMENSIONAL APPROACHES TOWARDS NEW TECHNOLOGY: INSIGHTS ON INNOVATION, PATENTS AND COMPETITION* (Springer Open, 2018) pg. 73-75

³²*Ibid*

³³ Why the ETSI IPR Policy Does Not and Has Never Required Compulsory ‘License to All’: A Rebuttal to Karl Heinz Rosenbrock, Bertram Huber, University of Tuebingen – Faculty of Law (2017) *available at*:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3038447 (last visited on October 25, 2019)

³⁴*Ibid*

issue as Paragraph 3.2.2 of ETSI's Guide on Intellectual Property Rights allows for removal of IPR disclosures by the IPR holders, which means that such declarations are actually revocable.³⁵

Another important characteristic of the ETSI IPR Policy which is noteworthy can be traced in its Clause 6.1 which states that:

“the scope of the license that the IPR owner should be prepared to grant on FRAND terms and conditions includes the rights to:

- MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
- Sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURES;
- Repair, use or operate EQUIPMENT; and
- Use METHODS.”

It is pertinent to note that the term Manufacture is defined as “production of equipment” and the Equipment is defined as “any system, or device fully conforming to as standard”. This clearly construes that the IPR Policy of ETSI is only applicable to the final end products and not to components of such products.

Another crucial feature of ETSI IPR policy is the fact that though it provides for the essential patents to be licensed by the patent holders on FRAND terms, however, this does not mean that licenses shall be made available to all individual companies. It is upon the patent holder to decide that to whom they would want to grant license. ETSI's core objective is to generate new and innovative technical standards, but with respect to making those standards available for implementation, ETSI only requires that the essential patent holders grant licenses on FRAND terms and that the essential patent is accessible.

It is thereby clarified that the ETSI IPR Policy never had the object of making the licenses available on FRAND terms even for the parts of end products, but

³⁵ASHISH BHARADWAJ, VISHWAS H DEVAIAH AND INDRANATH GUPTA (eds.), *MULTI-DIMENSIONAL APPROACHES TOWARDS NEW TECHNOLOGY: INSIGHTS ON INNOVATION, PATENTS AND COMPETITION* (Springer Open, 2018)

for the end products only. Also, ETSI is only concerned with providing access to the essential patent, irrespective of which level (levels mean the production levels or stages of production) of licensees is chosen by the patent holder. ETSI IPR Policy has managed to achieve its goals of ensuring the implementation of standards and thus making standard compliant products available to the end users and thereby removing inoperability issues.

iii. IEEE-SA IPR Policy

The IPR Policy of IEEE-SA was amended in 2015 in order to strongly combat the risk of patent holdups. The new policy has impacted various aspects of the standard setting process of IEEE-SA, since the maximum amount of intellectual property or more specifically patent related technical work goes into the setting of networking standards or more popularly called “the WiFi standard”. To be more precise, the WiFi standard is “*set of specifications for WiFi chipset that enables interoperability of electronics connected via wireless network can also be referred as IEEE 802.11 WLAN standard*”.³⁶

The new policy however, has faced flak from a multitude of industrialists and reputed academics such as Gregory Sidak and Katznelson. Sidak has commented that the new policy is a stark departure from the standardisation or standard setting procedure of IEEE-SA which included approval of the proposal, ballot voting, due process, etc. According to his analysis shows that an *ad-hoc* committee was formulated for drafting of the IPR policy and that most of the members that were companies and, in the industry, had given their negative feedback over the same. Katznelson has commented on the decrease of LoA (Letters of Assurance) after the publication of new rules. Basically, the opinion of the industry or the patent owners is such that the new policy is biased towards favoring the licensees and has lost its focus on incentivisation of the Companies, which could in turn result in the non-cooperation from their side.³⁷

³⁶*Ibid* n-39, pg. 97

³⁷KIRTI GUPTA AND OTHERS, *HIGHLIGHTS AND ECONOMIC ANALYSIS, IP LEADERSHIP*, Brussels, 2017 available at: <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/11/CPI-Gupta-Wong-Conigho-Naegele.pdf>

In summary, the crucial changes that were incorporated into IEEE-SA's IPR Policy included broad scope of FRAND terms and made it a significant to the policy. One of the important changes made in the policy was the waiver of essential patent holder's right of seeking injunction until successful completion of litigation for infringement against the said implementer of the standard. Secondly, there were changes made in the method of valuation of royalties based on smallest saleable unit or components of the end product which was in stark differentiation from ETSI's IPR Policy. Therefore, these changes have been highly disputed by the companies involved in developing innovative technologies and that involve technical standards as the new policy seems to be biased and highly beneficial to the licensees or the implementers, thereby undermining the rights of SEP owners.

IV. Competition Law Issues and FRAND Licensing of SEPs

The basic concepts that underlie Intellectual Property Rights (IPR) and Competition law seem to be at conflict with each other. IPR includes patents, trademarks and copyrights and other IP rights that basically grant its owners, exclusive rights or negative rights, which entail the creation of a monopoly in the market, whereas, competition law treats such creation of monopolies as a violation of its principle and against fair trade practices. However, it is still questionable whether such conflict does exist or IP rights are justified incentives for boosting an innovative environment and giving rise to new technologies, as even though the conflict between the objectives of these two systems of law may be well apparent to be at odds against each other, they were formulated to ensure the growth of welfare in economy. Between the conflict of IPR and Competition law lays the concept of Standard Essential Patents (SEPs).

The popular belief that exists in society is that needs of people lead to innovation. However, Joseph Schumpeter, a renowned economist has given a theory on the process of innovation, and in his theory, he has specifically highlighted the crucial role played by the inventor in the process of innovation and not just consumer needs. Therefore, he was of the view that innovation is a process that develops as a result of active role played by the inventor instead of consumer demand. He then goes on to define the various aspects of innovation as follows:

“(1) the standardisations of a new good – that is one with which consumers are not yet familiar – or of a new quality of a good (2) The introduction of a new method of production, that is one not yet tested by experience in the branch of manufacture concerned, which need by no means be founded upon a discovery scientifically new, and can also exist in a new way of handling a commodity commercially. (3) The opening of a new market that is a market into which the particular branch of manufacture of the country in question has not previously entered, whether or not this market has existed before. (4) The conquest of a new source of supply of raw materials or half-manufactured goods, again irrespective of whether this source already exists or whether it has first to be created. (5) The carrying out of the new organization of any industry.”³⁸

As a result of the active role played by the inventor or more broadly stated, the entrepreneur, the need to incentivize and encourage them and also provide them with economic benefits is very apparent. This is where the role of intellectual property rights becomes pertinent. Following are some of the popular theories that elaborate on the same concept, which is importance of and the reason behind grant of such rights.

- The *Utilitarian* theory
- The *Reward* theory
- The *Incentive* theory

The above three theories are considered the most commonly accepted economic theories underlying the concept of intellectual property rights. The term ‘property rights’ has only been recently used and the same does not mean that such rights enjoy absolute exclusivity and are completely immune to competition law implications. Intellectual property, first of all, cannot be considered and treated as ‘physical property’ and there are certain distinct characteristics between the two kinds of property that need to be clearly highlighted.

Among the different types of intellectual properties, patent hold an important and significant place. Patents are exclusive rights that are granted to inventors

³⁸Lianos & V. Korah with P. Siciliani, *Competition Law: Analysis, Cases and Materials* (forth. Hart Pub. 2017)

for their inventions for a limited period of time, provided the inventions meet certain criteria of patentability. Patent rights provide the owners exclusive rights “to prevent third parties not having the owner’s consent from the acts of making, using, offering for sale, selling, or importing for these purposes that product, if this is a patent on a product, or in case the patent’s subject matter is a process, to prevent third parties not having the owner’s consent from the act of using the process, and from the acts of using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.”³⁹

However, SEPs and their licensing can attract some unique implications of competition law. In order to avoid infringement of SEPs and subsequent process of endless litigation, which is economically and financially harmful to both the parties involved in such litigation, the SEP holders and its implementers enter into licensing agreements and these agreements are supposed to be on FRAND terms i.e. Fair, Reasonable, and Non-Discriminatory terms, or else they tend to attract the violation of competition laws, such as Section 1 of the Sherman Act in USA and Article 101 of TFEU in European Union. Apart from these legislations, certain international instruments also discuss the interplay between patent law and competition law like the WTO-TRIPS Agreement, the TBT Agreement.

V. Judicial Pronouncements of FRAND Terms in Certain Jurisdictions

i. USA

In USA, the authorities have found it to be beneficial for both the parties involved in a licensing agreement of essential patent, that the license must incorporate FRAND terms. When the licenses are made available on FRAND terms, the problems of patent holdups are somewhat mitigated. The vagueness of FRAND terms and their description in the relevant regulations, makes it difficult for the licensing parties to comply with the same. Nevertheless, the judicial pronouncements in USA have tried to clarify this vagueness to some extent.

³⁹ Article 27-31, WTO-TRIPS Agreement, 1995 and Article 4, Paris Convention for the Protection of Industrial Property, 1883

In USA, the *Unwired Planet v. Huawei*⁴⁰ is a classic example of the many smart phone wars that have taken place between huge companies dealing with this technology, merely on SEPs and their licensing related issues. The Court firstly focused on the meaning of FRAND. FRAND means “a worldwide license rate” and it was stated “...that a worldwide license would not be contrary to competition law. Willing and reasonable parties would agree on a worldwide license. It is the FRAND License for a portfolio like Unwired Planet’s and an implementer like Huawei. Therefore, Unwired Planet are entitled to insist on it...”⁴¹ Another point of discussion was whether FRAND is a rate or a range. Generally, this is calculated using the “top down” approach, that is firstly calculating the entire value of essential patent and then the patentee’s share in it. However, in this case neither parties seem to have been able to accurately decide on the rates, the court has stated that “there is a range in which one can establish a FRAND rate”. This does not mean that the FRAND is a range, what it means that FRAND is a rate belonging to a particular range based on the valuation. This gives flexibility in deciding the rates to both the parties. Apart from the “top down analysis” method, the other method suggested by the court is “comparable licenses” method, wherein the rates of royalties are to be set in comparison with other licenses. However, the same is not a very feasible method because of no reason other than that the licenses are confidential and data will not be available.

ii. China

Similar to USA, patent holdups and holdouts have created several problems with respect to licensing of SEPs in China. In China, the Supreme People’s Court has provided certain interpretations on issues concerning the “Application of Law in the Trial of Patent Infringement Dispute Cases” in 2016. Article 24 states that “in an SEP licensing negotiation process, if the SEP holder deliberately avoids its FRAND obligations, causing failure to reach licensing agreement, and the accused infringer has no apparent fault for that failure, the court shall not uphold an injunction claim. This means that during the SEP licensing process, both

⁴⁰ 2017 EWHC 711 (Pat)

⁴¹ *Ibid*

parties have to act in good faith and the injunctive relief is unavailable for an unwilling licensor against a willing licensee”.⁴²

iii. Japan

Similar to China, Japan also in 2018 published a guide to provide clarification in dealing with SEP and FRAND licensing issues. With respect to SEP negotiations, the guide provides for a “...comprehensive analysis of SEP and FRAND issues and how courts around the world have addressed them... provides both SEP owners and implementers with a structured framework and an action plan for negotiating SEP licenses”.⁴³ The licensing negotiation steps are also provided in a structured manner for ease of implementation by both the licensor and licensee.

iv. South Korea

As regards Korea is concerned, the two Qualcomm cases in Korea before the Korean Financial Trade Commission (KTTC) provides for the major aspects of SEP and FRAND licensing litigation scenario of Korea. These two cases related to Qualcomm are crucial because the commission has targeted and reviewed the business model of Qualcomm. Qualcomm has a ‘patent licensing’ division and a ‘chipset manufacturing’ division. The first Qualcomm case was decided in 2009, and herein the Court only made observations related to calculation method of FRAND royalties to avoid discrimination. The second Qualcomm case, which was decided in 2016, was the one where the commission investigated into the business model.

v. India

Ever since the ‘Digital India’ campaign of India’s present Prime Minister Mr. Narendra Modi started growing in 2014-15, with the objective to make India’s economy digitally well equipped, this has resulted in many foreign mobile and

⁴² Ashish Bharadwaj, Vishwas H. Devaiah and Indranath Gupta (eds.), Multi-dimensional Approaches Towards New Technology: Insights on Innovation, Patents and Competition (Springer Open, 2018) pg. 148-150

⁴³ Worldwide activities on licensing issues relating to standard essential patents, Doris Johnson Hines and Ming-Tao-Yang, WIPO Magazine (February 2019) *available at*: https://www.wipo.int/wipo_magazine/en/2019/01/article_0003.html (last visited October 26, 2019)

telecommunications companies entering into licensing contracts with local manufacturers.

Indian Government has also introduced a discussion paper⁴⁴ on SEP and FRAND commitments that seem to be raising questions to the companies and policy makers regarding their view points on the subject-matter. However, this paper seems to be more in favor of implementers rather than the patent holders and has raised several concerns over competition law violation in India.

Coming to the regulatory point of view, most of the SEP cases in India have revolved around the following provisions from Competition Act, 2002:

- **Section 4:** “An enterprise in dominant position performs any of the following acts:
 - a. directly or indirectly, imposes unfair or discriminatory practices
 - b. limits or restricts production of goods or provision of any services in any form
 - c. indulges in practice or practices resulting I denial of market access
 - d. makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which have no connection with the subject of such contracts; or
 - e. uses its dominant position in one relevant market to enter into, or protect, other relevant market.”

“Dominant Position” has been defined as a position enjoyed by an enterprise whereby enables it to

- a. operate independently of competitive forces prevailing in the relevant market; or
- b. affect its competitors or consumers or the relevant market in its favor.”⁴⁵

The first case related to competition and SEP was *Micromax v. Ericsson*⁴⁶ where the Delhi High Court decided upon the jurisdiction of CCI, stating that since the

⁴⁴ Government of India, *Discussion Paper on Standard Essential Patents and Their Availability on FRAND Terms* (Department of Industrial Policy and Promotion, Ministry of Industry and Commerce, 2016) *available at*:

<https://cis-india.org/a2k/blogs/discussion-paper-on-standard-essential-patents-and-their-availability-on-frand-terms> (last visited October 26, 2019)

⁴⁵ Section 4, Competition Act, 2002

⁴⁶ Case No. 50 of 2015, Competition Commission of India (November 12, 2013)

subject-matter was patent infringement covered under the provisions of the Patents Act, the jurisdiction shall be with the Civil Court.

Recently, in *Koninklijke Philips Electronics N.V. (Philips)*⁴⁷ the Court discussed crucial subject matters like “essentiality” of the patent, “international exhaustion” and “royalties”.

- “essentiality”: On validating whether the given SEP actually was essential or not, the Court refrained from going into any in depth analysis for the same. In the European and American cases, it could be seen that these cases had separate technical trials for determining the technical issues. However, the Delhi High Court did not consider it important to appoint a technical committee having the right expertise in deciding the matter, and instead, only asked Philips to produce the Essentiality certificates issued for its US and EU patents.
- “International Exhaustion”: The principle of international exhaustion states that the first sale of the patented products invalidates any further rights over the products. The same has been incorporated in Section 107⁴⁸ of the patents Act.
- “Royalties”: The Court placed the burden on the defendants to prove that the royalties charged by plaintiff weren’t as per FRAND terms.

The above judgment seems flawed on the above points and does not seem to provide any good precedent for such cases in the future.

VI. Conclusion

The Standard Setting Organizations and their IPR Policies are focused on establishing a framework wherein there can be smooth licensing of essential patents and implementation of standards so that inoperability is removed and customers are able to use the standard products available in market. The IPR

⁴⁷Koninklijke Philips Electronics N.V. (Philips) [Post Trial Judgment, 2019] *available at:*

<https://spicyip.com/2018/07/philips-sep-judgement-indias-first-post-trial-sep-judgement-has-serious-flaws.html> (last visited October 26, 2019)

⁴⁸ Section 107, Patents Act, 1970

policies require the patent holders to declare their commitment to FRAND terms for licenses of their patents. However, problems like patent holdups and holdouts, patent thickets, royalty stacking and other conflicts with the competition law have hindered the smooth licensing process.

FRAND terms are not defined but have been interpreted in numerous case laws and judgments and the ultimate conclusion is that, the established principle with respect to all the major international case laws suggest, that FRAND is a rate between a range, and that rate is reasonable and fair and provides for a balance of interests between the patent holders and licensees.

SSOs such as ETSI, IEEE-SA, ANSI, etc. have laid down their guidelines and have evolved to ensure that there is innovation through establishment of pure technical standards and the use of same is done in such a way that the customers are benefitted and so are other market players, along with the inventor. However, on study of various IPR policies of the abovementioned SSOs, most of them leave it to the parties to decide mutually the FRAND terms and therefore the valuation of same becomes subjective. This further creates problems for the courts or the adjudicating bodies to provide a rate that shall meet the FRAND commitment and also be mutually agreeable. Several methods have thereby been developed by the judges to calculate the FRAND royalties and also to determine if there was any violation of competition law. The courts have established a sound mechanism for determining when the injunctions would lead to violation of Competition law, as the same can be seen in case laws from USA and EU, China, Japan and Korea have also been largely influenced by the European and American Courts' decisions and have implemented the same in their judgments.

Now, coming to India and implications of the growing jurisprudence and understanding, worldwide on SEP and FRAND litigation, from the available information it seems that the concept may no longer be new, but Indian courts and authorities are taking time to developing sound principles for good precedential value that would help in adjudication of such case laws. However, the lack of understanding among the legal practitioners and among market players is something that needs to be rectified. The discussion paper by the Government of India has not seem to provide any material answers to the questions it had posed. One such question was that whether any separate regulatory authority must be there to adjudicate SEP cases in India.

Thus, it can be concluded that there might not be a need for separate regulatory body, but the manner in which regulation takes place must be reviewed. There must be separate technical trials for matters related to essentiality of patents or patentability, and separate trials for determining the Competition Law and FRAND rate issues. In these cases FRAND arbitration and mediation may be of help to the parties and might be a better option, but for India at present, the lack of jurisdiction calls for case laws with judgments that hold good precedential value.

Organizations can be developed to make sure that the administration of SEP licensing policy process goes on smoothly and on FRAND terms. These organizations can play a huge role in decreasing the amount of litigation and injunctions which resulted in smart phone wars throughout the world. With new technologies like Internet of Things (IoT), AI and Blockchains coming in and developing fast, the electronics and communication industry is only going to be in need of large amount of standard setting operations, and also licensing of the same. Some concrete rules and regulations might help in developing a better mechanism, however the existing rules if followed in a sound manner by the parties, through the help of independent and unbiased administrators, before the matter reaches to any dispute, would be really helpful and fruitful to the entire SEP licensing scenario.

A Study of Female Foeticide as Root Cause of Bride Trafficking in State of Haryana

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Abstract

Bride trafficking is forced sale, resale and purchase of girls/women in the name of marriage. Girls/women are kidnapped or lured into bride trafficking and sold, re-sold, raped and/or married off without their consent and their roles vary from sexual slavery to performing hard labour all the day, suffering physical and verbal abuse and living a life at the mercy of the men and/or their families who have 'bought' them. female foeticide remains the major cause for trafficking of brides in Haryana from other states as because of low sex ratio the number of marriageable girls in haryana are very less and which create a gender squeeze and force locals to buy brides from other poverty stricken areas. Poverty, lack of parenthood, illiteracy, customs and religious practices, quest for cheap labour, requirement of a servant/slave for the family, kidnapping, etc are some of the important factors, which contribute to the increase in number of trafficked brides in state of Haryana.

Keywords: *Bride trafficking, Trafficking for marriage, Female foeticide, Poverty and Trafficking, Mail order brides.*

I. INTRODUCTION

Factors promoting bride trafficking requires study of all social, political, religious, economic and legal factors surrounding this crime. The study of all these factors is important to understand the real gravity of this issue and this will also help us understand and discover what other factors or crimes help bride trafficking business thrive. After full understanding only, one can work out solutions to this problem and will be able to design a road-map for future.

The modus operandi for bride trafficking can be many². Some girls are purchased directly from parents and/or relatives purely on monetary

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considerations. Whereas some are sent by the parents on the pretext of job, education, marriage etc and some are kidnapped, others are lured for job, better life, marriage etc. and then sold for money. Traffickers keep devising new ways to trap the victims. One such mask worn by a human trafficker was that of an NGO worker called Munna who was on bail after being arrested from Udalguri district in Assam. He is accused of running a trafficking network in the guise of an NGO, trafficking minor boys and girls from poverty-stricken areas of Assam, Jharkhand and Bengal through an illegal placement agency called "Pooja". The placement agency is in New Friend's colony, Delhi. The trafficker was earlier arrested in a raid conducted by the police in another fake NGO agency named Rajdhani, based on information received from their Assamese counterparts. The man was also accused of cremating two girls from Assam without informing the police or parents about their death and has two cases registered against him in Assam Police station. He also has arrest warrants issued against him and has also sexually abused many poor girls and exploited them later by employing them as domestic helpers, after charging huge sum ranging from of Rs. 25000 to Rs.50000, from the buyers ³.

One of the most important factors is the inherent gender discrimination in Indian society. Bride trafficking is a symptom of social crisis, which is deeply entrenched in the dominance of patriarchal customs over women in India. Women are sold and purchased as property, which shows their vulnerability. The biggest problem due to which bride trafficking is not coming to an end is the societal acceptance of this practice. The societal acceptance of bride trafficking is so high that in some of the instances when a run-away bride is searched by the whole family and village people and ultimately found and caught, she is handed over back to the so-called husband and his family⁴.

²[Harpreet Bajwa](http://www.newindianexpress.com/nation/2019/jan/07/not-a-minor-problem-bride-trafficking-remains-a-booming-business-in-haryana-1921519.html), Not a minor problem! Bride trafficking remains a booming business in Haryana, <http://www.newindianexpress.com/nation/2019/jan/07/not-a-minor-problem-bride-trafficking-remains-a-booming-business-in-haryana-1921519.html> (last visited Feb. 18, 2016).

³NGO shield for trafficker, <https://shaktivahini.org/ngo-shield-for-trafficker/> (last visited Dec. 28, 2017).

⁴Shikha Kumari, Trafficked and Sold from One Man to Another, Minor Finally Returns Home, <https://www.videovolunteers.org/author/shikha-pahadin/> see also Ashok Kumar, Trafficked Women rescued from Haryana Village (Jan. 2, 2018), <https://www.thehindu.com/news/national/other-states/Trafficked-women-rescued->

There have been various instances in which these women have tried to escape from this trap but they were forcefully sent back to their so called husband (or purchaser) and their families. In some of these cases, whenever the victim women approached the police to seek support and help, due to high societal acceptance of this trade, the police hands them back to their husbands and their families. No case is filed, and the police does not take any action even if the case is brought out by a trafficked bride herself. There are instances when Khap Panchayats have even awarded punishments to these women because they attempted to run away. Thus, Trafficked Brides have no one to support them or ensure justice for them. No doubt some Non-Governmental organizations are available to help them but approaching these organizations is also an uphill task for these poor women⁵.

Other factors which reduce the number of marriageable girls for marriage are female infanticide and foeticide due to which people must have to buy girls from other states. There are issues both at source side and destination side which cause bride trafficking to grow in India (943 females per 1000 male)⁶. On the source side, main issues are related to poverty, illiteracy and allurements whereas on the destination side the problem is because of female foeticide, female infanticide and requirement of cheap labor etc. The other issue, which paves the way for bride trafficking, is abduction of young girls and women by traffickers. Earlier, bride trafficking was an unorganized sector but, slowly it is growing in its shape and becoming more organized⁷. Earlier, the traffickers used to be truck

[from-Haryana-villages/article14512330.ece](https://www.news18.com/news/india/its-so-common-for-haryanas-men-to-buy-and-sell-wives-that-no-one-cares-anymore-1824341.html) see also Adrija Bose, It Is So Common For Haryana's Men To Buy And Sell Wives That No One Cares Anymore (Aug. 12, 2018), <https://www.news18.com/news/india/its-so-common-for-haryanas-men-to-buy-and-sell-wives-that-no-one-cares-anymore-1824341.html>.

⁵Shikha Kumari, Trafficked and Sold from One Man to Another, Minor Finally Returns Home <https://www.videovolunteers.org/author/shikha-pahadin/> see also Ashok Kumar, Trafficked Women rescued from Haryana Village (Jan. 2, 2018), <https://www.thehindu.com/news/national/other-states/Trafficked-women-rescued-from-Haryana-villages/article14512330.ece> see also Adrija Bose, It Is So Common For Haryana's Men To Buy And Sell Wives That No One Cares Anymore <https://www.news18.com/news/india/its-so-common-for-haryanas-men-to-buy-and-sell-wives-that-no-one-cares-anymore-1824341.html> (last visited Aug. 12, 2018).

⁶Census report, <https://www.census2011.co.in/sexratio.php> (last visited Sep. 10, 2018).

⁷Dispensable Daughters and Bachelor Sons: Sex Discrimination in North India." Economic & Political Weekly 43, No. 30 (2008): 109-114.

or taxi drivers because they used to travel here and there and for them knowing details of girls were not a tough task, nowadays lot of existing buyers with the help of their purchased wives are also selling brides to the other people. There are villagers who have made this either their full time or part time business because of the money involved in it. Sometimes, the purchased wives visit their native villages along with their husbands and relatives and buy other girls from their own native land to be sold and trafficked as brides⁸.

The increase in the cases of bride trafficking can also be accounted to the factor that the nature of this trade is such that women can be resold to anyone on higher prices and therefore, one has almost negligible chances of loss, losing profit or initial money⁹. Trafficked Brides are seen as every good investment for these people with no chance of loss and furthermore, one can also sexually exploit the trafficked girls, be it for some time. If someone wants kids or needs someone to take care of his old parents etc., then buying bride is the best option. He also says that these women do everything they are asked to do out of fear of being killed and have very less demands in comparison to the local girls of Haryana which makes it a good deal¹⁰. Hence it is evident that the treatment which is accorded to the trafficked brides is even worse than that of a slave.

Poverty and female foeticide are the main factors of bride trafficking. This business is highly profitable as the woman can be trafficked and re-trafficked many times and the trafficker can make money at each stage of the trafficking. He also emphasized that people in Haryana treat women like a commodity and never feel bad to buy or sell women for the purpose of marriage. According to him the biggest problem in curbing bride trafficking is the attitude of the society and police towards this type of crime. He also discussed various instances when

⁸Deebashree Mohanty, Slave brides <https://www.dailypioneer.com/2015/sunday-edition/slave-brides.html>(last visited July 28, 2017).

⁹Deebashree Mohanty, Slave brides <https://www.dailypioneer.com/2015/sunday-edition/slave-brides.html>(last visited July 28, 2017).

¹⁰Adrija Bose, It's So Common For Haryana's Men to Buy and Sell Wives That No One Cares Anymore <https://www.news18.com/news/india/its-so-common-for-haryanas-men-to-buy-and-sell-wives-that-no-one-cares-anymore-1824341.html>. see also Paro conclave by Empower People, http://www.empowerpeople.org.in/uploads/3/7/2/4/3724202/paro_conclave_report.pdf (last visited Dec. 22, 2016).

police discriminated the bride trafficking victims and created hurdles in their rescue¹¹.

In many cases if trafficked bride manages to ran away from her matrimonial home and reach the police station to complain about her husband and in-laws and the police officer without understanding the gravity, tell her that quarrels and tiffs arise in every family and so she should go back to her husband's house. Not just this, he also called the so called 'husband family' and asked them to take their daughter-in-law back. These kinds of instances make the victims feel helpless¹². So they keep silent and never speak up against any human rights violation they face in the matrimonial alliance.

There are many factors which influence the attitude of trafficked victim attitude for not disclosing the atrocities they face and most important of the factor is that the husband's family is always near the trafficked victim when she talks to the people of NGO or media and due to this, most of the times, the real picture of their problem never comes out as the victim's answer is always manipulated in the presence of family. This factor also creates a situation due to which curbing bride trafficking becomes very difficult. It is also observed that the girls are married at a very young age (sometimes even less than 14 years) whereas the boys are married at a higher age of minimum 23-24 years, because of which, the availability of women in the village for local boys is less. Many a time boys study outside the village in different cities and places and when they come back to their village after studies, they are already above marriageable age according to the village standards. In this situation, the families of the boys are left with no other option than to purchase a Paro or Molki (in their terms) to marry their boys¹³.

¹¹Bride Trafficking <https://www.thebetterindia.com/6993/tbi-heroes-an-amazing-indian-who-aspires-to-empower-people/> see also Empower people Annual report http://www.empowerpeople.org.in/uploads/3/7/2/4/3724202/annual_report_2016-17.pdf (last visited Dec 29, 2018).

¹² Empower People Annual Report http://www.empowerpeople.org.in/uploads/3/7/2/4/3724202/ep_brochure.pdf (last visited Sep 28, 2019).

¹³supra note 3.

Para legal volunteer namely Mohammad Osman¹⁴ stated that only the poor people in Haryana buy women from other states for marriage while the rich marry within the state itself. No rich person marries a trafficked bride unless he is very old or is of unmarriageable age, physically handicapped, divorced or carries a bad reputation in the local community. He further said that if a well reputed and rich person buys a girl from outside, he is not respected in his own community. Apart from this there are various other reasons are observed which influence bride trafficking in Haryana. The families of local boys must spend a huge sum of money in the marriage ceremony and in the pomp and show associated with it and purchasing a bride is considered as a convenient option to avoid all this. The expenditure of one normal marriage could be around 5-10 Lakhs of rupees whereas these families of grooms can buy brides (Paro or Molki) for a price of not more than 1 Lakh rupees. These economic considerations also force families in Haryana to buy Trafficked Brides.

Bride trafficking is nothing but a form of forced slavery for women¹⁵. According to the renowned jurist Andrea Dworkin:

“The Genesis of any slave system is found in the dynamics, which isolate slaves from each other, obscure the reality of a common condition and make united rebellion against the oppressor inconceivable¹⁶”.

Similarly, these women are not allowed to talk to many people or organize themselves against their exploiters. Their silence against the crime has resulted in the rise of number of victims in the State of Haryana because the people who are engaged in the trafficking activity experience no fear or risk, specifically in terms of being implicated.

¹⁴supra note 7.

¹⁵Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx> (last visited Sep 28, 2019).

¹⁶Andrea Dworkin, *Woman Hating*, Penguin Group 1974 page 68 see also *african American History and Radical Historiography Essays in Honor of Herbert Aptheker* (<https://conservancy.umn.edu/bitstream/handle/11299/149108/ApthekerFestschrift.pdf?sequence=1&isAllowed=y>) (last visited July. 17, 2016).

II. Female Foeticide

With advancements in science and technology and easy accessibility of prenatal diagnostic techniques, the rate of female foeticide is going high. In one of the researches by Drishti Stree Adhyayan Prabodhan Kendra NGO, regarding female foeticide and number of clinics with ultrasound facility, the NGO came to a conclusion that the places having more number of ultrasound clinics have less girl child sex ratio¹⁷. The Prenatal Diagnostics Techniques Act provides for punishment up to 3 years of imprisonment and fine up to Rs.50, 000 to culprits of prenatal diagnosis but still, the number of female foeticide cases is on rise. There are restrictions and punishments for doctors who are involved in it¹⁸. The State Medical Council can suspend or cancel the registration of medical practitioners who are found to be involved in female foeticides.

The grave problems of female foeticide and extreme poverty are found to be the root causes which results into bride trafficking in the states like Haryana. The geographical, social and political landscapes of Haryana make it a great destination for trafficked brides¹⁹.

Foeticide is defined as destruction or abortion of a fetus whereas female foeticide is defined as abortion or destruction of female fetus. The frequency of female foeticide is indirectly estimated from the observed high or low birth sex ratio, which is the ratio of boys to girls at birth. Female foeticide is common in northern part of India including State of Haryana where the society is predominantly controlled and governed by men (patriarchy)²⁰.

¹⁷Smita Sharma, what is the impact of Child Marriage, (Dec. 25, 2016, 8:41 PM), <http://www.girlsnotbrides.org/themes/poverty/>. Also see, Stuart Shield, Poverty and Trafficking in Human Beings: A strategy for combating trafficking in human beings through Swedish international development cooperation, http://www.government.se/contentassets/326c82b44c784d67860d51420086cbe9/povert_y_and-trafficking-in-human-beings (last visited Dec. 25, 2016).

¹⁸Sushma Sharma, An overview on Pre-natal Diagnostic techniques Act and its Implementation IOSR Journal of Humanities And Social Science (IOSR-JHSS) Volume 21, Issue 10, Ver. 7 (October 2016) PP 62-68.

¹⁹Shruti Chaudhry, Lived Experiences of Marriage: Regional And Cross-Regional Brides In Rural North India, university of Edinburgh

²⁰ N Ahmad Female feticide in India, (Apr. 01, 2016) <https://www.ncbi.nlm.nih.gov/pubmed/20879612>

The low status accorded to Indian women coupled alongwith the traditional gender bias which is prevalent as an adverse bearing on the child sex ratio. In Vedic age, women in India were source of power, knowledge and wealth and were treated as Goddesses. British period added the vulnerability of women as British people used to treat Indian women as slaves of slaves²¹.

In Haryana, on the birth of a girl child in a family the primary concern or mindset of the parents and other family members is that of her marriage dowry and women safety. In India, customary rituals of parents on their death are to be performed by male child and according to various religious texts; male child is considered a blessing of God and the female child, a curse²². For example, manyhymns in Rig Veda express desire to beget heroic sons whereas no such similar prayers exist wishing for a girl child which shows that sons were preferred to daughters (This perhaps reflected the anxiety of a society that needed a larger number of male warriors to ensure its survival)²³. A common social behaviourwhich has been observed towards a girl child in India is that they cannot inherit the property (which legally they can) and that is why people want a son who can take their lineage forward and inherit their property. Women's right to property which is not enjoyed in Northern India is one of the main reasons for female foeticide.

During an interview with Vijay Pratap, a man of about 53 years of age and resident of Bhiwani district, the man expressed with confidence that he has four sons and no daughter because of which no family in the village ever take them lightly. He says that all his minor property disputes were also resolved with the help of his sons and he feels that his property is in safe hands. Vijay Pratap states one instance in which the property of a poor family was taken away by force by his own brother because this man had no sons to guard his property. He further says, sons in Haryana make you feel safe and powerful whereas having a daughter makes you vulnerable in the society. Your neighbours do not take you

²¹B. R. Sharma, Female feticide in India: Issues & Concerns, <http://medind.nic.in/jal/t08/i3/jalt08i3p157.pdf> (last visited Nov. 5, 2016).

²²B. R. Sharma, Female feticide in India: Issues & Concerns, <http://medind.nic.in/jal/t08/i3/jalt08i3p157.pdf> (last visited Nov. 5, 2016).

²³SreeNawas Rao, Rig Veda Position of Women Part II, http://creative.sulekha.com/rig-veda-position-of-women-2-2_306106_blog (last visited Feb. 2, 2015).

seriously and you cannot even have a strong hold on people nearby even if you are correct in any matter²⁴.

The above words of Vijay Pratap clearly depict the situation which people must be facing if they do not possess sons. This kind of thinking of people makes the girls unacceptable to the society and this directly increases the number of cases of female foeticide. Vulnerability of females because of brutalities of the male in the form of physical, sexual and mental abuse is one reason as to why parents are less willing to give birth to the girl child. Women or girls are always subjugated, condemned and deprived of economic, social and political opportunities, which leads to their further non-acceptance in the society. Parents are always under the threat of such abuses against their daughters and this ultimately leads to female foeticide²⁵.

The researcher in a telephonic conversation with one Chandra Bhushan Singh (name changed) of Barsola village of Jind district in Haryana got to know about the kind of fear people have regarding the birth of girl child. Chandrabhushan explains that a girl means more responsibility, no increase of family income and less gain as she will go to some other house after marriage. He further stated that one must give huge dowry in North India to marry his daughter and not just that, with every visit of girl's family to the girl's father's house, one must spend thousands of rupees in *vidai*²⁶ of groom. People equate daughter with financial burden on the shoulders of their father and brothers. Next issue, he says

²⁴Pamela Singla Department of Social Work 'We want Daughters-in-Law, not Daughters' Forced Marriages in Jhajjar District of Haryana, India University of Delhi https://www.academia.edu/33408434/We_want_Daughters-in-Law_not_Daughters_1_Forced_Marriages_in_Jhajjar_District_of_Haryana_India?auto=download (last visited March 02, 2018).

²⁴Ragini Sengupta, Social Factors Influencing The Choices of The Indian Hindu Married Women in Marriage

²⁵Pamela Singla Department of Social Work 'We want Daughters-in-Law, not Daughters' Forced Marriages in Jhajjar District of Haryana, India University of Delhi https://www.academia.edu/33408434/We_want_Daughters-in-Law_not_Daughters_1_Forced_Marriages_in_Jhajjar_District_of_Haryana_India?auto=download (last visited March 02, 2018),

²⁶Ragini Sengupta, Social Factors Influencing The Choices of The Indian Hindu Married Women in Marriage, Page 114 <https://uh-ir.tdl.org/bitstream/handle/10657/2690/SENGUPTA-THESIS-2013.pdf?sequence=1&isAllowed=y> (last visited Apr . 01, 2016).

which bothers most of the people here is women safety. If you have a girl in your home, you must be always conscious of the people who are meeting your family. Furthermore, with increasing number of rape cases, sexual abuse of girls etc., it becomes a threat to parents to give birth to a girl child. Ancash Singh, Chandra Bhutan's elder son, says, if your boy elopes with a girl it is not considered a big issue in the society but in case vice-verse happens, one will be outcasted by the society and will lose his repute. Ancash states that he clearly instructed his wife to give birth to a male child only. The reason behind female foeticide cannot be explained in more clear way than this, as honestly stated above by these people. The society looks at a girl child as a liability and that's why the number of female foeticides are increasing day by day and sex ratio of men over women is increasing which ultimately leads to shortage of girls and later leads to evils like bride trafficking and polyandry²⁷.

Gender discrimination is so much culturally rooted in our society that changing the status of women seems to be a humongous and a really difficult task. The predisposition against females in India has social, financial and religious causes. Children are relied upon to work in the fields, earn more and take care of parents in their old age. The man centric mentality additionally presumes that the name of father and his family will be carried forward by the boy and not by the girl. Religious traditions and convictions additionally prompt such discrimination and increment the need of male kid in the general public. One such custom can be seen among Hindus where amidst one of the prominent ceremonies of Hindus, lighting the funeral fire by a male child is viewed as essential for salvation of the soul. As per Manu, a man cannot accomplish *mocha* (salvation) unless he has a male child to light his funeral pyre. In maturity, the children will watch over them acceptably²⁸.

²⁷Garg S, Nath A, Female feticide in India: Issues and Concerns, <http://www.bioline.org.br/pdf?jp08099> (last visited Nov. 21, 2016).

²⁸Samsunnessa Khatun and Aznarul Islam, 'Death Before Birth' - A Study On Female Foeticide In India, https://www.researchgate.net/profile/Aznarul_Islam/publication/215590009_%27Death_Before_Birth%27_-_A_Study_on_Female_Foeticide_in_India/links/09e4150b8dba5859c5000000/Death-Before-Birth-A-Study-on-Female-Foeticide-in-India.pdf (last visited Apr.30, 2014).

The Sex ratio is of 861 women per thousand males and after the sex ratio provided above is depressing. The most depressing of it is the number of females in urban areas, which is way less than the number of women in rural areas. This depressing trend indicates that educated people are also involved in the heinous crime of female foeticide. This also gives a clear indication of female foeticide cases in the State of Haryana. Because of such less sex ratio, people of Haryana are forced to purchase brides from other states in a similar manner as someone is buying a property or commodity²⁹.

Bride trafficking is just one part of human trafficking and the statistics which are depicted are generally covered under human trafficking. In 2007 according to National Crime Records Bureau around only 249 accused are convicted out of 5528 arrested people³⁰. In year 2017 total 5898 cases were listed under head of human trafficking³¹. In 2007 according to National Crime Records Bureau around trafficking of 240 females took place for the purpose of forced marriage³².

Bride trafficking is a kind of human trafficking and when human trafficking increases in a country, it directly affects the number of women who are trafficked as brides from other states to the state like Haryana.

Haryana is a destination for bride traffickers where women brought from other states are sold and later forced marriages are performed. These women are bartered for a price like a commodity and their prices vary upon various factors

²⁹Riddhima Sharma, *Sex, Lies, and a receipt: Bride trafficking lifts it heads from under the veil*, (Oct. 20, 2014), www.thealternative.in/society/sex-lies-and-a-receipt-bride-trafficking-lifts-it-head-from-under-the-veil/.

Definitions for mu Dynamics

³⁰National crime records bureau, <http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf> page 981 (last visited Nov. 2, 2017).

³¹National crime records bureau, <http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf> page 981 (last visited Nov. 2, 2017).

³²National crime records bureau, <http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf> page 978 (last visited Nov. 2, 2017).

such as their age, beauty, physical appearance, virginity etc³³. This form of marriage is nothing but a modern form of slavery when a bride is purchased as slave in exchange for money. The dearth of women is forcing the villagers to buy brides for their unmarried sons. The fate of these women is generally decided by their buyers. These women are forced not only to be unwilling brides for aged men but also to serve as domestic workers, farm laborers as well as sex slaves³⁴.

The plight of such women is terrible and painful as they cannot even play the role of a whistle-blower due to the fear of being ostracized by the society. Furthermore, they are not even allowed to meet other people including other bride trafficking victims, which further creates a trap for them of which they can never come out³⁵.

These women are never given the status equivalent to that of the local bride who is not trafficked or purchased³⁶. For example, consider the case of Shalil (name changed) of Rohtak, who is a peasant in his late 40s. He discusses the culture of the region pertaining to purchased wives even in the presence of his first wife. His first wife is a native of Mewat and she is accorded more respect because she is native and not purchased like the other wife of the locality. Shalil married a Paro from West Bengal and that too after five years of his first marriage. His first wife and Shalil had a fight and because of which she did not return to Shalil's place for three years and during this phase, Shalil visited a trafficker in Kolkata who arranged a bride for Shalil after kidnapping a girl of age 15 years from Durgapur district of West Bengal. Shalil paid the money and brought the second wife from West Bengal to Haryana.

³³Ira Travedi, When a Bride-to-Be Is a Bride to Buy <https://www.foreignaffairs.com/articles/india/2015-05-22/when-bride-be-bride-buy> (last visited Oct. 12, 2018).

³⁴Combating Trafficking in Women and Children: A Gender and Human Rights, http://www.childtrafficking.org/pdf/user/unifem_gender_and_human_rights_framework.pdf. Framework (last visited Aug. 14, 2017).

³⁵Definitions for mu Dynamics, <http://www.definitions.net/definition/mu%20dynamics> (last visited Apr. 29, 2016).

³⁶Danish Raza, *When women come cheaper than cattle*, <http://www.hindustantimes.com/india/when-women-come-cheaper-than-cattle/storyEJD38cJ4kaTGVn03LJzUkJ.html> (last visited March 02, 2014).

Shalil did not disclose the amount of money involved in buying his second wife. The discrimination between both the wives is clearly visible as the local wife stays in house which is around 300 yards but the second one stays in a house, which is one third of the house of first wife. Shalil has 5 acres of land and his trafficked wife has only one-fourth of that property for her and her children. The first wife does not work in field whereas second wife spends most of the time working in the agriculture fields. Therefore, calling this marriage as marriage will be a misnomer.

Another incident is of a victim named Durga (name changed) who is a resident of the village Chhichhrana, Tehsil Israna, Panipat. Durga was trafficked at the age of 12-13 years in this village with her husband who works on a construction site. Her husband is from landowner community but has very few acres of land in his own name and is called as “chotazaminder”. She stated that her husband is Zamindar for namesake and does not have much property in his name although she is living in a Pucca house and has around 1 acre of land. Her husband’s name is Ramesh Chandra (name changed) who is around 5 years elder to Durga, who is around 28 years of age. Durga has studied till 5th standard and knows how to read and write a bit but because there are not many opportunities in the village, she works as an agriculture labor. She further stated that she has three kids, two sons and one daughter. She also informed the researcher that she was forced to abort twice because the child in her womb was a girl. Her story clearly depicts that female foeticide is widely prevalent in Haryana³⁷.

Not only do they face discrimination, but these women are also forced to live in a deplorable condition and are forced to bear all kinds of abuses. Sometimes, these women are also used as servants.

These girls are sold and resold many times depending upon the demand and supply. One victim of trafficking says that everyone in Haryana is not fortunate enough to get a Paro or Molki because availability of these women is not so easy and due to this, there are a lot of people who want to buy a bride is already married to someone and such puraches is done from even from husband or broker who. These purchased wives, sometimes after giving birth to children are resold because the purpose of buying them is achieved. As the demand for them

³⁷Annexure 1 Interview 39.

is always there in Haryana, reselling them is never tough and only when they are old (40 years and above), the demand for them reduces.

Poverty and skewed sex ratio, which is inextricably tied to the social malaise called female foeticide, stands out as the push-and-pull factor for bride trafficking. Where poverty stands out as the push factor, skewed sex ratio and less availability of girls for marriage is the major pull factor for bride trafficking.

Female foeticide has led to such a situation in Haryana where the demand for marriageable girls is high which has resulted in operation of a lot of organized trafficking rackets have in both source as well as destination states. Bride trafficking and less availability of girls can thus be referred to as a demand and supply relationship, which also proves the fact that to put a check on bride trafficking, the first and foremost requirement is to put a strict end to female foeticide. Although this way, it might take centuries to come to an end, but this is the only relevant way to put an end to bride trafficking.

Female foeticide has also shown an increasing trend over the years even though state has taken many steps in order to curb this menace. The growth in this phenomenon can be easily understood by observing the declining number of girls over the years as girls cannot just vanish but have been killed before or immediately after birth to save the family from the burden of a girl's expenses and security³⁸.

Ms. Maneka Gandhi, on girl child day observed:

Today, we are proud that we are one of the fastest growing economies in the world but, the paradox remains that the girl child is denied the right to be born. It is a matter of great concern that gender biased sex selective elimination is continuing in many parts of our country. This is a violation of human rights and the right to life guaranteed under our

³⁸Source states are those states which send/sale the girls for marriage in other state E.g. Bengal, Bihar, Orissa etc.

Destination states are those states which buy girls for purpose of marriage E.g. Haryana, Punjab etc.

*Constitution. The social biases against the girl child must be fought with all the resources at our command*³⁹.

Indian Government has also brought female foeticide related issues to the forefront through the “Beti-Bachao, Beti-Padao” initiative. Apart from this initiative, there are a lot of new initiatives which have been initiated since then in order to remove gender bias and gender imbalance from our society but the effect of these is negligible and still the sex ratio is not improving as thought.

Not only the problem of female foeticide is faced by this generation but it will be faced by our upcoming generations too because these trafficked brides are also forced to abort their girl child.

III. Other Factors Responsible for Push and Pull Factor for Bride Trafficking

There are various other factors responsible for creating a demand and supply phenomenon of trafficked brides. Unemployment affects the marriage choices both at the source and destination side of bride trafficking. In case the parents of the trafficked bride or the bride herself is unemployed, then the chances of bride trafficking increases many folds. During one interview with Mohammad Ismail who is around 25 years, it was told that when the boy is unemployed, no parent in Haryana will give their daughter to him for marriage which forces the boy to buy girls from Jharkhand, Bihar, Bengal or Orissa etc. Mohammad Ismail also told that some of his friends who are staying in nearby villages are married to Paro because only a Paro's parent can marry their daughter to unemployed men in Haryana. He further stated that these men do not ask any dowry due to which girl's family makes no exploration regarding employment and character of the groom. Sometimes the family and groom also lie to the parents that they are employed and working in some good company or government department. He said that no doubt it is a fraud in marriage but what to do when no one is available for marriage in the community.

According to the 2001 census, the number of landless agricultural workers in India was 10.67 Crore and as per Census 2011 it was 14.43 Crore⁴⁰. The number

³⁹Manika Garg, Infanticide vs. Female Foeticide, Int. Jnl. of Multidisciplinary Educational Research, ISSN: 2277-7881 Vol. 1 Issue 3 <http://ijmer.in/pdf/volume1-issue3-2012/220-229.pdf> (last visited Sept. 12, 2014).

is alarmingly very high and due to this only large number of people live below poverty and have nothing to sell at the time of marriage of their girls and as a result fall prey to the trafficker and marriage agents. Landless workers because of their poor economic condition sometimes marry their daughters to far off villages in Haryana to the grooms who ask for no dowry in return without giving it a thought as to what might befall their daughters and what could be the hazards of such marriage alliances⁴¹.

Social vulnerability caused because of religion, caste, colour and creed is also responsible for creating hurdles in marriage and due to this the people sometimes are forced to buy women for marriage⁴². There are various other factors which increase the bride trafficking and some of them are natural calamity, migration and livelihood conditions. Natural calamity disturbs the economic fiber of a family and parentless children are more vulnerable to bride trafficking. The ethnic clash groups in Assam are more vulnerable to the traffickers and are considered as soft targets for luring them to sell their girls to be a part of trafficking⁴³.

There are many other factors like corruption of police officers and other law enforcement officers which also promote bride trafficking to a large extent. Bride trafficking is supported by the villagers and anyone who goes against it is not tolerated because of which during a lot of rescue operations these villagers

⁴⁰Dr. K. Hanumantha Rao (Centre for Wage Employment and Poverty Alleviation), National Institute of Rural Development, Rural Development Statistics 2011-12, <http://www.indiaenvironmentportal.org.in/files/file/rural%20development%20statistics%202011-2012.pdf>. (last visited May . 27, 2016).

⁴¹Krishnaji, N.1987. "Poverty and Sex Ratio: Some Data and Speculations." Economic and Political Weekly, Vol. XXII, No 23, 892- 897.

⁴²Aditya Parihar, Crime Against Women In Haryana: An Analysis, International Journal of Humanities and Social Science Invention ISSN (Online): 2319 –7722, ISSN (Print): 2319 – Volume4 Issue 11 November. 2015 PP.16-24.

⁴²Human Trafficking: Two Assam girls rescued from Haryana, available at: <https://shaktivahini.org/human-trafficking-two-assam-girls-rescued-from-haryana/>. (last visited May . 27, 2016).

⁴³Human Trafficking: Two Assam girls rescued from Haryana, available at: <https://shaktivahini.org/human-trafficking-two-assam-girls-rescued-from-haryana/> (last visited May . 27, 2016).

become violent and even try to manhandle police personals and NGO workers if they attempt to rescue the victim⁴⁴.

IV. Conclusion

Bride trafficking is one of the traditional slavery systems, which has a deep history of the region. Therefore, the change cannot be brought by rescue and some other immediate relief or any harsh law. It can only be abolished by way of cultural renaissance and sensitization of people. This phenomenon is more like the demand and supply feature of any product or commodity which is sold in the market. The phenomenon will continue until there is a demand for brides in the states with skewed sex ratios and comparatively lower number of girls compared to boys. Thus, female foeticide and infanticide needs to be abolished or curbed at least in order to keep a check on the by-products of this phenomenon like bride trafficking which by itself has become a widespread phenomenon in today's scenario.

A girl, who is supposed to be in school at the tender age of 14 or 15 to build her future in the proper direction with proper opportunities to be made available to her, is being forced into the so-called institution of marriage with men twice or thrice her age. The deplorable condition of such girls can be made out from the fact that such girls work as domestic slaves during the day and sex slaves at night.

According to a research around 6 women out of 318 are forced to have sex with multiple partners, the same research also shows that 19.7 percent women will like to stay in poverty rather than live as a trafficked wife⁴⁵

It is thus concluded that where a girl child is received unpleasantly and is considered a burden, bride buying becomes a by-product and an absurd reality. Furthermore, result of the absence of a monitoring mechanism and minimum standards of victim care and protection in the schemes of govt. for the protection of trafficked victims and children, the National Commission for Protection of

⁴⁴Girl finally rescued from forced marriage, police largely uncooperative <https://www.bba.org.in/?q=content/girl-finally-rescued-forced-marriage-police-largely-uncooperative> (last visited May . 27, 2016).

⁴⁵Supra note 24.

Child Rights team detected cases of selling infants and sexual exploitation of girls at a State-supported “Swadhar” home in Rohtak. The alarming sex ratio of Haryana showed the fact that it would take about 50 years to reach a natural sex ratio even if zero female feticides takes place⁴⁶.

⁴⁶Unwanted women <https://shaktivahini.org/unwanted-women/> (last visited Jul . 23, 2016).

Role of Indigenous and Tribal Peoples in Eco System Services: Time to Look into the Pages of the Past for an Answer

Dr. Shambhu Prasad Chakrabarty¹

Abstract

Indigenous and tribal communities all across the world have taken care of the natural resources they have been living in for centuries. The various traditional knowledge's have transferred through generations and has been following them as ancestral knowledge. A lot many efforts have been made by these communities and serious contributions have been made in eco-system services by them. Their life has been sustainable and have respected natural resources more than their greed. Research has unraveled various method of similar eco system services which have been documented and practices till date. This practice requires to be imitated specially in jurisdictions with many indigenous, aboriginal and tribal communities specially in the area of conservation of indigenous medicines and water resources.

Keywords: *Indigenous Movement; Traditional Knowledge; Biodiversity; Ecosystem Services; Conservation.*

I. Introduction

Indigenous movements have got momentum in the last few decades like never before and 2019 initiates a new decade for the protection of indigenous and tribal languages across the planet. This would necessarily help in identifying the lost languages and would also help to carry on the messages and folklore that these languages generally carry with them. It also envisaged a decade that acknowledges what has been practiced in the past and how that may be conserved for the generations to come.

Indigenous rights after ILO 169 has turned out to be on the fore front and has been worth an era of celebrating their language, culture, their way of life, and most importantly their knowledge *inter alia* to conserve water. Various

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communities conserved and protected natural resources and their unique methods of conservation and protection of natural resources have never been discontinued. These know-hows and knowledge have survived many generations only through family practices. The most relevant area of research in the 'conservation world' today should be to identify and record the way these peoples managed to conserve natural resources for generations. It is surprising that the people who never had the opportunity to go to school are capable of producing genetically developed organisms, special techniques of surgery etc.

Modern scientific development has made millions of people literate with formal education, but the force of this educational system has a lot of adverse effects. It is very unfortunate that the scientific methods of catching large fishes, for example, in the world have destroyed over ninety percent of large fishes permanently. The advent of science and technology has been a boon on one hand and bane on the other. The improper and rampant use of technology have irretrievably damaged the environment. The ignorance to adhere to ecological ethos have a lot of adverse repercussions that we are now encountering. With the unfolding of various adverse-effects, of modern scientific discoveries and inventions, questions are now being raised even more after the corona virus outbreak, questioning such inventions.

II. Indigenous and Tribal Peoples

Indigenous population have existed in almost all parts of the world, passing significant test of time from time immemorial. Modern dictionaries have tried to analyze them from certain basic aspects and their journey with mother nature.

The term tribe has been identified by the Romans as political divisions where as the Greeks equated the term with fraternities. The term indigenous peoples and tribal peoples are in many a cases been used interchangeably. Even when there is no uniform definition of tribal peoples but a set of shared and distinct characteristics may lead to one. Tribal's are living descendants of 'preinvasion' inhabitants of lands and forests now dominated by others. The attachment to their territory is a significant feature of tribal existence. Various United Nations agencies have in their working definition of indigenous peoples incorporated these basic features. Commitment to cultural distinctiveness and a resolve to preserve both territory and culture as a means of reproducing a singular ethnic

community are major factors contributing tribal traits.² After studying the definition of the term tribe given by many sociologists, political thinkers and anthropologists, at various time, the researcher summed up the meaning of the term tribe with the aid of few of such definitions. However, it should be understood that the concept of 'tribal peoples' is nowadays mostly used to refer to a type of socio political organisation and that such a situation no longer exists. The reason behind this is the advent of various nation states rather than homogenous societies. The use of the word is prima facie problematic as it may invoke racial and negative connotations. It must also be noted that the international movement has further altered the relevant concept of tribal peoples and in the process of providing a meaning bereft of discrimination and racism. Even when the term has undergone a sea change historically and anthropologically, the word tribe needs to be understood from various dimensions. The word "Tribe" is derived from the Latin word "Tribus" meaning "one third". The word originally referred to one of the three territorial groups that united together to form Rome. The Romans applied the word "tribus" to the third five people who became a part of Rome before 241 B.C. A tribe was considered simply a territorially defined social group. They also called the conquered Gallic or Germanic populations 'tribus'. Thus, Romans primarily identified the term tribe as a 'political unit' with 'distinct name', and occupying a 'common territory' under a 'common leadership'. Apart from a tribe being a social group, which occupies a definite area, it has certain distinctive characteristics like cultural homogeneity and unifying social organisation. The identity and culture of every tribe are closely linked to the land and natural resources emanating out of such land and also the environment in which they live in with their family or clan. A tribe is viewed by some, historically or developmentally, as a social group existing before the development of, or outside of, states. A tribe is a distinct people, dependent on their land for their livelihood, who are largely self-sufficient, and not integrated into the national society. It is perhaps the term most readily understood and used by the general public. Stephen Corry, director of Survival International, the world's only organisation dedicated to indigenous rights, has defined tribal peoples as,

²Richard Falk (ed.), Maivan Clech Lam: At the Edge of the State: Indigenous peoples and Self Determination, 9 (Traditional Publishers. Inc. 2000).

*“...those which have followed ways of life for many generations that is largely self-sufficient and is clearly different from the mainstream and dominant society”.*³

The term ‘*tribe*’ has arguably also been used to refer to any non-Western or indigenous society.⁴ In some countries such as the United States of America and India, tribes are called indigenous peoples, and have been granted legal recognition and limited autonomy by the state. This attachment to a specific territory and insistence on the preservation of community on that territory distinguishes indigenous peoples from other ethnic minorities.⁵

One of the telling examples of the attachment of indigenous peoples are the refusal of accepting an amount as huge as \$400 million as compensation in lieu of the famous Black Hills of South Dakota, USA.⁶

III. Colonial Influence

With the advent of western dominance on the planet through the process of colonisation, slowly and steadily the indigenous culture and society started the process of evolution towards westernization with the initiation of the process of traditional and cultural erosion.⁷

Large scale displacement of tribals started in lieu of the process of developmental projects and industrialisation. With this started the process of resettlement in urban and semi urban areas by these uprooted population which became easy victims of discrimination and exploitation in the hand of nontribals. Lack of state initiative to protect this vulnerable class, instances of

³Elizabeth Palmer (trs.) Emilie Benveniste, *Indo-European Language and Society*, (Faber and Faber, London, 1973)

⁴A lot of racism is involved in such connotation

⁵Virginus Xaxa, “Tribes as Indigenous peoples of India”, 34, EPW 3593 (December 1999)

⁶The land dispute between the Government of US with the native Americans, Sioux Nation on the oldest mountain range of USA.

⁷Shambhu Prasad Chakrabarty, ‘Tribal Peoples and Conservation: Who are they! What have they done?’, in *Rule of Law: The Myths and Reality*, Cape Comorin Publisher, Kanyakumari, 2020.

atrocities increased leading them to be marginalized amongst all the people of the world.⁸

Those who decided to fight the odds in or around their displaced habitat found their slow and inevitable death due to the absence of their economic system as that was directly related with the land and resources inherent insuchland.⁹ The one-sided battle left the indigenous communities' strangers in their own land and marked as criminals and offenders against the state. Their struggle ended with the loss of lives of their leaders and forced assimilation of the rest in the lower strata of the urban and semi urban societies. There has been evidence of large- scale increase in the unskilled labour market due to the continuous and never- ending influx of indigenous and tribal peoples from their displaced habitat.¹⁰

IV. Understanding the Role of India in Protecting Biodiversity

Tribes and indigenous communities across the world have lived a sustainable life for centuries. They have always respected their cultural and social practices coupled with their TK and TCE over individual wants and desires. Indigenous movements have always been on the backfoot with tribal rights being violated in almost all jurisdictions. There has however, been a sea change in this approach as international indigenous movement have gained momentum. Activists advocating tribal rights in the international stage has achieved significant achievements with international indigenous decades have started to be celebrated. The year 2019 initiates a new decade for the protection of indigenous and tribal peoples across the World. This decade also envisaged and acknowledge the traditional practices of the past and identify avenues to conserve them for the generations to come. ILO Convention No. 169 has certainly been a reason to celebrate the victory of tribal and indigenous cultures, their way of life and most importantly acknowledging their knowledge. The techniques used by these communities in remote places difficult for human habitat have managed the conservation and protection of natural resources in

⁸ id at 7.

⁹ How Many Indigenous peoples Are There, And Where Do They Live? (August 16,2020 ,9:29 PM),
[http:// www.NativeNet%gnosys.svle.ma.us@tamvm1.tamu.edu](http://www.NativeNet%gnosys.svle.ma.us@tamvm1.tamu.edu)

¹⁰ SHAMBHU PRASAD CHAKRABARTY, *Supra* note 7.

their unique ways. The know hows and knowledge have survived generations through community practices and at times through specific families.

One of the relevant areas of research in the 'conservation world' today is to identify and record the way these peoples managed to conserve natural resources for centuries.

Studies done and research undertaken have unravelled various functioning standards in these communities to be behind their successful sustainable life. The advent of science and technology has been a boon on one hand and bane on the other. Rampant use of technology have irretrievably damaged the environment. The ignorance and negligence of repercussions from nature and acts done to promote development has reposed with devastating environmental disaster. With the unfolding of various adverse effect of these new inventions, voices from diverse corners questioning such developmental inventions. The relationship which existed between the good and the bad towards the environment has met with ignorance on one hand and greed on the other to reap economic benefits sans its inherent limitations. The Monsanto debate and banning genetically modified seeds by many states in various parts of the world are glittering examples of this conflict.¹¹

V. The Convention of Biological Diversity

Species both dealing with its varieties and variability's that functions within, between themselves and also between ecosystems are subject matter of biological diversity. Biological diversity simple sitter may be stratified as genetic diversity, species diversity and ecosystem diversity. This combination of living things in the physical environment of an ecosystem is linked with that of the other. Hence, no ecosystem is more relevant than that of the other, making every ecosystem subject matter of equal protection.

Humans since the last few centuries have used the resources of the world without following the ethos and bioethics that was followed successfully for centuries to protect the ecosystem. Industrial revolution and the new world order decided to use the sources as means of production and the outcome brought

¹¹Lessley Anderson, Why does everyone hate Monsanto?(Jul. 21, 2020, 10:30 AM), <https://modernfarmer.com/2014/03/monsantos-good-bad-pr-problem/>.

devastation to the ecosystem. Millions of species have extinct from the earth irrespective of the habitat.

The World Conservation Union included more than 16000 entries in the red lists of threatened species. The IUCN also reported that the extinction rate of species has jumped many folds to 50% than the one calculated from the fossil record. (Baillie et-al, 2004)

The UNEP also took up this issue in 1988 and convened a work group known as the Working Group of Experts on Biological Diversity to explore and identify the major steps required to be taken through an international convention of biological diversity. After three years, in 1991 the ad hoc Working Group on Intergovernmental Negotiating Committee. Later the next year in May 1992, the work culminated in Kenya at the Nairobi Conference for the Adoption of the Agreed Text of the CBD. In the next month, the Convention was open for signature of the states at Rio during the Earth Summit. The very next year in the month of December, the Convention entered into force receiving 168 signatures. As of date 196 countries have signed the convention.

The Scheme of the CBD reflects 42 articles, 3 annexure and 1 main body, the COP and periodic meetings. The two subsidiary bodies established to aid the process are SBSTTA and WG on Protected Areas. The former advises to COP relating to the implementation of the CBD.

Two protocols were established to achieve the objectives of CBD. The Cartagena Protocol came up in 2003 and the Nagoya Protocol on Access & Benefit Sharing in 2011.

VI. Understanding the objectives of CBD

The threefold objectives of CBD are generally conservation of biodiversity, the sustainable use of the various components of biodiversity and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. More specifically, the conservation on biodiversity may be classified under in situ and ex situ. In situ includes wildlife sanctuary, national parks and biodiversity reserves. On the other hand, ex situ includes seed bank/ gene bank, zoological garden, aquarium etc. Thus, conservation may be done in both these ways of the biodiversity to protect our ecosystem. The sustainable use of the

components of biodiversity includes efforts to integrate the considerations of conservation. It also encourages cooperation between governmental authorities and the private sector to achieve sustainability. Fair and equitable sharing of benefits include appropriate access to genetic resources, transfer of relevant technologies and appropriate funding which would consequently contribute to the conservation of biological diversity. The CBD needs to be implemented by the member states by developing national strategies and integrate in the international movement to protect the eco systems. The Convention of General Measures came up inter alia with these objectives.

VII. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity

At the 10th meeting of the CoP to the CBD held in Nagoya, on October 2010 The Nagoya Protocol was adopted. The Nagoya Protocol aims to implement primarily the third objective and other related articles of the CBD. These provisions called for negotiation, within the framework of the Convention. It further promotes and safeguard the fair and equitable sharing of benefits arising from the utilisation of genetic resources. It also aims to deliver greater legal certainty and transparency for both providers and users of genetic resources. It providing responsibility to the domestic legislation and regulatory requirements of the party to provide genetic resources and contractual obligations. Such development is to promote and ensure benefit sharing as and when the genetic resources goes out of party nation. In the 10th meeting of CoP, it mandated its Ad Hoc Open-ended Working Group on Access and Benefit sharing to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing.

The Protocol also looks into the access to traditional knowledge held by indigenous and local communities when it is associated with genetic resources and the strengthening of the ability of these communities to benefit from the use of their knowledge. India ratified the Protocol in 2012 and there are currently 101 Parties to the Agreement.

It is quite imperative to state that the number of biopiracy cases have been on the rise and this Protocol may stand as an impediment to the process. A few instances would make the relevance of this protocol clear.

VIII. Agriculture and TK

There has been a debate in recent times as to whether seeds may be the subject matter of market and the said debate was put into rest with the WTO and TRIPS coming closer to all the member states to accept the dominance of market in seeds. This amongst other things have destroyed the culture of seed protection, Traditional knowledge of cultivation of thousands of plant varieties. In a personal discussion with Dr Debal Deb, the founder member of Vrihi, an NGO's pioneer in the field of protection of rice varieties in Eastern India. In his book 'Seeds of Tradition, Seeds of Future, Folk rice Varieties of Eastern India' has specifically acknowledged the traditional knowledge of the indigenous communities to be more scientific and sustainable than that of the present era of science. The seeds which are genetically modified may be capable of producing larger amount but are inherent with major weaknesses like susceptible to adverse climatic conditions, pests etc. Hence a complete kit is to be in practice to make the most out of them. This inclination towards the GMO seeds have destroyed the entire balance of nature as these varieties requires more water than indigenous varieties. Subsequently, The salinity of the soil is reduced and in the absence of proper rainfall, the land eventually would be barren. It has been identified by various scientific research that agriculture which is not indigenous specifically rice varieties, utilizes more water and reduces the salinity of the soil. However, to address the huge demand there has been large scale acceptability of genetically induced seeds and that has led to the extinction of various indigenous varieties.

In order to acquire land and forest the British passed The Land Acquisition Act, 1897 and The Forest Act, 1978 respectively. The concept of 'patta' was first initiated to create a reservation over the land or inhabiting the forest. The Forest Act, 1878 clearly gave the State authority over the forests for the purpose of protection and reservation of forests and to prohibit or permit shifting cultivation. Moreover, "in the case of a claim to a right in or over any land, other than a right of way or right of pasture, or a right to forest produce or a

water-course, the Forest Settlement-officer shall pass an order admitting or rejecting the same in whole or in part".¹²

IX. Water Conservation

Prior to the formation of commonwealth countries, the role that British administration played in the colonial era skeptically raises questions the policy formulated devoid of protecting natural resources. Inter alia, in India it has been debated that there has been systematic destruction of natural resources by introducing cash crops and hoarding of food crops without distribution at the time of famine.¹³ It has also been argued that it is during this period, India lost almost ninety percent of her natural resources irretrievably.¹⁴ Many animals have got extinct as did hundreds of species of flora and fauna. The climatic conditions consequently have changed perpetually.¹⁵ The cost of such change is beyond evaluation and has become evident with the rise of global temperature and green house effects.

Tribals have with the intrusion of British got refuge in remote places along with their ancient know how. On the other hand, in other areas, technology became a part of life. Modern challenges have encouraged scientists to do the impossible. Efforts are made to develop new ways to recreate water. Technology today has also developed to such an extent that sea water is now transferred to drinking water. Technology today can recreate and reconstruct ozone layers. What stand in the way however is money. Today world has shifted from market economy to market society and hence the benefits are out of reach as the process is hugely expensive and the cost is beyond the reach of most countries including India. Would reconsidering the old techniques used by indigenous communities in India or those in the Amazon be explored to address the problem or are we too far from that due to practical and procedural reasons.

The time has come to adapt the older techniques in a new avatar to address the gravest challenge the world is facing today, the scarcity of water. The time has

¹²Census of India, 1931

¹³SHAMBHU PRASAD CHAKRABARTY, supra note 7.

¹⁴In an informal discussion with Dr Debal Deb, the seed man of India

¹⁵In an informal discussion with Dr Rajendra Singh, the water man of India. The coastal region provides the optimum condition for rainfall.

come to make a change and it is worth a consideration to look back into the pages of the past for some answer if any and also study some living examples to combat the irretrievable destruction of natural resources making it a major man-made catastrophe. We need to understand that the world would last but humans would not if this rate of destruction of natural resources continues.

There is an urgent need for both substantive and procedural measures to delay the catastrophe. More awareness coupled with urgent action is the need of the day. The question is can we do enough to prevent it and can we buy some more time. Can the tribal way be the way forward?

X. Eco-system Services

Sustainable economy of these groups makes them unique in various ways. This distinctive feature has many contrasting approaches to those of the non tribals. As a matter of fact, the term sustainable with its various dimensions became an institution by itself. However, very little has been thought about those who originated the concept and practiced it in the true sense of the term. The indigenous communities across the globe had a sustainable way of life. Whether it is their economy or attitude towards life, it is the term sustainable that perhaps suits them the best. The most unique feature of the tribals across most of the communities in the world is their sustainable economic system. Tribals have a long history of using the resources from the land and forest for various uses of their house and even transforming them for commercial use by their unique know-how and skillful artistry. Business in small scale is common amongst tribal societies. Involvement of women in collection and gathering of raw materials from the forest is common and their role in the economy is undebatable. The raw materials involved in the business and the skill needed are no longer easily available and the chance to work on them to explore the skill and practice is reducing at an alarming rate. The greener pastures of the urban and semiurban developments are attracting and alluring the younger generations to a more modern life. Whether or not they are better is another question to be answered.

XI. Conclusion

The spread of corona virus across the planet has raised many questions. One of the significant aspects debated upon is the danger modern scientific inventions have posed upon us. Whether, the human endeavor to embrace comfort and convenience be prioritized at the cost of the entire human race to the verge of oblivion. Innumerable efforts made in the last few decades of scientific and modern development has left the entire world almost inhabitable for humans. Almost ninety percent of the large fish community has been lost¹⁶ in the last few decades due to scientific and systematic but unethical catching of big fish from oceans, seas and rivers. Another interesting development that ratification of ILO 169¹⁷ can bring is a sea change in the enforcement mechanism to protect the tribals and indigenous communities which in turn would assist the entire society to understand the importance of protecting the environment as well as sustainable use of water. In lieu of the TK we may borrow from the indigenous and tribal population, we should also not forget to provide them due respect and honor that they deserve for their ecosystem services. Indigenous peoples may be considered to be the true friend of the planet whereas the modern so-called civilized community would ultimately make us inhabitable for this planet. Time has come for the UNSDGs to be adhered to and follow the best of ethical practices by learning from the culturally enriched communities and pay respect to them for all that they have done for the planet and our survival. It is also advisable to the countries having indigenous and tribal populace to provide true reports than mere fabrication and suppression of facts and mere eye wash in the name of development and protection of human rights of these peoples to the world community. *Inter alia*, community right to property must be conferred to these peoples and help them to live a sustainable life based on ethological ethos.

¹⁶An article published in 'The Nature' reveals the same study: Marsha Walton, 'Only 10 percent of big ocean fish remain' available at CNN Thursday, May 15, 2003 Posted: 0229 GMT (10:29 AM HKT)

¹⁷Only 23 countries have ratified this convention till date.

Using Leniency Effectively in Anti-Cartel Investigations: A Study of Recent Trends in Cases Decided by the CCI

Dr. Tilottama Raychaudhuri¹

Abstract

The Directive Principles of State Policy as enshrined in Article 39 of the Constitution of India lay down, inter alia, that the State shall direct its policy towards securing that the operation of the economic system does not result in concentration of wealth, to the common detriment. However, a study of the Indian market, decades after the enactment of the Constitution, reveals that the same is prone to wealth concentration, due to the concentration of production and supply of goods and services. A classic manner in which such concentration occurs is through the formation of cartels.

Generally speaking, cartels are covert arrangements between competitors to eliminate rivalry amongst themselves, in the market. Cartels are lucrative agreements because if a cartel flourishes then the total profits made by the participants of the cartel would be higher than the individual profits made by them in a competitive market. Cartels act like a single firm monopoly and are prohibited the world over because of the damaging effects they have on the economy.²

In India, the MRTP Act, 1969, was enacted to give effect to the directive enshrined in Article 39 of the Constitution of India. However, the MRTP Act became redundant due to various reasons, including economic reforms like liberalization and globalization. India's present law, the Competition Act, 2002, aims to curb cartelization effectively. With the use of contemporary tools like leniency programmes, the Competition Commission of India is encouraging cartel members to co-operate in anti-cartel investigations, resulting in crackdown of cartels in various important sectors of the economy. This paper analyses the impact of cartels on the economy and the measures being taken by the Competition Commission of India to deter cartelisation, by grant of leniency to whistleblowers.

Key words: *Constitution, MRTP, Competition, Cartel and Leniency.*

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² Dr. Tilottama Raychaudhuri, Cartels and Competition Law, Lecture delivered at the 72nd Orientation Programme organised by the UGC-Human Resource Development Centre, Jadavpur University, abstract available at <http://www.hrdeju.in/wp-content/uploads/2019/06/Abstract-Book-72OP.pdf>, (last visited on Oct. 29 2019).

I. Introduction - Anti Competitive Agreements

Anti-competitive agreements are agreements between firms which prevent or restrict competition in the market. They can be broadly classified into two kinds - horizontal and vertical. While horizontal agreements are agreements between firms which operate at the same market level, like agreements between producers of competing products, vertical agreements are between firms that are in a supply relationship, like agreements between the producer and seller of a particular product. Horizontal agreements pose greater concern to competition as such agreements entail a combination of market power and foster the creation of monopolies. Vertical agreements, on the other hand, are an important feature of commercial life, and can be regarded as an alternative to vertical integration.³ Vertical agreements affect competition only when the firm entering into such an agreement, has sufficient market power. In such cases, competition from competing brands [inter brand competition] is limited, therefore it is important that there exists sufficient competition within the supply chain [intra-brand competition]. However, if the firm entering into a vertical agreement does not have market power and is constrained by competition from rival brands, then restraints on competition imposed by it within the supply chain [intra-brand competition] may not affect the market.⁴

Since vertical agreements exert mixed effects on the competitive process, they have to be evaluated carefully by competition law. That is why, in most jurisdictions, vertical agreements are tested on the rule of reason, while horizontal agreements are susceptible to per se rules.⁵ The Competition Act,

³ “Ideally a supplier organising its distribution chain would prefer a system of vertical integration. This is because restrictions imposed in distribution of products by vertically integrated firms may escape the scope of competition law, as for an agreement to exist it needs two or more firms, whereas a parent and its wholly owned subsidiary constitute one economic actor”. See Tilottama Raychaudhuri, “Vertical Restraints in Competition Law: The Need To Strike The Right Balance Between Regulation and Competition” NUJS Law Rev Volume 4 Issue 4 (2011) <http://nujlawreview.org/2016/12/05/vertical-restraints-in-competition-law-the-need-to-strike-the-right-balance-between-regulation-and-competition/> (last visited on Oct. 29 2019).

⁴*Id.*

⁵ *Id.* There are some categories of horizontal agreements, like those fixing prices, dividing markets, restricting output and fixing bids/tenders which are illegal and attract action by competition authorities the world over. However not all horizontal agreements are prohibited. Hard core cartels are detrimental to consumer welfare, but there are other

2002, also follows this method. In India, Section 3(3) of the Competition Act deals with horizontal agreements and Section 3(4) with vertical agreements. The horizontal agreements mentioned in the Act are of four kinds. Agreements which-

(a) *“directly or indirectly determine purchase or sale prices;*

(b) *limit or control production, supply, markets, technical development, investment or provision of services;*

(c) *share the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;*

(d) *directly or indirectly result in bid rigging or collusive bidding.”*⁶

These agreements are presumed to have *“appreciable adverse effects on competition.”* On the other hand, the five vertical agreements listed in the Act, tying arrangements, exclusive supply agreements, exclusive distribution agreements, refusal to deal, and resale price maintenance agreements, are prohibited only if *“they cause, or are likely to cause appreciable adverse effects on competition in the market.”*⁷ Thus, it is evident that in India vertical agreements are subject to the rule of reason, and are not presumed to adversely affect competition, unlike horizontal agreements, where such presumption operates.⁸

II. Cartels

Among all horizontal agreements, cartels are considered to be the most detrimental to the competitive fabric of the market. Cartels are prohibited the

forms of horizontal agreements like research and development agreements, joint ventures etc. which may be beneficial for the economy. Such agreements are not considered to be per se illegal but are evaluated by the rule of reason.

⁶ The Competition Act, 2002, No 12 of 2003, s. 3(3) .

⁷ *Id.*

⁸In India, even horizontal agreements are not prohibited “per se.” According to Indian law, the term “shall presume” means a rebuttable presumption. See Indian Evidence Act, 1872, Section 4: *“Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.”* See also *Sodhi Transport Company V. State of Uttar Pradesh*, AIR 1980 SC 1099 and *R.S. Nayak V. A.R. Antulay*, AIR 1986 SC 2045.

world over, by all systems of competition law, because of their damaging effects.⁹ Cartels cause loss to the consumers as well as the economy. Cartels act like a single firm monopoly and its members need not make any effort to improve the quality of their products or enhance efficiency of operation. Cartels effectively act as a barrier to entry for new firms by sending false signals about the market and thereby succeed in keeping less efficient companies in business.¹⁰ International cartels that have been exposed have caused losses of over millions of dollars annually to individuals and companies, in the US alone. The overcharges caused globally by cartels amount to billions of dollars every year. In addition to overcharges, cartels have caused waste and inefficiencies that are much more damaging to global welfare.¹¹

Studies conducted by economists on the impact of cartels in developing countries, between 1995 to 2013, show that the same is quite substantial. In developing countries, affected sales related to GDP ranged between 0.01% to 3.74% on an average, while the maximal value reached 6.38% for South Africa in 2002.¹² The damage caused due to the extra profits made by such cartels was also significant, with the maximum rates reaching almost 1% of GDP (South Korea in 2004 and South Africa in 2002).¹³ These studies demonstrated that price overcharges due to cartelisation, in developing countries, were more or less similar to that in developed countries, which called for strong antitrust enforcement measures in the former.

Since cartels are secret agreements, they are difficult to detect. At the same time, being collusive agreements, there is considerable debate among economists and policymakers about how stable and sustainable cartels really are. Cartel data is

⁹ Dr. Tilottama Raychaudhuri, Cartels and Competition Law, Lecture delivered at the 72nd Orientation Programme organised by the UGC-Human Resource Development Centre, Jadavpur University, abstract <http://www.hrdcju.in/wp-content/uploads/2019/06/Abstract-Book-72OP.pdf>, (last visited on Oct. 29 2019).

¹⁰ MARK FURSE, COMPETITION LAW OF THE EC AND THE UK 134-135 (4th ed. 2004).

¹¹ OECD, Report on Hard Core Cartels, 2000, <http://www.oecd.org/dataoecd/39/63/2752129.pdf> (last visited on Oct. 29 2019).

¹² MARC IVALDI, FRÉDÉRIC JENNY AND ALEKSANDRA KHIMICH, CARTEL DAMAGES TO THE ECONOMY: AN ASSESSMENT FOR DEVELOPING COUNTRIES, <https://cepr.org/sites/default/files/Ivaldi%20-Cartel%20Damages%20061214.pdf> (last visited on Oct. 29 2019).

¹³ *Id.*

subject to measurement error, variables which may not be observable, and sample bias. There are, however, some generalizations that can be made about cartel behavior or success.¹⁴ There are certain markets where cartels appear to recur. And generalizations show that these markets display several characteristics which influence cartel sustainability, as depicted below:

Conditions Conducive to Cartelisation:¹⁵

Smaller Number of Firms	High
Higher Concentration Index	High
Similar Cost Functions of Firms	High
Homogenous goods	High
High entry and exit barriers	High
Low Price elasticity of Demand	High
Discontent with existing performance	High
Trade Associations	High
Large Powerful Buyers	Low
Demand fluctuations	Low
Threat of Legal Sanctions	Low

III. Anti-Cartel Legislation

Anti-cartel laws across the world are more or less similar, as their purpose is to prohibit and deter cartelisation. Hence, almost all systems of competition law

¹⁴ MARGARET C. LEVENSTEIN AND VALERIE Y. SUSLOW, WHAT DETERMINES CARTEL SUCCESS http://www.umass.edu/economics/publications/econ2002_01.pdf (last visited on Oct. 29 2019).

¹⁵ Adapted from Ritu Raj Arora and Runa Sarkar, Detecting Cartels in the Indian cement industry: An Analytical Framework, <http://www.iitk.ac.in/infocell/announce/convention/papers/Industrial%20Economics%20%20Environment,%20CSR-01-Ritu%20Raj%20Arora,%20Runa%20Sarkar.pdf> (last visited on Oct. 29 2019).

prohibit horizontal agreements on price fixing, limiting/controlling production and markets, sharing markets and sources of supply.¹⁶ Further, the expression ‘agreement’ does not only denote a written, legally enforceable agreement but also applies to informal agreements, gentlemen’s agreements, simple understandings and concerted practices whereby parties coordinate with each other in the absence of a formal agreement.¹⁷

In countries like the United States, cartels are per se illegal, without being tested on the basis of their effects. Jurisdictions like the EU require proof of an impact on competition to find an enterprise guilty, but some horizontal cartel arrangements have been placed within the ‘object box’, so that the competition authority is absolved from demonstrating that these agreements have anti-competitive effect.¹⁸ Countries, like India, have adopted a more conservative approach and require proof of effect in all cases, but the burden of proof is shifted in the case of horizontal agreements. As a result, it is presumed that cartels have anti-competitive effects, and this presumption must be rebutted by the defendant if the contrary is to be believed.¹⁹

IV. Methods for Effective Anti-Cartel Action

At the international level, the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN) have been proactive in the formulation of anti-cartel policy. Studies have also been conducted on cartels and their impact, by the United Nations Conference on Trade and Development (UNCTAD). In 1998 the OECD adopted a

¹⁶See EC Treaty, Chapter III of the UNCTAD’S Model Law on Competition, 2004 Article 81(1) (a)-(c); The Singaporean Competition Act of 2004 § 34(2); Indian Competition Act, 2002, Act No. 12 of 2003 § 3(3).

¹⁷Richard Whish, *Control of Cartels and other Anti Competitive Agreements in Competition Law Today* 46 (Vinod Dhall eds. 2007).

¹⁸ *Ibid.*

¹⁹ “*In case of agreements as listed in Section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition within India; the onus to rebut this presumption would lie upon the Opposite Parties. The parties may rebut the said presumption in light of the factors enumerated in Section 19(3) of the Act*”. See *Builders Association of India v. Cement Manufacturers’ Association (CMA) and Ors.* [Case No. 29 of 2010] at para. 288.

Recommendation for Action against Hard Core Cartels.²⁰ This recommendation was followed by several other reports identifying specific requirements for effective anti-cartel action.²¹ Some of these requirements are discussed below:

i. Special powers of investigation

Cartel busting requires special tools which differ from the tools required for investigation of other competition law violations. Since cartels are secretive and illegal arrangements, parties go to great lengths to hide evidence of the same. Therefore, discovering the existence of a cartel is, in itself, a huge task. To investigate cartels, competition authorities need to be given additional tools, like the power to conduct dawn raids, enter premises, seize documents, maintain surveillance of homes and office premises and monitor telephone conversations/e-mails. Most countries have given such special powers of investigation to their competition enforcement authorities.

ii. Whistle-blowing and Leniency

Cartels being collusive agreements are inherently unstable, as there is always incentive to cheat. Therefore, crucial tools in detection of cartels are leniency programmes where participants of a cartel who disclose to competition authorities their role in the cartel and cooperate with the investigation, are rewarded by a reduction of, or complete amnesty from, penalty. Leniency programmes have been highly successful, worldwide, in uncovering cartels. The United States Department of Justice has cracked more cartels with the aid of leniency programmes than it has with all other investigation tools

²⁰ OECD, Hardcore Cartels, available at www.oecd.org/dataoecd/39/63/2752129.pdf last (last visited Oct. 29 2019).

²¹ See. Recommendation of the Council concerning Effective Action against Hard Core Cartels, c(1998) 35/Final, May 13, 1998; Implementation of the Council Recommendation concerning Effective Action against Hard Core Cartels: First Report by the Competition Committee, January 1, 2000; Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws, DAFNE/COMP, April 9, 2002; Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation, December 15, 2005.

combined.²² Most countries today have leniency programmes in place.²³ However, to be successful, leniency programmes must provide a high degree of certainty of leniency to the informant and also provide assurances about confidentiality of information obtained. If the leniency is discretionary and the leniency policy lacks clarity then cartel members may not take the risk of coming forward with information.

iii. Fines and Criminal Sanctions

A prerequisite to any leniency programme is strong sanctions in the form of heavy fines. To ensure that cartel members volunteer information, the risk of cartelisation must appear to outweigh the potential rewards. In other words, firms will be deterred from acting as a cartel in a country's market, if that country's competition authority imposes heavy fines as penalties which are considerably more than the profits made by the cartel.²⁴ The fine levels currently being imposed by the EU are a good example of strong sanction. Though EU has no criminal penalty, the fines imposed by the EU are significantly greater than fines imposed for similar conduct in countries like the United States. In the United States, companies that do not cooperate with the investigation are often liable to pay fines that exceed 30 percent of the revenue generated by the sale of the cartelised product or service during the entire duration of the cartel agreement. In Europe, late informants can expect to pay much more.²⁵

²²SCOTT D. HAMMOND, CRACKING CARTELS WITH LENIENCY PROGRAMS, www.justice.gov/atr/public/speeches/212269.pdf last accessed on 29/10/19.

²³PAUL HASTINGS, CARTEL REGULATION, GLOBAL COMPETITION Review 2010, <http://www.paulhastings.com/assets/publications/1527.pdf> (last visited on Oct. 29 2019).

²⁴MARGARET LEVENSTEIN ET AL., INTERNATIONAL CARTEL ENFORCEMENT: LESSONS FROM THE 1990S, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=265741 last accessed on 29/10/19.

²⁵SCOTT D. HAMMOND, THE EVOLUTION OF CRIMINAL ANTITRUST ENFORCEMENT OVER THE LAST TWO DECADES, <http://www.justice.gov/atr/public/speeches/255515.html> (last visited on Oct. 29 2019).

Many countries also impose criminal sanctions on cartel participants, as jail sentences often act as greater deterrent than paying corporate fines. This system has been effective in countries like the United States where jail sentences have been imposed on individuals for being part of a cartel. This view is garnering popularity across the world. In the United Kingdom, the first jail sentences on individuals were imposed in 2008, in the marine hose cartel case, under the 2002 Enterprise Act. In 2008 itself, the UK's Office of Fair Trading charged four executives of British Airways with price fixing of passenger fuel surcharges. In Australia, criminal sanctions for cartelisation were introduced in 2009. Other countries like Chile, the Czech Republic, Greece, Mexico, the Netherlands, New Zealand, Russia and South Africa have also adopted, or are considering adopting laws which will entail criminal sanctions for cartelisation.²⁶ In India, there is no criminal penalty for cartelisation. However, the fines payable for cartelisation in India are fairly heavy, as discussed later in this paper.

iv. Rewards Programmes

While leniency programmes break cartels from inside, incentives and rewards programmes are effective mechanisms to break cartels from the outside. Cartel informant reward programmes provide incentives in the form of money to third parties, who are not members of a cartel, if they provide information to competition authorities regarding the existence/functioning of a cartel. Rewards programmes are an effective way of gathering evidence about cartels and can act as a deterrent to cartel activity.²⁷ The U.S. Civil False Claims Act provides private rights to citizens to prosecute antitrust claims, by bringing action in the name of the US government. Private litigants are entitled to equitable relief and treble damages.²⁸ In South Korea, the Korean Fair Trade Commission has

²⁶ *Id.*

²⁷ However, a system of providing financial incentives to informants is not without risk. Antitrust authorities have to carefully evaluate the motive behind the disclosure of such information, as also test the quality of the evidence obtained. See generally International Competition Network, Anti Cartel Enforcement Manual, http://en.fas.gov.ru/netcat_files/Analitical%20materials/MKS/Anti-Cartel%20Enforcement%20Manual%20Chapter%20on%20Cartel%20Case%20Initiation.pdf (last visited Oct. 29 2019).

²⁸ William E. Kovacic, Private Participation in the Enforcement of Public Competition Laws, <http://www.ftc.gov/speeches/other/030514biicl.shtm> (last visited Oct. 29 2019).

established a rewards system for those who report competition law violations and the identity of the informant is kept confidential.²⁹ India however, does not have any rewards/incentive scheme in place for informants who report the existence of a cartel to the Competition Commission.

v. Cooperation Agreements and Workshops

International cooperation is of great significance in controlling international cartels, and also domestic cartels where firms involved have offices in foreign countries. The OECD and the ICN encourage international exchange of information to detect and prosecute cartels. The Competition Act, 2002, confers extraterritorial jurisdiction on the Competition Commission of India to investigate cartels which are located in foreign countries but whose impact is felt within the Indian market³⁰. Cooperation agreements are important to ensure smooth functioning of such extra territorial jurisdiction.

Another feature of the global effort against cartels is anti cartel workshops that bring together investigators and prosecutors from around the world. The ICN Cartel Working Group Subgroup 2 annually organizes a Cartel Workshop where representatives of competition enforcement authorities of different countries discuss measures which can be implemented for better cartel action. These workshops offer excellent occasions for fostering informal contacts between the Agencies, including at operational level.³¹ They also address the

²⁹See generally Fair Trade Commission, KFTC's launch of Reward System for Informants, available at www.ftc.go.kr/data/hwp/rewardssystem.doc last accessed on 29/10/19.

³⁰ Section 32 of the Competition Act, 2002, provides that "*The Commission shall, notwithstanding that,— (a) an agreement referred to in section 3 has been entered into outside India; or (b) any party to such agreement is outside India; or (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire..into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit..*"

³¹See generally the Japan Fair Trade Commission's website <http://www.jftc.go.jp/e-page/internationalrelations/icn.html> (last visited Oct. 29 2019).

need for institutional changes in new competition law regimes, like prioritisation of cartels, increased staffing, training and development, awareness of competition issues by consumers and the industry.

V. Cartel Control in India - A Dismal Record under the MRTP Act, 1969

India's competition law, the Competition Act of 2002, has come into force fairly recently. The earlier legislation, the Monopolies and Restrictive Trade Practices Act (MRTP Act) of 1969 was designed in accordance with the socio economic objectives of that time, and did not have specific provisions to deal with cartels. While several reasons can be put forth as to why the MRTP Act was ineffective, some of the principal issues were the lack of proper definition of cartel, limited power of the regulator to deal with cartels, no extra territorial jurisdiction, no provision for penalty and lack of adequate resources. Hence, we have a dismal record of cartel busting during the MRTP period. Some cases are discussed briefly, below:

i. Soda Ash Cartel

This was one of the early cartel cases of 1996. The American Natural Soda Ash Corporation (ANSAC) comprising of 6 American producers of soda ash, attempted to sell soda ash at a low, cartelized price in India. Upon reviewing the agreement between the ANSAC members, the MRTP Commission considered it to be, prima facie, a cartel and issued an interim injunction against it. The Supreme Court, however, in a much criticised judgment, overturned the order of the Commission, inter alia, on the ground that the MRTP Act, 1969, did not have any extra territorial reach and therefore could not take any action against ANSAC.³²

ii. Trucking Cartel

In 1984, the M.R.T.P. Commission passed a Cease & Desist order against Bharatpur Truck Operators Union (order dated 24.8.1984 in RTP Enquiry

³² See *Haridas Exports vs All India Float Glass Manufacturers' Association*, (2002) 6 SCC 600. See also Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India https://www.cci.gov.in/sites/default/files/cartel_report1_20080812115152.pdf (last visited Oct. 29 2019).

No.10/1982), Goods Truck Operators Union, Faridabad, (order dated 13.12.1989 in RTP Enquiry No.13.13.1987), Rohtak Public Goods Motor Union (order dated 25.8.1984 in RTP Enquiry No.250/10983), for price fixing in the form of similar freight rates. However, due to dearth of penalty provisions in the MRTP Act, no fines could be imposed in this matter.³³

iii. Cartels in Cement, Tyres, Railways

In April, 2007, the Government of India admitted to the existence of cement cartels operating in the country for many years and its inability to deal with them without the existence of an effective competition law. The then Finance Minister, P. Chidambaram, acknowledged that there were well known cartels in the tyre as well as the cement industry.³⁴ In July 2008, the Business Standard published a news item stating that the Indian Railways procurement system was plagued by cartels and bid rigging which ran into thousands of crores, each year.³⁵

VI. Cartel Control under the Competition Act, 2002

The Raghavan Committee Report, which recommended the enactment of the Competition Act, 2002, stated that an important reason for enacting a new competition law was to prevent cartels, both domestic and international, from indulging in anti-competitive practices in India.³⁶ Unlike the previous law, the Competition Act, 2002, contains numerous provisions relating to cartels, starting

³³ Ibid.

³⁴ See PTI, Govt can't ban cement cartel: [FM.http://timesofindia.indiatimes.com/business/india-business/Govt-cant-ban-cement-cartel/FM/articleshow/1952019.cms#ixzz1DoYDMk6b](http://timesofindia.indiatimes.com/business/india-business/Govt-cant-ban-cement-cartel/FM/articleshow/1952019.cms#ixzz1DoYDMk6b) (last visited Oct. 29 2019).

³⁵ See Sowmya Suman, [Competition Law and Cartelisation](http://www.lawyersclubindia.com/articles/print_this_page.asp?article_id=543), http://www.lawyersclubindia.com/articles/print_this_page.asp?article_id=543 (last visited Oct. 29 2019).

³⁶ Report of the High Level Committee on Competition Policy and Law, paras. 1.2.3-1.2.4 https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf (last visited Oct. 29

from a proper definition of the term cartel,³⁷ to wide powers of investigation,³⁸ imposition of penalty on cartel members³⁹ and grant of leniency by the Competition Commission, for cooperation with cartel investigation.⁴⁰ In the last decade, the Competition Commission has been active in its prosecution of cartels. As of 2018, the Commission has passed more than 72 orders against companies for cartel infringements. The Commission has also imposed monetary penalties of more than 80 billion rupees on cartels, out of which penalties of more than 5 billion rupees were imposed in 2018 itself.⁴¹

Complex cases, such as those relating to cartel conduct in an oligopolistic market have also been dealt with by the Commission. The Commission has drawn a distinction between price parallelism in a non-collusive oligopoly and price parallelism due to coordinated behavior in an oligopoly. In the case *Builders Association of India v. Cement Manufacturers' Association (CMA) and Ors*⁴² the Commission noted that competitors in the cement market meeting under the umbrella of an association and exchanging data regarding price, production and supply, which in turn corresponded with market behaviour, could not be termed as mere price parallelism but mirrored “a condition of

³⁷Section 2(c) of the Competition Act, 2002, defines cartel as “an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services”.

³⁸ See Competition Act, Sections 19, 26, 32, 33 and 36.

³⁹Section 27 of the Competition Act, 2002, states that “...Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.”

⁴⁰Section 46 of the Competition Act, 2002, lays down the power of the Commission to impose lesser penalty. It provides that “The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:”

⁴¹Farhad Sorabjee and Amitabh Kumar, *The Cartels and Leniency Review - Edition 7 - India*, available at <https://thelawreviews.co.uk/edition/the-cartels-and-lenieny-review-edition-7/1179747/india> (last visited Oct. 29 2019).

⁴² Case No. 29 of 2010 [Order dated: 20.06.2012].

coordinated behaviour and existence of an anti-competitive / agreement in violation of provisions of section 3(3) (a) of the Act.”⁴³

i. Grant of Lesser Penalty

As discussed earlier, grant of lesser penalty or “leniency” is a form of protection given to whistle blowers by offering them lenient treatment if they give evidence of a cartel to the Commission. Leniency is one of the most effective tools to encourage cartels members to come forward and submit information about the same, in return for an incentive in the form of reduced penalty.⁴⁴ Leniency programmes have a deterrent effect on the creation of cartels as they create distrust and suspicion amongst cartel members.⁴⁵ This can be explained with the help of the game theory prisoner’s dilemma model. Game theory helps in predicting the result of games of strategy where the participants (and in case of cartels, the members) have incomplete information about each other’s intentions, and where exchange of information is difficult.⁴⁶

The classic prisoner’s dilemma situation is where there are two prisoners, who have committed a major as well as a minor crime. The police have evidence to nail them for the minor crime but not enough evidence to convict them for the major crime. During interrogation, if one confesses against the other and gives evidence about the major crime, the same would help the police in convicting the other. The police would want a conviction, so they offer an incentive to both the prisoners, saying that if one confesses against the other then the former would get no jail time whereas the latter would get the maximum sentence of 10 years. If both the prisoners confess then both will get a five year sentence.

⁴³ Ibid at para 6.6.13

⁴⁴ See

https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Leniency.pdf (last visited Oct. 29 2019).

⁴⁵ See <https://ec.europa.eu/competition/cartels/leniency/leniency.html> (last visited Oct. 29 2019).

⁴⁶ “A game (in strategic or normal form) consists of the following three elements: a set of players, a set of actions (or pure-strategies) available to each player, and a payoff (or utility) function for each player. The payoff functions represent each player’s preferences over action profiles, where an action profile is simply a list of actions, one for each player. A pure strategy Nash equilibrium is an action profile with the property that no single player can obtain a higher pay off by deviating unilaterally from this profile.” See <http://www.columbia.edu/~rs328/NashEquilibrium.pdf> (last visited Oct. 29 2019).

Finally, if neither prisoner confesses, each would get one year in prison on the minor crime, till police obtain more evidence.⁴⁷In a situation where the prisoners are unable to interact with each other, this poses a dilemma for both as to whether confession would be the right strategy and if so, at what point in time. The prisoner’s dilemma is depicted graphically below:

		Prisoner B	
		Confess	Keep Quiet
Prisoner A	Confess	Both go to jail for 5 years	Prisoner B goes to jail for 10 years, Prisoner A goes free
	Keep Quiet	Prisoner A goes to jail for 10 years, Prisoner B goes free	Both go to jail for 1 year

Given this situation, each prisoner in pursuing his own self interest would be incentivised to confess. Though the game theory model has nothing to do with prisoners, or investigators, in reality, the model is ideal in explaining the behaviour of participants of a cartel. In case of cartels, which are inherently secret and collusive agreements, the enforcement authority offers cartel members a deal which is to co-operate in exchange for leniency. Therefore, for a leniency programme to be successful it has to be structured in a manner that the dominant strategy for each firm would be to confess.

⁴⁷ Christopher R. Leslie, Antitrust Amnesty, Game Theory, and Cartel Stability, *Journal of Corporation Law*, Vol. 31, pp. 453-488, 2006 at p. 455, <https://pdfs.semanticscholar.org/665c/0aa8a7702da732a6a4d7ce2135ce68e62c6b.pdf> (last visited Oct. 29 2019).

ii. Leniency Provisions under the Competition Act, 2002

Section 46 of the Competition Act, 2002, contains provisions for grant of lesser penalty, subject to certain conditions. According to Section 46, *“The Commission may, if it is satisfied that any producer, seller... (etc) included in any cartel, which is alleged to have violated section 3, **has made a full and true disclosure in respect of the alleged violations and such disclosure is vital**, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:*

*Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed...**has been received before making of such disclosure.***

*Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller...who has made the **full, true and vital disclosures** under this section.*

*Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure **does not continue to cooperate...till the completion of the proceedings** before the Commission*

Provided also that the Commission may, if it is satisfied that such producer, seller..had in the course of proceedings,—

*(a) **not complied with the condition** on which the lesser penalty was imposed by the Commission; or (b) **had given false evidence**; or (c) **the disclosure made is not vital**, and thereupon such producer, seller...may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.”*

In August 2009, the Competition Commission of India (Lesser Penalty) Regulations, 2009 were brought into force. These Regulations laid down detailed requirements for qualification for lesser penalty, the procedure to be followed for grant of lesser penalty and the quantum of waivers available. Grant of lesser penalty depends upon four factors:

- (a) the stage at which the applicant comes forward with the disclosure

- (b) the evidence already in possession of the Commission
- (c) the quality of the information provided by the applicant, and
- (d) the entire facts and circumstances of the case⁴⁸

In August 2017, several amendments were made to the Regulations. Under these amendments, the meaning of the term 'applicant' under the Regulations has now been expanded to allow an individual who has been part of a cartel, to make a leniency application to the CCI for grant of leniency. Also, importantly, grant of lesser penalty to an applicant who has fulfilled all the requirements is now mandatory. Earlier, grant of lesser penalty was discretionary. This amendment has introduced more certainty to the leniency programme by making grant of lesser penalty mandatory, as discretionary leniency does not offer enough incentive to whistleblowers. Further, the benefit of leniency is now applicable to later applicants, whereas earlier, leniency could only be granted to a maximum of three applicants.⁴⁹ However, a drawback of the 2017 amendment is that confidentiality of the information obtained and the identity of the applicant can now be disclosed by the Director General of investigation, for the purpose of investigation. The amendment fails to clarify the factors which would guide such disclosure. Another problem that remains is with respect to imposition of penalty.⁵⁰ The amount of reduction of penalty still remains the discretion of the Commission.⁵¹ Briefly, the penalty reduction, according to the Regulations, is as follows:

⁴⁸ For a detailed understanding of the procedure relating to grant of lesser penalty see CCI Advocacy Booklet, available at https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Leniency.pdf (last visited Oct. 29 2019).

⁴⁹ See <https://www.azbpartners.com/bank/the-competition-commission-of-india-amends-lesser-penalty-regulations/> (last visited Oct. 29 2019).

⁵⁰ Ibid.

⁵¹ See <https://thelawreviews.co.uk/edition/the-cartels-and-lenieny-review-edition-7/1179747/india> (last visited Oct. 29 2019).

Competition Commission of India (Lesser Penalty) Regulations, 2009

Reduction in Penalty	Scenario
Up to 100%	Applicant is the <i>first to make a vital disclosure enabling the Commission to form a prima-facie opinion</i>
Up to 100%	Even if the matter is under investigation, if <i>without its disclosure, the Commission or the Director General did not have sufficient evidence</i> to establish the contravention
Up to 50% and 30% to the <i>second or third applicant(s)</i>	Submitted evidence provides a significant added value to the evidence already available with the Commission or Director General

iii. Implementation of Leniency Provisions by the CCI in recent cases

(a) *Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*⁵²

This was the first leniency application received by the Competition Commission, and it related to bid rigging with respect to tenders floated by Indian Railways. The case was taken up by the Commission suo moto, based on information received from the CBI. During the course of investigation, M/s Pyramid Electronics, one of the participants in the cartel, applied for leniency. The Commission while considering the application, noted that the applicant was “*the first and only party to accept the existence of a cartel/bid rigging in tenders for railways for BLDC Fans and submit information in support thereof the evidence submitted.. played a significant role in revealing the modus operandi of the cartel.*”⁵³ However, due to the stage at which the applicant applied for leniency – which was after the commencement of the investigation – the Commission granted a 75% reduction in penalty, as opposed to complete

⁵² Suo Moto Case No. 03 of 2014.

⁵³ Ibid at para 7.8

reduction.⁵⁴ Thus, the Commission in this case followed the accepted international practice of granting leniency according to the value as well as the timing of information received.

(b) *In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India*⁵⁵

This case was taken up by the Commission pursuant to an application made by Panasonic Energy India Co. Ltd. for grant of leniency. Panasonic submitted that there existed a cartel in the market for dry cell batteries India, between Panasonic, Eveready Industries Ltd. and Indo National Ltd. Panasonic also informed the Commission that all three manufacturers were members of a trade association called the Association of Indian Dry Cell Manufacturers “*which facilitated transparency between the Manufacturers by collating and disseminating data pertaining to sales and production by each of the Manufacturers.*”⁵⁶ Here, the Commission granted 100% leniency (the first complete reduction of penalty in India) to Panasonic in view of the following factors:

- ⌚ That it was the first to approach the Commission
- ⌚ That the evidence helped in assessing the domestic market structure of batteries, nature and extent of information exchanges and identifying the names, locations and email accounts of key persons involved, and
- ⌚ enabled the DG to conduct search and seizure operations.⁵⁷

With regard to Eveready Industries, who was second in making a disclosure, the Commission granted the benefit of 30% reduction in penalty in view of the fact that though the information received met with the requirements of ‘significant value addition’, Eveready had approached the Commission three days after the search and seizure operations commenced.⁵⁸ The Commission also granted Indo National Ltd. 20 percent reduction in penalty as it was third in making a disclosure and there was three week delay in approaching the Commission,

⁵⁴ Ibid at para 7.11

⁵⁵ Suo Motu Case No. 02 of 2016.

⁵⁶ Ibid at paras 1.2-1.3

⁵⁷ *Id* at para 10.2

⁵⁸ *Id* at para 10.4 (b)

though the company extended continuous and expeditious co-operation with the investigation.⁵⁹

*(c) Nagrik Chetna Manch v. Fortified Security Solutions and others*⁶⁰

This case related to bid rigging. According to the information filed, tenders were floated by the Pune Municipal Corporation during December 2014 to March 2015 for “Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s).” Certain bids submitted towards these tenders were alleged to be rigged.⁶¹ During the course of investigation, the Commission received 6 lesser penalty applications from the parties involved. One significant aspect of this case was that some of the parties had acted as proxy bidders without having any presence in the relevant market. In its order, the Commission granted leniency to 4 out of the 6 applicants. The first applicant was granted 50% leniency based on the quality of information submitted and the stage at which the lesser penalty application was filed.⁶² Considering the co-operation and value addition extended by the second applicant and in conjunction with the priority status accorded, the second applicant was granted 40% reduction.⁶³ Significantly, the applicant marker third in priority status was also granted 50% reduction in penalty in view of certain peculiar facts, that is, with regard to certain tenders, it was the first to give information to the Commission. Thus, the Commission decided to give first priority status to the third applicant for those tenders.⁶⁴ The fourth applicant was granted 25% leniency considering the stage at which it approached the Commission, the co-operation extended and the value addition of the information submitted.⁶⁵

*(d) Re: Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters*⁶⁶

⁵⁹ *Id* at para 10.4 (c)

⁶⁰ Case No. 50 of 2015.

⁶¹ *Id* at paras 2-3

⁶² *Ibid* at paras 101-106

⁶³ *Id* at paras 107-113

⁶⁴ *Id* at paras 114-120

⁶⁵ *Id* at paras 121- 126

⁶⁶ Case No. 02 of 2013.

This case related to “*exchange of commercial and confidential price sensitive information between (the parties) which resulted in bid rigging of tenders for procurement broadcasting services of various sporting events, especially during the year 2011-12*”.⁶⁷ Here the Commission granted leniency to both the parties involved in the cartel. The first party, Globecast, got 100% reduction as it voluntarily gave information to the Commission and assisted in the detection and investigation of the cartel. It also cooperated fully and continuously throughout the investigation. The second applicant was also granted 30% leniency, as by the time it approached the Commission, the latter had already formulated a prima facie opinion and referred the matter to DG for investigation. However, in view of the value addition and evidence given by the second applicant, it was still granted leniency, notwithstanding the 100% reduction granted to the first applicant.⁶⁸

*(e) Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India*⁶⁹

This case is related to the earlier dry cell battery case. Panasonic filed information with respect to certain anticompetitive non-compete contracts between Panasonic Energy India Co. Limited and another dry cell battery manufacturer. The Commission, upon investigation, found evidence of a cartel and imposed penalties on the other manufacturer (and the company executives involved)⁷⁰ but granted Panasonic 100% leniency for “full and true disclosure of information and evidence and continuous cooperation... provided, (which) not only enabled the Commission to order investigation into the matter, but also helped in establishing the contravention of Section 3 of the Act”.⁷¹

In a subsequent dry cell batteries case,⁷² Panasonic again filed a leniency application informing the Commission that there that there existed a bi-lateral ancillary cartel between Panasonic Energy India Co. Limited, Godrej & Boyce Manufacturing Co. Limited, in relation to institutional sales. Upon investigation, the Commission concluded that a cartel indeed existed and gave Panasonic a

⁶⁷*Id* at para 2

⁶⁸*Id* at paras 127-132

⁶⁹ Case No. 02 of 2017.

⁷⁰ *Id* at paras 33-43

⁷¹*Id* at para 40

⁷² Case No. 03 of 2017, Order dated 15.01.2019.

100% reduction in penalty, while penalizing the other two companies and the individuals involved.⁷³

VII. Leniency Policy of the CCI as revealed in the cases above

The cases decided in the last three years show that the CCI is proactively implementing the leniency provisions of the Competition Act, 2002. Analysis of the cases reveals that the main factor taken into account by the Commission while granting leniency, is the stage at which the applicant comes forward with the disclosure. In most of the cases maximum leniency has been granted in the “no knowledge phase”, that is, where information has been given to the CCI about the existence of a cartel which helps the latter form a prima facie opinion. For example, in the dry cell batteries cases Panasonic was granted 100% leniency for revealing the existence and modus operandi of the cartel. Similarly, in the Sports Broadcasters case, Globecast was granted 100% leniency as it submitted vital evidence which assisted in the detection of the cartel.

Apart from the stage at which the information is given, another important factor looked into by the CCI is the quality of the information received. Thus, other than the first applicant, if later applicants come forward with information which results in significant value addition, such applicants are also given the benefit of leniency in the form of reduced fines. An interesting example would be the Nagrik Chetna case where the third applicant was granted 50% reduction in penalty in view of the fact that it had submitted crucial information to the CCI regarding some tenders. Thus, the Commission decided to give first priority status to the third applicant for those tenders.⁷⁴ This approach of the Commission of granting reduced penalty to later applicants is likely to incentivise more cartel members to come forward and act as whistleblowers.

Though implementation of the leniency provisions has been commendable and in tune with international practices, grant of leniency by the CCI suffers from certain drawbacks. One issue is with respect to imposition of penalty. There seem to be no clear guidelines in this regard. Section 27 of the Competition Act, 2002 empowers the CCI to impose penalty on each member of a cartel to the

⁷³ *Id* at paras 39-50

⁷⁴ *Id* at paras 114-120

tune of “*up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher*”.⁷⁵ Although the CCI has not issued any clarifications on imposition of penalty, in the case *Excel Crop Care v CCI & Ors*⁷⁶ the Supreme Court asserted that penalties based on turnover should be imposed on the “relevant” or product specific turnover, as opposed to the entire turnover of the company.⁷⁷ Moreover, while calculating penalty, the damage caused and the profits which resulted from the cartel activity should also be considered.⁷⁸

A perusal of the decided cases reveals that there is no consistency in fines imposed. In the dry cell batteries case, the Commission imposed penalty of 1.25 times of the profit. In the Broadcasters case, the CCI imposed a penalty of 1.5 times the profit, and in the DC brushless fans case, 1.0 times the profit. Thus, imposition of penalty is at the discretion of the Commission.

Another problem that may affect potential leniency applicants is the issue of confidentiality. The orders of the CCI reveal detailed information regarding leniency applications, cartel members, the modus operandi of the cartel, the customers involved etc. Such detailed information given to the public cause loss of reputation to the companies involved and may give rise to claims for compensation. The CCI may consider publication of a non-confidential final order which contains the minimum, necessary disclosures made by a leniency applicant.⁷⁹

⁷⁵ See Section 27 (b) of the Competition Act, 2002.

⁷⁶ *Excel Crop Care Ltd. V. Competition Commission of India*, (2017) 8 SCC 47

⁷⁷ *Ibid* at para 74 “*In the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, we find that adopting the criteria of ‘relevant turnover’ for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties*”.

⁷⁸ *Id* at paras 71-72

⁷⁹ See “The Curious Case of Leniency under the Competition Act, 2002 in India” <http://www.mondaq.com/india/x/816022/Cartels+Monopolies/The+Curious+Case+Of+Leniency+Under+The+Competition+Act+2002+In+India> (last visited on Oct. 29 2019).

VIII. Conclusion

The MRTP Act, 1969, was enacted with the view to reduce wealth concentration, in accordance with the objectives of the Directive Principles of State Policy as enshrined in Article 39 of the Constitution of India. Years later, due to various factors like liberalisation, globalisation and changes in India's economic policy, the MRTP Act, 1969, was repealed and the Competition Act, 2002 was enacted in its place, with a view to promote and sustain competition in the market. One of the main successes of the Competition Act, 2002 has been with respect to anti cartel action. Cartels are considered to be the antithesis of a free and competitive market and are prohibited by almost all systems of competition law, the world over, because of the damaging effects they have on the economy.

A classic way to effectively investigate and prosecute cartels is with the aid of evidence received from whistleblowers. As cartels are covert agreements, parties go to great lengths to cover their tracks. Though competition authorities all over the world have been given special tools to investigate cartels, none of these have been as successful as leniency programmes which encourage cartel members to act as whistleblowers and give information against the cartel.

India has started implementing its leniency programme, very recently. A study of cases decided by the CCI shows that India is gradually putting together a leniency policy which offers a degree of certainty to the whistleblowers about the grant of reduced penalty, depending upon the stage at which the information is given to the Commission and the quality of the information submitted. Such decisions by the Commission are likely to act as incentive for more cartel members to come forward and give evidence against cartels. Controlling cartels has become an important agenda in all competition regimes so far, the orders of the Commission regarding grant of leniency have been effective and in tune with international practices. Hopefully, as the leniency programme gains momentum, the Commission will be successful in breaking down more cartels operating in India and put an end to these so called 'cancers' which have been plaguing the Indian market for decades.

Jurisprudence of Delivery in Consumer Contract in E-Commerce: A Critical Appraisal of The Consumer Protection Law in India

Jehirul Islam¹

Abstract

E-commerce market is growing tremendously due to the many advantages it provides to consumers and traders as well. On the other hand, concerns of consumer with respect to delayed delivery, wrong delivery, non-delivery and improper information pertaining to delivery of goods or services are also evident from the numbers of online consumer complaints. The Consumer Protection Act, 1986 and the Sale of Goods Act, 1930 may sufficiently protect consumers in traditional market; however, both the Acts fail to recognise the unique features of e-commerce, which have raised the new forms unease to consumers. The provisions of the newly enacted Consumer Protection Act, 2019 are structurally weak and inefficient to protect consumers in e-commerce.

Classification Code: O Economic Development, Innovation, Technology Change, and Growth

Key Words: *E-Commerce, Technology, Delivery, Consumer Protection, Law*

I. Introduction

Consumers are considered as susceptible in the hands of business societies. The susceptibility of consumer amplified in e-commerce, which provides opportunities to businesses to exploit consumers in many ways. The Minister of State for Consumer Affairs, Food and Public Distribution, Mr. Danve Raosaheb Dadarao has recently informed the Parliament that from August 2016 to March 2019 as many as 8,373 complaints of online consumers were registered pertaining to fraud in e-commerce.² The actual figures of such fraud, however, may go up by manifold.

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²Soumyarendra Barik, 'National Consumer Helpline Registered 8,373 Complaints of Fraud in Online Shopping in 3 Years, Minister Reveals' <https://www.medianama.com/2019/07/223-national-consumer-helpline-registered-8373->

In India, the rapid escalation of e-commerce retailing³ is due to many reasons, for instance, advancement of information and communication technology, increase number of internet users,⁴ ease of payment and shopping for goods or services from sellers located across the globe, shopping and payment at any time, more options in goods or services, more competition resulted in lower the prices, and discounting in energy and time. However, in contrast to the advantages, e-commerce has brought forth many challenges too with respect to the consumer protection.

II. Issues and Concerns

There have been escalations of fears among the consumers in e-commerce with respect to non-delivery, wrong delivery, and late delivery of goods or providing services. This fright of consumers resulted from numerous experiences of consumers and stories reported in news. Following are the few examples of such stories; instead of a laptop worth of Rs. 14,090, a package of brick has been delivered to 17 years old boy when he ordered for laptop, and terribly, the delivery man had left the place before the boy could actually check the product;⁵ A vim bar has been delivered to consumer in place of a Samsung Galaxy Core2; some pieces of stones were delivered when a consumer ordered for iPhone4S; in place of a Macbook Pro worth Rs. 84,000, consumer received a heater worth Rs. 600; an used phone and pair of used shoes were delivered, when a consumer ordered for brand new phone and shoes; an empty box has been

[complaints-of-fraud-in-online-shopping-in-3-years-minister-reveals/](#) (Last visited July 30, 2019).

³ Morgan Stanley expects ‘the size of the Indian Internet Market to rise from \$ 11 bn in 2013 to \$ 137 bn by 2020, making it fastest growing e-commerce market in the world’, https://www.business-standard.com/article/companies/india-set-to-become-world-s-fastest-growing-e-commerce-market-115020601227_1.html (Last visited August 1, 2019).

⁴Internet and Mobile Association of India (IAMAI) reported that, ‘India has 350 million Internet users’, <http://indianexpress.com/article/technology/tech-news-technology/india-now-has-over-350-million-internet-users-iamai/> (Last visited July 25, 2019).

⁵ Bosco Dominiquel, *Teen orders laptop for 14,000 online, get brick*, <https://timesofindia.indiatimes.com/city/chennai/Teen-orders-laptop-for-Rs-14000-online-gets-brick/articleshow/50401154.cms> (Last visited : July 25, 2019).

delivered to consumer in place of a pen drive;⁶ fake JBL Lifestyle products were selling by ShopClues.com, an e-commerce portal.⁷ In addition, issues pertaining to lost in delivery, non delivery, and damage of goods in delivery are common practices, which consumers experience in e-commerce.⁸ It has been argued that delay in delivery of goods continues as one of the main common grumbles of the consumers in e-commerce.⁹ Further, it has also been alleged that the one of the reasons for delay in delivery after receiving payments from consumer is to solve cash flow problems of seller.¹⁰ Presences of various fraudsters are also evident in e-commerce. They promise to sell goods at low price but deliver inferior goods or never deliver goods, or they may also disappear overnight.¹¹

It is pertinent to mentioned that, in contrast to traditional commerce, the nature of e-commerce obligates seller to make delivery of goods or services, resulting in consumer's absolute reliance on seller for the delivery. This dilemma of complete dependence of consumer with respect to delivery has raised many legal questions pertaining to the consumer protection in this new economy. Who should bear legal responsibility to deliver the goods, seller or buyer? Who should bear the loss if goods are lost or damaged during transit? What rights consumer may exercise if seller fails to deliver the goods or services within stipulated time? What would be the stipulated time if no time is prescribed in

⁶Sambit Satpathy, *4 unexpected things Snapdeal delivered to buyers and one that Flipkart didn't*, *BER India*, <http://www.bgr.in/news/4-unexpected-things-snapdeal-delivered-to-buyers-and-one-that-flipkart-didnt/> (Last visited: July 20, 2019).

⁷ Sangeeta Chengappa, *Harman issues legal notice to online retailer*, <https://www.thehindubusinessline.com/companies/harman-issues-legal-notice-to-online-retailer/article6835383.ece> (Last visited: July 22, 2019).

⁸Adrija Bose, *The Big Snapdeal Screw up: Man orders smartphone, gets bar of soap instead*, *firstpost*, <https://www.firstpost.com/living/the-big-snapdeal-screw-up-man-orders-smartphone-gets-bar-of-soap-instead-1779633.html> (Last visited: July 22, 2019).

⁹Nuzhat Parveen Khan and Parveen Khan, 'Online Shopping in India: Issues and Challenges with Special Emphasis on the Consumer Protection Bill, 2015' 3 *JLJ* 9 (2018).

¹⁰Akhileshwar Pathak, '*E-Retailing and the Consumer Protection Bill, 2015: Drawing from the European Union Consumer Directive*' Indian Institute of Management Ahmedabad Working Paper 2015-10-02, <http://vsliir.iima.ac.in:8080/jspui/bitstream/11718/17055/1/WP2015-10-02.pdf> (Last visited June 15, 2019).

¹¹ Gagandeep Kaur, *Jurisprudence of E-Commerce and Consumer Protection in India* 59 (Satyam Law International, 1stedn., 2015).

the contract? What would be the rights of consumers if goods or services are not in accordance to the description? What responsibility seller or service provider must have in protecting consumer's rights with respect to the delivery of goods or services? These questions among the many others are required to be addressed by consumer protection law for the effective protection of consumer in e-commerce.

If the questions of consumer protection do not get addressed with sufficient mechanism, it may lead to many adverse effects, such as, fraud or deception to consumers, unfair competition and marketing practices.¹² Though, the Government of India many a times expressed importance of information technology infrastructure for economic development, however, failed to fully realise the other side of the story of consumers' fright such as, online fraud, delayed delivery, delivery of wrong product or services.¹³

i. Delivery Goods or Services in E-Commerce and the Provisions under the Consumer Protection Act, 1986

In India, the Consumer Protection Act, 1986 administers the relationship between consumers and seller of goods and providers of services. Though, recently the Parliament has enacted the Consumer Protection Act, 2019, however, substantial provisions are borrowed from the Act of 1986. There is absence of specific legislation to regulate online transactions. In case of 'unfair trade practices', 'defects in goods', 'deficiency in services', and 'restrictive trade practice', the liability of seller or services provider arises under the Consumer Protection Act, 1986.¹⁴ A consumer may be protected under the above provisions, if a seller sales fake product, defective product, does any unfair trade practice or restrictive trade practice, or provide any deficiency in services. However, issues with respect to the delivery of goods or providing services, which are peculiar in e-commerce due its unique nature of transaction,

¹² Rajiv Khare and Gargi Rajvanshi, 'E-commerce and Consumer Protection: A Critical Analysis of Legal Regulations' 1 *IJCLP* 57 (2013).

¹³ Nuzhat Parveen Khan and Parveen Khan, 'Online Shopping in India: Issues and Challenges with Special Emphasis on the Consumer Protection Bill, 2015' 3 *JLJ* 4 (2018).

¹⁴ Rama Sharma, Vibha Srivastava, et.al., 'Consumer Protection in the era of E-commerce' 1 *IJR* 1295 (2014).

do not sufficiently fall under the above categories of liabilities of sellers or service providers.

In absence of sufficient provisions as to regulate the delivery of goods or services under the Consumer Protection Act, 1930, the various Consumer Forums established under the Act have dealt with issues with respect to effective delivery of goods or services in e-commerce. In *India Times Shopping v Shivanand Narain*¹⁵, the Chandigarh State Consumer Dispute Redressal Commission had made India Times Shopping, an e-commerce website accountable for delivering a faulty mobile set. Further, in *Amazon Seller Service Ltd v Gopal Krishan*¹⁶, the Chandigarh State Consumer Dispute Redressal Commission had directed the Amazon Seller Service Ltd, an e-commerce portal to refund to the consumer along with compensation for delivering defective mobile handset Xiaomi Redmi Note 3. Moreover, the Andhra Pradesh State Consumer Disputes Redressal Commission in *Shanmukha Sharma v Amit Agarwal*¹⁷ had observed that the delivery of food item after the date of expiry by e-commerce website, amazon.in is not only constitute a delivery of defective goods but also a deficiency in service.

One of the classic cases with respect to the issues of delivery of defective product and consumer' right arising there from has recently been dealt with by the Chhatisgarh State Consumer Dispute Redressal Commission in *Amazon Seller Service Private Limited v Love Kumar Sahoo*.¹⁸ In this case, the complainant had ordered a mobile handset of Micromax Company worth of Rs.9000 from Amazon.in, an e-commerce portal. On receiving the mobile handset, the complainant had observed defects in sensor and battery of the handset. On being informed the same by the complainant, the customer care service of Amazon.in had assured automatic solution to the problem through new updated software. However, problem in the handset still remained even after updating the software. On being informed again, the Amazon.in had assured to replace the battery. Nevertheless, such replacement could solve the battery problem, but problems with sensor remain unresolved. This time, the Amazon.in made a promise to replace the phone. On receiving a replaced phone,

¹⁵ (2010)MANU/SF/0061.

¹⁶ (2017)MANU/SF/0038.

¹⁷ (2017)MANU/SA/0002.

¹⁸ (2018)MANU/SG/0001.

complainant had observed same issues in the replaced phone and communicated the same to Amazon.in, which again replaced the phone for second time. The new phone, though, had dual sim capacity; however, one sim was functioning. Eventually, that phone was again replaced with another new phone for third time, and that too had problems of hanging and switching off while talking. The frustrated complainant requested for refund instead of replacement. However, to his surprise, refund policy of Amazon.in had been shown up to him, which exempts Amazon.in from any refund after 15 days of delivery, and since 15 days had been expired with many replacements, complainant was not refunded with the price. However, to solve the problem, the complainant had contacted the authorised service centre of the Micromax Company, where he had been informed that the phone was sold under a special offer, which disentitles the complainant to get the phone repaired through the service centre. Finally, the complainant had to knock the door of the District Consumer Forum. The Forum had directed the Opposition Parties (OPs) to refund the amount along with interest to the complainant. In appeal, the State Consumer Dispute Redressal Commission has upheld the decisions of the District Forum. Though, the decision of the forum came as a relief for the consumer, however, this case raised many fundamental questions with respect to rights of consumer in e-commerce, such as, do sellers have unfettered liberty in framing 'refund policy' in consumer contract especially in e-commerce? How many replacements of products should be allowed in e-commerce? Should the refund period be counted from the date of delivery or from the date of last replacement? Do the consumers have right to claim compensation for deprivation of product during the period of replacement?

According to Ian Ramsay 'role of consumer protection law should be to regulate market practices and social practices for controlling distressing consequences of probable violation of consumer protection with a view to ensuring adequate consumer protection along with the growth of e-commerce market'¹⁹. To answer the questions posed in e-commerce, consumer law should regulate e-commerce with detailed guidelines.

¹⁹ As quoted in Rajiv Khare and Gargi Rajvanshi, 'E-commerce and Consumer Protection: A Critical Analysis of Legal Regulations' 1 IJCLP 64 (2013).

ii. Consumer Protection with Respect to Delivery under the Sale of Goods Act, 1930

It is pertinent to mention that the Sale of Goods Act, 1930 contains significant provisions with respect to the issues of the delivery of goods and corresponding rights of buyer. With respect to the responsibility of delivery of goods, however, the provision of Act left it to the contract between the parties, which may be express or implied, and in absence of any such contract, seller is responsible to deliver the goods up to 'the place at which they are at the time of sale'.²⁰ Thus, this provision does not protect the consumer in terms of the responsibility to deliver of the goods. Issue pertaining to the damage of the goods during transit has been dealt by the Sale of Goods Act to a limited extent. Section 40 of the Act obligates buyer to shoulder 'any risk of deterioration in the goods necessary incident in the course of transit' even if a seller takes responsibility to deliver 'at his own risk'. Further, as per the provisions of the Act, in case of loss of goods in transit, the liability of seller would be depending on the question whether there has been transfer of property in goods or not?²¹ However, with respect to the time of delivery of goods, the Act dealt with two different situations; first, time of delivery is not stipulated in the contract and second, the time of delivery is stipulated in the contract. With respect to the first situation, the Act provides that in absence of stipulated time as to delivery, seller must deliver goods within reasonable time.²² On the other hand, with respect to the second situation, in absence of any clear provision in the Act, the judicial interpretations²³ compel seller to deliver goods within stipulated time, and

²⁰ The Sale of Goods Act 1930, s 36(1)

²¹ Section 26 of the Sale of Goods Act, 1930 reads as; '26. Risk prima facie passes with property.- unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.'

²² The Sale of Goods Act 1930, s 36(2)

²³ Section 11 of the Sale of Goods Act, 1930 *inter alia* provides 'any stipulation as to time is of essence of the contract or not depends on the terms of the contract'. This provision was interpreted by MacCardie, J in *Hartly v. Hymans* (1920) 3 KB 475, 484 as 'in ordinary commercial contracts for the sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery'. This proposition of MacCardie, J had been supported and reasoned out by Patna High Court in *Orissa Textile Mills v. Ganesh Das* AIR 1961 Pat 107, 109 in the following words; 'the reason is obvious. The mercantile contract is not always an isolated transaction, but a link in a chain of

failure of which entitles buyer to treat the contract as breach. Nonetheless, buyer has the liberty of acquiesce to the delayed delivery. However, in absence of any express provisions in the contract as to the time as essence to the contract, determining such essence is on the court to determine. It is pertinent to mentioned that, in e-commerce, a consumer has to follow the standard automatic procedure for ordering goods or service, where she has little opportunity to negotiate as to the time to be treated as essence to the contract.

Further, the Sale of Goods Act, 1930 recognised the rights of buyer in case of defective or wrong delivery of goods in the form of breach of conditions or warranties, which may be implied or express. Breach of conditions entitles a buyer to terminate a contract; whereas, breach of warranties do not enable buyerto terminate contract and reject goods, however, buyer may claim damages fromthe seller.²⁴ The Act allows buyer to terminate the contract for breach of implied conditions if the delivered goods are not as per the description in the contract,²⁵ are not fit for purpose as agreed by contract or are not of merchantable quality²⁶. The above provisions of the Sale of Goods Act, 1930, though, lay a good source of right of buyer under the Act, however, section 62 of the Act enables seller in e-commerce to exempt himself from the above liabilities under the Act through standard terms of contract.²⁷ Further, the Sale of Goods Act, 1930 has limited applicability up to the sale contract; the provisions for service contract are entirely out its purview.

It has been argued that, in addition to the Consumer Protection Act, 1986, sellers of goods and providers of services are also required to adhere to the provisions under the Indian Contract Act, 1872, and in case of sale contract, the provisions

transactions, so that punctual performance may go to the whole of consideration for the sale’.

²⁴ The Sale of Goods Act, 1930, s 12 (2) & (3).

²⁵ The Sale of Goods Act, 1930, s 15.

²⁶ See The Sale of Goods Act, s 16.

²⁷ Section 62 of the Sale of Goods Act, 1930 reads as ‘62. Exclusion of implied terms and Conditions.- where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both the parties to the contract.’

under the Sale of Goods Act, 1930.²⁸ This argument may be validated with the provision of section 3 of the Consumer Protection Act, 1986, which provides that ‘the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force’. However, contrary arguments are also raised, which argued that, though, the consumer protection law rest on the underpinning of the Indian Contract Act, 1872 and the Sale of Goods Act, 1930, however, consumer protection law failed to express this foundation and changes it brought in these laws. Hence, without expressing this foundation, law would become confusing, conflicting and unclear. Thus, it would be logical as well as rational to organise consumer law in such a manner which clearly declare the rights of consumer.²⁹

iii. Protection under the Consumer Protection Act, 2019

The Parliament of India has recently enacted the Consumer Protection Act, 2019 to replace the Consumer Protection Act, 1986. The genesis of the Consumer Protection Act, 2019 is the Consumer Protection Bill, 2015. The Consumer Protection Act, 2019 introduced a new right of consumer, which enable a consumer to return the goods within 30 days of delivery if any defects in goods or deficiency in services observed by consumer on receiving the goods or services.³⁰ This right of consumer is called right of ‘cooling-off’. This is applicable to both service contract as well as sale contract. It has been criticised that the provision in the present form is only declared right and remain as undernourished. Detailed provisions should be made to make this right efficient

²⁸Sarla Gupta and Beniprasad Agrawal, *Cyber Laws: Law Relating to Information Technology, Hacking, Intellectual Property Rights, Trade Marks, E-Commerce, Computers, Computer Software, Internet and Cyber Crimes etc.* 944-945 (Premier Publishing Co, Allahabad, 2ndedn., 2016).

²⁹Akhileshwar Pathak, ‘The Consumer Protection Bill, 2005: (Lack of) Rights of the Consumer to Terminate Sale Contract’ Indian Institute of Management, Working Paper No. 2015-09-01, <http://vslir.iima.ac.in:8080/jspui/handle/11718/17104>

³⁰ Section 2 (47)(viii) of the Consumer Protection Act, 2019 recognise the following act of seller or service provider as ‘unfair trade practice’, which reads as ‘after selling such goods and rendering of such services, refuses to take back or withdraw the goods or withdraw or discontinue the service and refuses to refund the consideration thereof, if paid, within a period of thirty days after the receipt of goods or availing of services if it is so stipulated and requested by the consumer’

and functional.³¹ Though, the objective of this right of consumer is to permit the consumer to test, feel, touch and use the goods or services, however, in recognising this right, a circumstance may occur, where a seller may raise an objection that the condition of the goods is diminished during 'cooling off' period, and are not in same condition as he delivered to consumer; eventually that may results in refusal by seller to refund price, if any, paid by the consumer. Thus, this situation may raise a legal question as to how much tests, touch, feel and use of goods or services be allowed to consumer? The answer should be, as much as a consumer is permitted in a physical shop.³² In addition, the legal provisions should also be made to answer the further questions, for instance, who should bear the responsibility to communicate the decisions to cancel the contract to the seller? What procedure and mode of such communication should be followed? What will be the legal consequence if a consumer communicates his decision to terminate contract before the 'cooling off' period gets over, but such communication reaches to a seller after the cooling off period gets over? It has been suggested that detailed legal provisions should made to answer the in the following order; firstly, it is the consumer who should bear the responsibility to communicate the decision to cancel the contract; secondly, seller must provide a cancelation form along with delivered goods in a durable form, which may also furnish through electronic means or puts up on website of the seller, however, consumer should have autonomy to use any other mode of communication in durable form; and thirdly, communication should be binding on the seller if the consumer communicates before the 'cooling off' periods gets over; though, it may reaches to the seller after the 'cooling off' period gets over.³³

Further, the applicability of the provision of 'cooling off' period to service contract may create a new problem. In service contract, once a service is consumed, it is irreversible. However, if the service is of continuing nature, a consumer may have a right to cancel a contract. In such a case, price may be charged for the service already received. Thus, it has been suggested that a

³¹Akhileshwar Pathak, 'E-Retailing and the Consumer Protection Bill, 2015: Drawing from the European Union Consumer Directive' Indian Institute of Management Ahmedabad Working Paper 2015-10-02, <http://vslir.iima.ac.in:8080/jspui/bitstream/11718/17055/1/WP2015-10-02.pdf>

³²See *id.*

³³See *id.*

solution in such a case of service contract should be to defer the provision of service till the period of 'cooling off' gets over. However, a consumer should have right request for the service during the cooling off period, and he should still have right to cancel the contract; provided he has to pay for the service consumed. It has been further suggested that the 'cooling off' period in case of service contract should be 14 days instead of 30 days as provided in the EU Directives, and it should start from the date of contract (unlike sale of goods, where cooling off periods start from the date of receiving the goods by consumer).³⁴

Similarly, though, digital contents are classified as 'goods' in the case of '*Tata Consultancy Services v State of Andhra Pradesh*'³⁵ by the Supreme Court of India, however, for the purpose of exercising the right of 'cooling off' with respect to digital contents (if not selling on CD, pen drive, DVD or other similar medium) should not be classified as goods, as it has similar features as service, which once consumed cannot be reversed. Thus, cooling period and rights of consumers which are to be applicable in service contract should also be applicable to digital contents (if not selling of CD, pen drive, DVD or any other similar medium).³⁶

It is further pertinent to mention that with respect to the sale of perishable goods, news magazine, newspaper and other goods of similar nature, the provision of 30 days 'cooling off' period may not be feasible for sellers. Thus, there may be two feasible solutions to the above problems; first, law should either categorise the goods, services and digital contents in three different categories, and different time period should be fixed for each category; second, law should provide compulsory 'cooling off' period for all the categories; however, duration of 'cooling off' period should be left with the parties to decide with the express consent.

³⁴See *id.*

³⁵ AIR 2005 SC 371.

³⁶See *Supra* note 33

III. Delivery Jurisprudence in Consumer Contract in Other Jurisdictions

i. Position in the USA

The Mail, Internet, or Telephone Order Merchandise Rule made by the Federal Trade Commission (FTC) regulates delivery issues in e-commerce in the USA. The Rules inflicted responsibility on traders to disclose clearly and conspicuously delivery date at the time trader solicits consumer. However, in absence of such a disclosure, a trader is bound to make delivery within 30 days of order placed by consumer.³⁷ Further, seller has to communicate a consumer promptly if any change occurred in the delivery date, and also duty bound to take fresh consent from buyer in such extended date of delivery with an option to buyer to cancel the contract.³⁸ In addition, detailed legal framework also laid down in the Rules with respect to the seller's responsibility pertaining to delayed delivery, consumer's rights of cancellation and refund.

ii. Position in the UK

The Consumer Rights Act, 2015 provides comprehensive provisions for proper delivery of the goods, services and digital content to consumer in the UK. Instead of providing similar yardsticks for proper delivery of goods, services and digital content, the Act prescribed diverse requirements or standards separately to make sure proper delivery with respect to goods, services and digital content, which are founded on the different nature of transactions and expectations of the consumer with regard to goods, services and digital contents. The Act cast the responsibility of delivery of goods specifically on seller in the Act.³⁹ In addition, with respect to the time duration for delivery, the Act left it with the parties to decide. However, in absence of any contract with respect to time of delivery, the Act obligates seller to make delivery without undue delay, within utmost time duration of 30 days after placing the order by consumer.⁴⁰ However, under provision of the Act, in absence of any contract, service

³⁷ Mail, Internet or Telephone Order Merchandise Rule, §435.2(a)(1).

³⁸ Mail, Internet or Telephone Order Merchandise Rule, §435.2(a)(2).

³⁹ The Consumer Rights Act 2015, s 28.

⁴⁰ See *id.*

provider has to perform service with a reasonable time, which is a question of fact.⁴¹

iii. Position in Canada

In Canada, though, consumer protection issue is a provincial subject, however, many guideline laid down at federal level for the provinces. The Internet Sales Contract Harmonisation Template provides a maximum of 30 days from the date of the contract for deliver in absence of any contract with respect to delivery between trader and consumer, failure of which by traders entitle consumers to exercise opportunity to cancel the contract.⁴² Similar provisions are also incorporated in the Canadian Code of Practice for Consumer Protection in Electronic Commerce, which provides that if a trader unable to deliver goods or commence service within the time as agreed, or any other material alteration in the goods or services, or in the contract, the trader must inform the same to the consumer in the same method as used to inform the consumer before entering into contract, and must also give a choice to consumer either accept the changed terms or cancel the order.⁴³ The Canadian Code further exempted consumer from any responsibility in cases of late-delivery, wrong delivery, or provides wrong information about delivery and lack of opportunity to the consumer to terminate an inadvertent transaction.⁴⁴

IV. Conclusion

Thus, delivery of goods or services is a critical facet in e-commerce. The entire process of delivery remains within the domain of traders. Further, the date and time of delivery largely remains within the unilateral decision of the e-trader. E-traders may either themselves make delivery or outsource it. Indeed, from the consumer perspective, a proper delivery is the only purpose of ordering goods or services online and making payment.

⁴¹ The Consumer Rights Act 2015, s 52.

⁴² Internet Sales Contract Harmonisation Template, s 5(3).

⁴³ Canadian Code of Practice for Consumer Protection in Electronic Commerce, principle 3.2& 3.3.

⁴⁴ Canadian Code of Practice for Consumer Protection in Electronic Commerce, principle 3.4.

The Consumer Protection Act, 1986 protects consumer in case of delivery of defective goods, deficiency in providing service, unfair and restrictive trade practice. These terms are also highly defined under the Act. In spite of use of liability exemption clause in consumer contract various Consumer Forums have recognised the rights of consumer in delivery of defective products in e-commerce. Apart from the Consumer Protection Act, 1986; the Indian Contract Act, 1872, the Sale of Goods, 1930 may also protect consumer in many aspect with respect the delivery, though the Scope Sale of Goods Act, 1930 is limited to sale contract. The recently enacted Consumer Protection Act, 2019, though, took few steps for recognising right of consumer in the form of cooling off, however, the Act in the present form appears to be inadequate to tackle the issues raised with respect to the delivery in e-commerce.

Thus, the existing Indian legal framework seem to be inadequate and unclear as to many peculiar issues with respect to delivery in e-commerce, such as, clear and conspicuous information regarding the date and time of delivery of goods or services; mode, manner and time of providing such information; maximum time limit for delivering goods or services; obligation to inform consumer in case of delay in delivery and recognition of consumer's rights in such as cases; other rights of consumer in case of late delivery, non-delivery, damage in delivery, lost in delivery of goods or services.

Hence, it is suggested that the legal provision should be enacted to provide for inalienable responsibility of traders in e-commerce to provide clear and conspicuous information in a durable form about the date of delivery before a consumer places an order. Further, depending upon the nature of transaction, maximum time duration with respect to delivery should be fixed by law. A responsibility of delivery and all the risk attached to it should be borne by traders in e-commerce. Use of any exemption clause in the 'user agreement' of consumer contract should be prohibited and declared such term as void. Law should clearly define the term 'proper delivery' of goods and services in retail e-commerce. Legal responsibility should be imposed on traders in e-commerce inform consumer promptly and clearly in a durable form, if any change in delivery date, due to the reason beyond the capacity of trader, and give an option to consumer to cancel the contract without any cost. A clear and comprehensive legal framework should be made to recognise rights of consumer

in case of non-delivery, lost in delivery, late delivery, damage in delivery and delivery of wrong products or fake products or services. The laws in the USA, Canada, and the UK may facilitate in developing Indian legal system with regard to delivery in e-commerce transactions.

Turnkey Construction Contracts in Construction and Infrastructure Projects: An Introductory Overview

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Abstract

Turnkey construction contracts have during recent time acquired considerable popularity in the construction, engineering and infrastructure projects sector all across the world. These contracts contain certain singular features in terms of risk allocation, relationship between the employer-party and the contractor-party, pricing mechanisms and several others. In course of this paper, the author would aim to introduce the concept of fixed price turnkey construction contracts, their various features, the purposes for which they are used, the reasons why these contracts may be preferred over their other counterparts in construction and projects, the various drawbacks of using such contracts, the way around some of those drawbacks and some of the standard form model contracts that are in vogue. The author would also consider the validity of the statement of such contracts being the future of the construction industry and the various approaches that the parties might adopt when it comes to execution of such contracts.

Keywords: *Turnkey contracts, construction, project finance, EPC contracts, risk allocation, employer, contractor*

I. Introduction

The entire concept of a construction contract hinges around having a legal arrangement whereby one of the parties (usually referred to as the contractor) is consenting to assume the responsibility of constructing one or more buildings or facilities for the other party (usually referred to as the employer) in return for consideration (the quantum of which would be decided at the time of formation of the contract) within a certain duration of time (again, decided at the time of the contract formation).² Either of the parties to such a contract may be in a superior bargaining position depending on the specific circumstances surrounding the contract; based on that, said party may seek to leverage its

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²GRAHAM D. VINTER & GARETH PRICE, PROJECT FINANCE: A LEGAL GUIDE, (3rd edition, 2016)

position to negotiate contractual terms and conditions favourable to itself –this practice has over the years led to the formation of a wide variety of standard form construction contracts. The purpose of a standard form contract is to seek to level the playing field to a certain extent between the parties regardless of their respective bargaining positions and thereby encourage said parties to agree to contractual terms that might be perceived as fairer and more balanced than any outcome that might have been produced in the absence of such standard form contracts were the parties to rely upon negotiations entirely. Fixed price turnkey construction contracts (hereinafter referred to as “TCC”), which form the subject matter of discussion of this paper, are considered as an exception created to this practice of using such standard form contracts in the context of construction projects – one of the key features of such turnkey contracts is an apparent transfer onto the contractor of an amount of risk that is greater than the usual practice.³

There exist several definitions of a TCC according to international standards prevailing in the arena of projects and construction; one of them for instance refers to it as *a contract under which the contractor is responsible for both design and construction of a facility,⁴ and is obligated to complete the project according to the prescribed criteria for a price that has been fixed at the signing of the contract.⁵* Mention may further be made in this context of the so-called turnkey responsibility that Wiven Nilsson referred to in course of his deposition before the IBA/SBL Turnkey Contracts for Heavy Plant Sub-Committee, consisting of liability for *inter alia* the technology involved in the process, designing and engineering, procuring and manufacturing the needed machinery and other assorted equipment, arranging for transports to and from the project site, erecting construction, training the personnel involved, coordinating and managing the overall project, catering to civil works for the process plant, and finally, commissioning and starting up the project facility.⁶

³*Ibid.*

⁴MICHAEL E. SCHNEIDER, *TURNKEY CONTRACTS; CONCEPT, LIABILITIES, CLAIMS*, I.C.L.R., Vol 3, 9781859788028, 11, (1986).

⁵CAMPBELL HARVEY, *TURNKEY CONSTRUCTION CONTRACT*, <http://financial-dictionary.thefreedictionary.com/Turnkey+Construction+Contract>, (Last Visited on October 20, 2019).

⁶ Tore Wiven Nilsson, Memorandum to IBA/SBL Heavy Plant Turnkey Subcommittee, March 11, 1987.

In the industry parlance, TCCs are also commonly referred to as the "package deal", "design and build" or "Engineering, Procurement and Construction (EPC)" contract⁷. The exact significance of the term 'turnkey' is that this kind of agreement imposes upon the contractor an obligation to assume liability for the entire design and construction, with the only thing left for the employer to do is to merely turn his key so as to commence operation of the constructed facility at the end of the contractual period.⁸ Thus for the employer, a TCC leads to considerable reduction in terms of the risks involved in the context of the construction, whereas for the company that assumes the responsibility for construction, a TCC would also lead to motivation to operate within the budget parameters allotted at the onset of the contract.⁹

In course of this paper, the author would seek to explore the different features of a TCC, extrapolating upon the components and application of these contracts, the standard forms and governing regulations, the general advantages of selecting a TCC as well as specific reasons that may motivate certain parties, as well as the shortcoming of such contracts and possible ways to mitigate such shortcomings to commercially acceptable levels. The entire examination is premised on an effort to determine the commercial viability of TCC in the context of construction business and project finance.

II. Turnkey Contracts: Features and Usage

While there are several variants of a TCC that are in vogue in the construction sector, most of them broadly feature at least three main aspects, *viz.* the manner in which the facility to be constructed is to be designed by the contractor (this may be delineated in the TCC itself, or separately mentioned in a different preliminary agreement), the different forms of technology and associated intellectual property (hereinafter referred to as "IP") that may be involved in the

⁷In India, EPC contracts have been in vogue for quite some time and have even formed subject matter of judicial scrutiny, for instance in cases like *Linde AG, Linde Engineering Division & Anr v. DDIT, (2014) 365 ITR 1 (Delhi)*.

⁸JOSEPH A. HUSE, UNDERSTANDING AND NEGOTIATING TURNKEY AND EPC CONTRACTS, (3rd edition, 2002).

⁹FARLEX, THE FREE FINANCIAL DICTIONARY, <http://financial-dictionary.thefreedictionary.com/Turnkey+Construction+Contract>(Last visited on October 20, 2019).

entire process (including but not limited to the patents and the design or other forms of know-how that might have to be licensed or acquired by the contractor either from the employer or from third party outsiders), and the specific nature of the obligations assumed by the contractor (these may include the various supplies, construction and erection involved in the project).¹⁰The employer also has certain responsibilities of his own, such as the obligation to pay in time the contractually stipulated price to the contractor, as well as not to cause any hindrance to or delay in the contractor's performance of his own contractual obligations.¹¹The contractor may also request the employer to exhibit evidence of his ability to pay the said price in advance. At the same time, a standard TCC usually mandates the contractor to design, procure, supply, execute, commission, test and complete the entire construction (often collectively referred to as "works") and provide suitable solutions to any defects that might be spotted in course of performance or post-performance for a specified period, as laid down in the contract, with appropriate level of diligence.¹²

While a TCC is ordinarily perceived as a species of design and build contract, yet in the international arena, it may often display an enhanced scope and involve schematic usage of utilization of various forms of IP by the contractor,¹³ especially in the context of projects involving TCC that consist of large-scale civil engineering construction on the one hand and installation of heavy-duty and/or intricate mechanical and electrical implements on the other.

As has been mentioned earlier, there can be more than one variation to a turnkey project wherein the contractor is supposed to be overall liable for the design, supply and execution of the work following the execution of the contract between him and the employer. Two such variations of considerable importance that deserve mention in this context are the Build, Own and Transfer model (hereinafter referred to as "BOT") and the Public-Private-Partnership Initiative or the Private Finance Initiative model (hereinafter referred to as "PFI"). The

¹⁰ Schneider, *supra* note 3.

¹¹ ICC Model Turnkey Contract for Major Projects, 2007, Article 13, <http://store.iccwbo.org/content/uploaded/pdf/ICC-Model-Turnkey-Contract-for-Major-Projects.pdf>, (Last visited on October 22, 2019).

¹² *Ibid.*

¹³ M.P. O'REILLY, CIVIL ENGINEERING AND CONSTRUCTION CONTRACTS, 62 (3rd edition, 1996).

former involves the contractor availing of the right to be responsible for the operation of the completed project for a specified duration following construction, at the end of which the project gets handed over to the original employer. The latter is a rather popular model used by the State or by individual government departments to procure necessary finance for a certain public project from private players, in a manner that will not necessitate the project expenditure to be reflected in the government balance sheets as debt incurred by the State.

When it comes to projects having global or cross-border dimensions, especially construction and infrastructure projects, the popularity of TCC has witnessed exponential growth over the recent years, with the State often preparing to retain overall project ownership and eventual control, but at the same time is not averse to hand over responsibility for construct and management to the private sector. Sectors such as public buildings, hospitals, stadia, municipal facilities including water and sewage etc. serve as prominent illustrations of this trend.¹⁴ In such projects, while the State may often put up the bulk of the finance, it is still the private contractor who would normally have the overall charge for the design, construction and management of the project for a specified duration (may be either short-term or long-term).¹⁵ The ownership of the project would usually remain with the State and the contractor would still be mandated to adhere to publicly prescribed performance standards and objectives. There are several highly reputed global institutions engaged in infrastructure development including the World Bank, the European Bank for Reconstruction and Development (hereinafter referred to as “EBRD”) and the like, which have displayed preference for TCC owing to the way that such contracts can be used to bring down the level of the risk that such institutions expose themselves to. Even under circumstances where the State is fully equipped to provide the necessary finance for a project, TCC may provide an attractive opportunity from the point of affixation of liability owing to its single-point treatment of said liability, as well as from the point of having a set of staff trained under similar parameters and as a functional team.¹⁶

¹⁴*Ibid.*

¹⁵STEFANO GATTI, PROJECT FINANCE IN THEORY AND PRACTICE, DESIGNING, STRUCTURING, AND FINANCING PRIVATE AND PUBLIC PROJECTS, 47 (2nd edition, 2012).

¹⁶O'REILLY, *supra* note 12, at 70.

III. TCC: Regulatory Environment

Most of the EPC projects all over the world, especially those having international dimensions, make use certain boilerplate clauses and features when it comes to TCC. One of the common sources utilised for this purpose is the so-called Orange Book and the Silver Book Contract published by the Federation Internationale des Ingenieurs-Conseils (hereinafter referred to as “FIDIC”); highly regarded among the international community of legal experts in the construction and project finance sectors (including those in Australia, England, Brazil, Canada, India and UAE), these documents are meant to form the basis for inter-party arrangements in the context of TCC and have also been adopted by several global associations of consulting engineers.¹⁷ Some of the key features of the Silver Book model discusses clauses such as the employer’s obligation to provide access to project site, to help the contractor procure the necessary permits and licenses, payment of contract price in time and furnishing adequate evidence of payment capacity, as well as the contractor’s mandate to obtain said licenses, frame designs, provide the employer with adequate guidelines for operations and maintenance, provide security bonds as performance warranty, ensure turnkey performance, furnish solutions to defects in the facility as per the contract, assume risks for even unforeseen difficulties for an agreed upon price, damages in the event of delay or reduction in contract price for performance failure, the procedure of possession of facility and operational control by the employer, trigger events for employer’s intervention, price modification, change in laws, indemnity obligations, right of suspension or termination of the contract, risk allocation, limitation on liability, force majeure events and finally, dispute settlement as per ICC Arbitration Rules etc.¹⁸

There are other sources that are also commonly acceptable, such as the model agreements adopted by industry bodies comprising engineering conglomerates

¹⁷ PRACTICAL LAW, ARE FIDIC CONTRACTS USED COMMONLY IN YOUR JURISDICTION FOR INTERNATIONAL PROJECTS? [https://uk.practicallaw.thomsonreuters.com/1-519-0075?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/1-519-0075?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (Last modified on January 1, 2016).

¹⁸ PIERRICK LE GOFF, NEW STANDARD FOR INTERNATIONAL TURNKEY CONTRACTS: THE FIDIC SILVER BOOK, <http://fidic.org/sites/default/files/New%20Standard%20for%20International%20Turnkey%20Contracts.pdf> (Visited on October 28, 2019).

and players in the construction industry, such as the Engineering Advancement Association of Japan (hereinafter referred to as “ENAA”) and the European International Contractors (hereinafter referred to as “ECC”).¹⁹One of the most renowned model templates provided in this context is that provided by the International Chamber of Commerce (hereinafter referred to as “ICC”) in 2007, also known as the ICC Model for Major Turnkey Projects; this has over the past decade come to be established as a balanced template safeguarding the myriad interests of the various parties involved in a TCC and seeking to cater to minimise uncertainty in contractual matters such as pricing and scope of performance, to provide mechanisms for expedited and efficient resolution of disputes to the satisfaction of the parties involved, and also to allocate the different categories of risk among the parties in an informed and holistic fashion, all the while reducing the need to depend upon the domestic legislations involved to the greatest extent possible.²⁰Having said that, it is quite possible for the parties to a TCC to allow the domestic legislations of the applicable jurisdiction to be the *lex loci* for the TCC, a practice that may even make room for adoption and interpretation of locally prevalent contractual norms and customary practices as applicable.

IV. Why Choose a TCC?

There are several significant advantages that the parties to a TCC may avail of, provided that the contract and the terms and conditions related thereto have been designed, drafted and executed according to acceptable standards in vogue. Some of these have been discussed in brief in the following part of this paper.

First, the employer is armed with the knowledge of the entire project-related liability (at least in the construction phase and perhaps also in the initial operational phase) being focused on a single source, represented by the contractor. Therefore, in the event of any inadequacy in performance, the employer is usually protected against such liability and the contractor be made

¹⁹O’REILLY, *supra* note 12, at 70.

²⁰JOHN DEWAR, INTERNATIONAL PROJECT FINANCE: LAW & PRACTICE (JOHN DEWAR, 2nd edition, 2015).

to assume all responsibilities related thereto.²¹In other words, the contractor has the contractual obligation under a TCC to deliver the plant (or whatever other form the project may take) to the employer in such a manner that the said plant is capable of fulfilling all the technical functions that it is supposed to according to the terms of the contract. Once he does that, he retains no further liability unless otherwise specified in the TCC (some contracts may require the contractor to provide additional warranties for the proper functioning of the facilities for specified periods after the employer has been handed over the possession thereof).

Secondly, one ought to consider the various results stemming from the aforementioned structure of relationship. Performance criteria should play a significant role in TCC, as should the stipulated standard of performance that the contractor is supposed to live up to.²²The latter should adhere to the criteria specified in the contractual clauses to the extent reasonably possible given the circumstances and by corollary, the facilities being constructed should also be able to exhibit the necessary level of functional capacity (by way of production etc.) as needed for the employer to break even at the very least and preferably show a profit.

The contractor may end up assuming the risk for both construction and design of the project in an EPC contract and hence may incur any liability only on the basis of how far his work might have deviated from the contractually stipulated performance and quality tests. In case the employer provides specific sets of instruction, then the contractor may take that as defence provided he has adhered to such instructions; however, too detailed instructions might actually lead to the risk being once again reverting to the employer and hence would usually be avoided by the latter. Under Common Law standards, the contractor's liability will be strict in case he fails to deliver a facility that is fit for the purpose for which it has been constructed.²³However, an EPC contract can prescribe even higher standards, to the extent that the contractor may be required to go beyond mere professional duty of care insofar as determination of

²¹UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, FEATURES AND ISSUES IN TURNKEY CONTRACTS IN DEVELOPING COUNTRIES: A TECHNICAL PAPER, <http://unctc.unctad.org/data/e83iia13a.pdf>, (Lat visited on October 28, 2019).

²²DEWAR (ed.), *supra* note 19.

²³*IBA v. EMI and BICC*, 14 B.L.R.1. (1980).

the aforesaid fitness is concerned; what this means is that for any manner of design fault or inadequacy, the contractor is most likely to incur liability.

Time-bound efficiency in the context of construction is usually expected from a contractor in relation to a TCC more commonly than his other counterparts, chiefly because he is the sole decision-maker when it comes to both design and construction and hence can make more expedited calls to synchronise and harmonise both sets of activities. As a result, the employer is not having to award two separate contracts for design and construction (latter cannot usually happen before performance of the former is completed in such cases), which saves considerable time and resources in the context of public procurement and an authority that may have to cater to political factors including wielding power for only a limited period owing to regular elections. Such an advantage may often compensate for the relative loss in control that the employer is subjected to when it comes to design or construction. This entire process of 'fast-tracking' is a distinct advantage of the TCC model.²⁴ Further, the same party taking responsibility for both design and construction means that any potential flaw in design is more likely to be discovered in the early stage of construction and hence relatively easier to get rectified for an overall lesser cost; consequentially, the risks associated with such flaws and by corollary the risks arising from the relationship between the employer and the contractor may also be better managed.²⁵

Another main reason behind the growing popularity of the TCC model is the aspect of finance for the project or to be more precise, the preference of global financing organisations such as the EBRD for lump-sum TCC projects for the purpose of building and maintaining infrastructure. Such preference together with the single-point liability system makes it easier for the employer to manage project completion risk and reduces the uncertainty associated with the financial exposure that the employer is subjected to when it comes to arranging for finance for the project concerned.²⁶

²⁴TONY GIBBS, *AN ASSESSMENT OF TURNKEY CONTRACTS FOR THE REALISATION OF CAPITAL WORKS PROJECT*, The Pan American Health Organization, The United States Agency for International Development, November 2008.

²⁵GATTI, *supra* note 14.

²⁶VINTER, *supra* note 1.

Yet another advantage of the TCC model comes into prominence when the contractor assumes the responsibility for initial operation apart from the construction. Under such circumstances, whatever initial problems that a newly operational facility usually faces are also taken care of by the contractor and by the time that the employer is handed over the project, most of those problems are either taken care of, or at the very least the employer inherits a staff well-trained to manage and deal with such problems on a daily basis.²⁷

Last but not the least, another oft-seen benefit that stems from a TCC model project is a fillip that it may give to innovation and creative solution-oriented approach to problems, with the combined entities of designer and builder (manifested as the contractor) being able to tackle design issues with the added benefit of sound and practical construction knowledge.²⁸

Apart from the aforementioned benefits that may result from an ordinary TCC, there are several other potential advantages that are not being discussed at present which may also bring added impetus to the increasing popularity of this model, such as the relative comfort that the employer may find in entrusting the designing and construction to a capable and experienced contractor especially when the employer's own in-house experts might be lacking in necessary capability or experience when it comes to a particular category of project.

V. TCC: Shortcomings

It is not as if the TCC model and the projects relying on the same are immune from problems and shortcomings of their own. Depending on the party objectives and other associated circumstances, there may arise factors that may dissuade opting for such a model in relation to a construction or infrastructure project.

Ordinarily, an engineer plays a pivotal supervisory role in the designing and construction phase in a project; yet, in a TCC, the engineer can at best hope to function as the representative of the employer with little to no oversight or veto

²⁷UNCTC, *supra* note 20.

²⁸OVERTON A. CURRIE, TURNKEY GOVERNMENT CONTRACTS—WHO'S WHO AND WHAT'S WHAT, 8(1) (The Forum of American Bar Association. Section of Insurance, Negligence and Compensation Law, 125 1972).

power during such phases, depending on the contractual clauses. Unlike other forms of contracts, the employer gets to intervene in such cases rarely if at all and may even choose to do away with the engineer's role, to the effect of insulating himself from a thorough understanding of the technical issues involved, which may in turn adversely affect his decision-making powers and the suitability of timing in exercise of such powers.²⁹ This may lead to the contractor seeking to compromise with the quality of the design in a manner that is not apparent at least during the construction phase but would still lead to lowering of costs on the contractor's part. In the absence of regular and effective oversight, by the time the employer might end up realising this, the liability period binding the contractor might already have come to an end, thus leaving the employer with little or no recourse.³⁰ There are, however, ways to address this problem, including the employer retaining at least regular supervisory power throughout even the construction phase (exercised through his engineer representative), with certain specified events acting as triggers for intervention.

If the project's nature demands a subsequent design modification, then the employer may end up incurring additional maintenance costs eventually and his profit expectations may get adversely affected in the long run, chiefly because the contractor would only be contractually bound to adhere to the original specifications as stipulated under the contract for the price agreed upon originally. A possible way out of this is to always require the contractor in a TCC to operate the facility for a certain period after the completion of construction and make him recover a part of the consideration payable to him from the project revenue obtained therefrom. That way, the contractor would have an additional incentive to smoothen any possible design defect and produce a functional facility capable of generating revenue and potential profit for the lowest level of maintenance possible.³¹

Since the contractor assumes all the design risks in a TCC model, it stands to reason that before bidding for any tender that may lead to finalisation of such a contract, he would like his design solutions to undergo at least preliminary level tests on various fronts – this in turn is bound to drive up the expenses incurred in

²⁹GIBBS, *supra* note 23.

³⁰*Ibid.*

³¹M.L. McALPINE, *CONSTRUCTION LAW: WILL DESIGN-BUILD CONTRACTING REALLY SOLVE ALL OF THE PROBLEMS?* 76 MIBarJnl. 522(1997).

the bid-submission phase.³²To counter this problem, suggestions have been made by expert financiers including international organisations such as the World Bank to restrict number of bids to a ceiling of six at the most, with technical ability and price competitiveness being considered as primary criteria for selection.³³ Further, the employer can always incentivise bidders by compensating them in case of competitive and well-prepared bids, which will of course act as an additional motivation for the parties intending to submit serious bids for the tender. The employer may also end up incurring significant costs for design verification; such resource expenditure coupled with the bidder-contractor's tendency to under-design at least at the tendering stage may end up making the TCC quite expensive at the awarding and formation stages. So that the employer does not succumb to the temptation to accept the bid based only on its attractive pricing package, further suggestions have been made to segregate the bidding process into two halves, with technical proposals being submitted and shortlisted in the first half and the pricing factor being introduced only in the second half after the bids have cleared the technical hurdle. According to this approach, the entire bidding process may thus consist of stages such as pre-feasibility, feasibility, bidding, evaluation of bids and award of contract, and negotiation.³⁴

Even more importantly, the contractor is not simply going to accept additional risks that the employer may wish to pass on to him as per the standard TCC objective; depending on his bargaining power, he may demand a higher price in exchange for such higher risk assumption. It will then depend on the prevailing competition level among the bidders (potential contractors) as to how much additional cost the employer may end up having to pay for not having to assume its own due share of risks; this in turn represents a risk on the part of the employer.³⁵ Further, if different parts of a project are subjected to different TCC, then the additional costs would also be further compounded. Given that the cost negotiations usually take place about the entire technological package bundle, it may be well-nigh impossible to estimate additional increase from the marked-up

³²HUSE, *supra* note 7.

³³G. WESTRING, *TURNKEY HEAVY PANT CONTRACTS FROM THE OWNER'S POINT OF VIEW* (1990) as seen in Huse, *supra* note 7 at 24.

³⁴*Ibid.*

³⁵JEFFREY DELMON, *PRIVATE SECTOR INVESTMENT IN INFRASTRUCTURE: PROJECT FINANCE, PPP PROJECTS AND RISK* (3rd edition, 2015).

costs at specific stages. The overall increase may well turn out to be sufficient to offset any financial advantage that may arise from opting for a TCC model in the first place and that is something the parties should keep in mind at the start of choosing this contract over its other counterparts.³⁶ Both the fixed cost (or the lump-sum approach) and the variable cost models may be susceptible to such pricing risks, albeit to varying degrees.³⁷ There may arise additional problems depending on the domestic legal regime of the concerned jurisdiction of the project, such as the Construction Contracts Act, 2013 of Ireland, which provides vide Sections 2 and 3 for a possibility of a conflict whereby the employer may insist that a contractor is not entitled to any payment until the construction phase is complete, whereas the latter may insist on partial payments in course of multiple points during the said phase.³⁸

Therefore, the author may be allowed to opine at this juncture that while the TCC model has its own benefits and shortcomings, there are certain factors on which it would depend which category might outweigh the other in a certain context – of such factors, the nature of a certain project, the surrounding circumstances, the relative bargaining power of the parties involved and the economics (mostly demand-supply conditions) of the markets for employers and contractors are some deserve a mention; it is on the basis of the strength of such factors that the pricing and commercial viability of a TCC ought to be determined and perhaps even pricing adjustment clauses may be used as and when appropriate to mitigate any adverse impact of such factors³⁹.

V. Conclusion

It is a reality of today that the TCC model is here to stay in the construction and infrastructure sectors, whether in their original form or in the modified versions

³⁶UNCTC, *supra* note 19.

³⁷MARK FRILET, *PRICE AND TERMS OF PAYMENT IN LARGE INTERNATIONAL TURNKEY CONTRACTS*, 18 *Int'l Bus. Law.* 362 (1990).

³⁸HUGH CUMMINS, *THE CONSTRUCTION CONTRACTS ACT 2013 - IMPLICATIONS FOR TURNKEY CONTRACTS AND ENERGY PERFORMANCE CONTRACTS*, <https://www.philiplee.ie/the-construction-contracts-act-2013-implications-for-turnkey-contracts-and-energy-performance-contracts/> (Visited on October 30, 2019)

³⁹FRILET, *supra* note 33.

involving aspects of BOT and/or PFI. The stability and certainty that it brings to the employer in the form of single-point liability for design, supply and construction remain quite unparalleled. Further, it also allows a relatively inexperienced employer to entrust the technical aspects of a project to qualified professionals and this advantage assumes further significance if the project involves cutting-edge technology. Having said that, as has been discussed above, TCC model is not without its weaknesses, including risks associated with bidding expenses, cost overruns, under-designing etc. In a standard TCC, the risks assumed by the contractor is definitely the most of all the parties, which is why the contractors need to adopt an approach that has successfully married efficiency, commercial viability and technical prowess when it comes to managing, executing and controlling the project⁴⁰. Incidentally, studies have revealed that the involvement of the owner/employer in the execution of the project bears a direct correlation with the eventual success of the project.⁴¹ This can of course be contractually provided for specifically, with the employer conducting regular audits of contractor's performance and the contractor complying with instructions arising from analysis of such audit reports and providing additional guarantees in case of deviation from such instructions.⁴² Finally, one may also mention a particular method of managing the project that has witnessed success in the TCC model context; popularly referred to as the "open-book" approach, it requires the contractor to publish and disseminate its policies and execution procedures when it comes to various aspects of handling the project through all its phases such as planning, scheduling, design management, risk allocation and mitigation, responses to change in control, and managing various claims arising in course of the project –this in turn facilitates transparency and contributes to overall project efficiency, with the employer, the contractor and other people involved in the decision-making process putting in commensurate efforts in harmony, complementing each others' roles in the process and striving to turn the project into a successful one.

⁴⁰For detailed discussion on the TCC Model in the Indian judicial context, one may refer to cases such as *Delhi Jal Board vs M/S Kaveri Infrastructure Pvt. Ltd.*, Delhi High Court, O.M.P. No.358/2007, November 29, 2013.

⁴¹THE SEARCH FOR THE PERFECT ARRANGEMENT: IS TURNKEY THE BEST, <http://www.consilium404.com/pdfs/ContractArrangement.pdf>, (Last visited on October 20, 2019).

⁴²*Ibid.*

Accreditation of Centres of Legal Education in India

Rhea Roy Mammen¹

Abstract

In India, higher education has witnessed considerable development since Independence with a remarkable growth in the number of Higher Education institutions (HEIs). Overall oversight of these HEIs is under the purview of the University Grants Commission (UGC) with support being provided by Statutory bodies as relevant to the different courses under consideration. In particular, the Bar Council of India (BCI) serves to offer regulatory insight for legal education in the country. Accreditation of HEIs was introduced in India in recognition of the significance of the quality of higher education relating to the achievement of the objectives of higher education. This article therefore attempts to scrutinise the current process of accreditation of HEIs in India under the auspices of the NAAC (National Assessment and Accreditation Council) with particular emphasis on centres of legal education. In this regard, the article scrutinises the regulatory authorities and quality reforms for higher education, and the relevance of accreditation and NAAC. Accreditation of centres of legal education as per the NAAC guidelines is also scrutinised along with the guidelines for accreditation specified by the BCI. In the light of these, the article provides recommendations to enhance the future accreditation of centres of legal education in India.

Key words: *Centres of Legal Education, Higher Education Institutes, Future Accreditation*

I. Introduction

This article seeks to examine the accreditation of Higher Education Institutes (HEI) in India, in general, and for Centres of Legal Education, in particular. By doing so, this paper seeks to provide insights regarding how accreditation is presently accomplished in India and the different modes of assessment.

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Moreover, the paper seeks to highlight how accreditation has affected centres of legal education in particular.

Accreditation of educational institutions has been in existence for more than a century in the United States.² However, its implementation in India is of more recent origin and hence is in the nascent stages. Although it is the endeavour of the government to ensure that all students, regardless of specialisation, receive the best higher education, the efficacy of the implementation of accreditation across domains is perhaps a different matter altogether. Consequently, the focus of this paper is to scrutinise the status of accreditation for centres of legal education in India with the objective of highlighting the shortcomings of the present accreditation process in this specific regard.

The paper is organised in the following manner. First, the present structure of higher education in India is introduced including legal education. This will be followed by a scrutiny of the regulatory authorities for higher education in India with particular emphasis on the regulatory authority for legal education. The third section will discuss quality reforms for higher education in India whereas the fourth section will scrutinise the relevance of Accreditation and the National Assessment and Accreditation Council (NAAC). In this regard, the parameters and process of accreditation will be scrutinised. This will be followed by an examination of the accreditation of centres of legal education, colleges accredited by NAAC, and NAAC criteria and the role of BCI. Finally, recommendations on key indicators that must be considered for accreditation of centres of legal education are provided.

II. Higher Education in India

The higher education system in India is one of the globe's largest.³ The fundamental infrastructure of this system, both from the perspective of policy and organising, falls under the purview of the Department of Higher Education

²UNESCO, *Accreditation and the global higher education market* (2008). <https://unesdoc.unesco.org/ark:/48223/pf0000163514> (last visited on April 1, 2020).

³UNIVERSITY GRANTS COMMISSION, *HIGHER EDUCATION IN INDIA ISSUES, CONCERNS AND NEW DIRECTIONS RECOMMENDATIONS OF UGC GOLDEN JUBILEE SEMINARS – 2003* (2003). <https://www.ugc.ac.in/oldpdf/pub/he/heindia.pdf> (last visited on March 28, 2020).

of the Ministry of Human Resources Development (MHRD).⁴ The Department is responsible for expanding access to Higher Education together with qualitative enhancement by means of superlative Universities, Colleges, and other Institutions. In keeping with its Vision to “realize India's human resource potential to its fullest in the Higher Education sector, with equity and inclusion”,⁵ the Department includes promotion of the “quality of Higher Education” in its Mission. This it endeavours to achieve by “investing in infrastructure and faculty, promoting academic reforms, improving governance and institutional restructuring toward the inclusion of the hitherto deprived communities”.⁶ Accordingly, a couple of the Functions of the Department are to “improve quality and to promote academic reforms” and “Setting up of new educational institutions and also capacity expansion and improvement of the existing institutions”.⁷

Since Independence, the Indian Higher Education sector has seen the count of Universities/Institutions at University level and Colleges increase tremendously. According to the MHRD website, Universities have increased in number by almost 34 times between 1950 (20 Universities) and 2014 (677 Universities). Of these, 45 are Central Universities (the MHRD is responsible for 40 of these), 318 are State Universities, 185 are State Private Universities, 129 are Deemed to be Universities, 51 are Institutions of National Importance under MHRD (IITs, IISERs, and NITs set up under Acts of Parliament), and four are Institutions set up under different State bills.⁸ The responsibility for Higher Education is shared by both the Centre and the various States in India. Standards in Universities and Colleges are managed and regulated by the University Grants Commission (UGC) and other statutory regulatory bodies. The definitions of the different categories of Higher Education are summarised in Table 1.

⁴ MHRD, *About Department of Higher Education* (2016), <https://mhrd.gov.in/overview> (Last visited on March 28, 2020).

⁵ *Ibid.*

⁶ MHRD, *OVERVIEW* (2016), <https://mhrd.gov.in/university-and-higher-education> (Last visited on March 28, 2020).

⁷ *Ibid.*

⁸ *Ibid.* IIT-Indian Institute of Technology, NIT – National Institute of Technology, IISER - Indian Institute of Science Education and Research

Table 1: Definitions of Higher Education Categories⁹

Category	Definition
University	“a University established or incorporated by or under a Central Act, a Provincial Act or a State Act and includes any such institution as may, in consultation with the University concerned, be recognised by the University Grants Commission (UGC) in accordance with the regulations made in this regard under the UGC Act, 1956.”
Central University	“A university established or incorporated by a Central Act.”
State University	“A university established or incorporated by a Provincial Act or by a State Act.”
Private University	“A university established through a State/Central Act by a sponsoring body viz. A Society registered under the Societies Registration Act 1860, or any other corresponding law for the time being in force in a State or a Public Trust or a Company registered under Section 25 of the Companies Act, 1956.”
Deemed-to-be University	“An Institution Deemed to be University, commonly known as Deemed University, refers to a high-performing institution, which has been so declared by Central Government under Section 3 of the University Grants Commission (UGC) Act, 1956.”
Institution of National Importance	“An Institution established by Act of Parliament and declared as Institution of National Importance.”
Institution under State	“An Institution established or incorporated by a

⁹*ibid.*

Category	Definition
Legislature Act	State Legislature Act.”

Source: MHRD¹⁰

Higher education in India is delivered through different types of colleges: “(i) University/ Constituent College - A college maintained by the university (ii) Affiliated College.”¹¹ A further category of Higher Education is autonomous colleges. These colleges are permitted to “determine and prescribe their own courses of study and syllabi, and restructure and redesign the courses to suit local needs, make it skill oriented and in consonance with the job requirements”. Moreover, autonomous colleges may “prescribe their own admission rules; evolve methods of assessment, conduct of examinations and notification of result; promote research in relevant fields” and so on.¹² Degrees are awarded by the different universities. In the case of colleges, the universities to which they are affiliated award the degrees.¹³ It must be noted that the regulations and rules of the university, college, and course, affect the instruction provided at the classroom level.¹⁴

Legal Education in India

Presently, legal education of India is offered in two modes: a three-year course, which is a postgraduate degree following a bachelor’s qualification, and a five-year integrated law course, which follows immediately after higher secondary education.¹⁵ Legal education in India has witnessed various transitions starting from a two-year course, in the initial phases of formal legal education in

¹⁰ *Ibid.*

¹¹ OPEN GOVERNMENT DATA (OGD), DIFFERENT TYPES OF COLLEGES (2012-2015) <https://data.gov.in/keywords/affiliated-college> (last visited on March 30, 2020).

¹² UGC, INVITING ONLINE APPLICATION FROM ELIGIBLE COLLEGES FOR AUTONOMOUS STATUS (2019), <https://www.ugc.ac.in/pdfnews/8774268> Inviting-online-application-from-eligible-colleges-for-autonomous-status.pdf (last visited on March 30, 2020).

¹³ CENTRE FOR CIVIL SOCIETY, REGULATORY STRUCTURE OF HIGHER EDUCATION IN INDIA (2015). <https://ccs.in/sites/default/files/research/research-regulatory-structure-of-higher-education-in-india.pdf> (Last visited on March 31, 2020).

¹⁴ *Ibid.*

¹⁵ BCI, RULES OF LEGAL EDUCATION, 2008 (2008). <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartIV.pdf> (Last visited on March 30, 2020).

India,¹⁶ to the present five-year programme. Although close to 1500 colleges offer legal education in the country,¹⁷ criticisms have been raised with regard to the quality of legal education. For example, it has been argued principally that the courses do not equip students for the legal profession. Moreover, fundamental lawyering skills are absent after completion of the course. Additionally, legal education in India has also encountered the criticism that it has been unsuccessful in equipping law students and further has desensitised them through education.¹⁸ The standards of teaching and the extent of discipline have also received severe criticism.¹⁹

III. Regulatory Authorities for Higher Education in India

Overall oversight for higher education in India is the responsibility of the University Grants Commission (UGC). This body was set up due to the passing of the University Grants Commission Act 1956.²⁰ This Act was itself the outcome of entry 66 of List 1 of the Seventh Schedule of the Constitution of India, that is, “Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions”.²¹

¹⁶Report of 14th Law commission of India on Reform of Judicial administration, Chapter 25 <http://lawcommissionofindia.nic.in/1-50/Report14Vol1.pdf> (last visited on March 30, 2020).

¹⁷ C. RAJ KUMAR & A. P. MISHRA, *REFORM LEGAL EDUCATION* (2019). <https://www.deccanherald.com/opinion/main-article/reform-legal-education-712906.html> (Last visited on March 30, 2020).

¹⁸ JENNIFER S. BARD, *PRACTICING MEDICINE AND STUDYING LAW: HOW MEDICAL SCHOOLS, USED TO HAVE THE SAME PROBLEM WE DO AND WHAT WE CAN LEARN FROM THEIR EFFORTS*, S.J.S.J. 136-209, (2011), <http://ssrn.com/abstract=1894498> (last visited on March 30th, 2020).

¹⁹Law Commission of India 184th Report on The Legal Education & Professional Training and Proposals for Amendments to the Advocates Act, 1961 and the University Grants Commission Act, 1956, p. 52. Available at <http://lawcommissionofindia.nic.in/reports/184threport-PartI.pdf> (last visited on January 27, 2020).

²⁰THE UNIVERSITY GRANTS COMMISSION ACT, 1956. <http://theindianlawyer.in/statutesnbareacts/acts/u11.html> (last visited on March 17, 2020).

²¹SEVENTH SCHEDULE OF THE CONSTITUTION OF INDIA, 319, <https://www.mea.gov.in/Images/pdf1/S7.pdf> (last visited on March 17, 2020).

It is stated in the Act's Preamble that it is "An Act to make provision for the co-ordination and determination of standards in Universities and for that purpose, to establish a University Grants Commission".²²

The Powers and Functions of the UGC are listed out in Chapter III, Section 12.²³ Specifically,

"It shall be the general duty of the Commission to take, in consultation with the Universities or other bodies concerned, all such steps as it may think fit for the promotion and co-ordination of University education and for the determination and maintenance of standards of teaching, examination and research in Universities"

In other words, it is the responsibility of the UGC to take necessary steps to determine and maintain the "standards" of higher education in India.

i. Regulatory authority for legal education in India

In India, entry into the legal profession is currently distinguished by the single window system.²⁴ Therefore, a person having a professional law degree is regarded as an advocate without needing to meet any requirements mandated by the Bar Council of India (BCI), the professional body for lawyers in India. With regard to legal education in India, statutory powers are endowed to four statutory bodies, namely the BCI, University Grants Commission (UGC), the State Government, and the University providing the legal education.

Bar Council of India (BCI)

The establishment of BCI was the outcome of the specifications of the Advocates Act, 1961. The responsibilities of the BCI encompass different official tasks such as, determining of standards for professional conduct and etiquette of lawyers. Moreover, it exerts "disciplinary jurisdiction over the

²²*The University Grants Commission Act, 1956.*
https://www.ugc.ac.in/oldpdf/ugc_act.pdf (last visited on March 28, 2020).

²³*Ibid.*

²⁴ Before the passing of the Advocates Act 1961, a person had to pass an examination conducted by the professional body for practicing as a lawyer. This practice is followed by many countries even today

bar”.²⁵ Further, standards for legal education are set by the BCI and it bestows recognition to institutes of higher education which award degrees in law that serve as prerequisite for registration as a lawyer.²⁶ The BCI comprises different committees such as, Disciplinary Committee, Legal Aid Committee, Executive Committee, Enrolment Committee, and Legal Education Committee. Other committees may also be established to scrutinise specific issues which may periodically arise.²⁷

The responsibilities of the State Bar Councils include entry of advocates into the roll, deliberation and confirmation of occurrences of misbehaviour among the admitted advocates, and upholding their entitlements and welfare.²⁸ On the other hand, appellate jurisprudence is implemented by the BCI.

The BCI’s functions with regard to legal education as per the Advocates Act, 1961, are as follows:²⁹

“(b) to lay down standards of professional conduct and etiquette for advocates;”

“(h) to promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education and the State Bar Councils;

(i) to recognise Universities whose degree in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect Universities 3[or cause the State Bar Councils to visit and inspect Universities in accordance with such directions as it may give in this behalf];”

Part-IV of the BCI Rules of Legal Education, 2008, sets down rules regarding the “standards of legal education” and “recognition of degrees in law for the purpose of enrolment as advocate and inspection of Universities for recognizing

²⁵ Bar Council of India, *About the Council* (2020) available at: <http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/> (last visited on March 28, 2020).

²⁶*Ibid.*

²⁷*Ibid.*

²⁸ADVOCATES ACT, 1961 (SECTION 6), <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/Advocates-Act1961.pdf> (last visited on March 17, 2020)

²⁹*Ibid.*, Section 7.

its degree in law”.³⁰The Rules also lay down the requirements for affiliation/recognition of institutions teaching law (centres of legal education/universities).³¹

The more recent Draft Rules of Legal Education – 2019 pertain to the establishing and maintaining of legal education standards and inspection of Universities.³²Chapter IV of these Rules pertain to Accreditation. In particular, the system and process of accreditation are described in S29 to S34. As per these proposed Rules, the accreditation of centres of legal education is to be performed by a Legal Education Accreditation Board (LEAB)³³. This is an autonomous body which will report directly to the Legal Education Committee of the BCI and is composed of members from the highest levels of the judiciary and academia, along with other members. However, the Rules are silent about the criteria for accreditation.

University Grants Commission

The University Grants commission (UGC) also has certain statutory powers with regard to the coordination of standards of legal education.³⁴As mentioned previously, the UGC is empowered to take all necessary measures to support and organise university education, and to define and preserve standards for instruction, assessment, and research in universities. Moreover, under Section 12(3), the UGC may propose the measures required to improve education in any university and further provide guidance to the university with regard to the actions to be performed to implement these measures.³⁵Fees charged by law

³⁰ BCI, RULES OF LEGAL EDUCATION, 2008 (2008). <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartIV.pdf> (last visited on March 30, 2020).

³¹*Ibid* at 37.

³² BCI, PART – IV RULES OF LEGAL EDUCATION – 2019. <http://www.barcouncilofindia.org/wp-content/uploads/2019/11/Draft-Rules-of-Legal-Education-2019.pdf>(last visited on January 29, 2020).

³³*Ibid* Section.30.

³⁴ K. C. JENA, *ROLE OF BAR COUNCILS AND UNIVERSITIES FOR PROMOTING LEGAL EDUCATION IN INDIA*, 44, I.J.L.J, Vol. 4 pp. 555-568. Available at: [http://14.139.60.114:8080/jspui/bitstream/123456789/12561/1/028_Role%20of%20Bar%20Councils%20and%20Universities%20for%20Promoting%20Legal%20Education%20in%20India%20\(555-568\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/12561/1/028_Role%20of%20Bar%20Councils%20and%20Universities%20for%20Promoting%20Legal%20Education%20in%20India%20(555-568).pdf) (last visited on March 30, 2020).

³⁵*Ibid*.

colleges and penalty for infringement by disaffiliation are addressed by Section 12a (5) of the UGC Act, 1956. On the other hand, inspection of law colleges is addressed by Section 13 of the UGC Act, 1956, while Section 14 deals with the consequences if universities fail to obey the recommendations of the UGC.³⁶

State Governments

The role of State Governments in legal education is principally connected to the setting up of private universities. It is necessary for private universities to contact the State Government and present an application in compliance with the rules of the state's private university Act or any other recommendation published by the State.³⁷ However, the application format and details needed varies across states. Further, the process and the schedule for returning applications also varies.³⁸

At the state level, state governments are enabled by Entry 32 of the State List to enact laws with respect to unification, regulation, and termination of universities.³⁹ Many states have enacted umbrella Acts over the past twenty years to bring transparency and prerequisites for the establishment of private universities.⁴⁰

Universities

Universities, as per the stipulations of the UGC Act 1956, are required to take the lead in developing new programmes, syllabi for courses, training of teachers, and monitoring programmes.⁴¹ As mentioned earlier, universities are categorised depending on the type of management. Additionally, the courses conducted by them are regulated by professional councils (e.g., BCI). The over-arching regulatory body is the UGC.⁴²

The different types of universities (see Table 1) offer different levels of freedom to the colleges in their control with regard to administration and academics. For

³⁶*Ibid.*

³⁷*Supra* note 12

³⁸*Ibid.*

³⁹*Ibid.*

⁴⁰*Ibid.*

⁴¹*Supra* note 33, p. 555-568.

⁴²*Supra* note 12

example, private colleges affiliated to government universities are especially constrained regarding administration and academics. While all universities have their own set of definite rules concerning affiliation, their processes for affiliation are somewhat the same. It must be noted that private colleges cannot commence admissions without pursuing affiliation first.⁴³

IV. Quality Reforms for Higher Education in India

The National Policy on Education (NPE) was formulated by India in 1986 in response to the movements across the world with regard to reforms in higher education by means of review and upgradation of policies, systems, and practices. The Programme of Action (PoA) followed the NPE in 1992. Giving prominence to quality education, both these bodies supported the introduction of an accreditation organisation in the country. In response, the National Assessment and Accreditation Council (NAAC) was launched in 1994, as an independent entity under the authority of the UGC for the accreditation of higher education institutions. NAAC's directive was to totally appraise and authorise higher education institutions.⁴⁴ The National Board for Accreditation (NBA) was established, also in 1994, by the All India Council for Technical Education (AICTE) to assess the programs of the country's technical institutions periodically.⁴⁵ More recently, the National Education Policy (NEP) released in 2019 included the recommendations and comments of academicians and visionaries, through consultative meetings with various distinguished academicians including Late Prof.(Dr) Madhava Menon, the Father of Modern Legal Education in India, with regard to legal education based on constitutional values and principles.⁴⁶

A Deloitte report in 2012 indicated that the considerable development experienced by Indian HEIs has led to the country's system of Higher Education

⁴³*ibid.*

⁴⁴ NAAC, <http://www.naac.gov.in/> (last visited on March 18, 2020).

⁴⁵ *About us*. Available at <https://www.nbaind.org/about> (last visited on March 18, 2020).

⁴⁶ NATIONAL EDUCATIONAL POLICY (2019). https://mhrd.gov.in/sites/upload_files/mhrd/files/Draft_NEP_2019_EN_Revised.pdf (last visited on April 2nd, 2020)

becoming one of the world's largest.⁴⁷ Nevertheless, although the country could be more successful in its endeavour to grow by addressing the challenges of expansion and equity, the most noteworthy aspect of merit, that is quality, has been disregarded.⁴⁸ As a result, four broad challenges have been encountered by HEIs in India "the supply-demand gap", "the low quality of teaching and learning", "constraints on research capacity and innovation", and "uneven growth and access to opportunity".⁴⁹

Consequently, accreditation was made mandatory for all Indian HEIs based on the UGC Mandatory Assessment and Accreditation of Higher Educational Institutions, Regulations, 2012, to deal with the challenges facing HEIs in India. In this regard, only institutions offering technical education were exempted.⁵⁰

The goal of mandating accreditation was to grant magnitude and credit to the quality of education provided by Indian HEIs. Further, it was to support greater funding and further motivation to meriting HEIs. Other aspects that impacted the stipulation for accreditation included supporting globalisation of alliances, research, and teaching-learning. Certainly, these systems have offered all stakeholders the opportunity to more closely understand Indian HEIs. Additionally, obligatory accreditation increases the answerability of HEIs to its stakeholders. As a result, it is imperative that serious attention is paid by HEIs to

⁴⁷ DELOITTE, *INDIAN HIGHER EDUCATION SECTOR - OPPORTUNITIES APLENTY, GROWTH UNLIMITED!* (2012) Deloitte Education Sector Team - Deloitte Touche Tohmatsu India Private Limited. Available at: https://www2.deloitte.com/content/dam/Deloitte/in/Documents/IMO/in-imo-indian-higher_education_sector-noexp.pdf (Last visited on March 18, 2020).

⁴⁸ EVERITT, R., *UNDERSTANDING INDIA - THE FUTURE OF HIGHER EDUCATION AND OPPORTUNITIES FOR INTERNATIONAL COOPERATION* (2014) BRITISH COUNCIL INDIA. Available at: https://www.britishcouncil.org/sites/default/files/understanding_india_report.pdf (Last visited on March 18, 2020).

⁴⁹ *Ibid* at 4.

⁵⁰ *Mandatory Assessment and Accreditation of higher educational institutions, 2012*. Available at: https://www.ugc.ac.in/pdfnews/8541429_English.PDF (last visited on March 18, 2020).

quality of education if they wish to continue to provide education that is tailored to societal needs, both current and future.⁵¹

V. Relevance of Accreditation and NAAC

Accreditation is a system “for recognizing educational institutions and professional programs affiliated with those institutions for a level of performance, integrity, and quality which entitles them to the confidence of the educational community and the public they serve”.⁵² Further, accreditation refers to “the action or process of officially recognizing someone as having a particular status or being qualified to perform a particular activity”⁵³ In the Higher Education perspective, accreditation is utilised as a procedure to evaluate quality parameters of programs or institutions with regard to their educational methods, performance, results, syllabus, teaching-learning, assessment, governance, and other associated facets which control the quality of education.⁵⁴ Typically, the process of accreditation is performed by an external objective body and involves scrutiny and assessment of an educational institutions or programme to make sure that it fulfils the norms issued by an accrediting organisation.⁵⁵ In case the norms are satisfied, the organisation grants accreditation status to the institution or programme.⁵⁶

⁵¹ UNESCO, HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: VISION AND ACTION. WORLD CONFERENCE ON HIGHER EDUCATION (1998) Paris: UNESCO. Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000116345> (Last visited on March 18, 2020).

⁵² AOTA, OVERVIEW (ACOTE HISTORY, MEETINGS, MEMBERS), <https://www.aota.org/Education-Careers/Accreditation/Overview.aspx> (Last visited on March 31, 2020).

⁵³ DEFINITION OF ACCREDITATION. available at: <https://www.lexico.com/en/definition/accreditation> (Last visited on March 17, 2020).

⁵⁴ NAAC, *MANUAL FOR SELF-STUDY REPORT FOR TEACHER EDUCATION INSTITUTIONS* (2019). <http://naac.gov.in/images/docs/Manuals/TeacherEducationManual-15-11-2019.pdf> (last visited on March 31, 2020).

⁵⁵ Accreditation.org, ABOUT ACCREDITING BODIES. Available at: <http://accreditation.org/accreditation-resources/about-accrediting-bodies> (last visited on March 31, 2020).

⁵⁶ Data.Gov.in, EDUCATIONAL ACCREDITATION (AISHE SURVEY), <https://data.gov.in/keywords/educational-accreditation> (Last visited on March 31, 2020).

At this point, it is necessary to highlight that accreditation differs from affiliation as the former indicates the giving of official authorisation to an educational institution whereas the latter signifies the official association or connection of an institution with a university.⁵⁷ Also, it does not follow that all institutions established according to the recognised guidelines are accredited.

In the opinion of the researcher, accreditation has grown in prominence in India and consequently there is a great drive towards achieving accreditation among institutions so much so that they have lost focus on the purpose of their establishment. Centres of legal education are also subject to accreditation as per the directive of the UGC and consequently law schools are moving towards obtaining accreditation.⁵⁸ On one hand, there is a belief that accreditation ensures the gradual enhancement of quality and progressive growth in institutions. On the other hand, accreditation is criticised as being the outcome of subjective evaluations of institutions with inadequate rigour and the use of “unfair means” to achieve accreditation in spite of a teaching-learning setting of inadequate quality.⁵⁹

Nevertheless, laying aside the criticism, if accreditation is examined in its intended sense, it is worth noting and appreciating that the purpose of accreditation in the educational context is to develop the quality of education provided by HEIs in India. According to the NAAC website, the following advantages are associated with accreditation:⁶⁰

⁵⁷FRANCHISE SCHOOL, WHAT IS THE DIFFERENCE BETWEEN SCHOOL RECOGNITION, AFFILIATION AND ACCREDITATION?<http://www.franchiseschool.in/difference-school-recognition-affiliation-accreditation/> (Last visited on March 31, 2020).

⁵⁸R. MUTTHIRULANDI, INDIAN COUNCIL FOR LEGAL EDUCATION (ICLE) & NATIONAL ACCREDITATION AGENCY FOR LEGAL EDUCATION (NAALE): FOR DEVELOPMENT OF LEGAL EDUCATION IN INDIA AND FOR AMELIORATION OF PREVAILING AFFLICTIONS IN THE FIELD (2016). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2767266 (last visited on April 1, 2020).

⁵⁹ P. K. NANDA, GOVT SHIFTS FOCUS FROM HRD INSPECTION TO SELF-DISCLOSURE FOR UNIVERSITY ACCREDITATION (2017). <https://www.livemint.com/Politics/UwCBKzxf3s8vduPzkH6GCI/Govt-shifts-focus-from-HRD-inspection-to-selfdisclosure-for.html> (last visited on April 1, 2020).

⁶⁰NAAC, BENEFITS OF ACCREDITATION, <http://www.naac.gov.in/assessment-accreditation> (Lat visited on March 31, 2020)

- “Institution to know its strengths, weaknesses, and opportunities through an informed review process
- Identification of internal areas of planning and resource allocation
- Collegiality on the campus
- Funding agencies look for objective data for performance funding
- Institutions to initiate innovative and modern methods of pedagogy
- New sense of direction and identity for institutions
- The society look for reliable information on quality education offered
- Employers look for reliable information on the quality of education offered to the prospective recruits
- Intra and inter-institutional interactions.”

i. National Accreditation and Assessment Council (NAAC)

As mentioned briefly, the NAAC is an independent body established by the UGC for the assessment and recognition of HEIs in India⁶¹ following the recommendations of the National Policy in Education (NPE 1986). This Policy focused specially on the maintenance of the quality of higher education in the country. The NPE and the Plan of Action (PoA-1992) supported the establishment of an independent national accreditation body to deal with quality issues. The NAAC was setup as a result in 1994 and is headquartered in Bangalore.⁶²

The vision accompanying the establishment of NAAC was to make quality “the defining element of higher education in India through a combination of self and external quality evaluation, promotion and sustenance initiatives”⁶³ This was to be achieved through “periodic assessment and accreditation”, stimulating the “academic environment for promotion of quality in teaching-learning”, by encouraging “self-evaluation, accountability, autonomy and innovation in higher education”, to have institutions engage in research, “consultancy and training programmes”, and to work together with “other stakeholders” in the evaluation.⁶⁴

⁶¹ NAAC, <http://www.naac.gov.in/> (last visited on March 18, 2020).

⁶² *Ibid.*

⁶³

NAAC, http://naac.gov.in/docs/Promotional%20Materials/Vision_Mission_Value.pdf (last visited on March 31, 2020)

⁶⁴ *Ibid.*

In order to achieve NAAC's vision and mission, assessments, which are equivalent to quality assurance (QA) agencies at global level, are implemented to promote the following five core values, i.e.,

- To contribute to the country's development,
- To nurture universal skills among students,
- To instil a system of values among students,
- To support technology usage, and
- To pursue excellence.⁶⁵

It is in this light that legal education is also assessed.

The NAAC manual provides for the following types of institutes:

- a) University
- b) Autonomous colleges
- c) Constituent/Affiliated colleges

There are specific key indicators which is applicable to each of the category. Though most key indicators are suitable for law institutes, they fail to capture the unique activities of the institute. As the scores are system generated, it is necessary to have the questions also formulated to include those that can capture the different practices of the professional course.

ii. Parameters for Accreditation

NAAC has identified seven parameters for assessing institutions. These parameters are common for all the disciplines irrespective of the type of institution. The parameters are termed as criteria and are the backbone of accreditation and assessment. They are identified based on the core activities of an institution and are as follows:⁶⁶

Curricular aspects

Curriculum is the backbone of a higher education institution (HEI). Therefore, a curriculum is required that is suitable to the demands of society, meeting the

⁶⁵*Ibid.*

⁶⁶ NAAC, *MANUAL FOR SELF-STUDY REPORT UNIVERSITIES* (2019). <http://naac.gov.in/images/docs/Manuals/University-Manual-11th-January-2019.pdf> (last accessed on March 31, 2020)

requirements to attain the necessary skills and values, academic flexibility, etc. NAAC looks into how institutions have best utilised the curricular aspect to ensure that the institutions are providing the best to the stakeholders. From the perspective of a university or autonomous college, it is important to look into how the curriculum is designed and developed. The key indicators therefore look into how a “need-based curricula” is best developed. It also considers the programme options that are made available and the frequency with which the curriculum is updated. As far as an affiliated college is concerned, the prime factor is how best the institution has implemented the curriculum taking into account the values and sensitivities emphasised. One of the key areas of curricular aspects is the academic flexibility enjoyed by the institutions. Another determining factor for NAAC is the effectiveness of the “Feedback System” and how well it is utilised by an HEI.⁶⁷

Teaching-learning and Evaluation

One of the prime requirements of education is that higher education is accessible to all and that it is inclusive. NAAC evaluates HEIs based on their ability to provide inclusive education to students not only from different strata of life but also of varying learning capacity. As Accreditation is related to outcome-based education, the consideration is how best the teaching and learning process has been student-centric and students are involved. Accrediting agencies move beyond mere policies and principles to look at how effective the teaching and learning has been and how students are benefited. This is also the reason why it is necessary to ensure that stakeholders are aware about the outcomes of the programme and course. More importantly, NAAC looks at the evaluation of the attainment of the said outcomes.⁶⁸

Research, Innovations and Extension

University and Autonomous institutes are given higher weightage for activities related to research such as, promotion of research, mobilisation of resources, innovation ecosystem, research publications and awards, etc. While encouraging research culture in the institution, NAAC also looks at how social responsibility is inculcated in students through extension activities. Extension activities

⁶⁷*Ibid* at 10-12.

⁶⁸*Ibid* at 12-14.

include NSS, NCC,⁶⁹ and other outreach programmes. Criteria III also requires institutions to ensure academia-Industry interlinking.⁷⁰

Infrastructure and Learning Resources

The focus of this criteria is to see if institutions have adequate facilities to support the holistic development of students. This includes the robustness of physical facilities, IT and campus infrastructure, and the library and collection of materials in the library.⁷¹

Student Support and Progression

Student support looks at how students are assisted through placement, welfare measures, grievance redressal, etc. Moreover, it examines holistic development of students through provision of extracurricular activities such as, social, leisure, and cultural. An institute's strength comes from how the students are placed in their life after the higher education. Therefore, details of the activities undertaken for student progression are necessary. This criterion also provides aspects to measure the successfulness of the alumni engagement and how students are rooted to the institution.⁷²

Governance, Leadership and Management

Criteria VI looks at the strategic planning adopted by management to ensure effective utilisation of human resources and other benefits available for an employee of the institution. Key indicators for this criterion include "institutional vision and leadership", "strategy development and deployment", "faculty empowerment strategies", "financial management and resource mobilisation", and "internal quality assurance system (IQAS)".⁷³

Institutional Values and Best Practices

NAAC assesses HEIs beyond their academic contributions to know how institutions have catered to different needs so as to inculcate the sense of gender

⁶⁹ National Service Scheme (NSS), National Cadet Corps (NCC)

⁷⁰ *Ibid* at 14-16.

⁷¹ *Ibid* at 17-18.

⁷² *Ibid* at 18-19.

⁷³ *Ibid* at 19-20.

sensitivity, harmony, environmentally friendly practices, etc. They also require institutions to have internal best practices.⁷⁴

Under each of the criteria, various quality indicators are defined. The indicators vary between the three kinds of institutions: University, autonomous college and affiliated colleges. The key indicators carry weightage based on which scores are awarded for grading.⁷⁵

iii. Process of Accreditation

Since its inception, NAAC has set out clear-cut procedures for accreditation. Recently, a revised process was launched which is effective from July 2017. Before considering the revised assessment and accreditation framework, it is necessary to look into the initial system of accreditation. Figure 1 depicts the process of accreditation prior to July 2017.

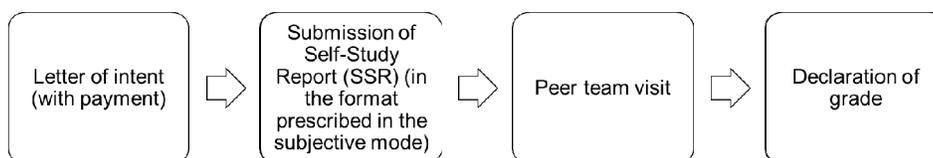


Figure 1: Process of Accreditation prior to July 2017⁷⁶

Source: Researcher's compilation

This process faced criticism as it was dependent on the subjective discretion of peer team members with 80% score of accreditation and only 20% value to the SSR submitted. Thus, there were challenges to ensure transparency.⁷⁷ Nevertheless, this process had its own advantages as the institutions of a particular discipline were able to justify the parameters assuitable for them.

⁷⁴*Ibid* at 20-21.

⁷⁵*Ibid* at 23-25, 48-104. See also GUIDELINES FOR ASSESSMENT AND ACCREDITATION 20-22. Available at: [https://mhrd.gov.in/sites/upload_files/mhrd/files/document-reports/Manual for Universities 23012013.pdf](https://mhrd.gov.in/sites/upload_files/mhrd/files/document-reports/Manual%20for%20Universities%2023012013.pdf) (last visited on March 17, 2020).

⁷⁶ Researcher's understanding of the process before the 2017 scheme

⁷⁷ REVISED ACCREDITATION FRAMEWORK, NAAC (2017), [http://www.naac.gov.in/docs/Revised%20Accreditation%20Framework%20\(RAF\).pdf](http://www.naac.gov.in/docs/Revised%20Accreditation%20Framework%20(RAF).pdf)

(Last Visited on April 2nd , 2020)

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The revised framework⁷⁸ has introduced “system generated scores” (SGS) combining online evaluation (~70%) and peer assessment (~30%). Further, the distribution of scores for qualitative (Q₁M) and quantitative metrics (Q_nM) is given clearly by NAAC. However, this is where the institutes of legal education have faced challenges. These challenges will be considered at a later point, as this requires consideration of the set parameters. The revised framework has tried to simplify the process and enhance transparency in accreditation which is definitely likely to increase the credibility. It has made a shift from the qualitative peer team assessment to a quantitative indicator framework (QIF).⁷⁹ The revised system also provides the involvement of Student Satisfaction survey (SSS) and the minimum marks that must be obtained to qualify for the visit from the peer team. The highlight is the “third party validation” of data provided by the institution.⁸⁰

Figure 2 depicts the revised framework.

⁷⁸*Ibid* at 8.

⁷⁹*Ibid*.

⁸⁰*Ibid*.

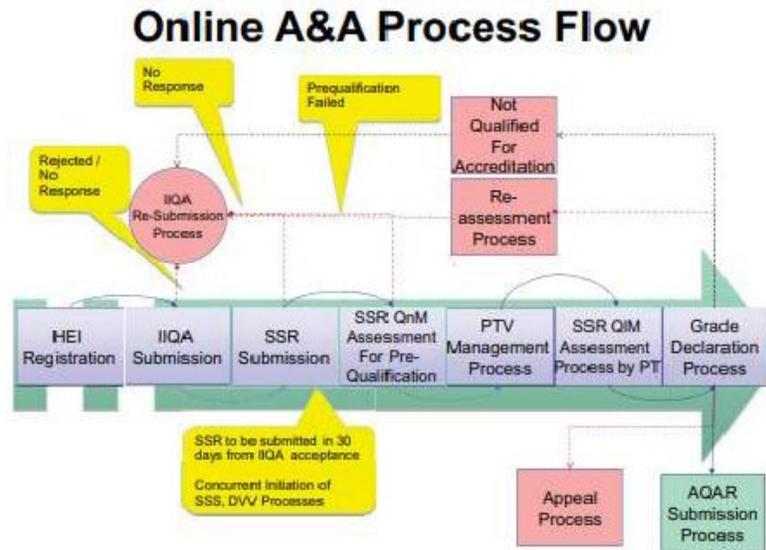


Figure 2: Revised Framework for Assessment and Accreditation⁸¹

Source: NAAC

However, it has been found that this revised process has made it more difficult for institutions to comply with the generic parameters, especially institutes of legal education.

iv. Accreditation of Centres of Legal Education

The mushrooming of law colleges across India has led to concerns over the quality of legal education and whether the course has ensured professional training in colleges.⁸² Similar to other universities and colleges, institutes of law

⁸¹ NAAC, ONLINE A&A PROCESS FLOW.

<http://www.naac.gov.in/docs/Flowcharts%20of%20A%20and%20A%20process-%20v1.pdf> (last visited on April 1, 2020).

⁸² P. THAKUR, ASLAW COLLEGES MUSHROOM, CONCERN OVER QUALITY OF ADVOCATES BEING CHURNED OUT (2017), <https://timesofindia.indiatimes.com/home/education/news/as-law-colleges->

[mushroom-concern-over-quality-of-advocates-being-churned-out/articleshow/57302886.cms](https://www.mushroomconcern.org/wordpress/wp-content/uploads/2020/04/mushroom-concern-over-quality-of-advocates-being-churned-out/articleshow/57302886.cms) (last visited on April 1, 2020).
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have also been accredited by NAAC, and the results are interesting to note. For instance, it is noteworthy that there is a considerable difference in the grade of the institutes between the prior and revised schemes. Table 2 summarises the status of accreditation of centres of legal education.

Table 2: Accreditation status of centres of legal education

Accreditation period	Number of colleges accredited
Prior to 2017 revised framework	44 ⁸³
After 2017 revised framework	32

Source: Researcher's compilation

Table 3 provides the breakup of institutions accredited under the different frameworks by grade.

Table 3: Breakup of accredited centres of legal education by grade

Grade	A++	A+	A	B++	B+	B	C	D	Total
Number of institutes pre-2017	0	1	14	5	11	10	3	0	44
Number of institutes post-2017	0	0	3	1	4	16	8	0	32

Source: Researcher's compilation

Figure 3 depicts the breakup by grade of centres accredited prior to 2017 while Figure 4 depicts the breakup by grade of centres accredited after 2017. Figure 5 depicts the comparison by grade of Centres accredited prior to and after 2017.

⁸³ Data collected from the accreditation results released by NAAC and compiled by the researcher.

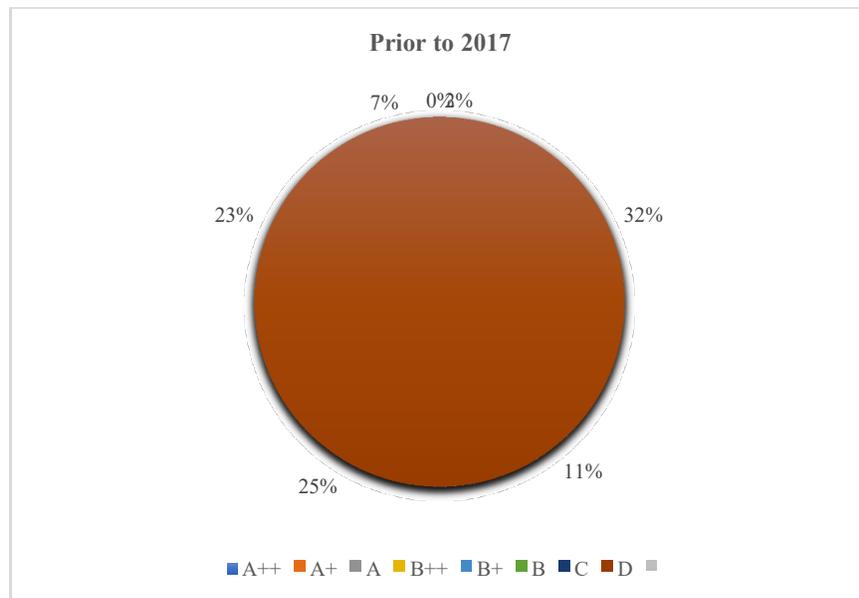


Figure 3: Centres accredited prior to 2017 – breakup by grade

Source: Researcher's compilation

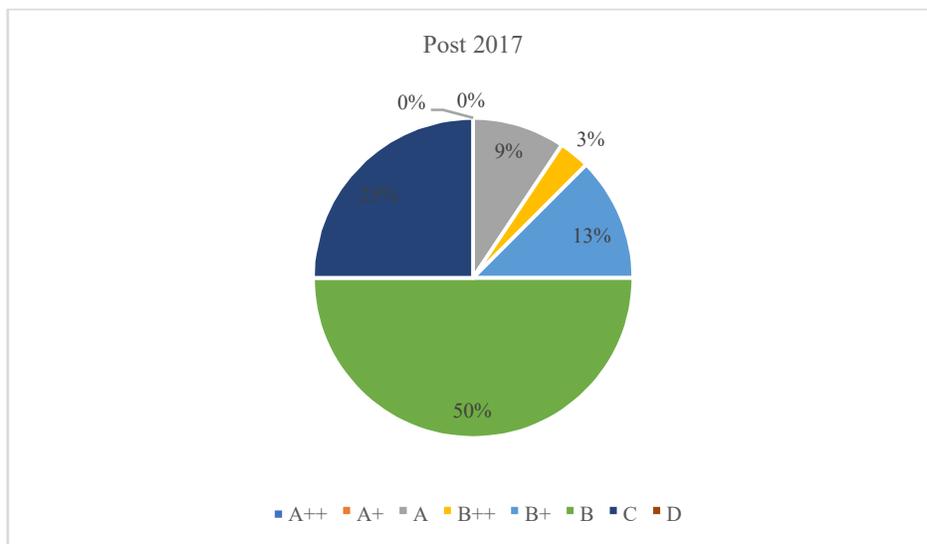


Figure 4: Centres accredited after 2017 – breakup by grade

Source: Researcher's compilation

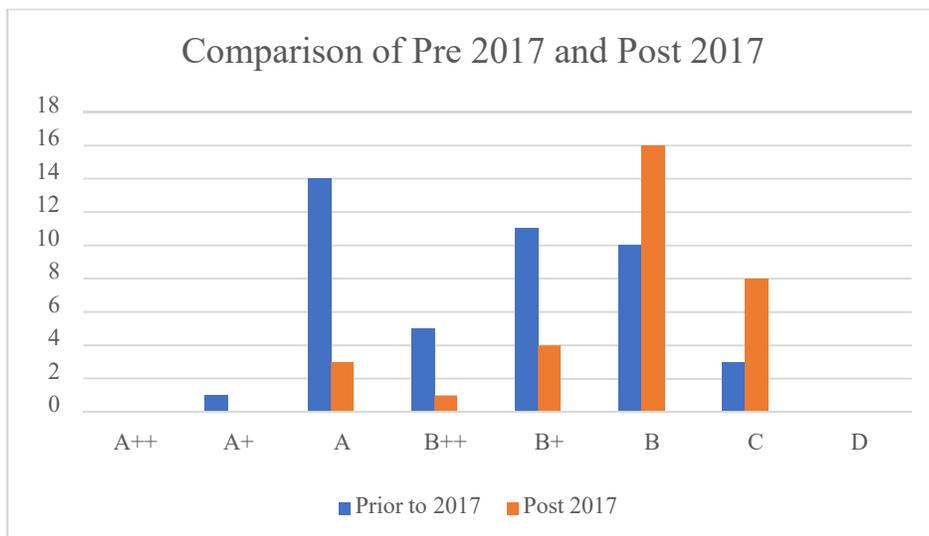


Figure 5: Comparison by grade of Centres accredited prior to and after 2017

Source: Researcher's compilation

Some of the above-mentioned colleges had their subsequent accreditation cycles after 2017. This has raised a concern regarding the applicability of the generic parameters for law institutes as this has caused several of the colleges to be downgraded. For instance, prior to 2017, there were 32% law colleges with 'A' grade, which has decreased to 7% in the post 2017 scenario. Further, there is only one university with A+ grade, in centres for legal education. Although there is an overall diminution of grade,⁸⁴ law colleges appear to be the most impacted as can be seen from the analysis above. Table 4 provides an indicative list of law colleges which have been downgraded in their subsequent accreditation cycles.

⁸⁴ P. GHOLAP AND P. KUSHARE, A COMPARATIVE STUDY OF ACCREDITATION GRADES OF NAAC VIS -A- VIS NBA FOR QUALITY IMPROVEMENT OF HIGHER EDUCATION IN INDIA (2019) I.J.M. Rev. 360. 07 02.

Table 4: Law colleges which have been downgraded (indicative list)

College name	Previous grade(Prior to 2017) (Last cycle prior to 2017 framework)	Post 2017 Framework (Subsequent cycle)
C1(JSS Law College, Mysore)	A	B
C2 (V.M. Salgoacar College of Law, Panaji)	A	B+
C3 (SDM Law College, Mangalore)	A	B++
C4 (Ismail Saheb Mulla Law College, Satara)	B++	A
C5 (JSS Law College, Hubli)	B++/B	B
C6 (SS ManiyarLaw College, Jalgoan)	A	B
C 7(ILS Law College, Pune)	A+	A
C8 (ManikchandPahade Law College, Aurangabad)	A	B+
C9 (I. M. Nanavathi Law College, Ahmedabad)	B	B

*Source: Researcher's compilation*⁸⁵

From the above results it can be gathered that, the generic parameters have impacted the centres of legal education adversely. In such a scenario, the grade cannot be regarded as one that appropriately reflects the quality of the institute.

There is no denying the fact that the streamlining is definitely required to ensure quality and transparency in accreditation. However, it is evident that certain aspects of implementation require reconsideration. This matter was taken on priority at the Conference of Vice Chancellors of National Law Universities on

⁸⁵ Gathered from NAAC website and respective websites of the college for the purpose of research.

Legal Education Reforms that was organised on 1st and 2nd September, 2018, in Delhi.⁸⁶ It was suggested and urged that separate parameters be set out by NAAC for accrediting centres of legal education. Presently, it is still hearsay that NAAC is likely to come out with the manual and parameters, but no official notification has come out in this regard.

Manuals for Open Universities,⁸⁷ Teacher Education Institutes⁸⁸, Health Sciences⁸⁹, Dual Mode Universities,⁹⁰ etc., have been released by NAAC but these do not contain anything specifically related to law institutes.

v. Accreditation under BCI – Rules of Legal Education, 2008

While NAAC presently enjoys the autonomy of accreditation, it must be noted that as far as legal education is concerned, the BCI Rules of Legal Education, 2008, also made reference to accreditation.

The BCI, under the Rules of Legal Education, had specific mention of accreditation in the 2008 Rules and these were further expanded in the Draft Rules submitted in 2019⁹¹. The Rules of Legal Education are covered under Part

⁸⁶ *Conference of Vice Chancellors of National Law Universities on Legal Education Reforms*, held on 1-2 September 2018 at ILI, New Delhi,

⁸⁷ NAAC, *INSTITUTIONAL ACCREDITATION MANUAL – SELF STUDY REPORT OPEN UNIVERSITIES*. <http://www.naac.gov.in/images/docs/Manuals/OpenUniversity-Manual-11-12-2019.pdf> (Last visited March 27, 2020).

⁸⁸ NAAC, *INSTITUTIONAL ACCREDITATION MANUAL – SELF STUDY REPORT FOR TEACHER EDUCATION INSTITUTIONS*. <http://www.naac.gov.in/images/docs/Manuals/Teacher-Education-College-Manual-04-03-2020.pdf> (Last visited March 27, 2020).

⁸⁹ NAAC, *MANUAL FOR HEALTH SCIENCES FOR UNIVERSITIES*. <http://www.naac.gov.in/images/docs/Manuals/23Sept19-revised-HSM-University.pdf> (visited March 27, 2020)

⁹⁰ NAAC, *Institutional Accreditation Manual for Self-Study Report Dual Mode Universities*. Available at: <http://www.naac.gov.in/images/docs/Manuals/final-Dual-Mode-University-Manual-7feb2020.pdf> (visited March 27, 2020).

⁹¹ BCI, *PART – IV RULES OF LEGAL EDUCATION – 2019*, <http://www.barcouncilofindia.org/wp-content/uploads/2019/11/Draft-Rules-of-Legal-Education-2019.pdf> (last visited on January 29, 2020).

IV of The Bar Council of India Rules 2008⁹² for the purpose of laying down the standards of legal education and regulating the quality of legal education. Under R.28,⁹³an accreditation system was laid down by BCI so as to provide accreditation rating based on performance. The 2008 Rules also provide for the constitution of the accreditation committee which shall be responsible for accreditation of an institution.⁹⁴

The Rules for accreditation (R31) mention that accreditation of centres of legal education can be done either through the Accreditation Committee of the BCI or through the NAAC.⁹⁵ The performance analysis referred to by the BCI has three components: academic, administration and financial⁹⁶ compared to the seven criteria referred to by the NAAC.

Further, the 2008 Rules mention that the data required from institutions will be for five years and there must be complete disclosure of records. It is necessary to note that, under R. 31(vi), with regard to the academic part, mention is made of the following required data:

- “(a) faculty student ratio
- (b) system of detail curriculum development and teaching practice sessions
- (c) number of working days annually
- (d) number of working days lost with reasons
- (e) qualification of the faculty
- (f) class performances of the students and class records
- (g) system of clinical program and internship
- (h) evaluation system and recordkeeping
- (ix) student-computer ratio

⁹²BCI, RULES OF LEGAL EDUCATION, 2008 (2008), <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartIV.pdf> (last visited on March 30, 2020).

⁹³ BCI, PART – IV RULES OF LEGAL EDUCATION – 2019, <http://www.barcouncilofindia.org/wp-content/uploads/2019/11/Draft-Rules-of-Legal-Education-2019.pdf> (last visited on January 29, 2020). Accreditation system: There shall be an accreditation and performance rating system for any institution having regular approval (p. 14)

⁹⁴*Ibid* S. 29

⁹⁵*Ibid* R.31 (i).

⁹⁶*Ibid* R.31 (iii).

- (i) on line library facility
- (j) capital investment of the institution per student
- (k) library investment per student
- (l) residential facility
- (m) outside the class hour of the faculty advice and interaction per student
- (n) career counselling opportunities
- (o) quality of the body of alumni
- (p) publication by faculty and students in journals
- (q) laboratory and moot court room exercise facilities
- (r) per student procurement of books and journals
- (s) class room environment
- (t) status of Free Legal Aid centre and legal literacy program run by the Centre of Legal Education and
- (u) any other information needed by the committee.”

The detailed proforma required is yet to be uploaded by the BCI under Schedule IX of the Rules, further showing the lack of coordination between NAAC and the BCI. The 2008 Rules further mention the heads that must be included for the financial assistance⁹⁷ while submitting the record.

In 2019, the BCI submitted the draft of amendment to the legal education rules where Chapter IV is dedicated to Accreditation. It is interesting to note that Schedule IX in the draft is also silent about the parameters of accreditation. However, the Draft Rules provide details regarding the Legal Education Accreditation Board (LEAB)⁹⁸ and their functions.

Thus, the current role of BCI in the accreditation of centres of legal education is limited to the provision of recognition/approval letter for the present academic year in its role as Statutory Regulatory Authority for such centres.⁹⁹

⁹⁷*Ibid* R. 31(d).

⁹⁸ BCI, PART – IV RULES OF LEGAL EDUCATION– 2019, <http://www.barcouncilofindia.org/wp-content/uploads/2019/11/Draft-Rules-of-Legal-Education-2019.pdf> (Last visited on January 29, 2020).

⁹⁹ NAAC, INSTRUCTIONS TO THE INSTITUTIONS (HEIS) FOR SUBMISSION OF IIQA. http://www.naac.gov.in/images/docs/apply_online/Instructions_HEI.pdf (last visited on April 1, 2020).

VI. Key Indicators that Must be Considered for Accreditation of Centres of Legal Education

Based on the scrutiny of the current accreditation process, the researcher proposes certain key indicators that must be included for accrediting legal education institutions. These are on the lines of the criteria specified by the NAAC.

i. Curricular Aspects

Universities have the responsibility of curriculum development, and as far as legal education is concerned, the curriculum must include a component of experiential learning and integrate this into the course through simulation, clinics, etc. For this key indicator, the accreditation body must seek from the University the percentage of experiential/ hands-on training included in the curriculum. Though the number of courses for employability/entrepreneurship/skill development is presently asked, it is also necessary to ask how a component is included in every paper.¹⁰⁰

Further, it is necessary to understand how universities guide the affiliated colleges and what is the academic flexibility they enjoy with regard to introducing their own courses.¹⁰¹

Universities also enjoy a monopoly when it comes to deciding the academic requirements of all the colleges. However, it is also a fact that a university will have different categories of colleges with different capabilities. Laying down minimum standards is definitely necessary, but to have the exclusive power to introduce courses, limits the academic flexibility. It is necessary that college must be given freedom to cater to the growing demands of the environment and students.

Moreover, colleges must be provided with guidelines to facilitate practice of and implementation of the experiential component. Additionally, internship is a mandatory requirement under the BCI and it is necessary for students to complete a mandatory requirement of 20-week internship to successfully complete the course. It is therefore necessary that key indicator 1.3.4¹⁰² be

¹⁰⁰*Supra* note at 65, Key indicator 1.1.3

¹⁰¹*Ibid* Key indicator 1.2 (academic flexibility).

¹⁰²*Supra* note at 65, p. 51

structured in such a way that the data of college of students completing the 20-week internship is also captured.

Autonomous colleges enjoy the academic flexibility of universities. It is therefore necessary to modify the percentage component of each course to cater to the experiential learning. Further, the recording of the internship of 20 weeks must be made mandatory.

Affiliated colleges do not enjoy academic flexibility as they receive academic directives from the university. NAAC therefore considers only the implementation of the curriculum which is a qualitative matrix, providing enough space for college to explain innovative practices. It is also necessary to consider the number of bridge courses and add-on courses introduced by the colleges. It can be seen that though introduced in the 2017 revised framework; bridge courses are no longer present in the 2020 manual. Nevertheless, colleges must be encouraged to introduce bridge courses with proper methods of assessment for students to showcase the skills that they have acquired.

Legal education stands apart for the **integrated course** that it offers. The five-year law course is a dual degree with a combination of multiple bachelor degrees varying from BA, BCom, BBA, BSc, and even BTech. In this regard, it is necessary that NAAC records how well the courses have been integrated to set a benchmark. The university has the freedom to set the curriculum. They are also at liberty to include interdisciplinary papers under the law course for completeness.

ii. Teaching-Learning and Evaluation

One of the prime focus of teaching, learning, and evaluation, must be how exercises such as moot court, drafting, debate, etc., are integrated into the class room lectures. It must also ensure that out of class teaching is included. Moreover, an interdisciplinary approach must be adopted by colleges in law institutes.

It is necessary for NAAC to look at the percentage of evaluation distributed for internal assessment, especially with the universities and autonomous colleges. However, affiliated colleges have a limitation, as the mode of assessment is

mandated by the university. In this situation, colleges must share how they conduct continuous internal assessments and maintain transparency.

iii. Research, Innovations and Extension

Universities and autonomous colleges have higher weightage for research, innovation, and extension compared to affiliated colleges. In centres, of legal education, skill labs can replace the focus on incubation centres. These skill labs can include moot court training, debate training, and drafting workshops to upgrade research skills among faculty and students. Further, professional trainings for lawyers must be included.

Extension activities are also very important for law colleges. Apart from NSS, NCC, etc., *legal aid* is a unique practice followed by legal education centres. It is therefore necessary to specifically mention what comprises legal aid activities especially with regard to legal awareness, accessibility of legal aid clinic, number of cases received by the legal aid clinic, village adopted by the clinic, etc. This must not be considered at par with NSS, NCC, etc., but rather as an essential activity for all senior law students. Moreover, universities and autonomous colleges must also seek for the list of lawyers enrolled with the clinic to extend support.

iv. Infrastructure and Learning Resources

Infrastructural requirements have to be in consensus with the statutory requirements of BCI. Moreover, it is necessary to build a database regarding the law books to be available in the institute library. However, the database should place emphasis on the authoritative books on the subject matter to be available in the library rather than merely a count of books. The number of books can be satisfied with an increased number of text books also and hence the library must be made more robust with further categories based on the stream that the college is offering. It is also necessary that the functional MOUs (Memoranda of Understanding) must not be with industries alone but must be with law firms, officers, and other NGOs (Non Governmental Organisations). This is because law schools are more likely to have interactions with NGOs and lawyers, as that is more crucial to a law student.

v. Student Support and Progression

For a law school, student progress and support are crucial in terms of the diversity it supports.

- **Student support:** Law graduates have multiple avenues of being placed, and one of the key areas is litigation. While providing capacity building and skill enhancement activities, skill labs must be considered as well.
- **Placement:**¹⁰³Legal education's purpose is not limited to placing students with firms. The prime choice of a law graduate will be litigation, followed by in house legal advisory, academia, and public service. Therefore, it is necessary that placement has the option to provide choice of employment over the employee details. The most common placement method in law schools is to convert internships to placement. Consequently, the college's placement efforts are limited to facilitation which does not directly enhance placement.

Further, as far as placement is concerned, it will be apt to look at the placement related training that college is extending to the students, how institutions facilitate academia–industry interaction through open houses, lectures, etc., and it must be recorded with details. It can be a quantitative matrix, which is adopted by centres of legal education.

- **Student Participation and activities:** It is necessary to have holistic development of student. just as much as sports and cultural activities are important, it is also necessary to understand student performance in co-curricular activities. In law institutes, co-curricular activities contribute to skill and value development in the students. Key indicators must provide the number of moot court competitions (and how many they qualify to different levels), debate competitions, drafting competitions, essay competitions, judgment competitions, and trial advocacy competitions, that the student have participated in and their performance in the same. The true quality assessment of a college lies in their participation in these activities.

¹⁰³*ibid*, Indicators 5.1 and 5.2.

- It is also necessary to consider the number of student publications apart from faculty publications and student participation in seminars, conferences, and workshops. The students interact and network through these conferences and workshops.
- Though the number of cultural and sport activities organised is important, it is equally or more important to look at local/state/national and international moot court competitions, trials, debates, etc., being organised by colleges.

vi. Governance, leadership and management:

- The present key indicators are suitable for law schools. However, it would be great if key indicators to understand institutional innovations for providing clinical trainings to faculty are also considered, as this is necessary to bridge the gap between theory and practical and have industry-academia interlinking.
- Centres for faculty training must be setup with list of trainers from the non-academic industry.

vii. Institutional values and best practices

The generic provisions of ensuring environmental practices, promoting gender awareness, etc., seem appropriate for centres of legal education also.

VII. Conclusion

This article attempted to provide insights regarding how accreditation is presently accomplished in India and the different modes of assessment. Moreover, the paper sought to highlight how accreditation has affected centres of legal education.

It could be seen that the present scenario of NAAC being the sole accreditation authority in India had resulted in some shortcomings with regard to the accreditation of centres of legal education. It was therefore recommended that the key indicators be modified to be more appropriate for evaluation of centres of legal education and suggestions for the same were provided.

Capital Punishment in India

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Abstract

India is a developing country with increasing crime rates. There are lots of legislation in India to stop and control crimes but all in vain, because the punishments are not sufficient for the crimes. The punishment should be severe to reduce the crime rate. All punishments are based on the same motive to give penalty for the wrongdoer. There are different kinds of punishment in India such as capital punishment, life imprisonment, imprisonment etc. Capital punishment is known as the most severe form of punishment. This paper says about the status of capital punishment all around the world and also defines the concept of capital offence. It also explains about the modes of capital punishment in India.

Keywords: *Capital punishment, Death penalty, Legislation, Capital offence, Crime, Offender.*

I. Introduction

India is a country which consist of large number of crimes and criminals. In India all punishments are based on the motive to give penalty for the wrongdoer. There are two main reasons for imposing the punishment, one is the wrongdoer should suffer and other one is imposing punishment on wrongdoers discourages other from doing wrong.

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There are different kinds of punishment in India based on their offence such as capital punishment, imprisonment, life imprisonment with fine etc. In this research the researcher focused on capital punishment or death penalty. Capital Punishment is one of the important part of Indian criminal justice system. Crimes result in death penalty are known as capital crimes or capital offences. The term capital punishment is derived from the Latin word “capitalis” means “regarding the head”.

The term death penalty is also known as capital punishment. Capital Punishment is a process by a person is put to death by a state for their criminal offence. Capital punishment or death penalty means the offender sentenced to death by the court of law for a criminal offence. Capital punishment which has been awarded for the most grievous crimes against humanity.

Death penalty differs from place to place, state to state and country to country. There are many human rights movements in India which says capital punishment is immoral. The human rights organisations are argued that capital punishment affect one person's right. In jurisprudence, criminology and penalty, capital punishment means a sentence of death. Indian criminal jurisprudence is based on the combination of two theories.

The constitution also gave powers to president and governor to suspend or pardon death sentence. In India capital punishment is awarded for the most serious and grievous offences. Capital punishment is given for murder, robbery with murder, waging war against the government and abetting mutiny, etc.

The death sentence is given only when the court comes to an end that life imprisonment is insufficient, based on situation of the case.

The main aim of this study is :-

- To study about capital punishment in India.

- To study about the criminological approach of capital punishment.

II. Methodology

This research is based on doctrinal type pattern. Doctrinal research is also known as traditional research. Doctrinal research is divided into different types such as analytical and descriptive method.

This research is based on information which has been already available and analysed those facts to make evolution of this research. This research involves secondary data. In this research the researcher mostly used books, articles, journals, etc.

i. Capital Punishment in India

Capital Punishment is a legal death penalty in India. India gives capital punishment for a serious offences.⁴ In India capital punishment is awarded for most heinous and grievous offence. In India Article 21 of the Indian constitution is “protection of life and personal liberty”. This article says “No person shall be deprived of his life or personal liberty except as according to procedure established by law”. This article says right to life is promised to every citizen’s in India. In India IPC provides death sentence as a punishment for various offences such as criminal conspiracy, murder, waging war against the government, abetment of mutiny, dacoity with murder, and anti-terrorism. The Indian Constitution has provision for mercy of capital punishment by the President. There are twenty-two capital Punishment is taken place in India since 1995. After the independence a there are fifty-two capital punishment is taken in India In

⁴25 MAJUMDER, SANJOY. "INDIA AND THE DEATH PENALTY." BBC News 4th August 2005..

“Mithu vs state of Punjab”⁵ the Supreme Court struck down the IPC Section 303 which provide mandatory death sentence for the offenders. India voted against a United Nations General Assembly resolution calling for a prohibition on the death penalty. In November 2012, India again continue its posture on capital punishment by voting against the UN General Assembly draft resolution request to ban death penalty.

There are mostly two methods executed for capital punishment.

a. Hanging

All capital punishment in India is implemented by hanging. After independence, In Mahatma Gandhi case Godse was the first person to be executed by capital punishment in India. The SC of India suggested capital punishment must be given only to the rarest of rare cases in India.⁶

In Indian the government mostly used hanging method to execute capital punishment.

b. Shooting

In India the Army Act and Air Force Act also provide implementation of capital punishment in India.⁷ In Air Force Act, 1950, section 34 allows the court martial to thrust the death sentence for the unlawful act mentioned in section 34(a) to (o) of The Air Force Act, 1950.

ii. Cases dealing with death penalty in India

⁵ 1983 SCR (2) 690

⁶

45 SAKHRANI, MONICA; ADENWALLA, MAHARUKH; ECONOMIC & POLITICAL WEEKLY, "Death Penalty – Case

⁷"CONSULTATION PAPER ON MODE OF EXECUTION OF DEATH SENTENCE AND INCIDENTAL MATTERS" (PDF). Law Commission of India. Retrieved 29 July 2013

a. Mithu v. State of Punjab⁸

In this case the Supreme Court struck down Section 303 of the Indian Penal Code, which provided for mandatory death sentence for offenders.

b. Bachan Singh v. State of Punjab⁹

In this case the Supreme Court says that capital punishment was given only to the rarest of rare cases.

c. Jagmohan v. State of UP¹⁰

This was the first case dealing with the question of constitutional validity of capital punishment in India.

iii. Statistical Report about Capital Punishment in India

National Crime Records Bureau (NCRB) and American Convention on Human Rights (ACHR) statistical report

Year: 1999-2003

Year	2000	2001	2002	2003
Sentences given	-	106	126	142

⁸ AIR 1983 SC 473

⁹ Criminal Appeal No. 273 of 1979, decided on 4 May, 1979

¹⁰ AIR 1973 SC 947

Sentences changes to life	-	303	301	142
Executed	0	0	0	0

Year: 2004-2009

Year	2004	2005	2006	2007	2008
Sentences given	125	164	129	186	126
Sentences changed to life	179	1241	1020	881	46

Year:

2010-2013

Executed Year	2010	2011	2012	2013
Sentences given	97	117	97	125
Sentences changed to life	62	42	61	115
Executed	0	0	1	1

According

to law

commission report, capital punishment in recent have been very few. Only three offenders were executed over a period of 10 years. One is in Maharashtra(2012), Delhi(2013) and Maharashtra(2015). In India there is no death penalty was takes place between 2005-2011, that period was known as execution- free period. The latest capital punishment was Yakub Menon. On average the, the court sentenced number of people to death row in India every year according to NCRB.

The above data shows a major gap between Death sentence pronounced and actual death sentence executed. According to the American Convention of Human Rights (ACHR) and National Crime Records Bureau (NCRB) data there have several death sentence pronounced between 2001 - 2013, but the authorities carried out only few executions. In India the death sentence rarely converted into executions. The law commission in India mostly recommends to abolish death sentence.

III. Proposed work

In the current system, the criminal will get the punishment only and that's why he will not get second chance to make himself/herself correct in the future. If punishment is of death or lifetime imprisonment then he will not get chance to be a good person in life and if he/she has family then all will suffer due to only 1 punished person. Due to ruin of only one person all the family member will suffer the problems.

Instead of all such punishments if he/she will get chance to correct his/her mistakes so that he/she can move forward and develop to better person from past. It will be beneficial for all the person living in surrounding to his/her environment.

We can replace these punishments with such type of treatment in which it will help to such persons to get good person throughout their remaining life.

IV. Implementation

There are 2 types of theories of punishment to such people which will lead to development in them.

- 1) Reformatory theory
- 2) Preventive theory

i. Reformatory Theory

It is based on principle to reform the offender. Through individual treatments to offender the convicted person is reformed. This theory will have target to educate the offender through which he/she can be reformed. It's like the punishment for benefit of own.

Reformatory theory supports criminology. Criminology says every crime as a diseased phenomenon, a mild form of insanity. Criminal anthropology, criminal sociology and psychoanalysis supports Reformatory theory.

This theory aims to develop the mindset of offender in such a way that he/she can lead a life like a normal person. This theory criticize all kind of corporal punishment.¹¹ Some of them are as follows.

a. Criminal Anthropology

The modern criminal anthropology says crime is a disease. Criminal anthropology says it is necessary to treat a criminal instead of punishing him. Hospitals and welfare homes are better adoption place to decrease crime than prisoners. Some crimes are happened by the normal persons due to willful violation of moral law. Sometimes crimes are caused due to mental or physical defect.

¹¹ Bachan Singh v. State of Punjab; AIR 1980 SC 898

b. Criminal sociology

Criminal sociology says to improve social and economic conditions to remove inequalities, than to punish the criminal. Punishment cannot change the crimes and crimes can be changed by justice and equality.

c. Psychoanalysis

Psychoanalysis is related to criminal anthropology and criminal sociology. Psychoanalysis support reformatory theory. Instead of punishment education and psychoanalytic treatment is needed for preventing crimes.

ii. Preventive Theory

The main aim of this preventive theory is to keep the offender away from the society. According to preventive theory the main aim of punishment is to set an example for others and prevent them from criminal activities. In this theory the offenders are punished with death penalty, life imprisonment.

Preventive theory was supported by many law reformers because preventive theory has humanizing Penal law. On many reformers view the preventive theory has a real effect on offenders. The main purpose of preventive theory is to take steps that accused person does not repeat the crime after enjoyment of Punishment.

This theory explains that capital punishment as an most severe form of punishment because of its detriment effect. A man has taken the life of another man. So he is responsible to be deprived of his life. In India they follows preventive theory.

iii. Clemency Powers

If the Supreme Court files a case against capital punishment, a prisoner can submit a mercy petition to the President of India and the Governor of the State. Under Articles 72 and 161 of the Constitution, the President and Governors, have the power “to grant pardons, reprieves, respites or remissions of punishment”.

There are many mercy petitions filed by the offenders for their offence to president or governor. That is known as pardoning power of president or governor.

Maximum number of petition were accepted by president. When president rejected mercy petition then the offender have the right to file curative petition.

Mercy Petitions Decided by the President of India (Law Commission Report)

Year	Number of mercy petitions accepted	Number of mercy petitions rejected	Total
1950-1962	180	1	181
1962-1967	57	0	57
1967-1969	22	0	22

1969-1974	3	0	3
1974-1977	NA	NA	0
1977-1982	NA	NA	0
1982-1987	2	30	32
1987-1992	5	45	50
1992-1997	0	18	18
1997-2002	0	0	0
2002-2007	1	1	2
2007-2012	36	36	72
Total	306	131	437

V. Conclusion

In India, capital punishment has been Practiced since ancient times. Many countries abolished capital punishment.¹² When we look at our national crime statistics death penalty has not proved to be deterrent for doing offence, the crimes rates are increasing only.

We have to reform our laws especially for death penalty in India. Our laws should reform and the punishment should be so rigours and it should be a example for people around him, about his unlawful acts. There is a punishment worse than death penalty.

Make the offender continuous discussion about capital Punishment and the rigorous life in prison is worse than capital punishment. Each day and night the offender should feel for his offence. The capital punishment is not effective to reduce crimes in Society. Hence null hypothesis proved.

¹² GANDHI 2016

The *KEBANG*: A Self-Governing Indigenous Institution of the Adi Tribe of Arunachal Pradesh

Jumri Koyu¹
Pradeep Singh²

Abstract

Besides being a land of rising sun, the Arunachal Pradesh is having so many diverse dispute resolution mechanisms, which runs parallel to the adversarial courts. The Kebang of the Adi tribe is one such indigenous traditional system, which also looks after the day-to-day affairs of the Adi villages. Unlike courts, the Adi Kebang is a non-adversarial justice delivery system having belief in amicable settlement of the disputes outside the courts. The present paper is an attempt to make readers understand about the working of Kebang in a very simple and lucid manner. The research study also reflects some views that testifies the relevance of Kebang system in the present times.

Keywords: *Kebang, Adi, Non-Adversarial, Amicable Settlement, Local Self-Government.*

I. Introduction

Arunachal Pradesh is the largest State in terms of geographical area in the North-Eastern part of India covering an area of 83743 sq. km. The State stands out for its unique and distinct tribal traditions and customs. The varied tribes and sub-tribes makes the state a colourful showcase of diverse culture and tradition. The tribes of Arunachal Pradesh have their own traditional system of administration looking after daily affairs of their villages. The amalgamation of varied culture and distinct traditions along with its unique customary practices shows the presence of varied legal enforcement mechanisms in the State. The State experiences different indigenous village councils that run parallel to the conventional courts in India. The *Kebang* of the *Adi* tribe is one such indigenous

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traditional court system looking after the administration of justice in the *Adi* inhabited areas.

The historical study of *Adi* tribe tells that the tribal society never was under any extraneous authority. They did not have any king, ruler or even know of chieftainship. The *Adi* villages were and until today are an independent unit having their own self-administration system. Their daily village affairs are governed by an indigenous local self-government called '*Kebang*'. This local self-government has been recognised as 'village authority' under Section 5 of the Assam Frontier (Administration of Justice) Regulation 1945. The indigenous institution looks after the social, economic, and political life of the *Adi* villages. It is also bestowed with judicial power to adjudicate disputes. In a Joint Conference of the Chief Ministers and Chief Justices of High Courts at New Delhi³, Justice Altamas Kabir (the then Chief Justice of India) and Mr. Ashwini Kumar (the then Union Law Minister) were of all praise for the performance of Arunachal Pradesh after an overall assessment of the judicial system of the country. Justice Altamas Kabir was in agreement with the assertion of Mr. Nabam Tuki (the then Chief Minister of Arunachal Pradesh) on the tremendous working of the traditional *Kebang* system for covering the judicial needs of the tribal area backing in a negligible number of pending cases in the State.

II. Who the Adis are?

Adi means people residing in the hills. Even today the tribesmen of foothills, if



Figure 1- File photo of *Adi* women performing *ponung* dance (ballad) at Poblung village Dere, Lower-Dibang Valley District. (Dated- 26/11/2018).

has to travel to the hill part of the *Adi* inhabited place, they say- "*Adi danpeendak*" means "moving towards the hills". The *Adis* proudly call themselves people of the hills.

The Assamese called the hill tribes as '*Abors*' which means 'unruly or disobedient'⁴. Later on, the term '*Abor*' being derogative was

replaced by '*Adi*' to get its own high, available at:

<https://economictimes.indiatimes.com/news/politics-and-nation/arunachal-pradesh-to-get-its-own-high-court/articleshow/19443895.cms> (last visited on August 11, 2019)

⁴VERRIER ELWIN, A PHILOSOPHY FOR NEFA 17 (M/s. Frontier Printers & Publishers, Itanagar, 1st edn., 1957).

resented by the tribal group and themselves suggested to call them *Adisor* hill men⁵. “*Abor* have always been a proud, independent people, resentful of interference and suspicious of strangers”⁶ writes Mr. Elwin. The author still remembers his older Schedule Tribe Certificate given by the office of the Deputy Commissioner, East-Siang district where it was written ‘belongs to AborGallong tribe’.

The *Adi* tribe is one of the major tribe in the state of Arunachal Pradesh. The *Adi* inhabiting places in the state of Arunachal Pradesh are the districts of Siang, East-Siang, West-Siang, Upper Siang, Lower-Dibang Valley and some parts of Lower-Siang, Shi Yomi districts and Lohit districts. These tribal groups belongs to the Tibeto-Burmese⁷ ethnic group. The *Adis* have a mythological belief of mapping out their origin and proudly calling themselves the descendants of *Abo Tani*- the first man who was again the descendant of *PedongNane*- the great granddaughter of *Sedi Melo* (the creator). There are different tribes belonging to the same ethnic group claiming to have a common origin, performing and celebrating similar kind of festivals and rituals. These people belonging from the same ethnic group are called the sub-tribes of the *Adi*. These sub-tribes are: *Minyong, Pasi, Padam, Bori, Bokar, Karko, Simong, Panggi, Milang, Pailibo, Ramo, and Adi Samoa*. They are bonded to one another through the indigenous political institution by means of social *Kebang* and judicial *Kebang* (brief discussion made in the succeeding pages).

III. What is *Kebang*?

The term ‘*Kebang*’ denotes a pluralistic character. It is a village council consisting of elderly members sharing opinion on certain issues of a village. In simple terms a *Kebang* is an assembly of villagers to address issues relating to their village. Therefore, no single person can constitute a *Kebang*.

Kebang is a unique and distinct way of administering the social, economic and political life of an *Adi* village. This village council system has been in practice

⁵dat 18.

⁶dat 17.

⁷DR. D. PANDEY, HISTORY OF ARUNACHAL PRADESH10 (Bani Mandir Publishing House, Pasighat, 5th edn., 2012).

since time immemorial. The village council runs administration according to the traditions, customs and conventions of the *Adis*. These traditions, customs and conventions in want of script do not have any written record. Thus, were orally handed down from a generation to other generation in the form of proverbs, sayings, *ponungs* (ballads), *abangs*(religious literature mainly represented by rhapsodies).

The *Adi Kebang* also has judicial power to try cases of both civil and criminal nature. Like that of a Lok Adalat, the *Adi Kebang* system is an instrument of Alternative Dispute Resolution. It is a non-adversarial traditional village council system; where disputing parties approach, to have an amicable settlement. The tribesmen prefer going to the *Kebang* for seeking justice instead of approaching the formal courts. The traditional court system believes in more of a compensation than inflicting physical punishment on one found guilty of an offence. The *Adi Kebang* since ages have the practice of mediation and conciliation providing a platform to disputing parties to have an amicable settlement. The supporting provisions of the Code of Civil procedure, 1908 (as inserted by Act No.46 of 1999 w.e.f. 1.7.2002) and as rightly interpreted by Supreme Court of India in the case of *Afcons Infrastructure Limited v. Cherian Varkey Construction Company Private Limited*⁸ for making use of alternative dispute resolution mechanism also substantiate the working of *Kebang*.

Section 89(1) of the Code of Civil procedure, 1908 provides for an option of outside court settlement. Section 89 (1) reads as follows:

“Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for- (a) arbitration;

(b) conciliation; (c) judicial settlement including settlement through Lok Adalat; or (d) mediation.”

In the context of the above mentioned provisions under Section 89 (1) read with corresponding Rules viz. Order 10 Rules 1-A, 1-B & 1-C of the Code of Civil

⁸2010 (8) SCC 24.

Procedure, the Courts in the State always have an option for an amicable outside court settlement.

A *Kebang* is headed by village elders called '*KebangAbus*' and assisted by other experienced member of a village. A person becomes *Kebang Abu* by virtue of his wisdom, knowledge of customary legal practices, good oratory power, and integrity. The ability and experience of *KebangAbus* guided by customary practices and conventions helps them to present and decide matters/disputes on merits. Anyone who deviates from right path, disturbing the peace and tranquillity of village is punished by *Kebang* by way of fines and compensation. The *Adi* believe that the decision arrived at and the judgment pronounced by a *Kebang* is impartial as they consider the same as collective decision of village community. There can be seen the presence of precedence of earlier judgments as village elders habitually cite ancestral practice of deciding a particular matter. A *Kebang* in no way deviates from customary practices except some changes brought in line with the modern legal system and changing dimensions of the society. Dr. D. Pandey asserts that: "the *Kebang* operates on the principle of unquestionable loyalty to the village community and customary laws".⁹

IV. Broader Understanding of *Kebang* System

Kebang is not limited to adjudication of disputes between parties. It is rather, as discussed earlier, a traditional local self-government which looks after everyday affairs of a village, may it be social, economic or political. Therefore, the *Kebang* system can be understood into two broad sense based on its existence in the *Adi* society viz. social *Kebang* and judicial *Kebang*. Social *Kebang* in its sense can be understood as a meeting or a village gathering. The entire village activities including the developmental works of a village is administered by a *Kebang*. It determines the rights and obligations of the villagers. A *Kebang* is called to discuss the affairs of a village pertaining to community fence, community hunting and fishing, cleanliness of village, festival celebration, utilization of village fund etc. A *Kebang* imposes fine on village members failing to participate in community works. It also hold a meeting to discuss matters relating to overall development of the *Adi* community within and

⁹DR. D. PANDEY, HISTORY OF ARUNACHAL PRADESH 215 (Bani Mandir Publishing House, Pasighat, 5th edn., 2012).

outside the State which is taken care of by the *Adi Bane Kebang* (Supreme Council of the *Adis*). On other hand, *Judicial Kebang*, as the term signifies, is a gathering of village council to adjudicate disputes between parties. However, there is an important difference between the two *Kebang*. In a social *Kebang* every member of a village has a right to speak and share his opinion as a participant in the meeting or the gathering; whereas in a judicial *Kebang* only the *Gaon Burahs/Gaon Burihs* and those whose name is listed (persons related to the matter) have the right to speak. The *Kebang* system thus provides political justice to the village community by giving opportunity to every village member to participate in the self-governing institution.

V. *Adi Kebang Ayon* (AKA)



Figure 2- Cover Page of *Adi Kebang Ayon*

The *Adi Kebang Ayon* is the written form of the customary laws of the *Adi* tribe. It is maintained under Section 1 (a) of AKA that it be called as the *Adi Kebang Ayon, 2012* (the Drafting Committee of the *Adi Bane Kebang*, the traditional supreme council of the *Adis* started its work in this year). The *Adi Kebang Ayon* as a written form of customary laws is the result of the *Adi Bane Kebang* Conference held at Tuting of Upper-Siang District on 16/01/2014. It is maintained by the *Adi Bane Kebang* that the provisions in the AKA be strictly adhered to in *Kebang* proceedings of the *Adis*. The *Adis* of different places had slight different form of rules in terms of fines, compensation and punishment; Therefore, in order to bring out a uniform law governing every *Adi* and to uphold

their unity the AKA was created. The AKA has been amended only once so far and is known as “**Adi Kebang Igenana Ayon, (Ijun Kunam), 2017**” (Rules of *Adi* Customary Law, (Amended), 2017).

Field study by the author revealed that the *AKA* translated in English language is put before the State Government of Arunachal Pradesh for its recognition and codification as *Adi* customary law in the recent times.

VI. Understanding *Gaon Burahs* and *Gaon Burihs*

Gaon Burahs and *Gaon Burihs* (herein after as *GBs*) as the name suggests are the village elderly men and women having good knowledge of customary practices and having a good oratory power. They are village elders appointed by Deputy Commissioner under Section 5 of the Assam Frontier (Administration of Justice) Regulation 1945. The persons to be appointed as *GBs* are voted through raising of hands by villagers in presence of Circle Officer or other officials delegated by Deputy Commissioner. The Regulation under Section 5 specifically does not mention the term *GBs* rather it provides for ‘village authority’. *GBs* are authorised by the Government to assist a Deputy Commissioner in the administration of villages. They play a vital role in the governance of the State. Even during British India, the *GBs* along with the *Kotok is* (Political Interpreters or popularly known as PI) played a vital role in the governance of the tribal areas.

The terminology *Gaon Burah* is not native to the state of Arunachal Pradesh. It is an Assamese connotation of village elderly man. The term seems to have inculcated in the customary system as being called by the Assamese people of the plain. This is because until 1972 when the state was rechristened from North-East Frontier Agency to Arunachal Pradesh and given the status of a Union Territory the region was a part of tribal area of Assam.

Traditionally speaking, the ancient *Adi* society had village elders called ‘*Milum*’ who guided and looked after the village administration. *Milum* are those elderly persons having good knowledge of customary practices and usages. While dealing with a matter they often referred to proverbs and sayings, which were deep rooted in the *Adi* societies since ages. This knowledge of *Milum* probably came from extensive personal experiences in *Kebang* proceedings and most importantly the careful hearing of teachings imparted by the elders. With the advent of British in the region and framing of the Regulation 1945 the customary system was recognised and given the status of ‘village authority’ as an institution; And henceforth deriving the term *Gaon Burah* in the traditional

system. The letter of recognition (*GB Certificate*) on appointment as village authority by Deputy Commissioner also maintains the term *Gaon Burah/Gaon Burih*.

An *Adi* village comprises of as many *GBs* depending upon the population size of village. Where, in a village, there are more than 2 (two) *GBs* there is a Head *Gaon Burih/Burih*. The rule for permissible number of *GBs* in a village is given under Section 22 (4) of the *AKA* which provides-

- In 100 (one hundred) people a single *GB*.
- In 150 (one hundred and fifty) people two *GBs*.
- A village may have at the most 10 (ten) *GBs*.
- A village may have more than 10 (ten) *GBs* if it exceeds 1500 people.

The *GBs* and Head *GBs* get a monthly honorarium of ₹1500/- and ₹2000/- respectively from the State government. They also get an amount of ₹2000/- every two years for the purchase of Red Coat.

VII. Importance of Red Coat in *Kebang*



Figure 3- File photo after a *Kebang* hearing at village Takilalung, East-Siang District, Arunachal Pradesh (Dated-14/11/2018).

Whenever a *Kebang* is called, the *Gaon Burahs* and *Gaon Burihs* are required to come in a Red Coat given to them by the District Administration. This red coat is the dress code of the village authority. It is commonly known as ‘*galiing*’ in the *Adi* inhabited areas. Donning of the Red Coat commands a great respect in *Adi* society.

VIII. *Dere/Moshup*



Figure 4- Rayang village Dere, East-Siang District, Arunachal Pradesh (File pic by author on field work).

The proceedings of a *Kebang* is held in *Dere/Moshup*(Community Hall). It is a generally a rectangular structure building with a platform like that of a stage in an auditorium. It has also fire place/places. *Dere/Moshup* is generally constructed at the centre of a village. All the village activities, may it be social, cultural, political or judicial takes place in the *Dere/Moshup*. The *Adis* believe that the *guminsoyin*(village spirit) and the spirit of the village elders resides in the *Dere* and looks after the *Kebang* proceedings.

It is pertinent to mention here that not every dispute is heard inside a *Dere*. Cases of such nature that may pollute the divinity of a *Dere* are heard in an open area and never brought up in a *Dere/Moshup*.

IX. Structure of *Kebang*

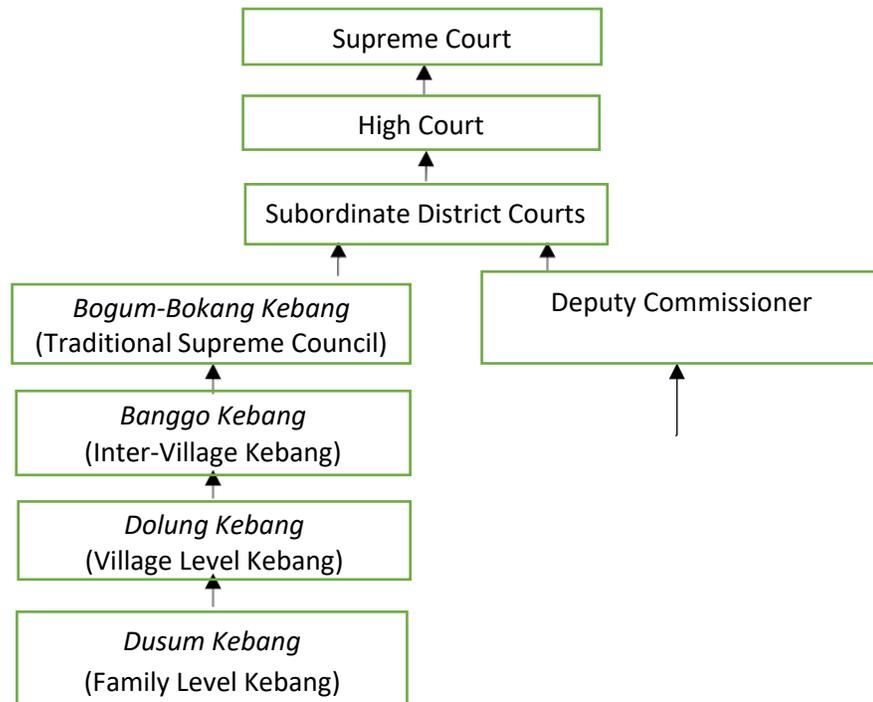


Figure 5- Appeal in order of hierarchy

The ancient *Adi* villages as were single independent units knew only theirvillage councils (*DolungKebang*). There was no other *Kebang* classification. With the changing situation, other levels of *Kebang* came into existence. The *Adis* say that these new forms of *Kebang* came into existence as a necessity of growing suspicion because of the extension of British regime in the region. Therefore, to have a better understanding of the working of *Kebang* system at different levels as per the present practice it is good to understand its nomenclature, which is classified into:

i. DusumKebang

DusumKebang is the smallest unit of *Kebang* system. It is a form of *Kebang* adjudication where parties without bringing out their dispute to the village community try to settle within the family. The elders of families and neighborhood take part in the *Kebang* proceedings. Disputes such as theft, marital disputes, adultery, family property and land dispute, etc. are tried to be settled within the families. The *AKA* Section 4 (1) (d) provides that there is a chairperson heading the *Kebang* proceedings with 15 other members participating in it. If the matter fails to be resolved within the family then it is brought before the *DolungKebang*. It is important to note here that a *DusumKebang* is an endeavor of parties to settle disputes within families as to uphold family dignity in the village, otherwise they are free to bring their matter before the *DolungKebang* (village council).

ii. **DolungKebang**

DolungKebang is a village level *Kebang* looking after the day-to-day affairs of village relating to social, economic and political life of people. Every adult members of a village participates in the *DolungKebang* irrespective of rich and poor, and gender bias. In *Adi* societies it is the most effective form of *Kebang*. It has been taking care of village administration since ages and is independent of any external influence. Not only this, the village councils play a significant role in maintaining its relation with other neighboring villages. It is the *Kebang* which promulgated laws and issued ordinances when other forms of *Kebang* was still not known. From the history of the *Adi* tribe one could sense enormous role of *DolungKebang* dedicating their time and energy for the smooth functioning of the village administration. It not only guides village community in social and cultural activities but also adjudicates disputes between parties.

With some exceptions in certain cases a *DolungKebang* is generally held at *Dere/Moshup* (community hall). It is headed and guided by *GBs* of a particular village and no outsider is allowed in the *Kebang* deliberation. The Head *GB* of a village presides as the chairperson in the village level *Kebang* proceedings. In the absence of Head *GB*, the Assistant Head *GB* and if both are absent then any one of the concern village *GB* presides on the chair. It is to be noted here that the *GBs* only sits to adjudicate a *Kebang* proceedings and do not take part in the *Kebang* debate. Only disputes involving parties and property from same village

are entertained by a *DolungKebang*. Section 19 (of criminal offences) and Section 40 (of civil suits) of the AFR also provides that a village authority to try cases involving person(s) accused if resident within the jurisdiction and are indigenous to the State. If disputing parties are from different villages then *Kebang* is held at the village where the cause of action arose or where the matter in question located. However, if agreed upon by everyone, the matter could be heard in the village of any one of the disputing parties. The jurisdiction and practice of the *Kebang* system is thus governed by the AFR 1945 and *AKA* (as provided under different provisions). During ancient times, village councils could declare war against other villages and also could punish convicts in heinous crimes with death penalty which after the AFR 1945 (Section 31) came under the jurisdiction of Deputy Commissioner and presently governed by the Indian legal provisions.

iii. **BanggoKebang**

Banggo in *Adi* means a territory constituting of many villages. The English translation of a *Banggo* can be said to be a territorial Circle. *BanggoKebang* is a council dealing with inter-village matters. Section 4(3)(a) of the *AKA* provides that the council constitutes of at least 10 *GBs* belonging from different villages. A Head *GB* of any one of the village within the *Banggo* sits as a Chairperson in the *Kebang* proceedings. A *BanggoKebang* is generally called for when disputing parties or the property in question involves two villages, and the matter could not be resolved in *DolungKebang*. Under Section 4 (3) (d) of the *AKA*, for a *BanggoKebang* to be held it is important that the same be informed to the Additional Deputy Commissioner through *Banggo* Secretary who thereby will call for the *Kebang*. The notice for conducting the *Kebang* with date and venue is provided well in advance to the disputing parties and village authorities.

iv. **Bogum Bokang Kebang**

Bogum Bokang Kebang (hereinafter referred to as **BBK**) is the highest appellate forum for adjudication of disputes in appeal. The disputes which could not be resolved by *BanggoKebang* comes in appeal before the **BBK**. It is a *Kebang* composition of different *Banggos/Blocks*. The cases involving two or more

villages, and matters where *DolungKebang* and *BanggoKebang* are undermined are brought before the *BBK*. It is a body constituting of President, Secretary and other office bearers. However, it's office bearers don't participate as judge in the adjudication proceedings but cause the conduct of the *Kebang*. Section 4 (3) (h) of the *AKA* provides that, for a *Bogum Bokang Kebang* to be held it is important that a letter be sent to the President of the *BBK* with the decisions of the *BanggoKebang*, and the same is accepted. The President/Vice President/Secretary of the *BBK* sits as the chairperson in the *Kebang* proceedings, and in their absence an elderly Head *GB* chairs the proceedings. It constitutes of at least 10 *Gaon Burahs* and *Gaon Burihs* as judge. All the disputes relating to the *Adis* is taken care of by the *Bogum Bokang Kebang*.

v. **Adi Bane Kebang**

Adi Bane Kebang(hereinafter *ABK*) is the Apex and Supreme Council of the *Adis*. It is like a Non-Governmental Organization which looks after the development and welfare of the whole *Adi* societies. It is an Organization consisting of President, Vice President, Secretary General, Treasurer and other office bearers. The *ABK* has sub-ordinate bodies like the *ABK* Women Wing and the *ABK* Youth Wing. Any representation of the *Adis* before the state machinery is brought by the *ABK*. The adjudication of disputes by *DolungKebang* or *BanggoKebang* unless is contradictory to the common law practice of the *Adis*, is not interfered by the *ABK*. If there is any conflict between the *Adis* and other tribes of the State or the neighboring States, the *ABK* plays an important role in resolving the same. The *ABK* holds meetings occasionally as and when required.

It is pertinent to put here that there has been always a doubt of simultaneous existence of the *Bogum Bokang Kebang* and the *Adi Bane Kebang*, their power and functioning. It is always misunderstood that the *ABK* is the highest appellate body against the decisions of the village councils (*DolungKebang* and *BanggoKebang*). To make out a simple understanding, the *Adi Bane Kebang* and the *Bogum Bokang Kebang* are the two sides of a coin. The only difference is that while the *ABK* deals in with the social issues relating to whole of the *Adis*, the *BBK* deals with the judicial aspects in appeal. It is also pertinent to mention here that a *Bogum Bokang Kebang* cannot be held without the presence of village authorities (*Gaon Burahs* and *Gaon Burihs*) from the hamlets of

*Galo*¹⁰ community as the term ‘*bogum*’ denotes ‘*Galos*’. This was told to the author by Mr. Tajing Taki (former Secretary General of the *ABK* and an Ex Zila Parishad Member) in an interview on 9th November, 2018. Still there exists confusions and debates regarding the power sharing and functions of the *ABK* and *BBK* which requires a sound debate from all stakeholders of the *Adi* community.

X. Punishment System in *Kebang*

An *Adi Kebang* believes in ‘compensation’ than to inflict physical harm on the one found guilty of an offence. The *Adi* belief that a wrong done to a person cannot be undone; but for the larger interest of the disputing parties in particular and the village community in general, a compromise can be entered into by way of compensating the victim by the wrong doer. This compensation during olden days was in terms of *tadok* (traditional beads), *Adam* (traditional brass plates), Cattle, pig, goat, *Mithun* (*bos frontalis*) or a property equivalent to that of a wrong done. These way of compensation systems still exist; however, the modern day practice is that an equivalent amount in cash, in lieu of the above mentioned properties is handed over to the victim. Fines are imposed on parties if obstruct the proceedings of a *Kebang* in an unruly manner, violating any specific law provided under the *Adi Kebang Ayon*, abstaining oneself from community services, acts or omissions affecting the peace and order of whole village etc.

XI. *Kebang*: A Democratic Institution

The *Kebang* system has always been portrayed as a democratic political institution by various scholars and writers in the past. Mr. Bani Danggen on the democratic character of *Kebang* writes that: “Yes, it is democratic theoretically and practically. It is democratic in spirit, in origin and function. It acts

¹⁰ ‘*Galo*’ is one of the major tribes of Arunachal Pradesh. Until year 2000-2001 *Galo* was one of the sub-tribe of the *Adi* tribe.

democratically in every field of activity”¹¹. This democratic aspect of *Kebang* has to be seen from the mirror of the *Adi* societies. The history of *Adis* tells that there were *KebangAbus* who headed and guided the *Kebang* proceedings; a close look at the statement depicts the non-participation of women in the *Kebang* proceedings. The author during a field study was told by respondents/participants that women were not even allowed to sit inside a *Dere/Moshup*. Even after the advent of British in the region and the introduction of Assam Frontier (Administration of Justice) Regulation 1945, the status of women in relation to their participation in *Kebang* deliberation did not improve. This could be assumed from the fact that until recent years only the term ‘*GaonBurah*’ (village elderly men) prevailed in *Kebang* system. It is also to be noted here that the term ‘*Gaon Burih*’ could not find place even in the Certificates of appointment by the Deputy Commissioner for this long time. The term could find its place in the Certificates only in the first half of the year 2018. Before this, an overwrite can be seen in the Certificates of few new generation of women village authorities. An interview with Mr. TacheLombi, GeneralSecretary of the Arunachal Pradesh *Gaon Burahs* and *Gaon Burihs* Association also revealed that the term ‘*Gaon Burihs*’ was added recently in the name of the Association in order to encourage more women’s participation in the traditional court systems of the State.

The terms ‘*Kebang Abu*’ and ‘*Gaon Burah*’ as discussed earlier in this paper itself is discriminatory. Both reflects only the representation of male members of a village.

The tag of democratic institution was given even after the non-participation of women in the *Kebang* system. It is to be noted here that the term ‘democracy’ meaning ‘the people’ is a connotation of the opinion of the majority. But in the practice of *Adi Kebang* there was complete absence of women participation. Women and *pagbos* (slave) in *Adi* society were never considered to be part of the *Kebang* system. The status of *pagbos* were little better than that of the women as the *pagbos* could represent their master in *Kebang* if authorised to do

¹¹BANI DUNGEN, THE KEBANG: A UNIQUE INDIGENOUS POLITICAL INSTITUTION OF THE ADIS51 (Himalayan Publishers, 1st edn., 2003).

so. An author in article on *Kebang* of the *Adi* of Arunachal Pradesh¹² very aptly made a vertical division of *Adi* society in respect of *Kebang* into two groups viz. (i) adult male and (ii) women and *pagbos*. The author concludes his research article while saying that: “the *Adi Kebang* seemed to have been constituted with the rich and influential members of the society in total exclusion of women and slaves. It is, perhaps, justified to call an *Adi Kebang* a partial democracy with lenience toward oligarchy”.

The status of women’s participation in *Kebang* even after the introduction of modern laws in the region did not improve until recent years. It was only in the year 1998 that for the first time a woman Ms. YameTapak was appointed as a



Figure 6- The author with Ms. YameTapak (*Gaon Buri*, Rani village, East-Siang District, Arunachal Pradesh, Dated- 12/11/2018).

Gaon Buri of Rani village. An interview (12th Nov. 2018) with her revealed that her participation in *Kebang* was not very much welcomed by her male counterparts. However, there is a wind of change in the present time as field study reveals that there is a positive response from all walks of *Adi* society for women’s participation in *Kebang*. During the field study the author wastold that the present *Adi* society is accepting and encouraging women’s participation in *Kebang* system.

XII. *Kebang* and the Natural Justice Principles

When we say Natural Justice Principles, it is always understood that it involves two things viz. (i) right to be heard (*audi alteram partem*) and (ii) rule against

¹²*Kebang* of the *Adi* of Arunachal Pradesh: A Study of its Democratic Aspects, available at: <https://www.articonews.com/study-of-kebang-of-adis-of-arunachal-pradesh-india>

(last visited on August 19, 2019).

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bias (*nemo iudex in causa sua*). These principles are the reflections of the 'equality before law and equal protection of law' provided under the Constitution of India. When we apply these principles in the practice of *Kebang*, the very first impression is that the principles have a significant place in the traditional system. However, field study conducted by the author creates a little doubt to this view. The study reveals that the *Kebang* system is blameworthy of corruption in different manner as informed by the respondents/participants. It is told that *GBs* in *Kebang* while adjudicating a dispute sometimes have clan considerations. They have a bias attitude favouring a disputing party if belonging from same clan. The *GBs* are also accused of gaining monetary considerations in lieu of a favourable decision for persons paying them in cash or in kind. This is opposing to the principle of rule against bias. An instance of bias attitude could be experienced by the author in a recent land dispute hearing wherein some *GBs* did not turn up the scheduled following second day *Kebang* hearing which could not be concluded the first day. The author asserts biasness here as only those *GBs* were absent the next day whose views were in favour of the complainant. The *GBs* had a duty not to be bias and participate in the *Kebang* deliberation the next day irrespective of their opinion on the first day, reason being the matter was referred back to the *Kebang* by the Additional Deputy Commissioner (ADC) to have their observations and decision.

The principle *audi alteram partem* does not simply mean a right of hearing rather it connotes a right that is fair and is devoid of fear against biasness. The fairness of hearing includes prior notice of the cases against them, a fair opportunity to answer them, and the opportunity to present their own cases¹³. The *Kebang* system without any doubt fulfils the requirement of giving prior notice and opportunity to the contending parties to present their side of the case. However, the study reveals that the *Kebang* system falls short of exacting this right to be heard. As per British Captain Dunbar: "the moot like method of shouting down any dissentient and so obtaining unanimity in the council is presumably adopted."¹⁴ This is what been told to the author by the respondents/participants during his field study also. This problem even though rare requires

¹³Natural Justice, available at: https://en.wikipedia.org/wiki/Natural_justice (last visited on August 11, 2019).

¹⁴*Supra* note 10.

timely intervention so that influential and rich do not undermine the system and justice prevails.

XIII. Conclusion

Social Engineering is not just a set of rules but is an instrument solving and harmonizing the conflicting interests by providing for maximum wants with minimum friction. This forms an idea of resolving disputes amicably without dragging it for a long period of time. The *Adi* also believes in the same context of an amicable settlement when they talk of the presence of *Kebang* in their society. They believe that unlike adversarial court system, where disputing parties fight for their rights, in *Kebang* system the parties seek for an amicable settlement. They also believe that the *Kebang* system protect the contending parties from having any bitter experience.

When Indian judiciary at different levels have crores of pending cases due to its long and tiresome proceedings, the right to speedy trial and getting justice becomes a distant dream. Further, the procrastination of court verdicts adds hindrance in getting access to justice. At this juncture customary legal practices like that of the *Adi Kebang* can save the day. This traditional court system boasts of consuming much lesser time and energy building the confidence of the disputing parties. The systems alike *Kebang* if adopted in other parts of the country definitely it may give a sigh of relief to the already over-burdened Indian Judiciary.

Further, it has always been talk of the day regarding commercialised practices by the advocates, along with the sky rocketed fees which drains out the pocket of the one seeking justice adding woes to their agonies. In this regard also, the *Adi* believe that the *Kebang* system provides a cost effective speedy settlement.

It is again to put that when most of the people (both literate and illiterate) in India and particularly the tribes of Arunachal Pradesh are not familiar with the legal technicalities of adversarial court system, this simple way of traditional court system can give confidence to larger masses to approach the village authorities seeking for justice.

The *Kebang* way of village administration and adjudication of disputes makes it very distinct. Its importance and presence in the tribal society is worth

mentioning owing to its informal approach towards access to justice, which is again faster, cheaper and non-technical. The only check upon *Kebang* like traditional system should be to ensure the maximum democratisation in its functioning. With an inclusive democratisation, these systems of non-adversarial process are always welcome steps.

Cross Border Mergers in India in the IBC Era: A Legal Inquiry

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Abstract

The Insolvency and Bankruptcy Code, 2016 (IBC), since its enactment, has been a subject matter of intense deliberation, both in the trade as well as the legal fraternity. Strong opinions are polarised between those who consider it a necessary step and those who classify it as a 'draconian legislation'. In 2018, certain provisions of the IBC were amended which introduced sweeping changes in both the substantive as well as the procedural aspects relating to the insolvency process. The Indian economy grew unprecedentedly while most economies were suffering from economic depression. This growth is attributed to the inflow of FDI into India by way of cross-border mergers & acquisitions. IBC is expected to play a significant role in establishing a solid legal platform where cross border mergers & acquisitions in India can flourish in mutual coexistence with all other laws leading to wholesome economic development.

Currently, the legal framework for cross border insolvency in India concerning foreign proceedings, the participation of foreign investors, recognition of foreign courts, and uniformity in relief provided etc. is unclear and at a nascent stage. This creates many legal hassles and confusion in the finalisation of cross border merger deals and makes the business climate uncertain. The authors attempt in earnest, to critically analyse the legal framework with respect to IBC and study the complexities of cross-border insolvency in the Indian context, and set out the broad principles of the UNCITRAL Model Law and determine the relevance of Gibbs rule in the insolvency resolution process to assess on a macroeconomic level, the impact of IBC on cross border mergers and acquisitions in India.

Keywords: *Cross-Border Mergers & Acquisitions, FDI, Cross Border Insolvency, UNCITRAL Model Law, Gibbs Rule, Insolvency and Bankruptcy Code, 2016 (IBC).*

I. Introduction

India is the third fastest growing economy in the world after the United States and China. India's economic transformation and momentous market potential is

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attracting substantial interest in the world economy.² India is among the top three global investment destinations and ranks 10th in FDI inflows in 2016, with trade volumes to the tune of USD 44 billion.³

The Indian economy has emerged as the world's fastest growing economy with an annual Gross Domestic Product (GDP) growth rate of 7.3% in the first quarter of 2018,⁴ owing to a strong capital market and market-friendly and competitive regulatory reforms. In 2018, India recorded her highest ever half yearly Mergers and Amalgamations (hereinafter M&A's) figure of USD 75 billion from 638 transactions comprising of ten deals in the billion-dollar category, and 52 deals above USD 100 million each, which together contributed 93% of total deal value.⁵ 2018 has witnessed 235 M&A transactions amounting USD 65.5 billion, along with the highest cross-border M&A's deal value since 2011 at USD 25 million, which is a monumental increase of 5.8 times the total value of the same in 2017.⁶

The Indian cross border merger and acquisition space, over the last couple of years, has witnessed a slew of policy-driven regulatory refinements driven aimed at ease of business as well as industry consolidation.⁷ This includes the much-hyped Insolvency & Bankruptcy Code, 2016⁸, which was aimed at facilitating cross border mergers and acquisitions in an organised and efficient manner by eliminating the threat of cross border insolvency which acts as a deterrent and major issue in all cross border mergers and acquisitions deals. Indian bankruptcy and insolvency laws were streamlined and consolidated with

²Afra Afsharipour, *Rising Multinationals: Law and the evolution of outbound acquisitions by Indian companies*, 44 UCDLR, 1029, 1030 (2011).

³WORLD INVESTMENT REPORT, 2017, UNCTAD, (May 9, 2017), http://unctad.org/en/Publications_Library/wir2017_en.pdf.

⁴Sridhar Ramasubramanian, *Expert speak on the overall economic outlook*, 16(4) GTILLP, 1, 25, (2018).

⁵*Id.* at 8.

⁶Anuj Chande, *2018 Setting new records for Indian M&A*, GTUKLLP, (Oct. 1, 2018, 11:15 AM), <https://www.grantthornton.co.uk/insights/2018-setting-new-records-for-indian-ma>.

⁷Sakshi Kapoor, *Mergers and acquisitions: Current scenario and emerging trends in India*, 1(6) IJMSR, 69, 70-71, (2018).

⁸Insolvency and Bankruptcy Code, 2016, Act No. 31, Acts of Parliament, 2016 (India)

the enactment of the Insolvency and Bankruptcy Code.⁹ The IBC has created a formal market for cross border M&A transaction involving distressed assets, and India has since seen a steady increase in transactions involving distressed assets.¹⁰ Legislative reforms including time-bound insolvency regime, replacing the primary company law, and the replacement of a redundant and complicated foreign investment regime with a new one, among others, have encouraged strategic cross border M&A activity in the country. The last fiscal witnessed deals over USD 80 billion, due to watershed activity in the telecommunication, financial services, technology and energy sectors – almost 30% more than the preceding year.¹¹

The MCA through a public notice¹² in June 2018 invited suggestions and comments on the proposed draft chapter relating to cross border insolvency which will make the provisions of IBC attuned to the Model Law.¹³

II. Cross-Border Insolvency Scenarios

In the Indian context cross border insolvency issues could arise in these circumstances: (a) where the creditors of an Indian debtor want to enforce their rights over the assets of an Indian debtor, located overseas; (b) where creditors

⁹Pratik Datta, *Value destruction and wealth transfer under the Insolvency and Bankruptcy Code, 2016*, NIPFP WORKING PAPER SERIES, 3, (Feb 2, 2019), https://www.nipfp.org.in/media/medialibrary/2018/12/WP_247.pdf.

¹⁰*IBC triggers M&A deals for distressed assets*, M&ACRITIQUE, (Jan 21, 2019), <https://mnacritique.mergersindia.com/insolvency-bankruptcy-code-drives-mergers-acquisitions/>.

¹¹*Telecom, technology and BFSI push India M&A activity to over \$50 billion in 2017*, LIVEMINT, (Feb 1, 2019), <https://www.livemint.com/Companies/D2Z14GP2u0Dr1TeshGwLAO/Telecom-technology-and-BFSI-push-India-MA-activity-to-over.html>.

¹² Insolvency Section File No. 30/27/2018, *Public Notice Dated 20/06/2018*, Ministry of Corporate Affairs, (20 Mar. 2019)

http://www.mca.gov.in/Ministry/pdf/PublicNotice_CrossBorder_20062018.pdf

¹³Sarthak Jain & Anuska Sheth, *Cross-border Insolvency: Why India should adopt the UNCITRAL Model Law*, ILJ, 1-2, (Jan 4, 2019), <http://www.indialawjournal.org/cross-border-insolvency.php>; See also, *Overview of cross border Insolvency framework for Corporate debtors under the Insolvency and Bankruptcy Code, 2016*, GOVT. OF INDIA, MINISTRY OF CORPORATE AFFAIRS, (Jan 19, 2019), http://www.mca.gov.in/Ministry/pdf/PublicNoticeCrossBorder_20062018.pdf.

of a foreign debtor want to enforce their rights over the assets of the foreign debtor based in India; and (c) where the Indian creditors to a foreign debtor, want to enforce their rights over the assets of that foreign debtor based in a foreign jurisdiction.¹⁴

The issues arising out of these situations are intricate and cross border insolvency, inevitably creates panic amongst the creditors across jurisdictions over how their claims may be compromised by the initiation of insolvency against the debtor in its centre of main interests.¹⁵

Cross border insolvency, essentially, can be deconstructed based on three key questions: which law shall be applied; who has the jurisdiction to carry out the insolvency process; and how are judgments asserting control over assets enforced?¹⁶ The redressal of financially afflicted debtors, having assets across jurisdictions has two principal theoretical approaches, and a third, more practical real approach.¹⁷ Firstly, there is the territorial approach¹⁸, which broadly provides that each jurisdiction will apply its laws over assets located in its jurisdiction, to the exclusion of others.¹⁹ Secondly, there is the Universalist approach²⁰, which provides for a single administrator applying a single global regime over assets, across national boundaries. Thirdly, there is the hybrid approach²¹, where different jurisdictions try to harmonize and work out the most

¹⁴A foreign creditor is allowed to initiate insolvency proceedings against an Indian debtor, under the IBC in India.

¹⁵Mukesh Chand, *Cross border Insolvency “From territorialism to universalism to modified universalism,”* LIVELAW, (Feb 8, 2019), <https://www.livelaw.in/cross-border-insolvency-from-territorialism-to-universalism-to-modified-universalism/>.

¹⁶A. K. Sikri, *Cross-border Insolvency: Court-to-court cooperation*, 51(4) JILI, 466, 467, (2009).

¹⁷Sarah Paterson, *Rethinking corporate bankruptcy theory in the twenty-first century*, OJLS, 1, 3, (2015).

¹⁸Approaches to Cross-border Insolvency, Australian Government, The Treasury (20 Mar. 2019)

<http://archive.treasury.gov.au/documents/448/HTML/docshell.asp?URL=6Approaches.asp> at 1.

¹⁹Ryan Halimi, *An Analysis of the 3 major cross-border insolvency regimes*, II PROGRAM PAPERS, 2, (Jan 25, 2019), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1046&context=international_immersion_program_papers.

²⁰Approaches to Cross-border Insolvency, *Supra* Note 17

²¹*Id.* at 1

suitable centre for conducting the proceedings, by way of co-operation from other jurisdictions having the distressed assets.²²

III. The Legal Framework in India for Cross Border Insolvency

Sections 234 and 235 of the Code²³ deal with cross border insolvency perfunctorily, empowering the government to make treaties and empowering the Adjudicating Authority²⁴ under the IBC, to issue a letter of request to a court in a foreign country, which has signed an agreement, to deal with the assets in a specified manner.²⁵ Theoretically, this provides a mechanism to foreign creditors to apply to Indian courts with their issue to deal with assets in India in consonance with the insolvency laws of the jurisdiction where foreign main proceedings have been initiated, with respect to a debtor, having assets in India.²⁶

For the admission of the foreign proceedings in India, the process set out under the Code of Civil Procedure, 1908²⁷ will apply, along with English common law principles. Similarly, for Indian proceedings to be recognized abroad, the procedural rules of the foreign jurisdiction will apply. Countries who are signatories to the UNCITRAL Model Law are mandated to provide for the recognition, cooperation, assistance and appropriate relief in insolvency proceedings commenced in India, except in cases where the country has otherwise required reciprocity. As of June 2018, 44 nations have adopted the UNCITRAL Model Law, including the United States, the United Kingdom and

²² Michael Guihot, *Cross-border insolvency: A case for a transaction cost economics analysis*, 25(5) NJBLP, 1, 3-4, (2016).

²³ Insolvency and Bankruptcy Code, 2016, *Supra* Note 7

²⁴ NCLT is the adjudicatory authority in matters of Insolvency & Bankruptcy under the IBC, 2016.

²⁵ Roshni Menon, *Cross-border insolvency- An analysis of the draft chapter*, L&S ATTORNEYS, 1, (Jan 7, 2019), <https://www.lakshmisri.com/News-and-Publications/Publications/Articles/Corporate/cross-border-insolvency-an-analysis-of-the-draft-chapter>.

²⁶ Ashish Pandey, *The Indian Insolvency and Bankruptcy Bill: Sixty years in the making*, 8(1) IMJ, 26, 28-29, (2016).

²⁷ The Code of Civil Procedure, 1908, Act No. 5, Acts of Parliament, India (1908).

Singapore. However, certain countries that have adopted it may have made reservations, and it calls for reciprocity.²⁸

While the IBC allows the government to enter into bilateral treaties to implement the UNCITRAL Model Law, it is not practical negotiating up to 200 separate bilateral treaties in such a short space of time as it will lead to further complications.²⁹ For India, the easiest solution would be sign and ratify the UNCITRAL Model Law and then incorporate the same into the IBC.³⁰ There is a common reservation that India will not give effect to the treaty provisions over public policy, but this reservation is very common amongst most contracting states and how the courts in India might interpret the principle³¹ and whether they will accord a narrow, or broad status, potentially frustrating the rights of foreign representatives in actions before the Indian courts is the key point here.³²

IV. India and the UNCITRAL Model Law

The UNCITRAL Model Law seeks to deal with the complexities in cases of cross border insolvency by rationalizing the process, but it should not be mistaken for creating a substantive, unified insolvency law.³³

The UNCITRAL Model Law provides for the principle of centre of main interests (COMI) in ascertaining the place where the main proceeding should be

²⁸ For the principle and implications of reciprocity, see Keith D. Yamauchi, *Should reciprocity be a part of the UNCITRAL Model cross-border insolvency law?* 16 IIR, 145, 147, (2007).

²⁹ Ran Chakraborti, *India's proposed cross border insolvency regime: Will it trump the Gibbs rule?* INDUSLAW, (Feb 10, 2019), <http://www.mondaq.com/india/x/721994/Insolvency+Bankruptcy/Indias+Proposed+CrossBorder+InsolvencyRegime+Will+It+Trump+The+Gibbs+Rule>.

³⁰ Morshed Mannan, *Are Bangladesh, India and Pakistan ready to adopt the UNCITRAL Model Law on cross-border insolvency?* UNCITRAL Model Law in South-Asia, 25(3) IIR, 1, 5, (2016).

³¹ Irit Mevorach, *Cross-border insolvency of enterprise groups: The choice of law challenge*, 9 BJCFC, 23, 26, (2014).

³² Sandeep Gopalan & Michael Guihot, *Recognition and enforcement in cross-border insolvency law*, 48 VJTL, 1225, 1226-27, (2015).

³³ Jenny Clift, *UNCITRAL Model Law on cross border insolvency-A legislative framework to facilitate coordination and cooperation in cross-border insolvency*, 12 TJICL, 307, 309, (2004).

initiated. Interestingly, COMI is not defined under the Model Law. It implies that the seat of a corporate entity's major stakes, either in terms of the location of its assets and its place of significant operations or control. COMI is determined by both objective and ascertainable factors by third parties, especially creditors and potential creditors.³⁴ The command and control test is the generally applied test to determine the COMI of an entity.³⁵ There is an obvious presumption in favour of the place of its registered office, which normally is the head office of the company³⁶ and this presumption has served well in the absence of any serious controversy.³⁷ The place of incorporation or the registered office serves as conclusive proof of the existence of a corporate entity.³⁸ The registered office, however, does not shift the burden of proof away from the foreign representatives seeking recognition in a main proceeding.³⁹ Courts generally, consider other factors, such as the location of the agency who manages the debtor, or the location of the debtor's headquarters⁴⁰, the location of majority of the debtor's creditors or the majority of creditors who would be affected by the case, the location of the debtor's primary assets and the jurisdiction whose law would apply to most disputes.⁴¹

In India, the initiation of proceedings against an Indian corporate entity itself makes such proceedings the "foreign main proceedings"⁴² then the COMI lies in India.

V. Implications of India Accession to the UNCITRAL Model Law

Cross border insolvency is resolved through a formal cross-border approach under the UNCITRAL Model Law on Cross-Border Insolvency⁴³ approved by

³⁴ In Re. *Stanford International Bank*, 2010 1270 Bus LR 1270 (2010).

³⁵ IAN F. FLETCHER, *INSOLVENCY IN PVT. INTERNATIONAL LAW*, 390-91, (2nd ed., 2005).

³⁶ Article 16(3) Model law; see also Virgos, Miguel, and Schmitt, Etienne. (1996) *The Report on the Convention on Insolvency Proceedings*, EU Council Document 6500/96 DRS8 (CFC)

³⁷ H.R. Report No. 31, 109th Congress, 1st Session, at para 114.

³⁸ ROY GOODE, *PRINCIPLES OF CORPORATE INSOLVENCY LAW*, 109, (4th ed., 2011).

³⁹ In Re. *Tri-Continental Ex. Ltd.*, 349 B.R. 627 (2006).

⁴⁰ H Jayesh et al., *A new look to the Indian corporate insolvency regime*, 10(1) IRI, 34, 36-37, (2016).

⁴¹ In Re. *Sphinx Ltd.*, 371 B.R. 10 (2007).

⁴² Article 2(b), UNCITRAL Model Insolvency Law (1997).

the UN General Assembly through a resolution in 1997.⁴⁴ The Model Law is a result of lengthy deliberations and was passed as a model law and not a convention to provide for greater flexibility for nations to adopt the same into their domestic laws.⁴⁵ This allows the nations to change, include or exclude certain provisions in addition to the existing model, giving states the option to adopt to the model law conveniently.⁴⁶

The present cross- border insolvency provisions under the Insolvency and Bankruptcy Code, 2016 (IBC), included on the recommendations of the High-Level Joint Committee on the Insolvency and Bankruptcy Code, 2015, requires India to enter into bilateral treaties with other nations to counter the issue of cross border insolvency.⁴⁷ This necessitates the application of the doctrine of reciprocity⁴⁸, where request letters may be issued by the NCLT or the authorized court to a tribunal or foreign court where the corporate debtor's assets are located.⁴⁹ Presently, India has not entered into any bilateral treaty with any other nation to further the development of the same.⁵⁰ The assumption that treaties with different states will have different provisions entailed leads to the uncertainty in the implementation and entering of the cross- border bilateral treaties.⁵¹ Reciprocal arrangements adopted uniformly will significantly minimise the burden on the judiciary.⁵²

⁴³ UNCITRAL Model Law on Cross-Border Insolvency (1997), (20 Mar. 2019), http://www.uncitral.org/UNCITRAL/en/UNCITRAL_texts/CrossBorderInsolvency/1997_ModelLaw.html at 1.

⁴⁴ Barry E. Adler, *A theory of corporate insolvency*, 72 NYULR, 343, 345, (1997).

⁴⁵ Wong Li Fern & Chelsia, *To better the insolvency regime: A question of assimilating the model law*, 23 SLR, 211, 217, (2003).

⁴⁶ *Id.* at 215.

⁴⁷ Vivek Tyagi & Manipadma Datta, *Regulatory framework of corporate insolvency in India: The road ahead*, 16(2) ABR, 5, 9, (2017).

⁴⁸ Keith D Yamauchi, *Should reciprocity be a part of the UNCITRAL Model Law*, 16 INSOLIR, 145, 147, (2007).

⁴⁹ Renuka Sane, *The way forward for personal insolvency in the Indian Insolvency and Bankruptcy Code*, NIPFP, 4, (Feb 23, 2019), https://www.nipfp.org.in/media/medialibrary/2019/02/WP_251_2019.pdf.

⁵⁰ Sreyan Chatterjee et al., *Watching India's insolvency reforms: A new dataset of insolvency cases*, Bloomberg quint, 3, 21, (2017)

⁵¹ William W Park & Alexandar A. Yanos, *Treaty obligations and National law: Emerging conflicts in international arbitrations*, 58 HLR, 251, 252, (2006).

⁵² *Supra* Note 16.

In the past, the adoption of the Model Law in India was recommended in the past by the Eradi Committee⁵³ and the N.L. Mitra Committee⁵⁴ in 2000 and 2001 respectively, but the same was not considered by the legislators.⁵⁵ The Model Law lays down the most widely accepted practices in cross-border insolvencies and has been signed and ratified by 44 states till date⁵⁶.

The Model Law basically provides for the following (a) The recognition of foreign proceedings, as a foreign main proceeding or as a foreign non-main proceeding ; (b) To provide access to courts in an enacting state; (c) Increased co-ordination and co-operation between the courts where the debtor's assets are situated and the court where concurrent proceedings are being carried out; and (d) Ensuring uniform and consistent relief to be given for the fair and orderly resolution of cross-border insolvencies.⁵⁷

The Model Law lays down the circumstances when and where the foreign proceedings are to be recognized and how they shall be recognized.⁵⁸ The recognition granted is based upon where the debtor has its centre of main interests (COMI) which is dependent on its place of establishment.

The relief provided after recognizing foreign-main proceedings is generally the grant of a stay on local proceedings by creditors against the debtor undergoing the insolvency proceedings. This implies that a moratorium be levied on the

⁵³ Justice V. Balakrishna Eradi Committee Report 2000 on Law Relating to Insolvency & Winding up of Companies, (2000) MCA Reports, India, (20 Mar. 2019), <http://reports.mca.gov.in/Reports/24-Eradi%20committee%20report%20of%20the%20high%20level%20committee%20on%20law%20relating%20to%20insolvency%20&%20winding%20up%20of%20Companies,%202000.pdf>

⁵⁴ Dr. N.L. Mitra Committee Report, Report of The Advisory Group on Bankruptcy Laws - May 2001, RBI Reports, India, (20 Mar. 2019) <https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225>

⁵⁵ Arjya Majumdar, *The UNCITRAL Model Law on cross border insolvency*, 2(1) ILJ, 1, 4, (2009).

⁵⁶ Status, *The UNCITRAL Model Law on Cross-Border Insolvency* (1997), (20 Mar. 2019) http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html at 1.

⁵⁷ UNCITRAL model law on cross border insolvency, Jan 2014, UNP E.14.V.2.

⁵⁸ Andre J Berends, *UNCITRAL model law on cross border insolvency: A comprehensive overview*, 6 TJICL, 309, 314, (1998).

assets of the debtor and the administration of his assets in that State to be entrusted to the foreign representative concerned. Article 21 of the Model Law is somewhat similar to the provisions of the IBC⁵⁹, which is based upon protection and not prejudicing the assets of the debtor, either in a foreign non-main proceeding or a foreign main proceeding.⁶⁰

The quantum of relief is determined on the principle of comity and assistance, although the Model Law is not very rigid on the demand for reciprocity. This implies that if India incorporates the Model Law, then Indian representatives cannot seek access to foreign insolvency proceedings of a nation that has not adopted the Model Law.⁶¹ However, a nation that has not adopted the Model Law may seek access to the insolvency proceedings in certain cases, of a State that has adopted it.⁶² The principle of reciprocity⁶³ that has currently been included in the IBC may however exist even if the Model Law is to be adopted.⁶⁴

VI. The Gibbs Rule and Its Relevance in Indian Context

The Gibbs Rule implies that a debt governed by English law cannot be discharged or upset by a foreign insolvency proceeding and the English Law shall take precedence unless that creditor has submitted to those foreign proceedings.⁶⁵

The longstanding Gibbs Rule was recently put to the test by English courts in the recent *Sberbank case*.⁶⁶ The judgment involves three pertinent issues: **firstly**, the extension of moratorium indefinitely where the moratorium period is at the brink of expiry under the local law; **secondly**, the status of creditors who

⁵⁹ Sec.14, Insolvency and Bankruptcy Code, 2016, Act No. 31, Acts of Parliament, 2016 (India)

⁶⁰ Ronald J Silverman, *Advances in cross-border insolvency cooperation: The UNCITRAL model law on cross border insolvency*, 6 ILSA JICL, 266, 266-67, (2000).

⁶¹ Matthew T. Cronin, *UNCITRAL model law on cross border insolvency: Procedural approach to a substantive problem*, JCL, 709, 711, (1999).

⁶² S. Chandra Mohan, *Cross-border insolvency problems: Is the UNCITRAL model law the answer?*, 21(3) IIR, 199, 220-21, (2012).

⁶³ For Principle of Reciprocity, See Keith D.Yamauchi, *Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?* 16(1) IIR, 145-179 (2007).

⁶⁴ *Id.*

⁶⁵ *Gibbs & Sons v. Societe Industrielle Des Metaux*, 2 QBD 399 (1890).

⁶⁶ *Gunel Bakhshiyeva v Sberbank of Russia & Ors.*, EWCA CIV 2802 (2018).

have rights under any foreign law document, and either who did not participate or agree to the restructuring proceedings; and **thirdly**, whether the Gibbs Rule is still a good law or not.⁶⁷

Many English academics in the judgement considered the Gibbs Rule as an anachronism, while some dubbed the "Gibbs doctrine to belong to an Anglo-centric age reasoning which should be confined to history."⁶⁸ Similarly in *Pacific Andes Resource Development Ltd*, the Singapore High Court⁶⁹ dismissed the Gibbs Rule, observing that: "In the case of a contractual obligation which is governed by English law, a further rule should be developed where, if one of the parties to the contract is the subject of insolvency proceedings in a jurisdiction with which he has an established connection based on residence or ties of business, it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law."

The Gibbs Rule is without doubt, problematic as it does not recognise foreign insolvency proceedings taking precedence over an English law debt; yet the English courts generally expect that a foreign court will recognise its own judgements in relation to a restructuring in England, under a foreign law loan agreement.⁷⁰ This leads to a dichotomous and paradoxical situation.

The Sberbank judgment⁷¹ further indicates that the English courts will not apply foreign law, or apply English law in a manner which replicates the intended relief that may be available under any foreign law if such an outcome cannot be achieved under the English law.⁷² Whether the IBC and subsequent incorporation of the Model Law will solve the issue with the Gibbs Rule and in

⁶⁷ Anthony v Sexton, *Current problems & trends in the administration of transnational insolvencies involving enterprise groups: The mixed record of protocols, the UNCITRAL Model insolvency law, and the EU insolvency regulation*, 12(2) CJIL, 812, 815, (2012).

⁶⁸*Id.*, See Professor Ian Fletcher's quote in paragraph 49 of the judgment.

⁶⁹ In *Re. Pacific Andes Resource Development Ltd*, SGHC 210 (2016).

⁷⁰Laura Carballo Pineiro, *Brexit and International Insolvency beyond the realm of mutual trust*, CPIL WORKING PAPER NO 2017, 2-3, (Jan 23, 2019), https://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2017_1.pdf.

⁷¹Sberbank, *Supra* Note 64

⁷²DONALD S. BERNSTEIN, *THE INSOLVENCY REVIEW*, 49-50, (6th ed., 2018).

the context of the Sberbank judgment⁷³, what might happen in case of an Indian debtor undergoing the corporate insolvency resolution process in India under the Code had foreign creditors under the English law financing documents needs further clarification⁷⁴

The question which warrants immediate answers are, will the English courts admit the application of an insolvency resolution professional's as a foreign representative under the Code?⁷⁵ Can it already do so only by incorporating the UNCITRAL Model Law, and without any further legislative action in India?

It is worth re-iterating that the IBC enables the Adjudicating Authority⁷⁶ to send a Request Letter to an appropriate Court of the country with which a bilateral treaty has been entered into, for recognition of proceedings⁷⁷, though such a request is still subject to the Gibbs Rule and the discretion of the English Court, notwithstanding the provisions of the Model Law and its incorporation.⁷⁸

VII. Insolvency and Bankruptcy Code (IBC), 2016 and Its Impact on Cross Border Mergers and Acquisitions in India

There is a significant increase in cross border M&A activity in India. The IBC 2016 creates a conducive environment for healthy companies to look for inorganic growth opportunities in entities undergoing insolvency resolution.⁷⁹ The acquisition of these entities with attractive concessions and exemptions from the tedious open-offer requirements by SEBI has made cross border M&A

⁷³ Sberbank, *Supra* Note 64

⁷⁴ Morrison and Foerster, *New UNCITRAL Model Law to facilitate cross-border restructuring and insolvency*, LEXOLOGY, (March 5, 2019), <https://www.lexology.com/library/detail.aspx?g=11c0fbc9-91f5-4302-b859-5caa03eabdc1>.

⁷⁵ DK Prahlada Rao, *Role and responsibility of insolvency professionals under the Code- An analysis*, ICSI, 21-22, (2017).

⁷⁶ The National Company Law Tribunal (NCLT)

⁷⁷ Sec. 234, Insolvency and Bankruptcy Code, 2016, Act No. 31, Acts of Parliament, 2016 (India)

⁷⁸ Manoj K Singh et al., *CIRP Regulation amendments: A step closer towards a smooth insolvency regime*, MANUPATRA, 13-14, (Jan 1, 2019)

<https://www.manupatrafast.com/NewsletterArchives/listing/Insolvency%20Singh%20A%20associates/2018/Insolvency-Vol%20II%20Issue%20II.pdf>.

⁷⁹ DEEKSHA MALIK & AISHWARYA CHOUDHARY, *EMERGING CHALLENGES IN MERGERS & ACQUISITIONS*, 23-24, (1st ed., 2018).

s lucrative.⁸⁰ While steel and pharma sectors account for a significant portion of strategic mergers under resolution plans, the cement and allied sectors are also gaining prominence among the market players. Assocham predicts almost \$50 billion worth of deals on the back of stressed assets in 2018.⁸¹ According to Assocham 944 transactions including 664 domestic and 280 cross-border worth \$46.5 billion in which \$13.1 billion was for domestic and \$33.4 billion cross-border M&As, took place in 2017.⁸²

Under the erstwhile Companies Act, 1956⁸³ only inbound mergers were permitted. The Companies Act, 2013⁸⁴ allows outbound mergers as well, and its provisions were notified in 2017.⁸⁵ Towards that objective, the Reserve Bank of India (RBI) issued Foreign Exchange Management (Cross Border Merger) Regulations, 2018⁸⁶ in March 2018, providing an organised and liberalised framework for cross-border mergers.⁸⁷ The new regulations made way for a deemed-approval status from RBI upon fulfilling certain laid down conditions instead of an intensive and tedious in-principle approval on a case-to-case basis. While the regulations are expected to boost merger volumes, certain grey areas still need clarification. For example, demergers, have not been provided for. Tax-neutral treatment has not been given to outbound mergers yet.⁸⁸ Further, there is no provision for fast-track mergers, which are available for domestic

⁸⁰Rajesh Belur, *How bankruptcy law and reforms will spark M&As across sectors*, NEWS CORP, (March 13, 2019), <https://www.vccircle.com/how-bankruptcy-law-and-reforms-will-spark-m-as-across-sectors>.

⁸¹*Towards sustainable and lasting growth: Annual Report-2016-17*, GOVT. OF INDIA, MINISTRY OF COMMERCE & INDUSTRY & DEPT. OF COMMERCE, (March 4, 2019), http://commerce.gov.in/writereaddata/uploadedfile/moc_636281140249481285_annual_report_16_17_eng.pdf.

⁸²*Id.*

⁸³Companies Act, 1956, Act No. 1, Acts of Parliament, India, (1956).

⁸⁴Companies Act, 2013, Act No. 18, Acts of Parliament, India, (2013).

⁸⁵M Nirmla, *Corporate restructuring and Companies Act-2013-An impact analysis*, 1(5) IJMSRR, 26-27, (2014).

⁸⁶Foreign Exchange Management (Cross Border Merger) Regulations, 2018, Notification No. FEMA.389/2018-RB, Dated: March 20, 2018, (20 Mar. 2019), <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11235&Mode=0> at 1.

⁸⁷Justin Bharucha, *Overview of M&A activity*, LAWREVIEWS, (March 7, 2019), <https://thelawreviews.co.uk/edition/the-mergers-acquisitions-review-edition-12/1174416/india>.

⁸⁸Afra Afsharipour, *Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies*, 44 UCD, 1029, 1031, (2011).

companies. However, as the regulations came recently and are still evolving, market dynamics and economic situation may prompt certain developments.⁸⁹

Almost all relevant corporate regulations in India have been restructured in the last few years, like the takeover rules, anti-monopoly laws, delisting and accounting guidelines, etc. Most recently, the FEMA (Transfer or Issue of Securities to Persons Resident Outside India) Regulations, 2000⁹⁰ – the principal law governing foreign investment in India – was replaced⁹¹ by a simpler and streamlined successor.⁹² The enactment of the Goods and Service Tax⁹³ is another significant step towards a simpler tax regime. On the policy level, many sectors like single-brand retail, manufacturing, and aviation have been brought under the automatic route over the last year.⁹⁴ There is also a growing overture for the simplification and unification of industrial and labour laws. The idea is to condense the 44 laws into four broad codes on wages, social security, safety regulations and trade unions. Another area on a similar path is the direct tax regime.

Cross border M&As are market-driven processes in a sense that, they are not only dependent upon the overall economy but also upon the external forces like market sentiment and regulatory developments.⁹⁵ Based on the atmosphere

⁸⁹*Id.*

⁹⁰Foreign Exchange Management (Transfer or Issue of a Security by a Person Resident Outside India) Regulations, 2000, Notification No. FEMA 20 /2000-RB dated 3rd May 2000, (20 Mar. 2019),

https://www.rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=174 at 1.

⁹¹The Foreign Exchange Management (Transfer or Issue of a Security by a Person Resident Outside India) Regulations, 2017, Notification No. FEMA 20(R)/ 2017-RB, Dated 07 Nov. 2017, (20 Mar. 2019),

https://rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=11161 at 1.

⁹²D'Souza-Monie et al., *India: Legal and tax issues in cross border M&As*, IFLR, 57, 59, (2001).

⁹³Introduced via 101st Amendment Act, Acts of Parliament, India, (2016).

⁹⁴Jatindar Singh, *Economic reforms and foreign direct investment in India: Policy, trends and patterns*, 8(4) IUP JFE, 59, 62, (2010).

⁹⁵Tony Edwards, Cross border mergers and acquisitions: the implications for labor, 5(3) ERLR, 320, 329, (1999).

created by the IBC and other regulatory reforms, cross border M&A are expected to increase.⁹⁶

Due diligence is advisable before making investments. Purchasing a distressed company calls for in-depth due diligence. Sector-wise, the technology, financial services and infrastructure should see the most activity.⁹⁷ Outbound investments will be led by the oil and gas sector, driven by India's pursuit to secure supplies of natural resources, and helped by the pro-trade measures taken by the government.⁹⁸ This trend can be termed as cautious optimism characterised by lower volume in trade, but a higher value in deals. Continued political stability, rapid economic reforms and macro-economic factors indicate that 2019 will be one of the most beneficial years for cross border M&A with transaction activity, with better returns than those achieved in 2018.⁹⁹

Even though the cross border M&A regulatory and policy framework in India is evolving, some challenges remain. One, such instance is SEBI's low threshold¹⁰⁰ listed companies for making open offers under the takeover regime. Acquirers are reluctant as significant costs, and expenses are involved. Further, the delisting a company from the stock exchanges after the merger is troublesome. Another issue is the varying stamp duty rates across different states, which have in the past made inter-state cross border M&As unattractive. Moreover, procedural bottlenecks like a long compliance list and multiple approvals from courts and sectoral regulators pose a problem.

VIII. Conclusion

The Notification on the draft chapter on cross-border insolvency by MCA, which aims at adopting the UNCITRAL Model Law, is a positive step, as it paves the way for India's accession to the UNCITRAL Model Law, rather than

⁹⁶Arpita Agnihotri, *Determinants of acquisitions: an Indian perspective*, 36(9) MRR, 882, 883, (2013).

⁹⁷KAMAL GHOSH RAY, *MERGERS AND ACQUISITIONS –STRATEGY, VALUATION AND INTEGRATION*, 557-58, (1st ed., 2010).

⁹⁸Rabin Hattari&Ramkishen S.Rajan, *India as a source of outward foreign direct investment*, 38(4) ODS, 497, 501, (2010).

⁹⁹Rajesh Begur, *How bankruptcy law and reforms will spark M&As across sectors*, <https://www.vccircle.com/walmart-gets-antitrust-approval-for-16-bn-flipkart-deal> (20 Mar. 2019)

¹⁰⁰25% threshold for making open offers.

entering into many bilateral arrangements with other jurisdictions. However, simply adopting the model law does not mean that the provisions of the IBC will be imported, or applied in foreign jurisdictions. It is clear that the Gibbs Rule is a good law and that the foreign creditors will retain their rights under the English law and financing agreements, notwithstanding an Indian restructuring, assuming that they did not participate in the restructuring process, or agreed to the restructuring plan.

In the context of a restructuring, it is implausible that a permanent stay is granted to a foreign creditor over an Indian debtor in proceedings before the English courts which are not implemented within any time-bound requirement.¹⁰¹ The suggested draft chapter fails to provide for the individual bankruptcy, which in turn minimises the scope of cross border insolvencies to corporates. The adoption of reciprocity, though not a requirement under the Model Law, will not restrict India from preserving the current provisions on cross border insolvencies.

In India, the application for the recognition of foreign proceedings is required to be made to the NCLT by the foreign representatives under the Model Law. To prevent any abuse of the powers broad parameters and guidelines for the use of discretionary powers of the tribunal while granting moratorium in case of foreign non-main proceedings need to be laid down. The adoption of the Model Law will help in the ease of doing business and significantly increase the inflow of FDI into India by way of cross border mergers and acquisitions. Finally, the Model Law should be adopted to achieve harmonization of insolvency laws, through international co-operation and co-ordination. All of this legal consolidation and harmonization will favourably impact the cross border mergers and acquisitions scenario in India.¹⁰²

¹⁰¹Chakrabarti, *Supra note 15*.

¹⁰²Aastha Kaushal & Saurav Gurjer, *Implications of India Adopting the UNCITRAL Model Law on Cross-Border Insolvency*, INDIACORPLAW, (March 9, 2019), <https://indiacorplaw.in/2018/09/implications-india-adopting-uncitral-model-law-cross-border-insolvency.html>.

Judicial Independence and Impartiality: A Sinking Belief

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Abstract

For efficient working of a republican setup rooted totally on Rule of law, an unbiased and impartial judiciary is indispensable. The percept of judicial independence and impartiality has brought greater significance in the countries with written constitutions, where the executive has been conferred with wide authority to sprint the government and the likelihood of abuse of such power is considerably high. In a country like India where judiciary is regarded as the watchdog of democracy, it undoubtedly becomes essential that judges in their individual capacities and the judiciary as a whole are unbiased and neutral of all interior and exterior influences in order to guard and shield the philosophical and conceptual phrases used in the preamble of the Indian Constitution. Besides, an impartial and independent choice mechanism is a sure safeguard for ensuring that persons with dubious integrity do not occupy high judicial offices, thereby enhancing public's have faith and self assurance in justice delivery mechanism of the country. Considering the significance which an unelected judiciary wheels in our system, the screening of judges to man the superior courts cannot be confined to mere technical and professional competence and their approaches and philosophies have to be screened extensively. The paper attempts to reflect the significance adhered to the principle of independent and impartial judiciary and the urgency to defend and hold such standards earlier than its dimensions turn into just indistinct and academic concepts. The continuous government stalling in the appointment of judges to the Superior Courts, nominating judges to political offices and occasionally unscrupulous conduct by some judges in the recent past, where judiciary on most part seemed to side with the executive, has raised questions on independent and impartial identity of judiciary. Should we permit the constitutional democracy to live to tell the tale or the authoritarian rule to be allowed is these days the important query before the masters of the country.

Keywords: *Constitution, Democracy, Independence, Impartiality, State.*

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I. Introduction

“All rights secured to the citizens under the constitution are worth nothing, and a mere bubble, except guarantee to them by an independent and virtuous judiciary”.

Andrew Jackson, 7th U.S. President

In any democratic system of governance, the twofold principles of judicial independence and impartiality are indispensable for upholding the Rule of Law and came to be the central theme of range debates and discussions in nearly all the democratic nations of the world. The independence of judiciary secured lots attention in the global locations with written Constitutions. Under a Written constitution, incorporating welfare philosophy, the government has been vested with huge powers for its acceptable functioning and to make policies for socio-economic development. However a robust democratic society that observes and upholds the rule of law cannot survive by relying solely on the splendid trust of those who govern its political institutions. The top notch protection of society from possible dangers originating from the abuse of power and circumvention of necessary democratic standards rests on, inter alia, the existence of counter balance mechanism. The independence of judiciary and legal profession is a quintessential pedestal of this system.³To maintain a balance of interests within a society and for its proper and smooth functioning, an independent and impartial judicial system was considered a pre-requisite. All the leading democracies of the world have time and again emphasized the need of an impartial and independent judiciary.

The genesis of institutional independence is grounded in the notion of Separation of Powers. Relying on the notion of separation of powers in the State, the independence of justice applies to each and every institution of justice, and to the individual judges who determine on particular matters.⁴Initially, there

³*Independence of Legal Profession: Threats to the bastion of a free and democratic society*, (Apr. 20, 2020, 7:55PM) <http://www.ibanet.org>.

⁴CristiDanilet, *Independence and Impartiality of Justice: International Standards*, (Apr.27, 2020, 5:35 PM),<http://www.medelnet.eu/images/stories/docs/independence%2520and%2520impartiality%2520of%2520justice->

was a call for institutional independence only but currently the drift is towards the independence of individual judges as well. Judges must be competent to discharge their professional obligations except being influenced by means of the executive/legislative branches of the government, by economic stake holders or by interest groups. While the State, one-of-a-kind establishments and private parties have an obligation to desist from coercing or persuading adjudicators to rule in a certain manner, judges too share a correlative responsibility to conduct themselves impartially.

II. Meaning of Judicial Independence

Normally independence is described as the absence of improper influence, coercion or strain from a range of internal or external factors whether or not political, social, and economic or different factors. It signifies some element that it is now not controlled or managed through any other agency or authority. Although the notion of judicial independence is recounted in a real manner and in many instances varies from one jurisdiction to another, but it does no longer detract from its recognition as a keystone of the Rule of law. For British, judicial independence intended that judges have to be free from affect from the king or Parliament. For United States, judicial independence means that judges ought to be free from the influence of the government or legislature.

In legal parlance, independence of judiciary imply the power of upholding besides concern or favour, the rule of law, character freedom and liberty, equality before law and unbiased and effective judicial control over administrative and executive working of the government.⁵ Independence, beneath the affect of fine State law, is commonly coupled with certain institutional guarantees or safeguards that enable adjudicators to free themselves to some extent from exterior pressures when making their decisions. Such safeguards include, amongst others, the neutrality of the appointment approach (i.e., an absence of political intervention), the stability of the position, autonomy from other branches of the government, a reasonable sphere of immunity, and the inviolability of their salary. Substantive independence of the Judges therefore, refers to as:

1.pdf&ved=2ahUKwi00o7proDpAhUi63MBHZd4B5wQFjAAegQIAhAB&usg=AOvVaw09PiudjZx3J8FtamrsfK3k/.

⁵ L.M. Singhvi, *Independence of Justice*, 14 INDIAN BAR REVIEW, 515-517 (1987).

- a) Decisional or functional independence where judges are anticipated to appear at settlements without surrendering to any inner or outdoor forces;
- b) Individual independence which implies the judges are no longer subjected to the authorities in any way in which would it possibly affect them in arriving at choice in precise cases;
- c) Collective independence which infers institutional, legit and economic freedom of judiciary as a whole vis-a-vis incredible hands of the government especially the executive and the legislative; and
- d) Innermost independence which implies freedom of judges from the judicial masters and associates. In different words, it pertains to, independence of an adjudicator or judicial officer from any form of order, manifestation or influence from his judicial superiors and associates in figuring out cases.⁶

III. Relationship between Independence and Impartiality of Judiciary

Judicial independence brings forth the accountability to enforce the law impartially. A court that lacks independence cannot be impartial. In according independence to judges, it is extraordinarily necessary that their judicial power be utilized in an independent fashion. To the judiciary as an institution, independence pertains to (freedom from distinctive branches of power, referred to as “institutional independence”) and to the specific judge, it signifies (freedom from exclusive contributors of the judiciary, or “individual independence”). “Independence” demands that neither the judiciary nor the judges who constitute it be subjected to the other state authorities. On the other hand, the attitude a judge or tribunal in the direction of a case and the parties to it is what is typically referred to as “judicial impartiality”. The idea of impartiality is thus related with the objectivity of the opinion or the lack of prejudice regarding one or other of the parties and forms a crucial component of justice. Judges are supposed to act as unbiased arbiters so that law suits are determined in accordance to the law free from the influence of bias or ply, or cronyism. In the context of Article 14.1 of the ICCPR, The Human Rights

⁶Sunil Deshta, *Independence and Accountability of Judiciary in India: Problems and Solutions*, 3 ORIENT JOURNAL OF LAW AND SOCIAL SCIENCE, 49-50 (2009).

Committee has noted that: “impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”.⁷

The principle of judicial impartiality is critical to the due process of law. The percept is dictated with the aid of statutory and common law and is required by using the rules of judicial conduct. The Code of Judicial Conduct requires a judge to be disqualified from presiding over any proceeding in which the judge’s impartiality would possibly and fairly be questioned. This indicates that judges are disqualified from presiding over cases not only when they are in fact partial to one side or the other, however, also when there is an appearance of partiality to the reasonable observer. Hence, judges are expected to keep away from no longer only real partiality, but the appearance of it as well, due to the fact the appearance of a judge who is not impartial diminishes public confidence in the judiciary and degrades the justice system.⁸

IV. Importance of Judicial Independence and Impartiality

In almost all the democratic nations, a place of outstanding significance has been accorded to the judiciary. It is a job of the courts to confirm the rule of law and to guarantee that the government runs in harmony with the law. In countries with written Constitutions, courts possess an extra characteristic of safeguarding the supremacy of the Constitution by decoding and making use of its provisions and maintaining all powers within the Constitutional framework. The Constitutional guarantees, formal legal framework and institutional safeguards are no longer in themselves enough if the values of independence and separation of powers, which structure the basis of such rules, are lacking. Judges need to be independent to fulfill their part with regard to the other authorities of the State, society as a whole, and the parties to any particular dispute upon which judges have to adjudicate.

In order to restrain other powers from committing abuses and to make them answerable for their actions or inactions, independent judiciary acts as a key

⁷ International Covenant on Civil and Political Rights 1966 art 14.1.

⁸ JEFFREY M. SHARMAN, JUDICIAL ETHICS: INDEPENDENCE, IMPARTIALITY, AND INTEGRITY 15 (Inter-American Development Bank 1996).

instrument (“power stops power”). It gives a stability and check upon the authority of the different organs of government and thereby nullifies arbitrary government actions. The call for independent judiciary is not due to the fact of eagerness on part of the people to regard judges as relished representatives of the public services, it is rather fundamental to preserve and uphold the purity of the justice system thus enabling judges to earn public confidence in the administration of justice. The impartiality and independence of judges is hence now not a prerogative or privilege accorded in their own interest, but for the sake of the rule of law and of all those who seek and anticipate justice. By and large, an impartial and independent Judiciary can stand as a bulwark for shielding and safeguarding the rights of the individuals and mete out evenhanded justice besides worry or favour. To ensure the rule of law and truthful judicial administration, an independent judiciary is therefore of utmost importance.

V. Creation of Independent and Impartial Judiciary

Being an intrinsic aspect of the rule of law, judicial independence is safeguarded by a number of international and regional instruments,⁹ and in many jurisdictions, it is a constitutional guarantee. The doctrine of independence of judiciary calls for ‘separation of powers’, a doctrine that takes its roots in Montesquieu’s book *Spirit of the Law/ De L’esprit des* (1748). Formal guarantee of judicial independence dates back to 1701, when England’s Act of Settlement accorded express safety to the judges from unilateral removal by the Crown in the context of a larger shift of power from the king towards the Parliament and

⁹*United Nations Basic Principles on the Independence of the Judiciary* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (Apr. 22, 2020, 11.25 AM), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>. ; *The Bangalore Principles of Judicial Conduct* UNITED NATIONS OFFICE ON DRUGS AND CRIME (Apr. 22, 2020, 11.30 AM), http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf. ; International Covenant on Civil and Political Rights 1966 art 14. ; European Convention on Human Rights 1953 art 16. ; Universal Declaration of Human Rights 1948 art 10. ; American Convention on Human Rights 1969 art. 8. ; African Charter on Human and Peoples’ Rights 1986 art 7. ; Arab Charter on Human Rights 2004 art 12, 13, 6.

the courts.¹⁰ After United States acquired its independence in 1776, its constitutional record was marked by way of the checks and balances among the three organs of the government and for many western countries, this system of counterbalance has been of tremendous inspiration. The architects of the US Constitution were very much concerned about having judges being immune from any kind of intimidation and thus provided for their appointment through nomination by the President and its confirmation by the US Senate rather than appointment through election. In order to shield them from aggression by the executive or the legislative branch, the US Constitution offers for life tenure of a federal judge.¹¹

The framers of the Indian Constitution were mindful of the very substantial and distinctive position appropriated to the judiciary in the scheme of the Constitution. They took greater efforts to secure that an even better and effective judicial structure was incorporated and voiced that separation of judiciary from executive, which is the life-line of the independent judiciary, is a basic feature of Constitution. Dr. B.R. Ambedkar in his speech in the Constitution Assembly on June 07, 1949 observed that: *“I don't think there is any dispute that there should be separation between the executive and the judiciary and in fact all the articles relating to the High Court as well as Supreme Court have prominently kept that object in mind”*.

Being the highest court in the land, it is very imperative that the Supreme Court be permitted to work in an atmosphere of independence of action and judgment and is insulated from all sorts of pressure, political or otherwise. To ensure such independence, several provisions were incorporated in the Constitution.¹² There was the focus that Judges, particularly the judges of the superior courts,

¹⁰ This Statute formally recognized the principles of security of judicial tenure by establishing that High Court judges and Lords of justice of Appeal hold office during good behavior. Appropriate and formal mechanism had to be in place before a judge could be removed.

¹¹ First, Article III states that federal judges shall hold their offices during good behavior and can only be removed from office by impeachment for the commission of high crimes or misdemeanors. Secondly, under Article III, the salaries of federal judges may not be lowered while they are in office. So, federal judges have virtual life tenure, so long as they do not misbehave, and their salaries are protected during that tenure.

¹² The entire scheme of judicial system in India is contained in art 124-147, art 214-232 and art 233-237. These Articles deals with Supreme Court, High Court and Subordinate Courts, respectively.

entrusted with the power to evaluate the administrative and legislative actions, discharge their duties without fear or favour and stay totally independent and wholly shielded from internal and external intimidations. The framers of the Indian Constitution therefore, brought a provision in Part-IV of the Constitution expressly directing the State to strive to keep judiciary out of politics.¹³

In India, the Supreme Court is envisaged as the custodian and the final expounder of the Constitution. It is regarded as the last authority to hold back any absolute, capricious and arbitrary exercise of power. Any legislative and executive activity of majority has to meet the scrutiny of legal elite, the judiciary, on the criterion of the constitutional arrangements and relevant statutory provisions so that the tyranny of the majority is contained by judicial vigilance. Besides upholding the constitutional supremacy, the Judiciary was assigned a role to act a guardian of the fundamental rights and civil liberties assured under the Constitution, as mere enumeration of range of fundamental rights in the Constitution without any provision to guard them will no longer serve any practical purpose. For this cause an independent and unbiased judiciary with the power of judicial review has been established.¹⁴ From time and again, the Supreme Court of India itself stressed on the principle of judicial independence. In *Minerva Mills Ltd. V. Union of India*¹⁵, the Court has found that the constitution has brought about an independent judiciary invested with the power of judicial review to decide the legitimacy of administrative actions and the validity of laws. Simultaneously, a solemn obligation is cast upon the judiciary itself under the constitution to keep distinctive organs of the State within the limits of the powers assigned to them by the Constitution by making use of power of judicial review as sentinel on the *qui vive*.

In the notable decision of *S.P Gupta v. Union of India*¹⁶, the Constitutional Bench of the Supreme Court held that, “judges should be of stern stuff and tough fiber, unbending before power, financial or political, and they may additionally moreover uphold the core percept of the rule of law which says: Be

¹³ INDIAN CONST. art 50 reads that the State shall take steps to separate the judiciary from the Executive in the public services of the State.

¹⁴ INDIAN CONST. art 32, Supreme Court of India exercises original jurisdiction for the enforcement of fundamental rights through power of ‘Judicial Review’.

¹⁵ AIR 1980 SC 1787.

¹⁶ AIR 1982 (2) SCC 831.

you ever so high, the law is above you. It is the principle of judicial independence which is indispensable for the foundation of actual inclusive democracy, preservation of the Rule of law as a dynamic notion and for dispensing social equity to the inclined sections of the public. It is this principle of independence of judiciary which we roust and hold in concept whilst interpreting the relative provisions of the Constitution.”In 1993, another Constitutional Bench in the *Second Judges Appointment Case*¹⁷, declared that judicial independence is the sine qua non of democracy. While the judiciary certainly remains distant from the legislature as well as the executive, the overall competence of the public can by no means be jeopardized from any quarters. The constitutional scheme desires at guarding an independent Judiciary which is bulwark of democracy.¹⁸

VI. Modes of Securing Independence and Impartiality of Judiciary in Indian Constitution

The founding fathers of the Indian Constitution enshrined numerous provisions to secure judicial independence and impartiality, which are as follow:

- a) Judges are appointed, after consultation with judiciary, by the President.¹⁹
- b) High minimum eligibility for appointment as a judge.²⁰
- c) Oath to work impartially, fearlessly and uphold the Constitution.²¹
- d) The security of tenure is assured to every judge. A judge of Supreme Court or High Court can be removed from his office only on the ground of proved misbehavior or incapacity by the President after an address presented to him by each house of the Parliament.²²

¹⁷ Supreme Court Advocates-on-Record Association &Anr. v. Union of India, Writ Petition (Civil) 1303 of 1987.

¹⁸ A.C. Thalwal v. High Court of Himachal Pradesh, AIR 2000 SC 2732.

¹⁹ Articles 124(2), 127, 217(1) of Constitution of India

²⁰ Articles 124(3), 217(2) of Constitution of India

²¹ Articles 124(6), 219 of Constitution of India

²² Articles 124(4), 128 of Constitution of India

- e) The privileges, rights and allowances conferred on the judges cannot be altered to their disadvantages after their appointment.²³
- f) The Supreme Court and High Courts have power to appoint their staff and frame rules to regulate their procedure. The remuneration and other allowances of judges are not subjected to the vote of legislatures.²⁴The administrative costs consisting of salary allowances and pensions of the Supreme Court and High court judges are charged to the consolidated fund of India and the States respectively.
- g) The judges of the Supreme Court are debarred from pleading after retirement before any court or judicial authority in India.²⁵
- h) The conduct of the judges of Supreme Court and High Courts in discharge of their duties shall not be discussed in legislature.²⁶

VII. Executive Incursions on Judicial Independence

Although the Constitutional framers made sincere efforts to ensure judicial independence and impartiality, the image of judiciary in its functional aspect is not fully independent and impartial. The establishment of independent judiciary remains a vague and academic concept. If we look by and large, the power of the Indian President to appoint judges is totally formal as the President is bound to act on the aid and advice of the Council of Ministers on this count.²⁷An apprehension constantly persists that such Ministers may additionally drag politics in the engagement of judges. The truth of such apprehensions may be evident from the past instances where until 1973, the common procedure used to be to appoint the senior most puisne judge of the Supreme Court as the Chief justice of India. But on April 25, 1973, such long standing convention was breached and unexpectedly bidden a good bye by the then Indira Gandhi regime, when Justice A.N. Ray was appointed as Chief Justice of India superseding other senior judges, namely Justices Jaishankar ManilalShelat, A.N.Grover and K.S. Hegde. The supersession was made a day after Supreme Court's judgment

²³ Article 125,221,360

²⁴ Articles 146, 229

²⁵ Articles 124(7), 220

²⁶ Articles 121, 211

²⁷ INDIAN CONST. art 74.

in the Fundamental Rights Case²⁸ and all the three judges resigned in protest as the practice was taken as an assault upon the independence of the judiciary. The government though justified the departure from past convention on two basis, one that the Constitution did not lay down any rule of seniority and secondly citing the recommendations of Law Commissions of India in its 14th report titled *Reforms in Judicial Administration*.

Second supersession could be witnessed all through the Emergency²⁹ when the Union Government in its supreme wisdom appointed Justice M.H. Beg as the Chief Justice of India on January 29, 1977, by superseding Justice H.R. Khanna. Justice Khanna submitted his resignation to the President soon after Justice Beg's appointment as the Chief Justice of India was announced. Khanna's supersession was feared much to the displeasure of the executive, as he was too independent and an ardent believer in the rule of law and sanctity of the Constitution. The plain motive backing Khanna's supersession was once executives desire to cast off any possible obstacles to their subsequent actions. Although in a well-known Fundamental Rights Case, Justice Khanna decided in the favour of government by upholding Parliament's power to alter, abridge or abrogate fundamental rights guaranteed under the Constitution, he had added a rider to it by holding that Parliament is not authorized to alter the "basic structure or framework" of the Constitution. Also Justice Khanna's dissenting opinion in the infamous Habeas Corpus Case,³⁰ that even if the fundamental rights are lacking, the State has not been given the power to dispossess an individual of his freedom except with the authority of law. Such and other similar pronouncements made him a bugbear for the executive and the legislature.

In 1993, the Supreme Court in *the Second Judge Case*³¹ confirmed the convention to name the senior-most judge of the Supreme Court as the CJI, subsequent to the retirement of the outgoing CJI. The Court stated that the convention is in keeping with the idea of independence of judiciary as it eliminates any likelihood of the executive intrusion in this business. And now

²⁸Keshvananda Bharti v. State of Kerala, AIR 1973 SC 461.

²⁹The Proclamation of Emergency on 25 June 1977 by Mrs. Indra Gandhi, referred as "the emergency".

³⁰ADM Jabalpur v. Shiv Kant Shukla, AIR (1976) 2 SC 521.

³¹Supreme Court Advocates on Record v. Union of India, AIR (1993) SC.

the senior-most convention has become a synonym for independence of judiciary.

The independence and functioning of the higher judiciary is additionally affected by the mode of their transfer. Although the Constitution offers a specific procedure for transferring a judge from one High Court to another³², there is hardly any efficient safeguard to counter the abuse of such power by the Executive. A list of 56 judges, to be transferred without their consent has been prepared during the emergency, but in the first occasion only 16 judges were transferred and the names of the other State judges on the list have been intentionally looked in order to shake the never of the judges of the High Courts.³³ Justice S.H. Seth, of Gujarat High Court, one of the judges so transferred, displayed a commendable courage by filing a writ petition against the Union of India and the then Chief Justice of India, Justice A.N. Ray, popularly known as *Sankal Chand's Case*³⁴ where Bhagwati and Untawalia JJ., in their dissenting opinion stated that transfer of a judge without his consent impedes the independence of judiciary.

In order to challenge the judicial power and primacy, the government in late 2014, enacted the National Judicial Appointments Act and the 99th Constitutional (Amendment) Act, established a new National Judicial Commission (NJAC). The Amendment inserted Article 124A in the Constitution which provided for the creation of the NJAC in place of current collegium system. The new NJAC would have extensively limited the judicial primacy and increased the governmental say in judicial appointments and was perceived by some in the legal fraternity as an attempt to intervene with the freedom enjoyed by the judiciary. However, the Supreme Court struck down the Government's bid to give the executive a greater say in the selection of judges by upholding the collegiums system.³⁵

The continuous allegations of executive interference in the judiciary, very recently led Justice Chalmeswar, the senior most judge of the Supreme Court,

³² INDIAN CONST. art 222.

³³ 2 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 2266 (3 ed. N.M. Trepathi, Bombay, 1984).

³⁴ Union of India v. S.H. Sheth, AIR (1978) 1 SCR 423.

³⁵ Supreme Court Advocates-on-Record Association and Anr. v. Union of India, AIR (2016) 5 SCC 1.

to raise certain questions by writing to the Chief Justice of India and thereby asking him to consider convening a full bench to take up the issue of such alleged executive interference. Such questions are fundamental for the preservation of judicial independence and especially the independence of country's highest court. In a letter written on March 21 of 2020, Justice Chalmeshwar cautioned that courts should not do the bidding of the government and "*the bonhomie between the judiciary and the government in any State sounds the death knell to democracy*"³⁶ The letter criticized the governmental attitude towards courts, the functioning of the High Courts and the changing relations among the executive and the judiciary. This criticism has been made in the context of the government's stonewalling of the Apex Court's collegiums recommendations for appointment of a judge, its erroneous actions in the matter and the compliance of the Karnataka Chief Justice with these actions.³⁷

VIII. Compromising Judicial Independence and Impartiality

As a result of the convention developed by the government to employ judges in various capacities post retirement, the doctrine of judicial independence seems to have suffered erosion in India. If a judge wishes to get any government office once retired, then normal feeling may arise among public that judge is not wholly detached in a case where the government is a part.

The nomination of Justice Ranjan Gogoi, the ex CJI of India, to the upper house of the Parliament presents a very recent example raising serious doubts concerning the judicial independence and constitutional propriety.³⁸ The fact that

³⁶(Apr. 23, 2020, 12:23 PM), [http://](http://www.google.co.in/amp/s/m.economicstimes.com/news/politics-and-nation/sc-judge-red-flags-centres-interference-asks-cji-to-convene-full-court/amp_articlesshow/63532757.cms)

www.google.co.in/amp/s/m.economicstimes.com/news/politics-and-nation/sc-judge-red-flags-centres-interference-asks-cji-to-convene-full-court/amp_articlesshow/63532757.cms.

³⁷ The unprecedented letter has questioned the probe initiated by Karnataka High Court Chief Justice Dinesh Maheshwari J. against District and Sessions Judge Krishna Bhat at the instance of Union Ministry of Law and justice, despite his name being recommended for elevation twice by the Collegium, (Apr. 28, 2020, 12:45 PM), [http://](http://www.google.co.in/in/amp/s/www.decanherald.com/amp/content/668064/threat-judiciarys-independence.html)
www.google.co.in/in/amp/s/www.decanherald.com/amp/content/668064/threat-judiciarys-independence.html.

³⁸ Justice Gogoi headed the Constitutional Bench in *M.Sidiq v. Mahant Suresh Das* (Ayodhya dispute 2019) that ordered the handing over of the disputed land to a trust, paving the way for the construction of the Ram Mandir.

the nomination came soon after the Akhil Bharatiya Karyakari Mandal of RSS applauding the Supreme Court for its 'highly balanced' and 'historic verdict in the Ayodhya dispute has led to accusations of quid pro quo.³⁹In the recent past, Justice Gogoi presided the benches of the Supreme Court that decided politically volatile issues such as the Rafale deal, Kashmir Habeas Corpus petition, NRC direction in Assam and the Ayodhya title dispute, and the judgments concluded in each case suited the present ruling party at the Centre.

A day after such nomination, former Judges of Supreme Court including Justice Chelameswar, J.A K Patnaik and Kurian Joseph together with Justice Madan B Lokur exhibited grave dismay and voiced against such decision by saying that such a nomination and its acceptance have certainly shaken the confidence of a common man and will raise multiple doubts regarding judicial independence. In the words of Justice Patnaik, "if the government wants real experts, they would have gone for experienced lawyers like K Parasaran, Fali Nariman and K T S Tulsi or academicians like Upendra Baxi. Why would a chief Justice, at the peak of the judicial system, at all take such a nomination and why would government offer this to him?" Justice Kurian Joseph expressed his deep concern over the issue by stating that "*I am surprised as to how Justice Gogoi, who once exhibited such courage of conviction to uphold the independence of judiciary, has compromised the noble principles on the independence and impartiality of the judiciary*".⁴⁰

However when we look around, this is no longer perhaps for the first time when the accusations of constitutional misconduct and quid pro quo have been raised. The practice of appointing and nominating judges to the political offices post retirement has been happening for decades. Few notable parallels can easily be

³⁹ (Apr. 29, 2020, 3:53 PM), <http://www.google.com.in/amp/s/www.theweek.in/news/india/2020/03/17/pre-retirement-judgements-and-post-retirement-posts-and-their-politics.amp.html>.

⁴⁰Seema Chishti, Liz Mathew, *Ex-SC judges say Gogoi in RS clouds judiciary's independence, he says am for nation-building*, THE INDIAN EXPRESS, March 18, 2020, at On 12 January 2018, justices Ranjan Gogoi, Madan B Lokur, Kurian Joseph and Chelameswar, the most senior judges then in the Supreme Court, in an unprecedented step, called a press conference to question the conduct of then CJI Dipak Misra, especially on the allocation of important cases to particular Benches by stating the independence of judiciary was in peril as that there was an attempt to fix benches and senior judges were being kept out of important cases.

drawn with some such past events with those unfolding now. Take an example of Justice Syed Fazal Ali, who despite his best powerful dissent against the government in *A.K.Goplan v. State of Madras* (1950), was appointed as the Governor of Orissa in 1951. The slashing criticism faced by such appointment virtually portrays the call for constitutional propriety where a judge should never be considered for political offices, nor should they accept such favours or positions.

The criticism in opposition of the nomination of Justice P. Sathasivam as the Governor of Kerala in 2014 not before long his retirement as the Chief justice of India offers an excellent example where such appointment forced some to reassess his judgments to see whether he was rewarded for some of his pre-retirement judgments. Incidentally, he was part of a Bench that decided know Sahabuddin Sheikh's fake encounter case in which present Union Home Minister, received a clean chit.

Among the varied instances of executive-judiciary nexus, Justice Baharul Islam's case stands out. Initially a congress politician, Justice Islam was twice elected to the upper house of the Parliament. After his resignation in 1972, he was once appointed as a judge of the then Assam and Nagaland High Court. He went ahead to become the Chief Justice of Gauhati High Court and retired in March 1980. In an unprecedented move, in December 1980, he was appointed to the Supreme Court. However, he resigned in January 1983 and was again elected to the Rajya Sabha, on a Congress ticket. His Rajya Sabha membership was sharply criticised as a quid pro quo for exonerating a Congress Chief Minister in a corruption case.⁴¹

On 20th August in 2019, Justice Sunil Grover of Delhi High Court brushed aside the petition of former Union Finance Minister P. Chidambaram seeking protection from arrest in a case under Prevention of Money Laundering Act (PMLA), 2002. The ruling led to arrest of Chidambaram. Justice Grover retired from office on August 23 and not less than a week was appointed as the chairman of the Appellate Tribunal for the PMLA.

⁴¹ (Apr. 30, 2020, 8:22 PM), <http://http://www.google.com.in /amp/s/www.theweek.in/news/india/2020/03/17/pre-retirement-judgements-and-post-retirement-posts-and-their-politics.amp.html>.

The list of the instances where judges could be seen favoured via the government of the day is quite long. It offers a grim reminder that the image of judiciary gets tarnished in such appointments besides the commitment of a political party to constitutional values. The Law Commission has long ago conveyed that this practice has a tendency to affect the independence of the judges and should be discontinued.⁴² Such appointments critically undermine judicial independence and impartiality. Such events do not bode well with the image of the judiciary as a guardian of the Constitution and the rights of the people mentioned therein. And somehow gives a genuine colour to the allegations that in India there is surely a nexus among judges and politicians and both are pursuing a policy of give and take.

IX. Conclusion

Executive's incremental encroachment in judicial sphere unveils a gloomy picture in near future of the government directing the courts what orders are to be passed. Democracy will be in danger if State agencies continue to meddle in the functioning of one another and strive to command each. Judges of higher judiciary seem more interested to secure their future than their present i.e., Pre-retirement judges influenced by post-retirement jobs. Except a few, there is a competition going on among judges to please the government of the day thereby overlooking an average person. The law is actually simple but is now bound and muddled in the complexities and for some judges such complexities made it too convenient to interpret law according to their conveniences. In defending and promoting the significance of judiciary as an institution charged with the duty to uphold the constitutional values, personal independence of judges is equally adored. The recent scenario of post-retirement nominations and appointments of judges put forth some thoughtful questions concerning the integrity, impartiality and conduct of a judge whilst in the office. If we fall short of judicious adjudicators who can display the courage to hold back from assuming post-retirement political offices, it is high time to bring about a constitutional prohibition calling for a mandatory cooling off period.

⁴² Law Commission of India. (1958). *Reforms of the Judicial Administration* (XIV Report).

There are certain assumptions at play as to why do democratic system vests in judge the power of judicial review. One such assumption is that the judges though not directly elected by the people, consequently continue to be immuneto popular influences and are anticipated to go with the aid of the spirit of law, even though not by its letter. There is a presupposition that judges, without the fetters of popular pressure, will turn out to be better at moral reasoning than politicians. Owing to these speculations, the impression that a judge is malleableto political leverages, turn out to be a fatal fault for that judge. The moment such a perception occurs, the authority of the judge as a person competent of superior moral reasoning crashes and with it erodes the institution of the judiciary.

An Analysis of Early Childhood Development in India

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“Be blessed childhood, which brings down something of heaven into the midst of our rough earthliness” - Henri Frederic Amiel

Abstract

The early childhood development is basically the development of right of children from zero to six years. Almost 90% of the brain develops during the age of 5 years. The development of child includes the physical, emotional, social, psychological and the like which are required to have a good and healthy life. If these developments will not take place during the initial years, a person's life will have risk of impaired growth and development. Children during their early childhood shall be given adequate nutrition for their growth, health care facilities regularly like vaccination etc, care and protection and play and learning. If a child receives proper favorable inputs of healthy life, he will grow and prosper in life and if a child receives unfavorable environment, he will be burden to society and the state will have to bear his responsibility throughout his life. Children are the future of our nation and it is the duty of the citizen to give them their required input to have healthy life. The Central as well as the State government initiated several times various policies and schemes to meet the challenges faced by the children for their proper growth and development. Many international conventions and declarations were made to cope up with the problems faced by children in different corners of the world. The judiciary has also framed guidelines and issued directions protecting the best interest of children.

Keywords: *Children, child development, early childhood, health and nutrition.*

I. Introduction

The most rapid growth and development of a human being takes places during his early childhood. It is a period spanning from zero to six (0-6) years.

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Childhood is the most precious and crucial phase of human life where a person develop physically, mentally and emotionally. To achieve these developments, a child should have access to his rights that is right to growth, survival and all other implied rights which are very much needed to make his development possible. A child should be guarded with proper nutrition, protection, affection, play and learning and most importantly health. Childhood is the foundation which makes a person immune for rest of his life. Now a day we see many children with high risk of impaired development. This is because of various disease, malnutrition, unsuitable environment, lack of care and vulnerability. During early childhood, brain development takes place, which if unfavorable tremendously shakes entire human life. Regarded as bud of social development, children are greater promises of tomorrow. There is plethora of legislation dealing with the best interest of child but sometimes that optimistic and wishful legislation seems to be shallow. Due to worse economic condition in developing countries, the goal to implement policies and programs of children became unrealistic. Many children are at greater risk of not developing to their full potential due to poverty, frequent illness, poor nutrition, inequality and inequities surrounding them. Children are the human resources invaluable but vulnerable³.

Early childhood development means development of a child in an environment of nurturing, caring enabling a child to be physically healthy, mentally alert and secured. It is a combination of health and nutrition, infant stimulation, education, sociology, psychology and economics. Our future prosperity and security will be at risk if we do not provide if children are not given proper facilities to build a strong foundation. Maximum vulnerability can affect child development as 90% child's brain develops during early childhood. In the by - gone era, children were not given any special treatment, they were forced to work for their livelihood in the underbellies of hazardous industrial cities. The plight of children of the lower strata was certainly gloomy during British period.

The importance of early childhood development is a matter of lifetime where actual process of brain functioning starts. It is a very crucial stage of a human life. Physical, emotional and mental development takes place during this phase.

³Swapan Kumar Sinha, *Child Labour in Calcutta: A Sociological Study*, Naya Prakash, Calcutta, (1991).

Many children do not get benefits and proper affection due to their family condition. This may be due to financial condition which worsens their conditions and hampers their future. There are also many children who though having strong financial background but they are not getting proper love affection, which is the outmost priority for them then. This actually directly hampers its mind and health. There should be nurturing relationships and rich learning experience which comes from family. As we all know, a small child can learn fast than a grown up person. It is this period where entire development takes place, sense of organs develop also a child can easily grasp whatever he is taught which is a matter of lifetime. He understands good and bad easily. A child will learn to adapt to everyday challenge if he is protected by supportive relations.

The society has a vital stake in its children as childhood is a universal human experience. In every child, foundation of a nation is laid as the nation future is in the hands of today's children. The more strong we will make foundation; the nation will prosper more in future. In historical aspects, the status and rights of children depend solely on customs, traditions and the laws of the country. Children need a conducive and congenial environment to develop into good citizen as the prosperity and progress of the country depends on the quality of its citizen. National laws have given the recognition on the importance of early childhood development and protected against the various odds that inhibit their growth. Childhood knows no artificial boundaries and is universal transcending all nationalities. Family shall provide natural environment for growth and well being of children as it plays a significant role in nurturing them. There are many acts/legislation/statutes/policies/convention for overall development and well being of children. But sometimes all these look mere shallow when we actually encounter a child moving in streets without proper clothes, food and proper nutrition. It looks like some day the nation will mourn the death of children at large and the whole country will suffer from deterioration.

II. Right to Early Childhood Development: Indian Perspective

Our Constitution which is the largest Constitution in the world has provisions for the rights which are of great importance for better future of the children. These rights are much dealt in fundamental rights and directive principles and

also in fundamental duties in the Constitution. Being one of the largest democracies, India has a federal system of government. The states have their own democratically elected governments. The relative jurisdiction of the Central and State government over matters has been indicated in the seventh schedule of the Constitution of India under Union, State and Concurrent list. The survival, protection and development of children fall either in concurrent or in the state list. Article 14 of the Constitution deals in equality before law. It says the state shall not deny to any person equality of law and equal protection of law within the territory of India. Article 15(2) provides nothing can prevent the state from making law specially for children and women.. Article 21 provides that life and personal liberty shall be given with due process of law. Article 21 A inserted by Constitution (Eighty – sixth Amendment Act) 2002 which deals in right to education. Article 23 deals in prohibition of traffic in human beings and forced labour. Article 24 deals in prohibition of employment of children forced to work in hazardous environment. Article 39(e) and (f) deals with the policies to be followed by the state. Article 42 deals in provisions for just and humane condition of work and maternity benefit. Article 45 deals in provision for early childhood development by providing care and education. Article 51 A (K) inserted by Constitution (Eighty – sixth) Amendment Act 2002 deals in fundamental duty of citizen to look after their child giving proper education.

There are plethora of legislations dealing with development of children. But the optimistic provisions look shallow. Many significant changes took place in the last few years amending many provisions in criminal justice system. Bills, Acts, Statutes also the existing laws have been upgraded observing the deteriorating position in the development of children. By the end of nineteenth century, major early childhood traditions emerged that was led mainly by organization of civil society and private sector. Unofficial policies for early childhood services have existed for hundreds of years. Most of the countries now are using integrated approach to formulate their National Early Childhood Development Policy or Policy Framework. Some of the policies are as follows:

i. The National Policy on Education, 1986⁴

This policy focuses on primary education of children which is important factor for human resource development.

⁴ <http://mhrd.gov.in>.

ii. The National Policy for Child, 1974⁵

This policy ensures full protection to children pre and post birth making childhood development strong physically, mentally and socially. The policy mainly focuses on proper nutrition and diet to help them to grow healthy.

iii. The National Nutrition Policy, 1993⁶

The National Nutrition Policy take account of vulnerable children by regulating and proper implementing programme on child health and development.

iv. The National Health Policy, 2002⁷

The National Health Policy deals in schemes designed by government and private organizations for proper growth of children and also give proper protection to other vulnerable groups including women and socio-economic lower classes who are derived of basic necessities.

v. The National Charter for Children, 2003⁸

The Charter of 2003 is adopted with a motive to address the unhealthy growth and issues affecting early childhood. The charter was brought in light so that society could redress the issues and concerns and make their future strong and bright as every child has the right to have better life for their better development.

vi. The National Commission for Protection of Child Rights Act, 2005⁹

The National Commission for Protection of Child Rights Act came into force for providing speedy trial and ensuring full justice to the children against whom offence is done. The Act deals with national and state commission for children along with powers and functions of the members who are appointed by the government ensuring full justice and smooth functioning of the commission. The Act also deals in children courts, finance, accounts and audits and other miscellaneous for proper functioning, implementing policies, enquiring complaints etc.

⁵ <http://childlineindia.org.in>.

⁶ <http://wcd.nic.in>

⁷ <http://childlineindia.org.in>

⁸ www.ispepune.org.in

⁹ <http://wcd.nic.in>

vii. The National Policy for Children, 2013¹⁰

The policy declared children as supremely important asset. The policy stands as a guide to dictates and inform laws, policies and programme. The guiding principles of the policy are as follows:

1. Every child has human rights which are inalienable, universal and indivisible.
2. Every child is important and the right of them is interrelated and interdependent.
3. Right to life, survival, education and overall rights which makes their development sound shall be given to every child.
4. Every child shall be safeguarded from exploitation and their environment shall be safe and sound.
5. Every child shall be given their freedom of speech and stern actions shall be taken if they are unsafe and insecure in any circumstances.

viii. The National Health Policy 2017¹¹

The national health policy aims to inform, clarify, strengthen and prioritize the role of the government in shaping health systems in all dimensions like investing in health, organization of health service, prevention of disease and promotion of good health through cross sectorial sections, access to technologies, developing human resources, encouraging medical pluralism, building knowledge base, developing better financial protection strategies, strengthening and health assurance. The policy envisages attainment of highest level of health and well being for all at all ages through preventive and promotive health care orientation programmes and universal good quality health care services without anyone having to face hardship as a consequence.

ix. The National Education Policy 2019¹²

The National Education Policy 2019 exclusively deals in early childhood care and education. The main objectives of the policy are as follows:

1. Every child from 3 to 5 years of age be ensured free, safe, high quality, developmentally appropriate care and education by 2025.

¹⁰ www.ekalavya.comnationalpolicyforchildren

¹¹ www.cdso.nic.in

¹² <http://mhrd.gov.in>

2. To achieve foundational literacy and numeracy by 2025.
3. To achieve free and compulsory quality education by 2030.
4. To encourage holistic development of child and to minimize rote learning by 2022.
5. To ensure that children are imparted education by qualified and experienced teachers.

The policy mainly focuses on overall development of children from 0 to 6 years by strengthening the pre - school education, better nutrition, investing for early childhood care and education, suggesting early childhood care and education to be an integral part of Right to Education Act, 2009.

x. Law Commission of India on Early Childhood Development¹³

Law Commission in its report on ‘Early Childhood Development and Legal Entitlements’ have elaborated the rights of early childhood development. The growth and development of child in its initial years of life makes as accelerated development for its entire life. Physical, emotional, socio-economic development takes place during 0 to 6 years. Many researchers have shown that 90% of brain develops during this period. If proper care is not taken during this stage it can lead child’s life to maximum vulnerability which has serious impact in overall development of a child. The causes of impaired development are disease, poverty, malnutrition and social exclusion. If a child is given favourable environment it will stabilize child’s health and potential to full swing. If child receives negative and unfavorable environment than it will lead to destruction his life finding its life somewhere lost.

There are also strict guidelines given by Hon’ble Supreme Court but it is really very painful to see the implementation. The judiciary has also been very active in ensuring proper justice to children. There are many cases dealing with best interest of children.

In *Bapuji Education Association*, “the Karnataka High Court held that right of an individual to have or to impart education is one of the most valuable rights”¹⁴.

¹³ www.lawcommissionofindia.nic.in

¹⁴ AIR 1986Kant119

In *B.M.M V. Union of India*, “the court held that it may not be possible to compel the state through courts to make provision by statutory enactment for ensuring basic essential to live with human dignity but where such enactment exist the state can be obliged to ensure observance of such legislation”¹⁵.

In *Maneka Gandhi V. Union of India* and *Francis Coralie Mullin V. Union Territory of Delhi*, “the court held that Article 21 included the protection of health and strength of workers, men, women and tender age of children against abuse”¹⁶.

In *Unnikrishnan V State of A.P.*, “the court held that the fundamental purpose of education is same at all times and in all places, it is to transfigure human personality into a pattern of perfection through a synthetic process of the development of body, the enrichment of the mind, the sublimation of emotion and the illumination of spirit. Education is a preparation for living life, here and hereafter”¹⁷.

In *University of Delhi V. Ramnath*, “the Supreme Court held that education seeks to build the personality of the pupil by assisting his physical, intellectual, moral and emotional development”¹⁸.

In *Ashok Kumar Thakur V. Union of India*, “the court held that the government in partnership with state has made tenuous effort to provide universal and quality education to children for their development”¹⁹.

In *Sheela Barse V. Union of India*, “the Supreme Court held that child is a national asset and it is the duty of the state to look after the child with a view to assuring full development of its personality”²⁰.

In *Laxmikant Pandey V. Union of India*, “it was held that equal opportunities for development for all children during the period of growth should be the aim

¹⁵ AIR1984 SC82

¹⁶ AIR 1978 SC 597 , (1981) 1 SCC P. 608

¹⁷ AIR1993 SC 2178

¹⁸ AIR 1962 SC 1873

¹⁹ (2008) 6 SCC 1

²⁰ (2008) 6 SCC 1

of the state for this would serve large purpose of reducing inequality and social justice”²¹.

III. International Perspective of Right to Early Childhood Development

Right to early childhood development gained importance in recent past earlier there were conventions of general nature related to children. The Universal Declaration of Human Rights²² is the first international declaration globally recognized and provided the right relating to early childhood development. A committee was established after the First World War in 1919 for child welfare and then a historic document Geneva Declaration came into existence pronouncing the rights of children for their development. There are many international instruments relating to childhood development. These are:

i. International Covenant on Civil and Political Rights, 1966.

The International covenant on civil and political rights laid emphasis to provide special protection to children. The convention stress on protection of children from torture, inhuman and degrading treatment²³ and also protect from being discriminated as to sex, religion, race, culture²⁴.

ii. Health for All Declaration, 1978.

The main objectives of this declaration was to promote health care, provide information on development of primary health care, evaluate the present health care, to define the role of government, national and international organization for development of health care organization, to formulate recommendations for development of primary health care²⁵.

iii. Maternity Protection Convention, 2000.

This convention promotes health and safety of children. It also directs the states to take preventive step for breastfeeding and pregnant women are not forced to

²¹ (1993) 4 SCC 204

²² Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy same social protection.

²³ Article 7 of ICCPR, 1966

²⁴ Article 24 of ICCPR, 1966

²⁵ Primary Health Care, Report of the International Conference on Primary Health Care, Alma – ata, UUSR.

work which affects their health. For protecting child's health maternity leave is given for a period of six weeks post birth also working women have the right to breastfeed her child during working hours²⁶.

iv. Education for All Declaration, 1990.

The only provisions relating to childhood development in the declaration is given under Article V which says 'learning begins at birth' which calls for early childhood care and education by families, communities, institutional programmers etc. Early childhood care was given recognition by Jometian Framework of Action by calling 'an expansion of early childhood care and development activities, including family and community interventions, especially for poor, disadvantage and disabled children'²⁷.

v. Moscow World Conference on Early Childhood Care and Education, 2010.

Moscow World Conference on Early Care and Education called the government to make strong policies and legislation on early childhood development. The conference recommended the 'states to develop legal frameworks and enforcement mechanism that are conducive to the implementation of the rights of the children to Early Childhood Care and Education from birth'²⁸ and 'adopt and promote an approach to Early Childhood Care and Education that is both holistic and multi-sectoral to ensure good birth outcomes, neonatal health and nutritional well being, care and education'²⁹.

vi. Convention on the Rights of the Child (CRC), 1989.

This is an important and comprehensive convention which provides clear and interdependent rights for children covering right to life, development, protection and recognition. This convention laid stress on ensuring child's development, child rearing facilities, developmental institution, law and policy development

²⁶ <http://www.ilo.org/dyn/normlex/en/f?pNORMLEXPUB:12100:0::NO::P12100-ILO-CODE:C183>

²⁷ Early Childhood Regional Capacity: Building initiative available at <http://www.unesco.org/education>

²⁸ Article 11(i)(a) of Moscow World Conference on Early Childhood Care and Education, 2010

²⁹ Article 11(I)(9b) of Moscow World Conference on Early Childhood Care and Education, 2010

for better interest of children and most importantly the rights of early childhood development³⁰.

vii. Zero Draft: Sustainable Development Goals.

The convention does not focus on specific definition of 'child', but it targets and set standards to achieve childhood development. The objectives of the zero draft mainly focus on to provide adequate nutrition, end malnutrition and hunger, quality education, achieve food security and implementing and promoting rights of the children.

IV. Conclusion

In order to have a good and peaceful society, there should be personality development. Personality development can be done when we will take care of children in their early childhood. This phase of life is very important as future custodian of our society rest in the hands of children. Tomorrow's eminent person in form of a good teacher, scientist, judges, doctors, politicians and many more comes from today's saving. It will be saving in form of children who in their early childhood if given, proper protection mentally physically and emotionally. A child in his initial years of life needs love and affection of parents, siblings and other family members. They should be given proper education which is fundamental right of every child. Many times we see children deprived of all basic requirements which assure full development of their personality. There are many national and international conventions and legislation which directly and impliedly provides various rights of early childhood development but there is no proper implementation. The government lacks in proper implementation of the programmes relating to early child. All these rights are in ink and paper. There is sufficient economy in India to run the machineries to give effect to early childhood. But these economies are enjoyed by other groups who are sufficiently sound to make their way. The Constitution of India pays no heed to rights of early childhood. It has only given direction to state to ensure early childhood care and protection. There is no specific law

³⁰ Convention on the Rights of Child, General Comment no. 7 (2005), Implementing Child right in Early Childhood , <http://www.ohchr.org/english/bodies/crc/docs/AdvanceVersionGeneralComment7Rev1.pdf>.

regarding early childhood only few policies are there. They look good in books and pages but reality is a nightmare when we experience what a homeless child goes through. The time has come to stand up and fight for the rights of children who cannot themselves stand. We, the people, the guardian should take initiative for their overall development as it is our responsibility to protect and ensure our future of the nation. All policies, programmes, rules and regulations at national and international level are showing the concern of all conscious concerned relentlessly working for the welfare of the children. More efforts are needed to protect the early childhood development. There is need to have a legal recognition and protection to this right in India being the second most populous country.

Jute and Sustainable Development- A Study of Its Socio-Economic and Environmental Prospects

Ruchita Chakraborty¹

Abstract

Jute is a natural plant fibre that has been traditionally used as a packaging textile, but over the past decades, it has been rapidly replaced with synthetic substitutes. However, in the wake of the global consciousness regarding environmental crisis and sustainable development, the rejuvenation of the industry seems to answer a number of calls. On one hand, its usage in the packaging industry can reduce plastic wastes considerably. Again, in the backdrop of the environmental international instruments in recent years, jute can be a viable alternative to achieve the goals towards maintaining ecological balance. On the other hand, the industry being a source of income for more than 40 lakh families, its revival is expected to benefit the nation socio-economically as well. In this context this paper explores the usage of the fibre as an environmental friendly alternative to various widely used synthetic commodities. It also locates the different environmental standards set by the world community that can be achieved with its increased usage. Further, in the context of the two important recent instruments- the Sustainable Development Goals and the Paris Climate Pact, this paper examines the various dimensions that the golden fibre can effectively answer.

Keywords – *Jute, Sustainable Development, Environment, Socio-economic benefits*

I. Introduction

Jute is a natural fibre mostly cultivated in the South-Asian parts of the world. It is a naturally grown fibre crop which is environment friendly and bio- degradable. It is considered as the second most important vegetable fibre after cotton. The jute fibre is characterised with properties of high tensile strength, it has low extensibility, and is a breathable fabric. It is extensively used as packaging materials. Other applications of jute include its usage in the textiles, construction, and agricultural sectors. It is used in developing high quality industrial yarn, fabric, net, and sacks. Jute has also found its usage in the

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automobile sector with increased research and innovation.² The fibre is often referred as the golden fibre, a name attributed to it due to the golden and silky shine of the fibre.

The cultivation of jute is extensively done in India and Bangladesh. More than 99 percent of the world jute cultivation is located in these two countries.³ Other countries that produce jute are Myanmar, Thailand, Nepal and Uzbekistan. The crop is cultivated as a commercial crop which grows in hot and humid climate. India is a major cultivator of jute. Most of the jute cultivation in India is concentrated in the Ganga delta region. Jute being a rain fed crop, it needs adequate rainfall. States like West Bengal, Bihar, Orissa, Assam, Tripura, Meghalaya, Andhra Pradesh and certain parts of South India cultivates jute.

The jute fibre being a natural plant fibre, all jute products are bio-degradable and environment friendly. With the rising levels of pollution due to excessive emission of greenhouse gases, and intensive use of petrochemical fossil fuel product like ethylene and propylene (plastics), the world has been witnessing large-scale ecological imbalance during the past decades. In this context this article aims to study the prospects of the jute sector as a viable alternative to synthetic fibres and the importance of shifting the global focus towards natural fibres. In the backdrop of the various environmental concerns and international steps taken in the past decade to reduce plastic wastes, this paper aims place jute and jute goods as a commercial product that can be the recourse to mitigate these issues.

II. Sustainable Development

As a concept of general understanding, sustainable development refers to the idea that while the human societies strive to excel in economic activities and meet their needs by adopting means that do not compromise the ability of the future generations to meet their needs. In other words it refers to responsible consumption and production patterns that ensure to maintain the ecological balance. The concept of sustainable development was extensively deliberated in the United Nations Conference on Environment and Development (UNCED),

²C.Alves, et al., "Ecodesign of Automotive Components making use of Natural Jute Fibre Composites", 18(4) *Journal of Cleaner Production* 313-327 (March 2010)

³ Food and Agricultural Organisation of the United Nations, "Statistical Bulletin 2018-Jute, kenaf, sisal, abaca, coir and allied fibres", (2018)

also known as the Rio de Janeiro Earth Summit, held in Rio de Janeiro from 3 to 14 June in 1992⁴. The most popular understanding of the concept was introduced and defined by the Brundtland Commission⁵ in 1987 is *development that meets the needs of the present without compromising the ability of future generations to meet their own needs*. In order to ensure sustainable development it is essential that economic, social and environmental development go hand in hand. Implementing sustainable development would essentially require us to trace the origins and integrate economic and ecological arrangements.

III. Jute and Sustainable Development

The fact that environmental degradation has turned to be a glaring issue for the world does not need to be exaggerated. The requirement to protect and reinstate the lost ecological balance is the need of the world currently. In this new awake, there have been a number of important international instruments that were adopted by the world in the past decade to minimise the harm caused to the environment due to the various economic activities that the different nations undertake. Sustainable Development Goals, 2015 and the Paris Agreement on Climate, 2015 are the major developments in this aspect during the past few years. In this context, an attempt has been made to locate the usage of jute and jute products in alignment with the objectives of these international commitments. Products that are made of jute and other natural fibres can be intrinsically interlinked with sustainable development. If such products are promoted and are used through planning and innovation, they can effectively act as instruments in reviving the misplaced ecological balance.

In the following paragraphs, this contention has been analysed and examined in the perspective of the Sustainable Development Goals and the Paris Climate Agreement.

⁴ It was attended by more than 100 heads of state, 170 governments, 2,400 representatives from NGOs, and nearly 10,000 journalists. It is also considered as a building block of environmental actions in the world

⁵ The Brundtland Commission, also referred as the World Commission on Environment and Development (WCED), operated from 1984 to 1987 under the auspices of the UNO. In the United Nations, it is also called the UN Special Commission on the Environment. It presented the report- Our Common Future where the principle of sustainable development was defined and is a milestone in diverting the world's attention towards the concept.

IV. Sustainable Development Goals, 2015 and Jute

The Sustainable Development Goals (SDGs) were adopted by the United Nations in 2015 which succeeded the Millennium Development Goals. Under the SDGs, 17 goals have been iterated that the world community aims to achieve within 2030. These goals promulgate certain economic, social and environmental standards that are targeted to be established across the world through state level actions and mutual cooperation among states. One of the important considerations for reducing the harm caused to the environment has been recognised to be the extensive usage of synthetics in various spheres of our daily lives. While the dangers of synthetics and the potential hazards it poses to the environment are all well known, reducing its usage has been grossly unsuccessful. The main reasons for failing to replace synthetics has been its abundance, easy availability and most essentially its affordable pricing which greatly appeals to price sensitive consumers. The commonly used synthetic variants which flood the markets with a variety of products are Polypropylene (also referred as pp) and Polyethylene.

In fact, one of the major reasons behind the downfall of the jute industry since the mid-sixties has been the advent of polypropylene. As these light weight, low-priced, abundantly available goods began to adorn the markets, the demand of jute products began to fall sharply both in the domestic and international domains.

Jute has primarily been used as a packing material, as such, among all synthetic products, the most important competitor that emerged for jute in the packaging market was polypropylene. Although jute and pp are not perfect substitutes, its low cost and abundance rapidly chewed up the share of the jute market. While the jute fabric is a more breathable fibre with higher resistance to solar degradation and less chances of slipping and tearing, on the other hand, pp is light weight and water resistant. But the major basis of competition between the two has been the price factor.⁶ However, despite its abundance and affordability, the dangers of increased usage of synthetics are well known. In fact, the world is witnessing its adverse consequences in terms of increased, unrecyclable, and

⁶Food and Agricultural Organisation, *Jute, kenaf and allied fibres*, available at: fao.org/3/y5143e/y5143e1g.htm, (last visited on: July 1, 2020)

polluting heaps of plastics which is threatening the bio-diversity on land, water, and effecting human life, in fact the entire ecology.

In this context, redirecting the world view back to the golden fibre can ensure the minimisation of pollutants and carbon footprints. If strategically promoted and marketed, jute and jute products can prove to be instrumental in achieving some of the SDGs to a great extent. These are discussed in the following paragraphs.

i. Goal 1 – Poverty Alienation

Goal 1 of the SDGs talks about *poverty alienation*. Poverty and hunger has been a persisting and critical challenge before the world. In this regard, it is crucial to note that the natural fibre industries like jute, provide employments and is a source of income for numerous people all across the world. This fact is more apt in the context of developing nations. On one hand there are considerable number of families which are involved in jute cultivation (In India it is estimated to provide livelihood to about 40 lakh families) and again, it provides employment to huge number of people in this production units and trading activities (estimated to be about 2.5 lakh employees in jute mills 5 lakh traders in India).⁷ Promoting jute products thus can create an eco-system which is sustainable both for the environment as well as for a large number of people. Hence, promoting jute products and other natural fibres, will ensure sustainable development and considerably help in poverty alienation.

ii. Goal 3 – Good Health and Well-Being

Goal 3 of the SDGs aims towards *Good Health and Well-being*. Good health and well-being are premised on sustaining life in an eco-system where pollution is minimum and people live in harmony with the nature. Life in the present times is subjected to numerous aggravations in terms of pollution of water, soil, air, noise, etc. In this context again, natural fibres like jute are viable options in

⁷D. K. Kundu, “Potentials of Jute in Sustainable Family Farming for Livelihood Security in India and Recent Developments in Jute Production Technologies” in B. Mandal et al. (eds.), *Family Farming: Challenges and Opportunities* 209-217 (Renu Publishers, New Delhi, 2016)

minimising the existing pollution levels, not only in terms of manufacturing goods the product life cycle of which are bio-degradable (cradle to grave), but the crops as well benefit in restoring the lost ecological balance. (It has been seen that jute plants absorb huge amounts of carbon dioxide from the air. In approximately 100-120 days of jute cultivation, per hectare plantation can absorb almost 15 MT of CO₂ from the air and release about 11 MT of Oxygen.⁸)

iii. Goal 9- Industry, Innovation and Infrastructure

Again *Goal 9* which enumerates *Industry, Innovation and Infrastructure* targets inter alia to reduce the emission of greenhouse gases during manufacturing process. It aims to bring forth innovation in developing goods, production process, raw materials, transportations etc., that would be more environment friendly. In order to objectively transition towards such methods the usage of bio-based products need to be increased and industrial wastes must be treated before discharging. In this context, in consonance of the Kyoto Protocol⁹, it is crucial to minimise the emission of harmful greenhouse gasses and imbibecarbon dioxide neutral methods. Such implementations can alter the focus towards the natural fibre markets. Various industries use fossil fuels or mineral resources as raw materials, which are essentially non-renewable resources. Natural fibres on the other hand, are renewable and leave almost no carbon footprint in the entire life cycle of its products. One such natural fibre is jute which can be used for multiple purposes thus reducing the plastic usage. It is however important to note that shifting the trajectories entirely would demand a fundamental transformation of the world's attitude. It is only possible to create a sustainable global economy when the natural renewable resources are exploited commercially. Crops like jute and other natural fibres, are renewable resources since the crops can be planted regularly and they also promote the natural bio- diversity. In this backdrop, research and development for innovative and

⁸Omar Faruk and Mohini Sain (eds.), *Biofibre Reinforcement in Composite Materials*, 4 (Woodhead Publishing, UK, 2015)

⁹The Kyoto Protocol was an agreement that signatory nations would cut emissions of greenhouse gases, including carbon dioxide, by an average of five percent below 1990 levels by 2012. Each country was assigned an individual target for cuts based on its share of global pollution. It was signed in Kyoto, Japan in 1997 and officially entered into force in 2005.

diversified application of natural fibres could prove to be an efficient way to achieve the goals. Increased consumption of natural fibres in the commercial sphere can be viable green options for achieving a greener planet.

iv. GOAL 12 – Responsible Consumption and Production

On similar lines, the implementation of *Goal 12* which lays down *Responsible Consumption and Production* may also be accelerated with the increased usage of natural fibres like jute. Goal 12 essentially aims to minimise over extraction of natural resources and instead divert consumptions in sustainable manner. When natural resources are randomly and irresponsibly mined, it results in rapid degradation that causes serious threats to the future generations. However, with increased usage of natural fibres and plant based resources, this threat may be considerably mitigated and mainstreaming sustainability practices can be easier. Usage of jute products could reduce the burden of fossil fuels and at the same time would also palliate the long term adversities of the synthetic goods disposal. The achievement of this goal essentially diverts the trajectory of policy approach towards a more sustainable consumption and production pattern. This in turn would demand a commitment from the industries to not just adopt sustainable practices in business and procurement processes but also downsize subsidies for fossil fuels, which predominantly reflect a mode of economy that is based on r take-make-dispose methods.¹⁰ The process needs to integrate recycling in its apparatus.

v. Goal 13- Climate Actions

This is a very important goal which draws the world attention towards the rampant greenhouse emissions causing havoc in the environment. From global warming to rapid melting of Arctic Ice to depletion of the ozone layer, it creates numerous threats towards sustaining life on earth. Given this scenario, it is the

¹⁰Marisa Gabriel and María Lourdes Delgado Luque, “Sustainable Development Goal 12 and Its Relationship with the Textile Industry” in Miguel Angel Gardetti and Subramanian Senthilkannan Muthu (eds.), *The UN Sustainable Development Goals for the Textile and Fashion Industry* 21-46(Springer Nature Singapore Pte Ltd., 2020)

call of the hour to evolve sustainable plans to address the accelerated impairment to the ecology. In this context again, minimising the usage of synthetic goods and instead diverting towards natural goods like jute can be an operational relief to break the depleting trend of the environment.

vi. Goal 14 – Life in Water

Life in water happens to be one of the grossly effected areas due to excessive usage of synthetic goods. The need to protect marine bio-diversity need not be reiterated. The synthetic wastes, primarily single use plastics have proved to be a catastrophe for marine life.

The way it has engulfed the water bodies, it causes detrimental effects on all forms of marine life. It is a fact that till the 1950s most of the fishing gears and other fishing equipment were made of bio-degradable products such as jute or hemp ropes or paper bags. Even if they were disposed in the water bodies, they decomposed eventually which never caused any harm to the natural environment under the water. But with the proliferating use of plastic and synthetics, the newer equipment made from these materials when lost or abandoned into water bodies, they do not decompose and instead continue to be accumulated. They are often consumed by sea animals, cause blockage, and threatens the safety of different marine species, including marine mammals, sea birds, sea turtles, fish, crustaceans, and even corals¹¹. Recently, in March 2019, a young whale was found dead in the shores of Philippines and scientists found that there were 88 pounds of plastic wastes in its stomach. It was starved to death since it was unable to eat anything due to the massive plastic wastes it had consumed that accumulated in its stomach.¹²

vii. Goal 15- Life on Land

Synthetic goods have been detrimental for the natural habitat on land as well. Under this Goal the SDG aims to protect the terrestrial ecosystem and

¹¹ National Oceanic and Atmospheric Administration Marine Debris Program, "Report on the Entanglement of Marine Species in Marine Debris with an Emphasis on Species in the United States" 2 (2014)

¹² Alejandra Borunda, This young whale died with 88 pounds of plastic in its stomach, The National Geography, (March 18, 2019)

biodiversity. Here again, using jute in various industries instead of synthetic alternatives can effectively minimise land degradation and restore vital ecosystems. For example, it has been scientifically proved that jute can be very good alternatives to synthetic geo textiles in the construction industry. Since they are bio degradable, they do not harm the flora and fauna of the region. Additionally with increased innovation in this aspect, the jute geo textile materials has also been extremely cost effective compared to synthetic materials¹³.

Again, the polyethylene bags which are mainly single use plastics have recently been a matter of significant concern in the context of their disposal. Often huge heaps of such polyethylene bags are seen on landfills which act as major impediments in the flourishing of the flora and fauna of the region¹⁴. In this context again, jute bags, in addition of being durable and useful for people, can significantly reduce unwarranted plastic wastes.

Further, jute pulp can also be used as raw material in the paper manufacturing industry which can reduce the usage of wood pulp which is extracted after cutting trees. While wood pulp is collected from trees which need years to grow and in case of replantation too, the immediate effect on the environment is heavy, jute being a crop annually grown, it is indeed a renewable resource that can save the environment¹⁵.

Additionally, jute crops also safeguards photosynthetic CO₂ fixation in the air.¹⁶ Further, it is also instrumental in preserving and restoring the ecological balance since its residues and by-products can be applied for multi-purpose utilities.

Realising the effectiveness of natural fibres like jute can help the world to redirect their track towards a balanced ecology. It would not be wrong to deduct

¹³ Manoj P. Samuel, S. Senthilvel and Abraham C. Mathew, "Performance Evaluation of a Dual-Flow Recharge Filter for Improving Groundwater Quality" 86(7) *Water Environment Research* 615-625 (July 2014)

¹⁴ Barnes, David K A et al., "Accumulation and fragmentation of plastic debris in global environments." 36(1526) *Philosophical transactions of the Royal Society of London. Series B, Biological Sciences* 1985-1998 (2009)

¹⁵ JorgMussig (ed.), *Industrial Application of Natural Fibres – Structure, Properties and Technical Applications*, 159 (Wiley Publications, United Kingdom, 2010)

¹⁶ Omar Faruk and Mohini Sain (eds.), *Biofibre Reinforcement in Composite Materials*, 4 (Woodhead Publishing, UK, 2015)

that jute can be placed as an economically viable, socially beneficial and environmentally sustainable agricultural product. This fact has been recognized by the United Nations as well when the UN General Assembly adopted the resolution titled 'Natural Plant Fibres and Sustainable Development',¹⁷ on 19th December 2019. The resolution was suggested by Bangladesh. It happens to be the first resolution that has surfaced the important consideration before the world forum that natural fibres like jute, abaca, coir, kenaf, sisal, hemp and ramie could act as prospective substitutes to the perilous products like plastics made from fossil fuels. The paradox lies in the fact, that the world is not well aware about the utility and benefits of these products. If research and development activities are introduced amply in respect of these sectors their commercial efficacies can be further explored. In this direction the said Resolution may be an eye opener for the world community which aims to stimulate the use of natural plant fibres in all relevant areas and in turn propagates for sustainable development. The Resolution also calls for relevant support in terms of political motives and economic considerations to organise these valuable resources for integrated development which can act as an impetus to catalyse measures of sustainable production processes.

V. Paris Climate Agreement

Another important milestone in the international scene of environmental awareness in recent times has been the Paris Climate Agreement adopted in December 2015. It was eventually enforced on November 4, 2016. The Agreement has been carved out of the 21st Conference of Parties (COP21) of the United Nations Framework Convention on Climate Change (UNFCCC). These Conferences began since 1995 which is an annual meeting of the world forum for discussing climate change issues. It began its journey initially with negotiating the Kyoto Protocols. The significance of the Paris Agreement lies in the fact that it is the first effort of the world to mitigate the problem of global warming by adopting unique measures of adherence. Under this agreement the world community has attempted to undertake region based action plans for individual nations regarding the steps that they can take to reduce the greenhouse gas emissions. Unlike the previous efforts that framed straight jacket

¹⁷ UN General Assembly, Seventy Fourth Session, Agenda Item 24, Agricultural Development Food Security and Nutrition, Resolution on the Report of the Second Committee - A/74/386, (September 2019)

formulas which in most cases were never implemented by the states, under this Agreement, the nations are required to formulate their own individual plans. There have been arguments in the academic and industrial spheres over decades that setting universal goals for environmental plans cannot succeed since local needs and interests differ greatly. Hence the target of saving ecological balance must be generated at local levels. Further, sustainable development is also required to be redefined recurrently at local levels for these are essentially to be executed and practiced at regional levels.¹⁸

In most cases the nations based their targets on their economic and other situations at the domestic levels and sketch out their contribution in fighting the escalating problem of global warming. Instead of propagating for specific targets regarding emission reduction, Under Article 4 of the Agreement, it incorporates flexibility in asking the states to chalk out their contributions. The primary objective of the Agreement is to achieve the target of controlling the rising global warming within 2 Degrees Celsius above pre-industrial levels, and striving to limit it within 1.5 Degrees. The Agreement also promulgates for 'peaking of emissions'¹⁹ and balance emissions by forming sinks of greenhouse gases. Another factor that marks the crucial role of the Agreement is the review mechanism incorporated. It is to be conducted every 5 years referred as Global Stocktake, which will analyse and evaluate the progress of each country separately against the commitments that they have set for themselves.

In this context, it is interesting to note that most of the sectors that emit greenhouse gasses use fossil fuels. Therefore, jute can be placed in this context as a viable raw material and input in the production chain that can contribute immensely in reducing carbon foot-print. Huge amount of plastic wastes that are generated in the packaging of mercantile items like food stuffs, appeals, foot ware, consumer durables, construction, etc., can be mitigated by using jute packaging materials instead. Further in industries like construction, paper, transportation sectors, replacing the existing synthetic inputs with jute may

¹⁸ David G. Victor, "Recovering Sustainable Development", 85(1)*Foreign Affairs - Council on Foreign Relations* 91-103 (Jan- Feb2006)

¹⁹When a city or country have reduced its greenhouse gas emissions over a five-year period or longer and attain at least a 10 per cent reduction compared to its peak emissions, it is referred as peaking of emissions.

assist in bringing a momentum to the actions that are to be taken under the Agreement.

VI. Sustainable Development During Covid-19 and Jute

The outbreak of the pandemic COVID 19 has identified a number of reasons to reflect upon the course of actions that have been adopted over the time in treating the nature and the resources available. It has not only casted its grim shadow over physical and mental health of people across the world, but has also effected the social and economic life of the world. It is indeed a wake-up call for entire humanity to rectify on the irresponsible behaviour that has been persistently displayed in dealing with the bounties of nature. The lack of accountability that were created in the pretext of economic activities also need to be redirected . With the lockdown declared and the economic standstill, the country witnessed an instant variation in the weather conditions for the better, cleaning of the rivers, dwindling pollution levels in all cities, etc. This brings forth the crucial question about the status and seriousness with which the Sustainable Development Goals and the Paris Agreement are being adhered to.

It is high time that the trajectories of inclusive economic, social, and political policies based on a sustainable ecosystem are explored and take a back-foot from the continuous irresponsible consumption and economic patterns thereby developing more resilient societies. Sound environmental responses are the critical need of the hour. Amidst the rising COVID 19 concerns, the United Nations Environment Programme (UNEP) has iterated 4 sustainable goals out of the 17 that could stimulate a brisk global recovery. These are - Goal 13 - Climate Action; Goal 15 – Life on Earth; Goal 14- Life below Water; Goal 12 – Responsible consumption and production.²⁰

At the onset the most essential prerequisite is to thwart the distressing rates of global warming. It is important to realise that the issue of global warming is beyond the reach of any science and technology, nor can it be fixed with any amount of funds. Hence, a reasonable orientation for decarbonising the planet is the best that humanity can strive for. The current statistics reveal that the world is proceeding towards a 3.2 degree global temperature rise and beyond, which is

²⁰ Green economy & COVID-19 recovery, United Nations Environment Programme, available at: unenvironment.org/news-and-stories/story/green-economy-covid-19-recovery (last visited on July 16, 2020)

both precarious and detrimental.²¹ While the Paris Climate Agreement targeted to check the rising temperature at 1.5 degree, and maximum to 2 degrees, the actual scenario is sombre and afar from the target set. The environmental experts analyse that such conditions may provoke the occurrence of further pandemics, undeniably result in extreme weather events, floods, and droughts; surge the dearth of food availability, and cynically effect that economic and security systems. None of these are desirable or worthwhile. Climate actions indeed form the fundamental aspects of the SDGs since it has the potential to prejudice the situations to such overwhelming levels that it can detriment all other SDGs. Therefore, all viable options must be explored that can control the carbon footprint thus embracing greener technologies and renewable resources. In this respect again the natural fibres like jute can prove to be beneficial and a welcome step. Especially since jute is an imperative alternate to different arrangements of plastics, propagating it could be a positive step to towards mitigating the concern.

Secondly, regarding life on earth, human activities need to be more conscious and sensible so that they do not amplify the destruction of natural habitat. Amidst the brazen shape of the pandemic, it is essential that the world analyses the zoonotic diseases – their causes and effects so that comprehensive policy frameworks can be developed towards maintaining and promoting world health. Further with the scrutinisation of these factors, the hazards of unchecked environmental annihilations will also surface that can govern the directions of future actions. Again in this context, promoting natural products like jute, which are bio-safe and ensure biosecurity can prove to be a pragmatic approach. This will aid in restoring the lost ecological balance and will also serve human kind in the long run.

Thirdly, as far as life in water is concerned, human activities have grossly effected them as well to their detriment. There is no denial that human beings depend greatly on the marine ecosystem in a number of ways in the form of

²¹ COVID-19: Four Sustainable Development Goals that help future-proof global recovery, UNEP, *available at*: <https://www.unenvironment.org/news-and-stories/story/covid-19-four-sustainable-development-goals-help-future-proof-global>, (last visited: July 10, 2020)

coastal protection, life-saving medicines and drugs, various industrial uses and most importantly for food. However, unfortunately these factors have not been successful in urging humans to cease their unmindful behaviour in treating the marine ecosystem. The world population has continued to exploit the marine life with rampant domestic and industrial waste disposal into water bodies and heightened use of non-biodegradable products which are eventually discarded into the water bodies. Various forms of marine species are endangered and struggling for existence due to these factors. This situation has taken up a further ghastly shape with the outbreak of the pandemic. There has been a substantial rise in creation of toxic medical wastes which also includes huge amount of single-use plastic wastes. The disposal of these wastes therefore poses greater challenge and if not treated properly, will ultimately jeopardise land and marine environment. The need of the hour is thus to focus towards intervention of technology to ensure that the damage caused is minimised. In the post -COVID recovery phase, it is also crucial to think of bio-friendly packaging options that does not harm the environment and goes ahead to endorse a sustaining blue ecosystem.

Finally, regarding responsible production and consumption patterns as well, the pandemic has proved to be an eye opener. The imprudent lifestyle choices and incautious business patterns have hammered the natural resources into fragile and delicate states. The ecosystem has been randomly disrupted, most economic frameworks have been carbon-intensive, and mechanisms to control the unfettered emissions have been limited. It is thus time to divert our production and consumption designs prioritising green practices and rather turn *atmanirbhar*, as propagated by our honourable Prime Minister. A huge learning from the pandemic has been that it is always possible to devise new methods and explore unwonted avenues during the time of adversity. From conducting online classes, to online research modes, to online connectivity throughout the world, to online working, online court hearings, there has been a fundamental change in the work-life space intensified with the infusion of technology. Interestingly, the change has not stopped here, during the pandemic, a lot of economic activities were based on locally sourced raw materials and local production processes.

In this context, up surging the use of natural and renewable resources is imperative. It definitely calls for incorporation of innovation and technology.

However, the important matter is, when usual policies and social norms are metamorphosing according to the changing demands of time, this situation can be well leveraged to take robust initiatives and vocalise the locally produced jute and use it for industrial purposes. This can further lead to the fabrication of an environmental setup and industrial ecosystem that are complimentary to each other and are not conflicting at fundamental levels. A sustainable economy can thus be established with proper planning and strategizing. Fossil fuels which act as raw materials in manufacturing plastic and synthetic goods are not resourced in India, but on the other hand, she is the largest producer of jute in the world. It is rather worthwhile to switch our priorities to green alternatives as soon as possible.

In this context jute as an alternative can be a vital option. It is a plant fibre and is bio friendly. It also helps in balancing the lost ecological interface. The most effective utility of the jute fibre in this context would be its extensive usage as a packaging material and a viable alternative to single use polyethylene bags. This would also ensure protection of the natural habitat on land and as well as under the water.

It is pertinent to mention here that with recent research in Bangladesh, they have developed a variety of bio-degradable cellulose sheets using the jute fibres. These are also referred as jute plastics which have been found to have similar properties like the single-use plastics as far as their utility and usage is concerned. Bangladesh has named this material Sonali²² that can be used extensively for food and garment packaging, as wrapping materials, and also as carry bags. Bangladesh has not yet begun the commercial production of Sonali but it is expected to mould the market dynamics as soon as it hits the commercial space. It is also a ray of hope against the harmful consequences of petrochemical resins.

VII. Conclusion

In respect of socio-economic and specially environmental perspective, the golden fibre has massive utility that can be explored with proper research and development and infusion of technology in the sector. But despite its immense

²²Shaharia Pavel and VijitSupinit, "Bangladesh Invented Bioplastic Jute Poly Bag and International Market Potentials", 5(4) *Open Journal of Business and Management* 624-640 (2017)

potentials it is thwart with multiple challenges. The primary concern in this context is the lack of awareness among general people and more importantly among the policy framers and decision makers across the world. Unless it is promoted highlighting its commercial and industrial usages, manoeuvring its prospects will not be possible. Secondly, there are huge gaps in the strategies of its promotion both in the national as well as in international markets. The steps taken by the government in this regard are rather maladroit. The marketing strategy needs to be more aggressive and product placement needs to be focused on its utilities and versatility.

Given the pandemic situation, jute can be very well marketed with its environmental benefits and multiple usage in different areas – packaging being the primary among them. Unfortunately, even in the packaging sector, its usage is limited especially in the commercial packaging sector where the market is flooded with plastic packaging materials. Although they are cost effective, abundantly available and easy to use, plastics throw huge challenges through its usage. The main reason to opt back jute fibres are the rising environmental concerns. Hence, this aspect needs to be clubbed in the promotional activities of the products which are grossly inadequate. Promoting jute and jute products as an alternative to the synthetics in world markets with the backdrop of the climate change issues and motive of decarbonisation is essential. For bringing about positive changes in the sector which is today considered as a sunset industry, it is crucial to focus on two factors – firstly, strategic promotion of the fibre with its environmental benefits; and secondly, infuse research and development so that the potentials and the uses of the fibre can be further explored. Although both these aspects are taken up by India and Bangladesh who are the major jute producing nations in the world, but the efforts need to be coupled with greater zeal and rigour. The positive ray of hope in this regard is that the UN has recently recognised the importance of natural fibres in achieving SDGs. However its promotion can be further explored in the world which has just suffered the pandemic and probably would better understand the importance of natural fibres. If properly strategized, jute can be re-introduced to the world with all its prospects and utilities.

Constitutionalism to Transformative Constitutionalism: The Changing Role of the Judiciary

Indrani Kundu¹

Abstract

Constitutionalism ensures protection of rights of its citizens. The Constitutional designers provided two models to ensure the same. These two models are-

- a. Parliamentary Sovereignty- It postulates that the legislature is the legitimate forum for safeguarding citizen's rights.*
- b. Judicial Supremacy- It emphasizes the significance of the Court to safeguard rights of citizens.*

Judicial Supremacy proliferated post Second World War as a reaction to the often violation of rights of minority group. The probability of imperilment of rights of groups having inadequate representation in the Parliament was supposedly more in Parliamentary Sovereignty. Judicial Supremacy ensured better protection of rights because it had the power to review and strike down any rights-infringing legislation. In almost all the countries the Apex Court is vested with the ultimate power of interpretation of the Constitution to ensure protection of rights. Judicial Review and Constitutional Interpretation by the Judiciary has led to the introduction of 'Transformative Constitutionalism'. Transformative Constitutionalism recognizes the changing nature of the Society and accepts the Constitution as a transformative document rather than a rigid one.

In this backdrop this paper undertakes the study of the written Constitution of India and the unwritten Constitution of the United Kingdom. The object of this study is to locate any shift in the principles of Constitutionalism in the Constitutions of these two countries.

Keywords- *Transformative Constitutionalism, Parliamentary Sovereignty, Judicial Supremacy, Constitution of India, Constitution of United Kingdom.*

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I. Introduction

Constitutionalism can be defined as a doctrine of the legitimacy of the action of the Government. It ensures that the governance or any action by the Government is in compliance with the pre-fixed legal norms. Constitutionalism denotes that the Government derives its authority from the law. However, a country may have the Constitution but not the Constitutionalism. The Constitution of a country lays down the structure of various organs of the Government and specifies their area of function. However, at the same time there is a necessity to check any abuse of power by the governmental institutions. Constitutionalism is that mechanism which restricts the governmental institutions from being arbitrary.

Constitutionalism is a system of governance where the Government adheres to some principles in order to ensure check on the arbitrary exercise of power by its organs. These principles are-

- a. Democratic governments,
- b. Parliamentary sovereignty,
- c. Separation of power,
- d. Rule of law,
- e. Judicial review,

Giovanni Sartori² defines Liberal Constitutionalism constituted of following elements-

- a. Having a higher law, either written or unwritten, i.e. the Constitution,
- b. Independence of judiciary having judges appointed independently and who are dedicated to legal reasoning. It includes judicial review as well.
- c. Law is enacted through a pre-fixed procedure,
- d. Due process of law.

Therefore, the object of Constitutionalism is to ensure protection of citizen's rights from being violated by the arbitrary action of the government. Constitution of some countries upheld the Parliamentary Sovereignty to ensure protection of citizen's right, while some countries have evolved and emphasized upon Judicial Review of right-infringing legislations to ensure protection.

² Giovanni Sartori (1924-2017) was an Italian Political Scientist specialized in study of Democracy and Comparative Politics.

Parliamentary sovereignty postulated that the Parliament, rather than the Court, was the legitimate forum for safeguarding the right of citizens. British orthodoxy claimed that Courts be denied the right to review and strike down the legislation enacted in a democratic way. On the contrary, the American model of judicial supremacy empowers the court to review and strike down rights- infringing legislation³. This American model of judicial supremacy proliferated in India and was slowly absorbed into the Indian legal system.

II. Theories of Constitutionalism

The concept of Constitutionalism begins from the transformation of political society from natural state as propounded in the Social Contract Theory by Hobbes, John Locke and Reaussou.

Hobbes (1588-1679) in his social contract theory propounded that in natural state individuals were under constant threat of war. In natural state the rights of individuals were violated more often and the 'might is right' was followed. Hobbes observed that this kind of society could never bring stability, thus, the concept of 'government' paved its way into it. According to Hobbes there were two kinds of pacts, these are-

- a. Pactum Unionis- due to constant threat of war in natural state people wanted to protect their property. Pactum Unionis was a pact amongst each other to understand and respect each other's rights and to live peacefully.
- b. Pactum Subjectionis- By Pactum Subjectionis people agreed to surrender themselves under the authority of a superior power who may be called the Sovereign. Pactum Subjectionis also brought, along with it, the concept of limiting natural rights of an individual to an extent so that it did not hurt the natural right of another individual.⁴

PactmSubjectionis, according to Hobbes, gave rise to the concept of Sovereign or Government. However, Hobbes did not say anything as to how to control the

³ Chintan Chandrachud, *Balanced Constitutionalism*, xxix, (OUP, New Delhi, 2017)

⁴Hobbe's Social Contract Theory, (23.07.2020, 5:30 P.M.)

https://www.researchgate.net/publication/261181816_Summary_of_Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau

Sovereign if it becomes arbitrary. Hobbes theory of Social Contract had Utilitarianism, Absolution, Individualism except Constitutionalism.

Hugo Grotious (1583-1645), a contemporary of Hobbes, propounded Social Contract theory on the same line as Hobbes. According to Grotious once the natural rights were surrendered to the superior political being men had no control over the governance. Thus, surrendering natural rights to superior political being amounted to forfeiture of the right to control the Government if turned to be arbitrary.⁵ Therefore, Hugo Grotious also propounded a Government devoid of the principles of Constitutionalism.

John Locke (1632-1704) presupposed that men surrendered their natural rights to the community and not to any superior political being. Locke acknowledged the two types of pacts i.e. Pactum Unionis and Pactum Subjectionis by Hobbes. However, Locke was of the view that men did not surrender their natural rights by Pactum Subjectionis, rather they subject themselves to the rule by a superior political being who would also protect their natural rights. he also opined that a superior political being or the sovereign would be overthrown if turned out to be arbitrary. Thus, Locke has proposed limitation upon the power of the sovereign to some an extent which found its similarity with the principles of Constitutionalism.⁶

Rousseau (1712-1778) explained that during transformation of natural state into political society men were not in contact with each other, therefore, they have not thought of surrendering their rights. Once, the political society was established there was conflict of interest which paved the way for limitation of natural rights by the superior political being. This gave rise to the necessity to have a sovereign or superior political being in a political society. However,

⁵ Social Contract theory as propounded by Hugo Grotious, (23.07.2020, 6:00 P.M.) <https://plato.stanford.edu/entries/grotius/>

⁶DaudiMwita, Social Contract Theory of John Locke (1632- 1704) In the Contemporary World, (June, 2011) (23.07.2020, 6:15 P.M.) https://www.academia.edu/1489291/Social_Contract_Theory_of_John_Locke_19321704_in_the_Contemporary_World

Rousseau opined that sovereign power must be limited and obedience to the law must be subjected to 'General Will'.⁷

The above discussion makes it clear that the Social Contract Theory gave rise to the concept of Sovereign. This Sovereign is supposed to command obedience and impose limitation to the exercise of rights by its subjects. This concept of Sovereignty also induces that the power of the Sovereign must be limited. Thus, the origin of Constitutionalism can be traced back to the point where need was felt to control the sovereign power.

Blackstone (1723-1780) also expressed the necessity of controlling the sovereign power. According to Blackstone the factor controlling the sovereign power is the 'Natural law' which also includes the faculty of reasoning. Blackstone explained 'Sovereign Power' in English legal system where initially the sovereignty lied with the Monarch which later on transferred to the Parliament in 1688 through Glorious Revolution. Thus, in Blackstone's theory the Sovereign is the Parliament. According to him the Sovereign would not act arbitrarily because it has a moral obligation to comply with abstract and metaphysical norms.⁸

A.V. Dicey (1835-1922) explained Constitutionalism as existing in the English Legal System. A.V. Dicey also acknowledged absolute power of the Parliament to legislate. However, this absolute legislative power, according to him, could be controlled by Political Sovereign i.e. common people. Therefore, Dicey indicated that common people acted as restraint upon the arbitrary power of the Sovereign.⁹

Therefore, the Sovereign power needs to be controlled from being arbitrary is the fundamental object of Constitutionalism. The abovementioned jurists tried to give various theories as to how to restrain sovereign power from being arbitrary. This paper will discuss how Constitutionalism developed in India and United Kingdom. Both the countries have similar political history i.e. history of foreign

⁷ Rousseau's Social Contract theory, (23.07.2020, 6:30 P.M.) <https://www.sparknotes.com/philosophy/rousseau/section2/>

⁸ Sir William Blackstone, Commentaries on the Laws of England, 115 (J.B. Lippincott Company, 1983).

⁹ David Jenkins, From Unwritten to Written: Transformation in the British Common-Law Constitution, Vanderbilt Journal of Transnational Law, 870-873 (2003).

invasion. The legal systems of both the countries have been influenced by foreign legal system. However, both the countries underwent different process while developing their respective legal systems.

III. Constitutionalism in India

The Constitution of India is the supreme Law of the land. Article 13 of the Constitution of India has provided that any legislation inconsistent with the constitutional provisions must be declared repugnant by the Court¹⁰. This means that India upholds the Constitutional Supremacy which allows no law or action to violate the provisions of the Constitution of India.

Principles embedded in the Constitution of India are-

i. Constitutional Supremacy

Constitutional Supremacy means that all the organs of the government i.e. the legislature, executive and judiciary shall owe allegiance to the set of principles as laid down by the Constitution of India. The judgment delivered in *Virendra Singh & Ors. v. State of Uttar Pradesh*¹¹ is significant as in this case the Constitutional Supremacy was upheld. This suit was filed under Article 32 of the Constitution regarding post-constitutional right to property which was

¹⁰ Article 13 of the Constitution of India

Laws inconsistent with or in derogation of the fundamental rights

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void

(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality

¹¹ *Virendra Singh & Ors. v. State of Uttar Pradesh* AIR 1954 SC 447.

situated in Indian States that were not part of British India. However, later on these Indian States were acceded to India following independence and became the integral part of Indian Republic. These Indian States were independent during British raj and acknowledged as suzerain power and owed modified allegiance. These Indian states were acceded through Instrument of Accession post 1947. The rulers of these Indian States accepted to join India on the condition that their sovereignty within the State would not be affected because of this accession, and the same was also mentioned in the Instrument of Accession. States that were in question later on formed part of the state of Uttar Pradesh. These Rulers granted some rights to individuals regarding four villages in 1948 which was later on revoked by the Government of Uttar Pradesh in 1952 stating it as an act of the State. The Petitioners being aggrieved by this order filed this Writ petition.

This case was presided over by five judges Bench comprising of the then Chief Justice M.C. Mahajan, Vivian Bose, N.H. Bhagwati, B.K. Mukherjea and T.L.V. Aiyar JJ. Justice Vivian Bose (for himself and on behalf of four other judges) observed that the State of Uttar Pradesh can not exercise 'an act of State' power against its own subjects. Prior to the adoption of the Constitution people of Indian States and/or Dominion of India may have owed allegiance to different sovereign. However, with the adoption of the Constitution all other territorial allegiance were wiped out and the past was obliterated except where preserved expressly, at that moment all the allegiance sprang from one source for all grounded on the same basis, the sovereign will, of the people of India with no race, caste, creed, class, distinction, reservation etc. Petitioners, in favour of who grants were made, were acknowledged as Indian citizens from the beginning of accession of their states into Indian Territory. Petitioners and the authorities both were subjected to the Constitution of India. Therefore, the State Action of the State of Uttar Pradesh against its own subjects was declared to be void.

This case, undoubtedly, upheld the Constitutional Supremacy in 1954. This judgment can be said to be in support of words of Abraham Lincoln i.e. the government of the people, by the people and for the people.

ii. Judicial Review

In India the Constitution has empowered the Judiciary with ultimate power of declaring any Act as unconstitutional by virtue of Article 13 of the Constitution of India on the following ground-

- i. Acts so far as inconsistent with the provisions of the Constitution of India,
- ii. The State shall not make any law which takes away or abridges rights of citizens,
- iii. Any Bye Law, Regulations, Orders inconsistent with the Constitutional provision shall not be effective.

The Indian Judiciary immediately after the adoption of the Constitution of India was entrusted with review of several legislations. In *A.K. Gopalan v. State of Madras*¹² the six judges Bench, comprising of Chief Justice H. Kania, Fazl Ali, Patanjali M. Shastri, M.C. Mahajan, S.R. Das and B.K. Mukherjea JJ., reviewed constitutionality of Preventive Detention Act, 1950. The Bench declared Section 14 of this Act unconstitutional on the ground that this section prevents the disclosure before the Court the grounds of detention.

In *Shankari Prasad Deo v. Union of India*¹³ initiates the series of cases where the Indian Judiciary reviewed the Constitutional amendments involving important questions of interpretation of the Constitutional provisions. In *R.C. Cooper v. Union of India*¹⁴ the eleven judges Bench comprising of J.C. Shah, S.M. Sikri, J.M. Shelat, Vishishtha Bhargava, G.K. Mitter, C.A. Vaidyalingam, K.S. Hegde, A.N. Grover, A.N. Ray, J.P. Reddy, I.D. Dua JJ., reviewed the Constitutional validity of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969. The majority judgments by ten judges upheld the validity of the Act, however, declared that the calculation of compensation for acquisition under this Act was not adequate and was ordered to be amended.

Besides reviewing constitutionality of legislations, the Indian Judiciary also reviewed administrative action and/or discretion. *A.K. Kraipak v. Union of*

¹² *A.K. Gopalan v. State of Madras* AIR 1950 SC 27.

¹³ *Shankari Prasad Deo v. Union of India* AIR 1951 SC 458.

¹⁴ *R.C. Cooper v. Union of India* AIR 1970 SC 564.

India¹⁵ is a significant case where the Indian Judiciary reviewed the administrative action. In this case five judges Bench comprising of Hidayatullah, J.M. Shelat, K.S. Hegde, A.N. Grover, V. Bhargava JJ., declared that the administrative action exhibiting biasness could not be held constitutional. In this case the appellant, A.K. Kraipak, was one of the members of an interview Panel taking interview for Indian Forest Service. However, it was alleged that A.K. Kraipak also appeared in the interview as one of the candidates. Therefore, biasness was alleged on the part of the administrative authorities. The Bench unanimously declared this administrative action as unconstitutional.

iii. Judicial Activism

Judicial Activism in India was introduced with the power of review of legislation and administrative action by the Judiciary under Article 13 of the Constitution of India. Significant features, as subsequently developed, of judicial activism under the Constitution of India were-

- i. Access to justice through procedural innovations i.e. relaxing the *locus standi* rule to introduce Public Interest litigation,
- ii. Interpretation of the Constitution in a manner that stretched it beyond the intention of the framers in order to ensure justice.¹⁶

Procedural innovation was introduced by relaxing *locus standi* rule to Public Interest Litigation. Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar¹⁷ disclosed shocking conditions of under-trial prisoners in the State of Bihar and their accessibility to justice was seemed to be bleak. Alarmingly, large numbers of inmates of prisons in the State of Bihar were awaiting their trial. In some cases the inmate was already in the prison for a period more than the period of imprisonment had the trial been completed and punishment imposed. In this case two judges Bench of the Supreme Court comprising of P.N. Bhagwati and D.A. Desai JJ. observed that inaccessibility of speedy trial amounted to infringement of rights guaranteed under Article 21 of the Constitution of India.

¹⁵ A.K. Kraipak v. Union of India air 1970 Sc 150.

¹⁶ Abhinav Chandrachud, Supreme Whispers, 29 (Penguin Random House, Haryana, 2018).

¹⁷ Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar AIR 1979 SC 1369.

Procedural innovation also involves court's power to exercise Epistolary Jurisdiction. Epistolary jurisdiction empowers the Judiciary to take letters into consideration and initiate a trial on the basis of such letter. This procedural innovation was introduced to ensure accessibility of justice to oppressed people. In *Sunil Batra v. Delhi Administration*¹⁸ Justice V.R. Krishna Iyer again converted a letter from the inmate of a prison into a Public Interest Litigation. The letter disclosed human rights violation of prisoners in prison. V.R. Krishna Iyer, O. Chinnappa Reddy and R.S. Pathak (concurring) JJ. in this case observed that in no circumstances the human rights of prisoners could be violated by jail authority.

Since 1950 various judges interpreted the Constitutional provisions stretching its meaning beyond the intention of the framers of the Constitution of India in order to ensure justice. In *A.K. Gopalan v. State of Madras*¹⁹ Justice S. Fazl Ali interpreted the Constitutional provision liberally and dissented to the majority judgment where it was held that 'right to freedom of movement' guaranteed under Article 19 (1) (d) was mutually exclusive of 'right to life and personal liberty' guaranteed under Article 21 of the Constitution of India. Justice S. Fazl Ali observed that in order to ensure enjoyment of all the fundamental rights by the citizens it was necessary to ensure that these fundamental rights were inter-linked to each other.

In *I.C. Golaknath v. State of Punjab*²⁰ the eleven judges Bench in 6:5 majority (Chief Justice K. Subba Rao, for himself and on behalf of Shah, Shelat, Vaidiyalingam, Sikri JJ, with Justice Hidayatullah concurring) observed that the power of the Parliament to amend the Constitutional provision was limited to the extent it did not abridge or take away the fundamental rights of the citizens.

In *Keshavananda Bharti v. State of Kerala*²¹ the concept of 'Basic Structure' was given by the Indian Judiciary. The Basic Structure doctrine limited the Parliament's power to amend the Constitution to the extent of the amendment changing the very basic structure of the Constitution. S.M. Sikri, J.M. Shelat,

¹⁸ *Sunil Batra v. Delhi Administration* AIR 1980 SC 1579.

¹⁹ *A.K. Gopalan v. State of Madras* AIR 1950 SC 27.

²⁰ *I.C. Golaknath v. State of Punjab* AIR 1967 SC 1643.

²¹ *Keshavananda Bharti v. State of Kerala* AIR 1973 SC 1461.

A.N. Grover, K.S. Hegde, B.K. Mukherjea, P. Jaganmohan Reddy and H.R. Khanna JJ. observed that the Constitution of India had Basic Structure which if altered would change the very nature of the Constitution of India. However, there is no unanimous decision as to the features which constitute Basic Structure of the Constitution of India. Nonetheless, this case is a glaring example of judicial activism in India because of the effort of the Supreme Court of India to protect fundamental values of the Constitution of India.

*Maneka Gandhi v. Union of India*²² is another example of judicial activism in India where the Judiciary reversed the precedent upheld in *A.K. Gopalan* case since 1950. In *Maneka Gandhi* case the five judges Bench overruled the judgment of *A.K. Gopalan* case and held that-

- i. Right to Equality guaranteed under Article 14, Right to Freedom guaranteed under Article 19 and Right to life and personal liberty guaranteed under Article 21 are mutually inclusive and interlinked. These fundamental rights can not be said to be exclusive of each other,
- ii. 'the procedure established by law' in Article 21 of the Constitution of India connotes fair and just procedure. Article 21 of the Constitution of India ensures procedural fairness as well.

*Vishaka v. State of Rajasthan*²³ marks a significant milestone in the journey of judicial activism in India. The judicial activism in *Vishaka* case is different than the abovementioned two types of activism. In this case there is neither stretching of the meaning of legislation beyond intention of the framers nor any procedural relaxation is found. This case is significant because the Judiciary had to deal with an issue where there was no pre-existing legislation. The three judges Bench analysed the case through the lens of gender equality recognizing sexual harassment at workplace as a social problem and discriminatory form of violence against women. The Bench referred the guidelines provided in Convention on Elimination of All forms of Discrimination against Women and provided guidelines to be followed by the employer in the establishment. This guideline is known as *Vishaka Guidelines* and to be effective until any appropriate legislation is enacted.

²²*Maneka Gandhi v. Union of India* AIR 1978 SC 597.

²³*Vishaka v. State of Rajasthan* AIR 1997 SC 3011.

Therefore, the Indian Judiciary has rarely hesitated to address the issues of infringement of rights of the citizens. The procedural innovation relaxing the rule of *locus standi* was introduced when the Judiciary noticed that in most of the cases the infraction and infringement of Constitutional rights go unheard and unremedied because the person could not even approach the Court. The Judiciary resorted to liberal interpretation of the Constitution whereby the meaning of a provision was stretched beyond the intention of the framers of the Constitution when the case demanded so. The Judiciary did not even hesitate to come forward and fill the void left by the lawmaking institution, as it has done in *Vishaka v. State of Rajasthan*.

a. Separation of Power

Separation of power as explained by Wade and Phillips is that the same person should not be part of more than one organ of the government. It also means that the organs of the government should not control and interfere with the functioning of each other.

Article 50 of the Constitution of India mandated the state to separate judiciary from the executive. Except this provision no other provision lays down regarding separation of power in the Constitution of India. However, the framers of the Constitution have provided an arrangement of power sharing which shows that in India separation of power doctrine is followed to some extent. Article 245 of the Constitution of India has laid down that separate list would be provided regarding area where the Union and the State legislature would be empowered to legislate. This provision was to avoid any further confusion in matters of legislation. The Constitution of India has provided separate arrangements explaining the rights and responsibilities of the executive and the legislature, however, no express provision is there regarding separating both the organs of the government.

However, in the Constituent Assembly Debate on 10th December, 1948 the matter of 'Separation of Power' between important organs of the government was discussed. Prof. K.T. Shah also suggested for insertion of new Article i.e. Article 40-A in the Draft Constitution separating the organs of the government. Dr. B.R. Ambedkar dissented to the proposal of insertion of new Article and contended that separation of executive and legislature might be there under the Constitution of United States of America but the same arrangement was

criticized as well. Therefore, the motion of inserting the Article 40-A was rejected.²⁴ Therefore, despite the attempts being made the strict separation of power was rejected under the Constitution of India.

b. Rule of Law

Rule of law embodies the doctrine of the supremacy of law. Rule of Law, as explained by A.V. Dicey, is –

- i. Supremacy of law,
- ii. Equal protection by law and equal subjection of all classes before the law, and
- iii. Paramountcy of the law over the government.

The principle of Rule of Law is an underlying principle of the Constitution of India. This principle was upheld in *Indira Nehru Gandhi v. Raj Narain*²⁵. Raj Narain and Indira Gandhi both contested General election of 1971 from Rae Bareilly constituency. In the election Mrs. Indira Gandhi won with sweeping majority. Raj Narain brought a suit before the High Court of Allahabad challenging the election of Mrs. Gandhi and contended that Mrs. Gandhi has resorted election malpractices. After hearing of both the parties the High Court of Allahabad declared Mrs. Gandhi guilty of election malpractices, misuse of government machinery under the Representation of People Act, 1950 and declared her election void. An appeal was filed before the Supreme Court of India. However, Supreme Court issued a stay on execution of the order of the Allahabad High Court on 24th June, 1975 since the Court was in vacation. One the very next day the Indira Gandhi imposed emergency on 25th June, 1975. During this emergency the Congress government introduced the 39th Amendment to the Constitution of India on 10th August, 1975. This amendment inserted Article 329 A in the Constitution of India. By virtue of this amendment the Parliament placed the election of President, Vice President, Prime Minister and the Speaker of Lok Sabha beyond the judicial scrutiny. *Indira Nehru Gandhi v. Raj Narain* was heard by five judges Bench consisting of A.N. Ray, H.R. Khanna, K.K. Mathew, M.H. Beg, Y.V. Chandrachud JJ. The Bench unanimously declared 39th Constitutional Amendment void as it affected the rule

²⁴ Constituent Assembly Debate, 10th December, 1958, Vol- VII.

²⁵ *Indira Nehru Gandhi v. Raj Narain* AIR 1975 SC 2299

of law and the basic structure of the Constitution of India. Therefore, bringing the election in the posts of the Government institution under the judicial scrutiny the Indian Judiciary upheld the doctrine of Rule of Law.

IV. Constitutionalism in United Kingdom

United Kingdom consists of four countries England, Wales, Scotland and Northern Ireland. The capitals of these countries are London, Cardiff, Edinburgh and Belfast respectively. The Kingdom of Wales was annexed with the Kingdom of England in 1536 which was then followed by union with Scotland in 1707 forming Kingdom of Great Britain and ended with the union of Kingdom of Ireland in 1801 building the United Kingdom of Great Britain. It was initially a Monarchy that later on transformed into democracy through Great Revolution in 1689 with Parliamentary form of representative government.

The Constitution of the United Kingdom is unwritten. However, the principles of good governance are upheld in several texts like Magna Carta 1215, English Bill of Charter 1689. Legal system of the United Kingdom is not written in standing orders. The responsibilities of major institutions of the government and the arrangement of power sharing have been institutionalized through a continued practice over centuries. Most of the practices in the legal system of the United Kingdom have been developed through precedents and become a tradition. Principles of Constitutionalism as designed in the unwritten Constitution of the United Kingdom are explained herein below.

i. Parliamentary Supremacy/ Parliamentary Sovereignty

Parliamentary supremacy was introduced in English legal system through the Great Revolution in 1689 when the Monarch accepted the sovereignty of Royal Council. Royal Council was an institution of members representing the common people in the government. This Royal Council later on was developed to Parliament.

Parliamentary Supremacy or the Parliamentary Sovereignty has been established in the United Kingdom through continued practice. It means that the Parliament in the United Kingdom has the absolute power to legislate. Therefore, the Parliament has been vested with a significant power where there is a probability

of act in an arbitrary fashion. However, according to Blackstone (1723-1780) Parliament would restrain itself from being arbitrary because any man made law cannot survive unless its compliance with the natural law. Therefore, Blackstone resorted to natural law as a method of limiting the absolute power of the Parliament to legislate. According to him, a man made law has to comply fundamental and basic principles of natural law.²⁶

A.V. Dicey (1835-1922) has propounded the concept of Political Sovereign and Legal Sovereign. Political sovereign is common people while the legal sovereignty belongs to the Parliament. Dicey has stated that Parliament would not legislate arbitrarily because the political sovereign has power to change their representatives in the Parliament. Therefore, the right to election of common people would act as restraint on the Parliament's absolute power to legislate.²⁷

Therefore the English legal system definitely upheld Parliamentary Sovereignty, but the same is not absolute.

ii. Separation of Power

In the United Kingdom there was no separation of power in that sense until the enactment of the Constitutional Reform Act, 2005. By virtue of the Constitutional Reform Act, 2005 the Apex Court of the country was separated from the Upper House of the Parliament. The idea of separation of power is that the major organs of the government act independently. However, the same was not followed in the United Kingdom till 2005 when the highest appellate court of the country i.e. the House of Lords was also the Upper House of the Parliament. This practice prior to 2005 is criticized because the legislation enacted by the Houses of the Parliament if found to be right infringing may go to the House of Lords as it was the highest appellate court of the Country. Thus, the probability of biasness could not be ruled out. Therefore, this practice imperiled the rights of common people and was finally removed by the Constitutional Reform Act, 2005.

²⁶ Sir William Blackstone, Commentaries on the laws of England, 115 (J.B. Lippincott Company, 1983).

²⁷ David Jenkins, From Unwritten to Written: Transformation in the British Common-Law Constitution, Vanderbilt Journal of Transnational Law, 870-873 (2003).

iii. Judicial Review

Judicial review is the power of the court by which it can review legislation and executive action. The unwritten Constitution of the United Kingdom has been misunderstood for not upholding judicial review because the Apex Court has been a part of the Upper House of Parliament and there is no written text delineating the responsibilities of the organs of the government.

A.V. Dicey opined that judicial review has been ensured under the unwritten Constitution of the United Kingdom. The judges of the United Kingdom hold their offices for permanent tenure which definitely raised them above any direct influence of the executive. In *Dr. Bonham's case*²⁸(1610) Sir Edward Coke (1552-1634) observed that sometimes the Parliament might enact legislation contrary to common right and reason. Sir Coke declared an Act enacted by the Parliament as void as it was contradictory to common law principles. He also observed that restricting absolute power of the Parliament was not an alien concept to the English Legal system. This precedent was further continued by Lord Chief Justice Henry Hobart in *Day v. Savadge*²⁹. In this case Justice Hobart observed that common law principle overrode the enactment of the Parliament. In *Sheffield v. Ratcliff*³⁰ Justice Hobart observed that judicial review of legislations and executive action derived from liberty and the authority of judges was to interpret the legislation to bring out the truest and best use.

iv. Rule Of Law

Rule of Law indicates subordination of arbitrary power of authorities to well defined law. Henry de Bracton (1210-1268) for the first time introduced the concept of subordination of arbitrary power of Monarch by demanding Royal Council, a system alike Parliament. Sir Edward Coke advocated for the supremacy of the common law and codification of the same for ensuring primary condition of freedom limiting the arbitrary power of the Monarch.

Dicey gave three meanings to the rule of law, these are-

²⁸*Dr. Bonham's case* [1610] 8 Co. Rep. 107, 114 (CP)

²⁹*Day v. Savadge* (1614) Hob. 84 (CP)

³⁰*Sheffield v. Ratcliff* (1615) Hob. 338 (CP)

- i. Absolute supremacy or predominance of regular law as opposed to arbitrary power,
- ii. Equality before the law or equal subjection of all classes before the law,
- iii. Paramountcy of the law over the Government. Therefore, Constitution is the consequence of the predominance of the legal spirit of any country.³¹

Therefore, according to Dicey's theory of Rule of Law English Court was closely associated with upholding rule of law in English legal system.

v. Unitary Government

Government of the United Kingdom is Unitary though all the local authorities are elected and independent to execute policies within the limits of the Constitution. The administrations of England, Wales, Scotland and Northern Ireland are different from each other. However, all these four countries of the United Kingdom are members of the European Community and are under direct control of the Central Government and the Parliament of the United Kingdom. The United Kingdom parliament is empowered to enact laws. Any law enacted by authority other than the Parliament is under Royal Prerogative or is delegated by the Parliament.

V. Transformative Constitutionalism

Transformative Constitutionalism is that theory which recognises the changing nature of the society and acknowledges that the Constitution must go through amendments in order to keep pace with the change. The origin of 'Transformative Constitutionalism' is found in the history of post-apartheid South Africa. Karl E. Klare in 'Legal Culture and Transformative Constitutionalism' stated that *transformative constitutionalism is a long-term project of constitutional enactments, interpretation and enforcement committed to transform the political and social institutions and power relationships in*

³¹Rocardo Gosalbo Bono, The Significance of the Rule of Law and its Implications upon the European Union and the United States, University of Pittsburgh Law Review, 254.

*democratic, participatory and egalitarian society.*³² Transformative Constitutionalism could be seen in Germany post Denazification. Therefore, the shift from constitutionalism to transformative constitutionalism is mainly due to institutionalised violation of rights by the State.

Indira Jaising, a senior lawyer of the Supreme Court of India, stated that transformative constitutionalism for her is ‘personal liberty’. The difference of transformative constitutionalism with constitutionalism is that in transformative constitutionalism the central role of the state is to fulfil the project of emancipation and constant development of constitutional ideals i.e. liberty, equality and fraternity. Advocate Indira Jaising has mentioned that in India the judge constantly working for such development was Justice V.R. Krishna Iyer and Advocate Jaising accepted his influence on her works.³³ According to her the Constitution is explained as radical document which even if guarantees freedom but upheld old hierarchical positions. Therefore, the duty to ensure transition keeping pace with the change in the society lies upon the State. The two key aspects of Transformative Constitutionalism is

- It envisages attainment of substantial equality by recognising and eliminating all forms of discrimination as they may have existed or may develop in the future;
- It calls for a realisation of full human potential within positive social relationships – the use of the term “positive social relationships” instead of limiting it to an individual’s interactions with the state is indicative of the pervasive nature of Transformative Constitutionalism in the private sphere as well.

Michael Hailbroner observed that Transformative Constitutionalism is perceived differently in different countries by lawyers and Courts. Some countries associate it with the role of judges while some countries attribute

³²Karl E. Klare in ‘Legal Culture and Transformative Constitutionalism’, (26.07.2020, 6:50 P.M.) <https://www.barandbench.com/columns/constitution-day-2019-note-on-transformative-constitutionalism>.

³³ Transformative Constitutionalism explained by Advocate Indira Jaising, (26.07.2020, 6:35 P.M.) <https://scroll.in/article/931512/for-us-it-now-means-personal-liberty-indira-jaising-explains-transformative-constitutionalism>.

transformation to the political process.³⁴ According to Michael Hailbronner the U.S. Constitution did not empower the Judiciary with task to bring out more just and egalitarian society.

Constitutionalism ensures freedom, equality and fraternity. However, transformative Constitutionalism recognizes the transformation and tries to attain more just and egalitarian society.

In India the institution recognizing this social transformation and ensuring justice is the judiciary. Post 1975 i.e. after declaration of emergency, Judicial pronouncements were delivered favouring rights and interests of citizens and judges who facilitated this and expanded the scope of judicial activism were Justice P.N. Bhagwati, Justice V.R. Krishna Iyer, Justice H.R. Khanna, Justice O.P. Chinnappa Reddy etc. Justice V.R. Krishna Iyer recognized the social transformation and acknowledged-

- a. Inviolability of fundamental rights in *Maneka Gandhi v. Union of India* (1978)
- b. Human rights of under-trials and convicted person in *Sunil Batra v. Delhi administration* (1979)
- c. Inadequacy of the rights of a divorced Muslim wife under the personal law in *Bai Tahira v. Ali Hussain* (1979)

Justice Bhagwati recognized that the social transformation also brought awareness amongst citizens about the rights. However, filing a suit was still involved a lot of procedural complications which restricted many from instituting suits. Therefore, Justice Bhagwati relaxed the Locus standi rule to allow any public spirited person to file a suit for public at large, for example *Hussainara Khatoon v. State of Bihar* (1979).

The very recent case explaining transformative constitutionalism is *Navtej Singh Johar v. Union of India*³⁵. Justice Dipak Mishra (for himself and Justice A.M. Khanwilkar) observed that *the Constitution of India is regarded as a social document. The society is ever changing and to cope up with the change the Constitution must evolve. This points out towards the transformative role of the*

³⁴ Michael Hailbronner, *Transformative Constitutionalism: Not Only In the Global South*, *American Journal of Comparative Law* (2017).

³⁵ *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.

*Constitution. The ability of the Constitution to transform makes it an organic document.*³⁶

Justice D.Y. Chandrachud observed that *the society acknowledging the injustices which it has perpetuated is a mark of evolution. There are instances of suppression of identity and one's sexual orientation in the fear of persecution.* Justice Chandrachud also regarded the Constitution as being transformative in character and upholding rights of marginalized and deprived sections in the society. He further held that LGBT community has following rights without discrimination-

- i. All the Constitutional rights,
- ii. Equal rights of citizenship,
- iii. Right to choose partner.

For citizens of the United Kingdom the rights were not consisted of set of guarantees embodied in a written instrument. Liberty and freedom for British citizens are residue of liberties that remained untouched by the Parliament (consisting of House of Commons and House of Lords). Rights were safeguarded through parliamentary scrutiny of legislations as well as through judicial review of administrative actions.³⁷ However, towards the later half of the twentieth century appeals for the enactment of bill of rights increased. It was probably because a realization was drawn that Parliament was no longer an effective check on the government. After at-least three attempts the Parliament of the United Kingdom enacted the Human Rights Act, 1998.³⁸ The Human Rights Act, 1998 was enacted to ensure better protection of rights guaranteed under the European Convention on Human Rights. The government set out threefold rationale for enacting Human Rights Act, 1998-

Firstly, it would enable citizens to enforce their Convention rights in domestic courts instead of filing it to Strasbourg court of Human Rights,

Secondly, it would be brought more meaningfully into the courts of the United Kingdom, otherwise, till now courts used to refer Convention rights as an aid to interpretation of rights available to British citizens,

³⁶Navtej Singh Johar v. Union of India AIR 2018 SC 4321 at 65.

³⁷Chintan Chandrachud, *Balanced Constitutionalism*, xxxi, (OUP, New Delhi, 2017)

³⁸G.W. Jones, *British Bill of Rights*, 43 (1), *Parliamentary Affairs*, 27 (1990)

Thirdly, it would allow British judges to influence jurisprudence of Convention rights in Europe.

Until 1998 individuals did not have direct access to Strasbourg Court. They had to apply in the European Commission on Human Rights which would launch a case in the Strasbourg Court on Human Rights on behalf of the aggrieved individual.³⁹

The Preamble of the Human Rights Act, 1998 states that this Act is enacted to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights. Prior to the ratification of the Convention rights the difficulties faced by the Judiciary was that the Judiciary had to treat the Convention rights as an aid while interpreting domestic legislations. Any domestic legislations, if found to be contradicting the Convention rights, would outweigh the Convention rights. The Parliament did enact legislations safeguarding rights of British citizens. However, the same still seemed to be inadequate to protect rights of citizens.

In *Taylor v. Co-operative Retail Services*⁴⁰, the employee, Taylor was subjected to some pressure to join Trade Union Association which was legal under the domestic law of United Kingdom but violated rights guaranteed under the European Convention on Human Rights. The plaintiff's complaint was dismissed in an action brought before the Employment Appeals Tribunal. The Court of Appeal upheld the decision of the Employment Appeals Tribunal and the plaintiff was wrongfully dismissed from his employment for not joining Trade Union Association. The Court of Appeal decided the case under the domestic law which justified the dismissal. However, the Court made an observation that *the pressure to join Trade Union Association and subsequent dismissal for failing to join such amounted to violation of rights guaranteed under the European Convention on Human Rights. Had the Plaintiff gone to the European Commission on Human Rights, the Plaintiff would have definitely won the case. However, this road to justice is long.*

This observation of the Court of Appeal in this case disclosed two things-

³⁹ Chintan Chandrachud, *Balanced Constitutionalism*, xxxiii, (OUP, New Delhi, 2017).

⁴⁰ *Taylor v. Co-operative Retail Services* 1982 Indus. Cas. R. 600.

- a. The Judiciary recognized the disparity between the domestic law and Convention rights,
- b. There is a necessity for ratifying the Convention Rights and to enact legislation.

Thus, the Parliament was not at all an effective check on arbitrary power of the government and the Judiciary had to intervene. Post enactment of the Human Rights Act, 1998 there is an increase in cases related to human rights violation in the United Kingdom.

VI. Conclusion

It is realized that changes occur in the society so often that sometimes it is not possible to amend the legislation keeping pace with it and the parliamentary scrutiny of laws is no more a guarantee of protection of rights of citizens. The role of Indian Judiciary in upholding rights of prisoners in Charles Sobraj v. Superintendent, Central Jail, Tihar case, Sunil Batra v. Delhi Administration case, Francis Coralie Mullin v. The Administrator, Union Territory of Delhi case⁴¹ shows the transformative character of the Constitution of India. The rights of prisoners, with some restrictions, were upheld by the Judiciary by interpreting the constitutional provisions liberally and most importantly without having any specific law laid down on that issue. Recognizing and acknowledging rights of LGBT community in Naaz Foundation v. Government of NCT, Delhi case, NALSA v. Union of India case and Navtej Singh Johar v. Union of India⁴² case are also example of transformative nature of the Constitution.

In the United Kingdom the parliamentary scrutiny of legislation seemed to fail to protect the rights of citizens which led to a demand for enactment of Human Rights Act, 1998. The enactment of Constitutional Reform Act, 2005 separating the highest Appellate Court of the Country from the Upper House of the United

⁴¹ Charles Sobraj v. Superintendent, Central Jail, Tihar AIR 1978 SC 1514
Sunil Batra v. Delhi Administration AIR 1980 1579
Francis Coralie Mullin v. The Administrator, Union Territory of Delhi AIR 1981 SC 746.

⁴² Naaz Foundation v. Government of NCT, Delhi WP (C): 7455/2001
NALSA v. Union of India (2014) 5 SCC 438.
Navtej Singh Johar v. Union of India AIR 2018 SC 4321.

Kingdom Parliament was another step in ensuring impartiality and better protection of human rights of British citizens.

Therefore, the Constitution, written or unwritten, cannot be rigid and the institutions must be able to amend it keeping pace with the changing society. The purpose of having the Constitution is to transform the society in a better way and this is the fundamental feature of Transformative Constitutionalism. In both the cases of India and the United Kingdom the institution recognizing this change and further institutionalizing the same is the Judiciary. Besides the enacted legislations the Judiciary is there to protect the rights of deprived and marginalized section of the society. Thus, in both the countries Parliament is no more the only institution for protection of rights. Keeping pace with the change India and the United Kingdom have been found to adopt a balanced approach for protection of rights. Chintan Chandrachud in 'Balanced Constitutionalism' has argued that this balanced approach in the United Kingdom has been able to foster far more balanced allocation of power⁴³. In the United Kingdom for the protection of right the Parliamentary scrutiny of enactments was supposed to be the effective mechanism. However, with the change in English society the role of the judiciary is protection of rights of British citizens is recognized and the United Kingdom has taken a balanced approach.

This balanced approach is also found in the Constitution of India where the legislature enacts the law and the same is being reviewed by the judiciary and if necessary is also declared as unconstitutional. The recent judgments of the Supreme Court of India recognizing the rights of minority group, marginalized group exhibits the significant role assumed by the Indian Judiciary for the welfare of the society.

As elaborated by South African Chief Justice, Justice Pius Langa, *the transformative character of the Constitution holds the key to more equitable future. Thus, transformation does not end when we all have equal access to resources, lawyers and judges embrace the culture of justification. It is a permanent phenomenon where there is a scope of dialogue. Where the change is unpredictable but the idea of change is constant.*

⁴³ Chintan Chandrachud, *Balanced Constitutionalism*, (OUP, New Delhi, 2017).

NOTES AND COMMENTS

**Right to Privacy as a Fundamental Right in Absence of
Express Statutory Provisions:**

A Critical Analysis of Justice K.S.Puttaswamy (Retd.) V. Union of India¹

Dr. Bibhabasu Misra²

Abstract

Inalienable rights are inherent in Human called as natural rights as for example “Right to privacy.” Positive law made by legislature regulate it according to States’ reasonable necessity. These limitations are mentioned in the Constitution itself. In India, right to privacy has been recently recognised by the Supreme Court. In India there was a bill related to Right to privacy. The judgments of the Court are mainly corrective in nature and enforceable by the Contempt of Courts Act, 1971 (Civil Contempt and Criminal Contempt.) or with the help of Article 142 and 144 of Indian constitution. In absence of specific legislation, we can read the right to privacy in statutes like IPC, CRPC, Easement, etc. If we file a petition under the Contempt of Courts Act, 1971; it will generate procedural difficulties, that is permission needs to be taken from Advocate General. Thus, corrective approach of the Court is only remedy in absence of express statutory provisions.

Key words- Privacy, Constitution, Statutory scheme, Justice.

I. Introduction

Fundamental rights are no doubt individualistic in nature and if violated, it will attract punishment that is imprisonment or damages. Now the question is, if all the fundamental rights are natural right or not. There is an argument that anything appearing under Part III of the Indian Constitution are not fundamental rights. Only those natural rights are recognised by the State, those are fundamental rights. In India, ‘WE THE PEOPLE’ have enacted the Constitution and imposed upon ourselves certain rights and duties. Parliament, Judiciary are

¹ AIR 2017 SC 4161

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creature of the Constitution. The Parliament ENACT law and judiciary interpret the Constitution and law. Unfortunately, except Right to Privacy bill, there is no specific statute that expressly cover the concept of “Right to Privacy”. Then we have to refer other enactments which impliedly incorporate the right to privacy. The Apex Court in the Puttaswamy³- Judgment recognised “Right to Privacy” as fundamental right and other authorities shall comply with it under Article 144 of Indian Constitution. But then common people need to file Writ in the High Court and Supreme Court or through the help of Contempt of Court’s Act. If any individual from rural area wants to invoke High Court’s jurisdiction for breach of privacy; for filing a Writ, there shall be huge expenditure for that person. Article 21 of the Indian Constitution provides; “Protection of life and personal liberty – “No person shall be deprived of his life or personal liberty except according to procedure established by law.” There seems to be no proper procedure prescribed for dealing with cases relating to right to privacy. The Apex Court Judgment declared the law as -privacy is a fundamental right implied in Article 21; but in absence of legislation, this is the sole guidance for cases dealing with violation of right to privacy. There is another problem that under Article 142, the Court pronounces order for end of justice between the parties, which may be termed as practise order, rather than a precedent. There is a comparison which is found in Salmond’s jurisprudence, where it has been mentioned that precedent may be a golden nugget but statute is coin in the realm. Thus, there is advantage, if statutory law covering privacy is enacted and it shall be no doubt more easily accessible.

Taking cue from working of privacy in other jurisdiction, in India a relatively new democracy, privacy was not expressly recognised but after framing of U.D.H.R(Article 11) concept of privacy gradually seeped in, we can peruse through some Supreme Court judgments and see how the interpretations become liberal from literal interpretation.

In A.K. Gopalan v State,⁴ while examining the Prevention of Detention Act, Court held that personal liberty of a man can be taken away by a procedure established by law. The Articles of the Constitution are separate code itself.

³ Supra 1

⁴AIR 1950 SC 27.

In *R. C Cooper and union of India*,⁵ the first idea evolved that Constitution is a composite code.

The Articles are overlapping and supplementary to each other thus the species of liberty mentioned in Article 21 has also have separate presence in Article 19.

In *KesavanandaBharati*,⁶ while interpreting Article 13, and 368, on 24th April, 1973, the Court pronounced an evolving basic structure which seems to be beyond the repealing power of legislature. Even the 9th Schedule land laws are to be tested in touch stone of the basic structure.

In *Maneka Gandhi v Union of India*,⁷ it was held that every law has to be tested on the fair, just and reasonable principles.

In *I.R. Coelho(Dead)*⁸, it was decided that all the fundamental rights can be amended save the basic structure.

Thus, we have no doubt that privacy is the part of the basic structure and it keeps evolving on legal, moral, social norms of a State.

In *Puttuaswamy*⁹, it was decided after considering the previous precedents that privacy is related with dignity(Not mere animal existence); and as inalienable part of fundamental rights of the Indian Constitution.

II. Privacy under Other Legislations

We can also examine some statutory provisions, where privacy doctrine is impliedly incorporated, and going through these laws we can easily identify the appropriate local forums and solution of the legal problems. Then we may avoid costly writ process in the High Courts.

i. Section 506 IPC- 506. Punishment for **criminal intimidation**.—**Whoever commits, the offence of criminal intimidation** shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc.—And if

⁵ AIR 1970 SC 564.

⁶(1973) 4 SCC 225.

⁷AIR 1978 597.

⁸ AIR 2007 SC 8 61.

⁹Supra 1

the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or [imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute **,un- chastity to a woman**, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Thus. going through this particular provision, we grasp that, there can be a demoralising attack on the property (Statutory Right), person, or personality by any one and that is off course violating one's privacy. Strangely, no man seems to be worried about their virtue.

ii. There are some provisions of CRPC, where Right to privacy(dignity) are impliedly protected.

1. .WherePardanashin women are given chance to withdraw after Police give them chance to withdraw the search has to be made keeping decency of the women in mind.
2. Women not to be arrested after evening or can be attested if lady officers are present. (Section 43 CRPC).

2A-. Section 53 of the CRPC provides a provision of lady medical officer examining a woman, accused of any criminal offence.

iii. Under section 161 and 162 when police examine witness and accused, they can remain silent when there is a chance that given information may expose them to criminal liability.

Also, deposition given to Police officer need not to be signed by accused and witness.

iv. Under Easement Act, one has to be given access to light and water which make the property enjoyable. (Dignity). Section 4 of the Easement Act defines Easement which is a beneficial enjoyment of the property by the dominant owner. In absence of access to light, water etc., the dignity and value of the dominant property gets diminished.Thus Privacy is not a mere negative right butalso a positive right to be imposed on the State.

v. Section 122 of the Indian Evidence Act, 1892 provides that, communication between married persons are privileged. Any spouse cannot disclose any

information in any suit and criminal proceedings. about the other when their status is married.

Section 124 of the Indian Evidence Act provides that no public official shall be not compelled to disclose such information, when the information is given to him in official capacity.

Section 129 of the Evidence Act provide that communication with legal adviser is confidential.

We can easily conclude that non-disclosure, communication are part of privacy in different dimensions.

III. Right to Information Act Vis-A- Vis Official Secrets Act.

Right to information is available against the State and if not given within stipulated time by State information officer and Central information officer penalty may be imposed. Under section 8 if there are grounds where State is not bound to disclose information if it hurts integrity, sovereignty, security of the State etc. This information's also shall come under the protection of official Secrets Act. Private party is not bound to provide information about another individual under the scheme of this Act.

The Doctrine of privacy has many dimensions, like economic angle, feminist angle, Bork's critique.

Economic angle- According to Posner, those rights to privacy should be protected, which are economically efficient than the right to privacy. If it is not possible to decide a privacy right with valuable economic aspect, it is not worth protecting. As for example, Section 268 of IPC provides monetary damage for creating public nuisance. However, having a criminal trial in this case is worthless because cost shall be more than the cost for protection of nuisance in the form of right to privacy.

Bork's critique- The right to privacy is criticised under this doctrine as a mere judicial activism. It is not mentioned in the Bill of Rights.

There is a counter argument that liberty is recognised under the American Constitution which are species of privacy.

Feminist critique- Feminists are against the concept of privacy. Because they believe that in the name of privacy, the State refuse to see the oppressions committed in private arena.

In India, gradually the State started to protect individual rights of women, under the statutory scheme of Protection of Women from Domestic Violence Act, 2005.

In 2013 Criminal Amendment Act, 2013 incorporated the concept of Stalking and voyeurism, which is in essence violation of right to privacy of awoman. Legislature assumes “Women” cannot be perpetrator in such offences of “stalking” and “voyeurism”.

IV. Conclusion

The Apex Court has interpreted the Constitution and declared right to privacy as a fundamental right. In absence of express statutory provisions, the judgment is the main source of law. If Court Continues interpretation of concept of privacy in the ordinary statutes, then litigations may increase, but the violators will be cautious enough before acting as a “peeping Tom.” Again Court can punish the offenders for civil and criminal contempt through The Contempt of Courts Act, 1971. Liberty has no corresponding duty, and taking cue from it, Article 21 had very restrictive interpretation. Now it has received activist interpretation by the Apex court.

Legislation and Dangers in Road Usage

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I. Introduction

India has a second largest network of roads in the world. The total road length in India is 5897671 KM. This comprises of 132500 of National Highways/ Expressways, 156694 of state highways and 5897671 Km of other road like major district roads, village roads etc.⁴ According to World Statistics, 2018, India ranks 1st among 199 countries in road fatalities.⁵ In Ministry of Road Transport & Highways yearly, Road Accidents in India (2018) it is mentioned that out of 467044 road accidents, 151417 persons died (2317 juveniles) and 469418 were injured. Wrong side driving took toll of 15 lives daily. Over 15000 passengers including 9349 drivers were killed on account of not using seat belt.⁶ Thus to travel on road in India is fraught with danger of getting accident or suffering with injuries. Seeing the data of causalities and injuries of road traffic accidents on account of various factors the probability of meeting with accident in road traffic is very high on Indian roads.

Dangers in road usage are multi-sectoral and multilayered. The danger may be on account of bad engineering of roads, absence of proper maintenance of roads, faulty traffic management, lack of proper enforcement of rules and regulations related to road traffic, behavior of drivers on the road etc. In terms of rules and regulations in India the main legal instrument to regulate road traffic safety is

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⁴ Government of India, Annual Report, Ministry of Road Transport (2018-19).

⁵ International Transport Forum, Road Safety Report/OECD 2019.

⁶ Government of India, Road Accidents in India, Ministry of Road Transport and Highways, (2018).

Motor Vehicles Act. However police authorities also invoke certain sections of Indian penal Code for penalizing the offenders of traffic violations. Rash driving is covered under Section 279 of IPC⁷. This section takes into consideration only the wrongs of driver and other factors are not taken in to account. The wrong committed by a driver may also be interpreted by policemen on the duty subjectively. Other sections such as 336⁸, 337⁹, 338¹⁰ and 304-A¹¹ of the Indian penal Code are also some times invoked. These sections are generic in nature and invoked on the whims and fancies of policemen present on duty at the time of committing offence. These section do not comprehensively define offence related to driving and do not take other contributing factors those may have been responsible for the traffic violations even when there might not been any

⁷Indian Penal Code, No. 45 of 1860, PEN. CODE (2019). Section 279 states as follows: Rash driving or riding on a public way.—Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

⁸Indian Penal Code, No. 45 of 1860, PEN. CODE (2019). Section 336 states as follows: Act endangering life or personal safety of others.—whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

⁹Indian Penal Code, No. 45 of 1860, PEN. CODE (2019). Section 337 states as follows: Causing hurt by act endangering life or personal safety of others.—Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

¹⁰Indian Penal Code, No. 45 of 1860, PEN. CODE (2019). Section 338 states as follows: Causing grievous hurt by act endangering life or personal safety of others.—Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

¹¹Indian Penal Code, No. 45 of 1860, PEN. CODE (2019). Section 304A states as follows:

Causing death by negligence.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

mistake on the part of driver. Section 184¹² of the Motor Vehicles Act also defines dangerous driving and this also relates to behavior of the driver. Here also other contributing factors are not taken into account. Subjectivity creeps in while defining offence by the policemen on duty. In amended Motor Vehicle (Amendment) Act, 2019 a new Section 198A¹³ has been inserted. As per this section if accident occurs on account of faulty maintenance of road then concerned authorities may be penalized if found guilty.

¹²The Motor Vehicles Act, (1988) Section 184 states as follows:

Driving dangerously.—Whoever drives a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the place where the vehicle is driven and the amount of traffic which actually is at the time or which might reasonably be expected to be in the place, shall be punishable for the first offence with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, and for any second or subsequent offence if committed within three years of the commission of a previous similar offence with imprisonment for a term which may extend to two years, or with fine which may extend to two thousand rupees, or with both.

¹³The Motor Vehicles (Amendment) Act, (2019) Section 198A states as follows: (1) Any designated authority, contractor, consultant or concessionaire responsible for the design or construction or maintenance of the safety standards of the road shall follow such design, construction and maintenance standards, as may be prescribed by the Central Government from time to time. (2) Where failure on the part of the designated authority, contractor, consultant or concessionaire responsible under sub-section (1) to comply with standards for road design, construction and maintenance, results in death or disability, such authority or contractor or concessionaire shall be punishable with a fine which may extend to one lakh rupees and the same shall be paid to the Fund constituted under section 164B. (3) For the purposes of sub-section (2), the court shall in particular have regard to the following matters, namely:— (a) the characteristics of the road, and the nature and type of traffic which was reasonably expected to use it as per the design of road; (b) the standard of maintenance norms applicable for a road of that character and use by such traffic (c) the state of repair in which road users would have expected to find the road; (d) whether the designated authority responsible for the maintenance of the road knew, or could reasonably have been expected to know, that the condition of the part of the road to which the action relates was likely to cause danger to the road users; (e) whether the designated authority responsible for the maintenance of the road could not reasonably have been expected to repair that part of the road before the cause of action arose; (f) whether adequate warning notices through road signs, of its condition had been displayed; and (g) such other matters as may be prescribed by the Central Government. Explanation.—for the purposes of this section, the term “contractor” shall include sub-contractors and all such persons who are responsible for any stage in the design, construction and maintenance of a stretch of road.’

II. Factors Responsible for Causing Dangers for Road Usages

It is a fact that while driving on the road drivers, besides his or her own error, come across of so many other factors that directly or indirectly contributed dangers in usage of road. In following paragraphs some dangers of road usage to the road users are being described in brief:

i. Engineering of Roads

Engineering of roads with faulty design is one of the major danger in usage of road. The engineering design of roads like sharp turns, slopes, presence of black spots (accidents prone spots on the roads) etc. are considered hazards to road safety. Even national highways in India are full of black spots. Ministry of Road Transport & Highways has identified 789 black spots based on fatalities during the year 2011-12, 2012-13 and 2013-14 calendar years and a comprehensive rectification plan has been initiated¹⁴. The absence of crash barriers on the roads is also a danger on account of faulty engineering design. In India, Ministry of Road Transport & Highways has started installing crash barriers in hilly terrain on national highways as roads in hilly areas in absence of crash barriers are prone to accidents. Ministry of Road Transport & Highways has identified a length of 280 kms in hilly areas for installing crash barriers.¹⁵ In order to have a good road engineering European Community started the European Road Assessment Program (EuroRAP). The aim of this program was to give safety ratings to roads of Europe. Roads were rated according to the presence of crash risks with reference to engineering of the roads. This program was successful in giving road engineers vital information and for benchmarking and planning in construction of roads for performance with reference to the road safety.¹⁶ Road infrastructure safety is really important in rural India as during the year 2018 over 65 per cent of total accidents occurred on rural roads in India.¹⁷ Safety on rural roads in European Union Funded Project RIPCORD-ISERST

¹⁴Government of India, Road Accidents in India, Ministry of Road Transport and Highways, (2018).

¹⁵Government of India, Annual Report, Ministry of Road Transport & Highways, (2018-19).

¹⁶<http://www.eurorap.org>.

¹⁷Government of India, Road Accident in India, Ministry of Road Transport & Highways, 2018.

was launched in 2005 emphasizing on improvement of road designing of rural roads.

ii. Lack of Proper Traffic Management

On the roads is also a major danger on usage of roads. There is no homogeneity of traffic. On Indian roads, all types of traffic like cars, motor cycles, busses, cycle rickshaws, e-rickshaws etc. run on the same road. This becomes a hazard on road as the vehicles on high speed are likely to collide with the vehicles running at low speed. Therefore, homogeneity of traffic is extremely desirable. In India no such homogeneity of traffic has been done. Further this strategy also emphasized functionality of roads in order to avoid danger of using road. As per this strategy roads are categorized on the basis of functionality like thorough roads, distributor roads, access road etc. In India such categorization has been started in recent years by constructing expressways, economic corridors etc. The Dutch Sustainable Safety based on this concept of functionality of roads, homogeneity of masses for speed and directions was resorted and it resulted reducing fatalities in Netherland by 47 per cent during the period 2000-2017¹⁸.

iii. Lack of proper Enforcement of Laws

Lack of proper enforcement of rules and regulations by enforcement agencies is also one of the factors that imparts in enhancing danger of usage of roads. The magnitude of lack of enforcement of road traffic safety rules may be judged by the fact that during the year 2018 on police controlled traffic there occurred 12793 accidents and in these accidents 4090 persons were killed and 11519 were injured.¹⁹ Enforcement of traffic safety laws also need automation and will of the authorities to enforce traffic laws in proper spirit. The French Success Story is an excellent example in this regard. In France at the instance of highest political authority drivers' feeling of impunity was taken seriously. The fully automated system was introduced in order to catch all major violations of traffic laws on the roads. This was implemented in a time bound manner within strict adherence of time limits set. The concept of zero tolerance was introduced and cameras were fixed. This resulted in reducing fatalities in road accidents during

¹⁸<http://www.sustainablestetuy.nl>

¹⁹Ibid.

the period 2001-2015 by more than 35 percent from 8160 to 5318 respectively.²⁰ The road fatalities during the year 2016 in France stood at 3477.²¹

iv. Lack of Good Technology and Innovation for Safer Cars

Lack of good technology and innovation for safer cars is also one of the dangers for the road users. In this direction, in Europe a program EuroNCAP (European New Car Assessment Program) was started. The cars were developed by performing crash test in frontal impact, side impact etc. There were also fitted in the cars reminders for bearing seat belts. The cars were rated at a scale of 1-5 stars taking into consideration the basis of the result, the protection of occupant of the car received, protection of pedestrians in case of accidents. This resulted in 30% lower risk to the passengers of the car that rated 4 stars in comparison to the car that rated 2 stars.

v. Driving & Drinking

Drunken driving really has become menace on the roads especially during night. The driver under the influence of drug and alcohol lose control over the speed of car and this result in accident causing fatal injuries and even deaths. This can be gauged by the fact that during 2018 on account of drunken driving or driving under the influence of drugs total of 1208 accidents occurred. In these accidents 4188 persons died and 9944 person injured.²²

vi. Over speeding

Over speeding is one of the lethal danger to road users. The saying goes well that speed thrills but it kills. Drivers who drive at very high speed beyond the speed prescribed by statutes are danger to the safety of themselves and to the safety of other road users also as at high speed the probability of meeting with accidents increases. During the year 2018 on account of high speed total of 310612 accidents took place. In these accidents, 97588 persons were killed and 316421 persons were injured.²³ Thus it can be seen from the data of accidents

²⁰<http://www.securiteroutiniere.equipment.gov.fr/>.

²¹Global status report on road safety report 2018.

²²Government of India, Road Accidents in India, Ministry of Road Transport and Highways, (2018).

²³Ibid.

on account of high speed that over speeding is a great danger over road for road users and also for drivers.

vii. Behavior and Conduct of Drivers

The behavior of drivers not adhering to the lane driving is also one of the danger to the road users. On account of wrong side driving or lane indiscipline during 2018, there occurred 24781 accidents. In these accidents 8764 persons were killed and 24100 were injured.²⁴ If driving behavior of the drivers on the wheels is monitored or controlled by the enforcement agencies or self-training of the drivers than these type of fatalities and injuries can be avoided. Driving when driver is tired is also as dangerous as drunken driving. A tired driver tend to sleep while driving. The drivers asleep are likely to meet accidents on highspeed road and their reflex actions do not work properly. On account of tiredness, their reflex action becomes impaired and result in accidents. Therefore, there should be compulsory rest for drivers who drive heavy vehicle for long distances specially carrying inter-state goods

viii. Violating Traffic Rules

Jumping red lights by the vehicle drivers is again a danger to the road users. On account of jumping of red lights by the motor vehicle drivers during 2018 there occurred 4418 accidents. In these accidents 1545 persons were killed and 4126 persons were injured.²⁵ If the behavior of the driver is tamed by the enforcement agencies or by self-discipline of the driver i.e. not to jump the red lights than undesirable accidents could have been avoided.

ix. Distracted Driving

Distracted driving has also become a danger on road users. The driving while texting on mobile phone, eating or other activities results in accidents. On account of using mobile while driving, during 2018 there occurred 9039 accidents. In these accidents, 3077 persons were killed and 7878 persons were injured.²⁶ The behavior of the driver is not desirable on the wheels to use mobile

²⁴Ibid.

²⁵Ibid.

²⁶Government of India, Road Accidents in India, Ministry of Road Transport and Highways,(2018).

phone or engage in other activities. This behavior would become lethal to other road users also.

x. Non-use of Safety Devices

Non-use of safety devices like seat belts and helmets has been lethal to drivers of two wheelers and motor vehicles. The use of these devices is critical for averting fatalities and grievous injuries to the driver on the wheel. On account of non-use of helmet 43614 persons were killed. Similarly on account of non-use of seat belts 24435 persons were killed. These figures include both drivers and passengers.²⁷

xi. Bad Weather

Bad weather conditions also become dangerous for driving on the roads. Therefore, whenever, weather conditions go worse, drivers should slow down the speed or avoid driving in order to avoid accidents. On account of rainy conditions there were 44011 accidents on the roads. In these accidents 14590 persons were killed and 45010 persons were injured. These fatalities and injuries could have been avoided if drivers on the wheels would have taken right decision not to drive in rainy condition or would have driven slowly and carefully. Similarly, during foggy and misty weather conditions, there occurred 28026 accidents during 2018 in these accidents 11841 persons were killed and 25265 persons were injured. The wise decision of the drivers in foggy and misty weather conditions would have resulted in avoiding these fatalities and injuries.²⁸

xii. Over-loading

Over-loading of heavy vehicles is also a danger to road users. Over loaded vehicles are having goods protruded latterly, over the roof and sometimes on front also. Over loaded trucks sometime result in accidents due to bursting of tyres from excess weight, failing of breaks, collapsing on the road, loss of control of drivers over the speed. In substance, over loaded trucks become hazard to other road users on the road like cyclist and pedestrians. During the year 2018 on account of over loading there occurred 47092 accidents. In these

²⁷Ibid.

²⁸ Ibid.

accidents 17981 persons were killed and 48343 persons were injured.²⁹ However over loading has suitably been taken care of in Motor Vehicle (Amendment) Act, 2019. The penalties for driving over loaded vehicles have been increased many folds. The over loaded vehicles can only be allowed to go on the road by enforcement agencies only when over weight is off-loaded.

III. International Scenario

Danger in road usage has been a major concern at international level also. So many countries have taken care of while making policies with reference to road traffic safety. Swedish parliament in 1997 adopted Vision Zero. It was based on principal of ethics, responsibility change, safety philosophy and driving mechanism for change. This resulted in reduction of road traffic fatalities by 45% during the year 2002-2018.³⁰

Government of India has also taken into consideration the recommendations of Group of State Transport Ministers constituted by Ministry of Road Transport & Highways and has included these recommendations in the Motor Vehicle Amendment Act, 2019. More than 100 sections have been amended or newly inserted. These amendment have emphasized strengthening of enforcement of road safety laws thus improving road safety. Penalties for violation of various provisions of road safety laws have been increased many folds in order to deter the vehicle drivers to violate rules and regulation of the road safety while driving on the road.

IV. Conclusion

In conclusion danger in road usages are manifolds. Concerted efforts are to be made in order to have long lasting impact on safety of road users in order to reduce economic and social loss by way of large scale deaths and injuries. These efforts are to be at all fronts like legislative, enforcement of traffic laws, engineering of roads, engineering of automobiles, education & training of drivers imparting them better skills for driving on the roads etc.

²⁹Ibid.

³⁰International Transport Forum, Road Safety Report/OECD 2019.

BOOK REVIEW

TERMITES IN THE TRADING SYSTEMS: HOW PREFERENTIAL TRADE AGREEMENTS UNDERMINE FREE TRADE(2008) by Dr. Jagdish Bhagwati, Oxford University Press, New Delhi, pp. xviii+ 139, Price INR 295.

Jagdish Bhagwati has been a lifelong critique of the preferential trade system prevalent in the international trade regime globally. In this book, the Professor for Economics at Columbia University has attempted to make a robust case against the preferential trade agreement (PTAs, hereinafter used interchangeably for free trade agreements) culture and severely criticizes it. Bhagwati has made a compelling argument against PTAs and calls it a short sighted idea wherein the political leaderships are negligent towards the legal and economic implications of such agreements. His primary reasons against the preferential trading system are that PTAs allow for a more preferential treatment towards partner countries thereby creating a barrier for non-partner countries by discriminating against them. He argues that the premise of a multilateral trading system is non-discriminatory and by succumbing to the idea of providing preferential treatment to each other, the discrimination against the non-partner countries eventually leads to the contradiction of the basic premise.

ORIGINS OF PREFERENTIAL TRADE AGREEMENTS

In the first chapter, Bhagwati has traced the history of the PTAs and has divided the same into three subsections. He initiates the discussion by explaining PTAs, FTAs and the Custom Unions (CUs) and then shifts focus to the United States of America (US)'s view point, in 1800s, towards open market which should be free from all the discriminations and the market forces would determine the fate of the economy. He explains how the US's view point was different from that of the United Kingdom (UK), which believed for a preferential trade regime and then proceeds to the shifting paradigm in the UK, where economists like John Keynes had a change of heart and came out in full support for a trade system with no barriers or discriminations.

The chapter identifies the flow which led to the establishment of GATT regime. It begins with discussing the gradual shift, where economies were adopting the Most Favored Nations (MFN) principle to a sudden change into a "protectionist

regime” in the 1930s. The chapter also discusses the failure of International Trade Organization (ITO) to exist and its subsequent ramifications as to origin of General Agreement on Tariffs and Trade (GATT). Bhagwati argues that the GATT’s system of emphasizing on MFN for reduction in trade barriers worked wonders and resulted in reduction of tariff barriers to negligible. He criticizes the misuse of Article XXIV of the GATT, which is an exception to the general principle of MFN. The chapter emphasizes on increase in the preferential treatment as a result of uncoordinated pursuit of protectionism and the misconception that such protectionism will further the nation’s interests in the race for free trade. To back his contention, he resorts to statistics displaying rapid rise of PTAs across all dominions of civilizations till 2006.

REASONS FOR SURGE IN PTAs AND FAILURE OF GATT

In the second chapter, Bhagwati explores the whys and wherefores for such surge in the number of PTAs and holds that the proponents of trade barriers “piggybacked” the proponents of multilateral nondiscriminatory free trade. He holds that FTAs are in fact not free since by the virtue of abolishing tariffs and other barriers for the member states, the PTAs subject the non-members by not providing such preferential treatment and therefore increase protection against the non members. Due to the aforesaid, trade can actually divert from efficient, low cost non-members to inefficient participants. Citing the above he comes down heavily on the NAFTA which was helmed by the United States.

Bhagwati then proceeds to analyze the effects of the GATT on the PTAs and how, if at all, does GATT tends to curtail the rising number of the PTAs. The chapter holds that GATT was initially largely successful in restoring the multilateralism however, it soon faded due to the misuse of the exception clause i.e. Article XXIV, which regulates formation of PTAs and CUs on fulfillment of certain criteria. Bhagwati chalks out a few reasons for such inability and holds the shifting views of the US towards the PTAs as the first reason. US was avocal critique of countries resorting to such agreements and during the formation of the ITO, negotiated towards applicability of the exception clause only in the case of CUs. However, later US sought to form a PTA with Canada and therefore changed its stance to include the PTAs under the ambit of the exception clause as well. This caused the exception clause to lose a little of its mettle since the PTAs are far easier to agree upon than the Custom Unions without requiring difficult negotiations over common external tariffs.

The second reason for GATT's incapacity to discipline the formation of PTAs is the ignorant attitude of Members towards restrictive qualifications under Article 24. Bhagwati states that the WTO created Committee on Regional Trade Agreements and tasked it with the responsibility to examine the complicity of the referred PTAs with Article 24. However, since there is practically no member state left which has not entered into a PTA of its own, there is no neutral members to enforce the mechanism under Article 24 and thus, he argues that the existence of the Committee has turned into a mere formality.

Bhagwati holds the special exception carved out for the Developing nations under the Special and Differential Treatment (S&DT) as the third reason for GATT's inability, wherein the developing countries are exempted from the obligations imposed by the GATT membership, while being eligible to enjoy the rights enshrined under it. According to this exception, the developing countries are not subjected to any of the mechanisms imposed by Article 24 as long as the PTA is amongst the less developed or developing states.

Upon assessing the aforesaid reasons, Bhagwati divides the post Tokyo Rounds timeline into two groups, first period of regionalism and second period of regionalism. He highlights that that many developing and underdeveloped countries in East Africa and Latin America, entered into their own PTAs where they would produce the commodities for their consumption without relying on the Western powers. However, the idea could not succeed because these states relied on bureaucratic decisions, instead of market forces, to allocate the different import substituting activities among themselves.

However, he says that the second Regionalism was a huge success which can be attributed to the change in opinion of the United States towards bilateralism. He traced its origin from the Cold war era, where the United States was desperate to have a foot hold in the Europe in form of the first NAFTA. This, coupled with the fact that even the UK was struggling to become a part of the European Community's proposed CU due to opposition from the French, motivated the North Americans to abandon their policy of multilateralism and inspire the British to look out for a "policy space" of its own. Bhagwati also blames the European Union (EU) to enter into multiple PTAs with non EU members thereby motivating the United States to look "South". United States being a major player in the international trade scenario found potential partners in the South American countries, which were struggling from heavy debts and were in

desperate need of debt relief. Bhagwati argues that the aforesaid coupled with the furtherance of the personal ambitions of the bureaucrats and misunderstanding as to PTAs paving way for Multilateral Trade Negotiations (MTNs) resulted in the much-needed boom to the second period of regionalism.

Towards the conclusion of the chapter, Bhagwati jots down the reasons of how and why the developing countries joined the impending race of forming one's own PTAs. He associates the fear of competition, sense of security among one's peer and "monkey see monkey do" as the key reasons for the developing states to form PTAs among each other. Whereas, he associates sense of stability with presence of hegemony, fear of being left out in the "big table" and retaliation against other's PTAs as the reasons for developing countries to enter into PTAs with a developed country.

THE ILLS OF PTAS

The third chapter discusses the detail of how PTAs are ticking time bombs. As discussed earlier, PTAs are shifting trade from cost effective non-partners, thereby affecting allocation among the countries and thus undermining, what he calls as "cosmopolitan advantage". He further blames PTAs to cause "terms of trade loss" wherein a member shifts to import from a higher costing member, therefore buys imports more expensively. However, he humbly accepts that it's not necessary, theoretically, that PTAs might not result in aforementioned "trade diversion" but rather might result in some welfare enhancing deals for the host nation or "trade creation" but still he firmly believes that the preferential trade system is largely a double edged sword.

Bhagwati then proceeds to analyze the recent trend in defense of the PTAs - only countries which are "natural trading partner" should enter into PTAs and the determining factors between them will be the volume of existing trade between them and their geographic proximity. Using simple statistics mechanisms and secondary data he rejects the aforesaid citing that whether two countries share 'high' volume of trade is a relative question with no fixed answers. He objects to the thinking that high volumes of trade make two countries 'natural trading partners'. At times powerful states are in fact biased towards a developing state for their own 'non trade' motives and it's not unusual for one state to coerce another to trade more volumes than the latter actually intend to. He further states that it is not advisable to build models believing that the

PTAs are beneficial up to a certain range because in such situation a country would need to shift the comparative advantage in order to still derive benefits from that PTA.

In the later half of the chapter, Bhagwati discusses that the PTAs arrangement has become a general norm where one country is now signatory to multiple PTAs and thus creating a “Spaghetti Bowl” in the world trade. In such a situation, tariff reduction varies from the PTA to PTA and tariff on specific goods would depend on the country of its origin. Under this ‘rules of origin’, “substantial transformation tests” and “value content tests” are applied to see if the product is eligible for the preferential tariff rate and if the product uses the prescribed amount of raw materials originating in the country enjoying preferential treatment. These rules of origin vary between members and non members across different FTAs and across different products within each FTA. Chapters on rules on origin across different FTAs aren’t just a one or two paged document but rather are hefty bound books which usually run to thousands of pages! Bhagwati also resorts to the plight of the private sector in explaining how this “Spaghetti Bowl” is a problematic affair for them as well. Apart from producing goods and their marketing, the companies are now worried about trade barriers, rules of origin, rise in prices and also the reduction in flexibility. He also discusses the reasons related to trade, for instance, powerful countries like the United States enter into PTAs with developing nations to force upon them certain non trade stipulations pertaining to intellectual property, environment, labor welfare etc. in garb of conditions necessary for that arrangement or in interest of other party. Bhagwati also refers to multiple specific incidents where representatives from the United States have tried to sell off the preferential trade system to the small countries by luring them into believing that it’s in “their interest” to get into PTAs with the United States and secondly it helps them to ‘embrace’ multilateralism and negotiations at WTO, both of which he rejects by labeling as “waste assets” and “problematic”.

BEST CASE SCENARIO

The fourth and final chapter serves as the conclusion to the book where Bhagwati tends to give his opinion on how the multilateral trade system suffering from the pandemic, chaotic and problematic PTAs can be restored. He advocates for three viable alternatives to resolve the aforementioned- 1) No more preferences and reduction in the existing ones by build in reduction of

difference between MFN tariff of non members and preferential tariff of the members. However, he agrees that this will not be the correct choice since, a lot of members enjoying benefits of PTAs will not be fine with their preferences being eroded. 2) Reduce the chaos of the aforementioned “Spaghetti Bowl” through harmonization and convert it into “Pasta” and then “Pizza”. What he argues here is that now countries must untangle the proverbial spaghetti by aggregating PTAs to plurilateral regional groups, instead of bilateral agreements. Such plurilateral regional groups should be further aggregated to substantially freed multilateral trade. However, despite it being the most lucrative alternative, Bhagwati is aware that such resolutions will be filled with insuperable technical problems for e.g. resolving different rates for similar products across PTAs, different rules of origin for different products, plethora of trade un-related measures etc. 3) Bringing the MFN tariff down to negligible level, which according to him is the most appropriate solution given that the “hegemony” have already exploited a lot of developing countries through different means in garb of the PTAs negotiation and now this “indirect” solution to control damage done by PTAs to trading system through tariff system is probably the most viable alternative.

In the conclusion Bhagwati emphasizes that the journey to bring MFN tariff down will be an uphill task as a lot of countries are deprived of the sources to negotiate meticulously and meritoriously over its demands and on the otherhand the lobbyist and developed countries in favour of the prevalent PTAs are supported with insurmountable riches to go against such countries not in support of *status quo*. Therefore, Bhagwati rests his case by putting up a lot of faith in the need of political will to surmount the challenges posed by the existing crisis.

The book is an interesting read for anyone interested in the field of international trade law. Bhagwati elaborates upon his beliefs and theories with reasons, illustrations, his insider tidbits and humor. A few observations stand out after the reading of the book. First being that he has focused heavily on the behavior of the United States in global trade, its shifting paradigm and lobbying practices. Therefore, the book proves as an interesting case study of the American practice towards PTAs. Secondly, it seems like he has focused extensively on manufacturing goods and has undermined the contribution of agrarian commodities and economies in the world trade. In the present day, it is also to be considered that PTAs are a method of diplomacy. Most of the MFN

tariff is zero now and PTAs tend to exclude the high MFN tariff items.¹ Therefore the relevance of adopting the reduction of MFN rate methodology as suggested by Bhagwati might become futile with increase in further liberalization. With that being said, the relevance of the book in contemporary times cannot be minimized. Considering the increasing number of PTAs negotiations underway, emergence of new economies and the existing crisis in WTO, Bhagwati's book serves as a basic reading for everyone trying to figure out the jargons of contemporary trade law.

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¹Yose Rizal Damuri, 'How preferential are preferential trade agreements? Analysis of product exclusions in PTAs', (2009) Working Paper No. 2009/30 available at: <https://repository.graduateinstitute.ch › record › files › CTEI-2012-02> (last visited on April 10, 2019).

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DEPARTMENT OF LAW, UNIVERSITY OF NORTH BENGAL

The Department of Law is prominently situated on National Highway 31 between Bagdogra and Siliguri in the District of Darjeeling, West Bengal. The distance from Bagdogra is six kilometers and from Siliguri is seven kilometers. The Department has its own campus in the south Block of the North Bengal University. The sprawling campus of the University enjoys the pristine beauty of the eastern Himalayas and is the intellectual hub of North Bengal. Siliguri is an important sub-division of the district and commercial capital of North Bengal. Located at the foot hills of eastern Himalayas, Siliguri is the gate way to North eastern India and land locked countries like Bhutan and Nepal. It shares a huge and porous international border with Bangladesh, Nepal and Bhutan. It is well connected with all metropolis and major cities by air and rail.

The Department of Law was formerly known as the University College of Law and was established as such in the year 1974. It was upgraded as the Department of Law in the year 2000. Presently the Department offers a B.A. LL.B. (Honours) 5 year integrated course, LL.M. course and Ph.D. The intake at the LL.B. level is eighty, and the LL.M. course which was started in 1993 has twenty five seats. The criteria of admission both at LL.B. and LL.M. is on merit. The Department has a rich Ph.D. programme. It was started in 1999 and since then more than 24 Ph.D. degrees have been awarded. Presently there are about twenty five scholars engaged in doctoral research under various faculty members under the UGC Regulation, 2009. The Department attracts scholars and students from all over India and especially from Sikkim, Assam, Tripura, Arunachal Pradesh, Uttar Pradesh and Orissa. It also attracts students from Bhutan, Nepal and Bangladesh. The self financing P.G. Diploma course on Environment has presently been discontinued.

The Department was jointly selected by the British Council, Delhi, University of Warwick, U.K. and the National Law School of India University to carry out the Human Rights Outreach Project. It was also a partner institution with CEERA, National Law School of India University for carrying out environment education for forest personnel, Tea Garden personnel and judicial officers.

The Department has published number of books as well as Booklets in Human Rights, Environment Legislations in Bengali and Nepali. It has a Legal Aid Clinic in collaboration with the State Legal Services Authorities. It runs a very successful NSS programme.

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