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From the Editor

Over the past years, the journal has strived to contribute to the academic discourse surrounding legal issues by publishing articles by both students and established scholars, as well as by both domestic and international authors. By any measurable standard: we have seen a steady increase in readership, article submissions, and citations to our published articles. However, we have also grown in less quantifiable ways: our reputation and visibility in the academic community continues to broaden, and our editorial board constantly reassesses and revises the editorial process to ensure the most efficient and satisfying experience for both authors and staff.

Volume 8 : Issue 1 is a general publication which has attracted some high quality submissions that highlight the great variety of research topics providing a diversity of perspectives on the current and controversial issue of affirmative action. We are pleased to present eleven articles that in their own ways contribute to a better understanding of a range of issues on consumer protection, right to education of children in disaster hit areas, freedom of speech and expression in social networking, surrogacy, rights of workers, etc. and also a critique of contemporary topics which like Criminal Law (Amendment) Ordinance 2018, Post of Parliamentary secretaries, Rohingaya refugee crisis etc. This volume also contains papers awarded as the Best Paper presented in National *Conference on Contemporary Socio-Economic and Legal Issues* in India held on February 16-17, 2018 in IMS Unison University, Dehradun.

It is due to the support of our faculty advisors, the hard work of our editorial staff, and the interest of our readers that we are able to come out successfully year after year with each volume, and we hope that this tripartite support continues in the future. We thank all of our authors, Advisory and Referee members who make the publication of the journal possible.

In solidarity,

Dr. Saroj Bohra

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CONTENTS

Interrogating the major essence of the unrelenting pursuit of Imitators by Inventors of Trademarks and Trade names

*Dennis Odigie**

ABSTRACT

Quite often, inventors of trademarks are at war with imitators of invented marks on merchandise of the same general description. In the same vein, imitators of trade names are battled out of the use or adoption of identical names by competitors in the same line of business.Due to absence of public policy, and failure OFrelevant regulatory agencies to provide for reparation of victim consumers, inventors do not find the need to take cognizance of the interest of injured consumers by making them nominal claimants in claims against imitators for the purpose of compensation for injury suffered.Rather, the inventor's primary aim of seeking redress is to obtain injunctive relief, damages and destruction of infringing products. The scenario raises issue of sincerity of purpose on the part of inventors as to whether consumer protection is the major driving force behind the fight against counterfeiters as claimed. Existing legal framework and decided cases on the subject show that inventors' claim in this respect is misleading as it cannot be substantiated. Rather, the foremost and dominant reasons for the imitators rummage by inventors have proved to be the need to protect business goodwill and ensure continuity in the trade. Injunctivereliefs obtained against imitators could at best have an indirect benefit to the consumer without opportunity for compensation for purchase of counterfeited goods in place of genuine products. The paper recommends that the relevant regulatory bodies, legislature and courts could fill existing gap by providing opportunity for reparation for victim consumers.

Keywords: Inventor, Imitator, Trademark, Trade name, Passing off

1. Introduction

A conceptual approach to a discourse on this topic is apt for a better appreciation of the salient issues that arise for consideration, in the quest to sufficiently interrogate the foremost rationale for the perpetual chase of counterfeiters by inventors over the use of invented merchandising marks on substituted goods. On the foregoing score, an overview of the concepts of trademark, trade name, passing off and infringement shall constitute a necessary precursor in this work.

Trade mark is an intellectual property which upon registration gains legal protection. It has been variously defined by statute[1] and legal scholars to include, the mark of distinction adopted by an inventor of a product to distinguish his product from those of other manufacturers who are engaged in the manufacture of goods of the same general description[2]. The Trademarks Act defines a trademark as any device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof[3]. The concept has also been defined as a distinctive sign, mark, symbol or indicator which distinguishes goods and services of an enterprise (individual/company) or any legal entity from those of others in a given class. It could be in the form of words, letters, numbers, drawings, shapes, labels, colours, pictures or combination of all or some of the above elements[4].

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1 In Nigeria, the extant statute that protects registered trademarks is the Trade Mark Act,Cap,T.13,LFN,2004

2 Dennis Odigie, LAW OF TORTS(TEXT AND CASES), 426(Benin City, Ambik Press, 2008)

3 Section 9, Cap.T.13, Laws of the Federation, 2004. Section.67 of the Act also described a "Trade mark" as a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under section 43 of this Act.

4 https://learnnigerianlaws.com/index.php/component/k2/22-registration-of-trade-marks?showall=1&Itemid=0, (Last visited onMay 13, 2018)

Once a consumer recognizes a product by its trademark[5], he is able to differentiate the product from substituted goods. Where a particular product has been known for quality, it gains business reputation and consumer confidence in the overt market, and attracts goodwill to the manufacturer in the form of quality assurance and high demand. The imitator's reason for counterfeiting the inventor's mark is to take benefit of the inventor's already established goodwill which has been acquired over time,with the result that unsuspecting customers are unable to differentiate between the genuine product and the imitation.A Trade Name is the name under which a trader carries on business.It helps to distinguish the trader from others who carry on the same business[6].

The tort of passing off in relation to goods or trade name is committed when the product or business name of an inventor that has gained business reputation and goodwill is simulatedbya counterfeiter in the course of business, with a view to causing injury to the inventor's business. The ingredients of the tort of passing off aptly outlined by Lord Oliver of the House of Lords in *Reckitt and Colman v. Borden*[7] as:

(1) Injury to the plaintiff's goodwill or reputation in the minds of the purchasing public by defendant's association with inventor's identifying "get-up" (brand name, trade description, labelling or packaging).

(2) Misrepresentation by the defendant (whether intentional or not) to the public leading or likely to lead the public to believe that the goods or services are the plaintiff's.

(3) Resulting damage to the plaintiff.

Passing off is committed against a trademark, trade name, get-up, brand name, labelling, packaging, pictorial representation or colouration, once the possibility of deception is perceived[8]. The foregoing scenario is common in societies where majority of the consuming public is pre-dominantly illiterate. It is common to find inventors of trademarks in litigation against imitators of their products, once the latter's product is perceived to be capable of deceiving consumers. In *Continental Pharmaceuticals Ltd v Sterling Products Nig.Plc* and *Smithkline Beecham*[9], the defendants introduced the 'eclipse' symbol on their analgesic pharmaceutical product, 'panadol' tablet, in a manner resembling the plaintiff's registered 'eclipse' symbol on its 'cephamol' tablet, also an analgesic pharmaceutical preparation. Restraining the defendants from adopting the eclipse symbol, Tsoho J, said;

> *"Due to the high rate of illiteracy in Nigeria, the 'eclipse' design on the analgesic products will certainly stand out to illiterate consumers .Therefore, by adapting the 'eclipse' design on the defendants' 'Panadol' and 'Panadol extra' analgesic, there is a potential for causing confusion."*

The likelihood of deceit is often not limited to illiterates; therefore the dominant syllables on a product should not only be compared visually but also phonetically. This is crucial to situations of over the counter quick purchase by unsuspecting literates who might be in a hurry such that having a careful perusal of the letters and syllables on the product might not be feasible at a given moment.

The foregoing scenario plays out when a reputable trade name is imitated by a competitor in the same line of business with a view to deceiving consumers into doing business with the imitator instead of the one originally contemplated. The law allows inventors to take pro-active steps to forestall perceived damage to their economic or business interest, without waiting for injury result.

The much orchestrated primary reason for the endless in-fighting has always been 'the need to protect the consumer'. However, decided cases show that the need to have short changed consumerscompensated by the imitator is never conceived by aggrieved inventors in litigation process. Affected consumers are hardly known to inventors. It is the inventor who enjoys the benefit of injunctive relief and damages against imitators.

2. Judicial Relief for infringement of Trademark

An examination of relevant decided cases is imperative at this juncture, for a better appreciation of the legal value of the foregoing argument. In *Wellcome Nig. Ltd v. Ranbaxy Nig. Ltd,*[10] the plaintiff's company had been identified with the manufacture and marketing of a pharmaceutical product used for colds and catarrh, and was marketed as "actifed". Some years later, the defendant company produced a similar product for the same ailment in the

5 As in brand name, get-up, packaging, or colouration.

6 Niger Chemists Ltd v. Nigeria Chemists (1961) All NLR 171

7 (1990) 1 ALL E.R.873

8 Per Ademola CJN,in Alban Pharmacy Ltd. v. Sterling Products International Inc(1968)1 ALL NLR 300

9 38 NIPJD(1995) 460/1995

10 (1990)7 F.H.C.L.R.353

name of "actid". Plaintiff's objection to the defendant's use of the name was upheld by the court on grounds consumers could easily confuse the defendant's new product with that of the plaintiff.

In Seven *Up Bottling Company Ltd v. Bubble Up International Ltd,*[11] the court upheld plaintiff's objection to defendant's introduction of its product 'Bubble Up' which was a brand of carbonated water or soft drink, similar in outlook to that of the plaintiff' 'Seven Up'.In *U.K. Tobacco Ltd v. Carreras,*[12] the plaintiff marketed its cigarette product called "Band Master" with a Whiteman's picture in 'Band Master's' uniform. Thereafter, the defendant sought to introduce a similar cigarette product tagged 'Barrister', also in a Whiteman's picture. The court held that the pictorial representation in defendant's product was capable of deceiving consumers of cigarettes who ordinarily would have demanded for and purchased plaintiff's product.

In *American Cyanamid Company Ltd. v. Vitality Pharmaceuticals Ltd,*[13] the plaintiff's company manufactured and marketed an encapsulated antibiotic preparation known as 'Gonocin'. The defendant's company thereafter introduced an identical antibiotic preparation into the Nigerian market and called it 'Gonorcin'. The court held that defendant's product was capable of confusing the public who would have opted for the plaintiff's product.

In *Beecham Group Ltd v. Esdee Product Nig. Ltd,*[14] the plaintiff's company manufactured a liquefied glucose preparation of non-alcoholic beverage called 'Lucozade'. Later on, the defendant's company introduced a similar product, called 'Glucose-AID'. The court upheld plaintiff's objection to the introduction of defendant's product into the overt market, and held that the word "glucos-AID" could easily confuse the illiterate or semi-illiterate consumer who had the intention to purchase Lucozade.

Similarly, in *Reckitt and Colman v. Borden,*[15] the plaintiff's 'J.I.F'lemon juice sold since about 1956 in containers, shaped and coloured like lemons. The sale of defendant's product 'Realmon' in a very similar container was restrained following proof by the plaintiff that its continued co-existence with plaintiff's product in the market would adversely affect plaintiff's goodwill. Granting an order of injunction against the defendant, Lord Jauncy of Tullichette said;

> *"The decision did not confer on the plaintiffs a monopoly of selling lemon juice in plastic lemons, but it only decided that the defendants did not take adequate steps to differentiate their product so that customers would not be deceived."*

A perceived futuristic damage to reputation can be forestalled by an order of injunction. Damage to reputation may occur even when the goods of the defendant are totally different from those of the plaintiff. In *Lego System v. Lego M. Lemelstrich,*[16] the defendant company intended to sell 'Lego' garden irrigation equipment made like plaintiffs' famous 'Lego' toy bricks of coloured plastic. Falconer J. recognised that the plaintiffs might want to use the name at a future date in the garden equipment field. A permanent injunction was therefore granted against the defendant. In *Bollinger v. Costa Brava Wine Co,*[17] the producers of 'Spanish Champagne' successfully challenged the defendant's use of the designation 'Champagne'on its drink.

Distinctiveness has always been the fundamental essence of injunction against imitators. In *Alban Pharmacy Ltd v. Sterling Products International Inc.*[18] the owners of the trade mark 'Castoria' objected to the defendant's application to use the mark 'Casorina' on medicines of the same type as sold by the objectors. The court was of the view that the objector's apprehensions about the possibility of confusion was well founded, having regards to the similarity in the dominant syllables in both marks. Consequently, consumers were protected from the confusion that could have arisen from a simultaneous use of the two marks. According to Ademola CJN: *"The criterion is that the mark sought to be registered must not when compared with what is already registered, deceive the public or cause confusion."*

Similarly, in *Iyke Merchandise v. Pfizer Inc & Anor,*[19] the plaintiff/respondent *(PfizerInc)* has been engaged in the manufacture and sale of a pharmaceutical product, a worm expeller known as 'Combantrin Plus' for the treatment of worms in children and adults. The name was

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11 (1971)1U.I.L.R 154

12 (1931)16 N.L.R.11

13 [1985] 3 NWLR (Pt.11)112

14 [1985] 3 NWLR (Pt.11)122

15 supra

16 (1983)F.S.R.155

17 (1961)W.L.R.277

18 [1968]1 ALL NLR 300

19 (2001) 6 NSCQR 997, [2001] 10 NWLR (Pt. 722) 540

duly registered under Trademarks Act as No. 31159. There after, the defendant/appellant (Iyke Medical merchandise) also a pharmaceutical outfit, sought to put into the market a product known as 'Combiterim' which is also for the treatment of worms in both children and adults. The plaintiff filed an action for an order of injunction to restrain the defendant by itself, its servants or agents from infringing, passing off or importing or causing to be manufactured the said 'Combinterin', and for an order of delivery up for destruction of the infringing product and for damages. The action succeeded.

2.1 Exceptions to the grant of Injunction for infringement of Trademark

It is noteworthy that it is not all similarities in trademarks that attract judicial relief. A fanciful and ornamental character or device added to a registered trade mark in the packaging of the product cannot form a part of registered trademark. Such characters only make the product appealing and decorative. Consequently, a similarity occasioned by colouration and decoration in the packaging style of a product cannot constitute an infringement. In *Ferodo Ltd v. Ibeto Industries Ltd,*[20] the plaintiff company manufactured brake linings and packaged same in the name of its registered trademark 'Ferodo'. The defendant company also packaged its brake linings in a similar form, but in the name of 'Union supa'. The plaintiff company's application to restrain the defendant from packaging its product in the intended form failed because, the respondent's trade mark 'Union supa' was held not to resemble plaintiff's trademark 'Ferodo', and not capable of deceiving literate or illiterate consumers into confusing one for the other. In its judgment, the court relied on Re Clement et Cie's Trade Mark[21] and said;

> *"I desire to add that our judgment must not be understood as sanctioning of registration of words which in themselves would not constitute a proper trademark, mainly because some flourishes were colourably placed around them with a view of making out distinctive or compound label when infact, what was neatly intended to be registered is the word alone."*

The plethora of cases examined in this work revealed that the endless in-fighting and litigation between inventors and imitators over the use of similar or identical merchandising marks on substituted goods is primarily to safeguard the manufacturers' economic interest, and ensure continuity in the use or the invented mark. A manufacturer would hardly resort to litigation against an imitator for the singular purpose of attracting reparation to the victim consumer for injury suffered.The legal consequence of successful litigation by an objector is the restraining order against the continuous use of the offending mark on the imitator's product.

2.2 Passing-off relating to Business Names

Where there is similarity between an existing business name and another that is about to be registered, the tendency is that purchasers or patrons could easily confuse one for the other. An order of injunction would lie to restrain the prospective trader from using such name. In most cases, both are usually engaged in similar business activities. In such circumstances,it is neither necessary to prove that deception has taken place, nor that the offender has intention to deceive. It is enough that the name adopted by the prospective trader is capable of deceiving members of the public into mistaking the business of the imitator for that of the inventor which they originally planned to patronize. This legal position was succinctly put by Clark and Lindsell[22] as;

> *"It is now well settled that proof of an intention to deceive is not essential. It is enough that the false representation has in fact been made, whether fraudulently or otherwise, and that damages may probably ensue, though the complete innocence of the party making it may be a reason for limiting the account of profits ... It is also clear that the plaintiff may succeed although no deception has actually taken place. But although (sic) neither is necessary, proof of either an intention to deceive, or instances where deception has taken place or both will materially assist his case."*

An appreciable number of cases have been decided along the line of the above dictum. In *Niger Chemists Ltd v. Nigeria Chemists,*[23] the plaintiff (Niger Chemists) had several branches in Onitsha and other towns in the then Eastern Nigeria. The defendants later founded a firm carrying on exactly the same business in the same street in Onitsha under the name and style of 'Nigeria Chemists'. The court restrained the defendants from the use of the

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[20] [1999]2 NWLR (Pt.592)509

[21] (1990) CH 114 at 120

[22] CLERK & LINDSELL ON TORTS,Para.2228, p.1214 (Sweet & Maxwell, 14th Edition);See also; Payton v Snelling (1901)A.C 308,309

[23] [1961] ALL NLR 171

name 'Nigeria Chemists', and held that its use would cause a grave risk of confusion and deception to the public, and that the name was one calculated to deceive consumers or persons who knew of, and in fact meant to deal with plaintiff's company 'Nigeria Chemists'as a drug manufacturing outfit. Granting an injunction against the defendant, the learned Judge Pater J. said:

> *"The first point for determination is whether the name 'Nigeria Chemists' as to be calculated to deceive. Two matters are, I think, well settled. First, it is not necessary to prove that there was any intention to deceive; this has been held in a long series of cases, and is not disputed. In this case, I strongly suspect that the defendants did in fact choose a name and address as similar as possible to that of the plaintiff in the hope of diverting some of its business to themselves, but it is not necessary to decide the point and I do not do so. Secondly, it is not necessary to prove that deception has actually taken place. The plaintiff is entitled to take action quiatimetbefore he is actually injured and the question is whether the words are calculated to deceive, not whether they have in fact deceived."*

On a similar note, in *Madam Ogunlende v. S. A. Babayemi,*[24] the plaintiff sued the defendants for injunction and damages for passing off its business name. The defendant originally operated a partnership with the plaintiff under the name and style of 'Mercury Builders'. Thereafter, the defendant broke away and started a similar business in the name of 'Mercury Builders (Nig.) Ltd.' Granting an injunction to restrain the defendant from carrying on business as 'Mercury Builders (Nig.) Ltd.', Taylor C. J. said: *"The name of the second defendant company was calculated to deceive due to its similarity with the name of the plaintiff's association and the plaintiff was therefore, entitled to succeed in this action."*

Similarly, in *Hendriks v. Montagu,*[25] the plaintiff's trade name of 'Universal Life Assurance Society'was protected from being confused with the defendant's 'Universe Life Assurance Association'. Granting an injunction against the defendant, Palmer J. remarked:

> *"Now, is there such a similarity between those names as that the one is in the ordinary course of human affairs likely to be confounded with the other? Are persons likely who have heard of the Universal to be misled into going to the Universe? I should think, speaking for myself very likely indeed. Many people do not care to bear in mind exactly the very letters of everything they have heard of…"*

What constitutes deception in the context of this discourse is not determined by any hard and fast rules, but the peculiarity of the facts and circumstances of each case. Thus, in *Ewing v. Buttercup Margarine Co,*[26] Lord Cozens-Hardly M. R. said:

> *"I know of no authority, and I can see no principle, which withholds us from preventing injury to the plaintiff in his business as a trader by a confusion which will lead people to conclude that the defendants are really connected in some way with the plaintiff or are carrying on a branch of the plaintiff's business."*

In Maeder's Application[27] Sargeant J. said that deception meant no more than "likely to deceive" or put in another way, "so nearly resembling as to be calculated to deceive" meant "so nearly identical as to be confusing." The learned authors[28] Clark and Lindsell on Torts summed up the foregoing as follows:

> *"The court will interfere to prevent the use of deceptive business name as it will to prevent the use of deceptive trademarks, and substantially all that has been said in the foregoing paragraphs applies to such cases. The name which it is sought to protect need not be the plaintiff's own."*

2.3 Observation

The decided cases examined in this work revealed a possibility that some consumers have been successfully short changed by avaricious and unprincipled copycats into buying counterfeited products in place of the inventor's genuine products originally contemplated. However, none of the decisions elicited suggestions on the desirability of joining identified victim consumers as nominal parties, let alone ordering any form of reparation to them. Rather, the award is always and only to the inventor of the trademark or trade name.

It is further observed that the extant regulatory statute on Trademarks[29] is silent on financial compensation to consumers who have been successfully deceived into

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24 (1971) U.I.LR.417

25 (1881) 17 Ch.D 638

26 (1917) 2 Ch.1

27 (1916) 1 Ch 304

28 CLERK & LINDSELL ON TORTS,Para.2235, p.1218 (Sweet & Maxwell, 14th Edition)

29 Trademarks Act, Cap.T.13,LFN,2004

buying substituted products in place of what they originally intended. Common law as it stands recognises only the reliefs that are directly and financially beneficial to aggrieved objectors, namely[30]:

a) A court order (injunction) that the defendant stop using the accused mark;

b) An order requiring the destruction or forfeiture of infringing articles;

c) Monetary relief, including defendant's profits, any damages sustained by the plaintiff, and the costs of the action; and

(d) An order that the defendant, in certain cases, pay the plaintiffs' attorneys' fees.

It is submitted that the observed gap in the statute is fundamental enough to warrant amendment. The court could in exercise of its equitable powers make laws to fill this gap through judicial pronouncement.

3. Conclusion

It is obvious that if the Consumer Protection Council had put machinery in place for injured consumers to be joined as nominal parties by aggrieved inventors in actions against imitators, a regime of financial compensation platform for injured consumers would have been established. The consumer has a right to be compensated in clear cases of deception. The Consumer Protection Council could fill the gap by making policies that could mandate aggrieved inventors to join identified injured or short changed consumers as nominal claimants in reparation suits against imitators. This would enable minimal reparation to be paid to identified victim consumers for the deceit. In addition, the Council could provide *pro bono* legal Services for affected consumers from the legal department in the establishment.Since judges make laws through judicial pronouncement, courts are enjoined in exercise of their equitable powers to take express opinion on the need for aggrieved inventors to take cognisance of victim consumers' interest in litigating unprincipled counterfeiters.

As a way of keeping the Consumer Protection Council and Inventors of trademarks and Trade Names on the same page in the fight against imitators.The Trade Marks Registry should maintain a data base for inventors' litigation against imitators, and establish a formidable synergy with the Consumer Protection Council in the protection of the consumer through a sustainable regime of effective regulatory. The Trademarks Act should be amended to provide complementary consumerprotection and compensation platform for identified victim consumers.

Decided cases on the topic show that although inventors of trademarks or trade names parade consumerprotection as the foremost reason for litigating imitators, the reason is cosmetic and misleading, as no consumer has been known to enjoy a fraction of financial benefit from the enormous damages often awarded aggrieved inventors. The bottom line remains that consumers'interest is of least consideration to the inventor in the fight against imitators.Protection of goodwill and the quest to continually appropriate the exclusive use of invented markhave proved to be the actual and major reasons for the persistent legal tussle against imitators. On the whole, it is submitted that until the aforementioned suggestions are pragmatically implemented,the much orchestrated slogan of 'Protection of the Consumer' as the inventor's major reason for the relentless fight against imitators would remain a ruse by aggrieved inventors.

[30] www.uspto.gov/page/about-trademark-infringement, (Last visited on June 20,2018)

Judicial Contribution towards Consumer Protection: An Appraisal

Krishna Bharadwaj *

ABSTRACT

The Consumer Protection Act, 1986 has established specialized consumer forum at the district, state and national level. The count of complaints or cases filed against the service providers and producers of a product makes it evident that the consumers are exploited to the maximum. This exploitation is to be resolved or prevented by the commissions or redressal agencies using the most appropriate methods. Defects and deficiencies which cause serious harm to the consumers should be limited from effective functioning of the Consumer Protection Act, 1986. The paper explores the role of the judiciary in protection of rights of the consumers.

Keywords: Consumer Protection, Consumer Forum, Defects, Deficiencies, Rights

1. Introduction

The Consumer Protection Act, 1986 was enacted based on United Nations Guidelines on Consumer Protection, 1985.[1] The Act aims to protect the consumers from exploitation and protects their interests. It accords various rights to the consumers, such as [2]-

(a) the right to be protected against the marketing of goods and services which are hazardous to life and property;

(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to protect the consumer against unfair trade practices;

(c) the right to be assured, wherever possible, access to a variety of goods and services at competitive prices;

(d) the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate forums;

(e) the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and

(f) the right to consumer education.

2. Role of Judiciary

The Consumer Protection Act, 1986 was the first legislation in the world to include a separate three tier dispute resolution mechanism for the consumers. Consumer fora at the district level, State Commission at State level and National Commission at the national level are established to resolve the disputes.[3]

The Judiciary in India has played a major role in protecting the citizen from unfair trade practices and exploitation by delivering justice effectively remedying the consumers.[4] The judiciary is considered to be the guardian of rights and has been proactive in preserving the rights of the consumers.[5]

3. Consumer Protection and grievance redressal

Consumer Protection Act, 1986, passed by the Parliament came into effect from July 1, 1987[6] . The Act provides for setting up quasi-judicial bodies in each District and State and at the National level, named the District Fora, the

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1 Meenu Agrawal, CONSUMER BEHAVIOUR AND CONSUMER PROTECTION IN INDIA, 28 (New Century Publications, New Delhi, 2006).

2 J. N.Barowalia, COMMENTARY ON THE CONSUMER PROTECTION ACT 1986, 34 (Universal Book Traders, New Delhi, 1996).

3 Avtar Singh, LAW OF CONSUMER PROTECTION: PRINCIPLES AND PRACTICES, 64 (Eastern Book Company, Lucknow, 1997).

4 V.K. Agarwal, CONSUMER PROTECTION: LAW & PRACTICE, 39 (6th edn., Bharat Law House Pvt. Ltd. Books, New Delhi, 2009).

5 P.K. Majumdar, LAW CONSUMER PROTECTION IN INDIA, 86 (Orient Publishing Company, New Delhi, 1997).

6 J. N.Barowalia, Commentary on the Consumer Protection Act 1986, (Universal Book Traders, New Delhi, 1996).

State Consumer Disputes Redressal Commissions, and the National Consumer Disputes Redressal Commission (NCDRC) respectively [7]. The consumer fora were created as an alternative for the consumers to approach in order to get quick justice.

The Act, being a welfare legislation, is considered as an important milestone in the field of consumerism. An aggrieved consumer can register a complaint before the District Consumer Forum for pecuniary value of upto Rs. 20 lakh, State Commission for value up to one crore and the National Commission for value above one crore, in respect of defects in goods or deficiency in service. The Act also provides that a complaint registered must be disposed off by the forum within a period of three months from the date of receipt of notice by opposite party in circumstances where there is analysis or testing of commodities is not felt important, and within five months if it is felt by the fora that an analysis or testing of commodities is indispensable with[8].

3.1 Defects in goods

Regarding defects in goods, the judiciary has given several pronouncements whichhasrelieved the consumers from the harm caused by the purchase of an item or hiring of a service. It covers almost all kinds of products starting from everyday use to agricultural products. There is always appositive response from the commissions or agencies under the Act when the complainant claims for the loss occurred. It is regulated under the policy of pro-consumers and is given that the provider is ultimately responsible to take the liability for providing a defective product, as shown in cases below:

A company from Kerala provided a power tiller with defects and damages. This case was brought to the Consumer forum by the complainant and the case ordered the manufacturer to compensate the loss.[9] This example of defect in agricultural machinery makes it evident that there are pronouncements under the Act which covers agricultural products too.

There was a case involving air conditioners which clearly states that the liability can be put on anybody who provides the product. A person bought an air conditioner from a dealer and not the actual manufacturer and found that the compressor was not working. When he filed a case, the dealer mentioned that he was not the manufacturer of the compressor or the air conditioner; hence he cannot be liable to the defect. The National Commission took up this issue and after investigation it was seen that the compressor used in the conditioner was a second- hand item and it was an assembled conditioner. Though the dealer was not directly involved in the reasons for the defect, he was penalised. Thus, manufacturers alone are not responsible for the defect, the person who delivers the product or item to the consumer is also considered.[10]

The President of the National Commission once filed a complaint against the supplier of an air conditioner. The defect here was improper working of the air conditioner due to change in season. The District Forum made judgements or order favouring the complainant. But there was an appeal against the order from the opposite party, and the State Commission was involved in the procedure. Finally, there was reduction in the amount or compensation that was ordered. This incident shows the procedural functioning of the commissions under the Act. Irrespective of the position of the complainant, there are certain terms to be followed by all the complainants.[11]

Cars also come under the term goods and they too have few standard defects which are considered by the commissions of all levels for proceedings. One major problem or defect which occurs very frequently in cars is rust.[12] Selling a rusted car or car with rust on all its assembled parts will be taken as a defect and this serious issue will even lead to money refund. The next defect in cars is when a supplier makes a mistake in engine numbers. Another defect which can be considered by the commission for any complaint is providing or selling a vehicle without relevant documents. Such cases will be taken to serious levels of penalty since the sold vehicle might have been brought to the seller's firm illegally.

However, there are certain cases which cannot be considered as a defect under the Act. In case of accident, the complainant cannot file a case on the manufacturer or supplier unless he proves that the accident was due to mechanical defects in the manufacturing of the car. Thus, these situations will not make the provider liable to the loss.

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7 P.K. Majumdar, Law Consumer Protection in India, (Orient Publishing Company, New Delhi, 1997).

8 SukhdevAggarwal, COMMENTARY ON THE CONSUMER PROTECTION ACT, 1986, 52 (Bright Law House, New Delhi, 2003).

9 M/s Kerala Agro Machinery Corporation Ltd. v. Bijoy Kumar Roy, 2002(2) CPR 107 (SC)

10 Harmohinder Singh v. Anil Sehgal, 1999 (1) CPR 101 (NC).

11 R.K. Kapur v. R.N. Mittal, 1996 (2) CPR 78 (NC).

12 E. Bhagvandas v. Sunderam Motors & the Premier Automobiles, 1991 (1) CPR 318 (AP)

Appeals made against orders from the National Commission will be directly looked after by the official body wherever appeal was made. A person purchased a car and found several defects in it. The car was later taken to the workshop for where relevant repairs were done. Yet the car suffered from problems while driving and so the consumer took this issue to the commission. The order was that the manufacturer and the supplier of the car were liable to pay the amount for which the car was bought.[13] In addition to this, 18% interest was charged to the manufacturer and supplier. Dissatisfied with this order, appeal was made and finally the decision of the State Commission was chosen.

Computers, being under the category of goods, can have admissible defects. The cases are dealt generally if proper methods or facilities are not available to determine the Actual cause of the defect. The possibility of defect would either be taken as defect right from the purchase of the computer or during usage due to misuse.[14]

Electrical appliances without the ISI license or standards are strictly not permitted into the market for sale. This is to ensure that there occurs no harm to the user due to high voltages or any other hazardous electrical component in the appliance. Warranty can be used by a consumer to make the supplier liable to pay the repair costs under maintenance contract. There was a case where an elevator manufactured by a company did not function properly after five years. This was taken to the commission and the order favoured the complainant by making the supplier or manufacture pay for the repair costs completely. At times, the warranty period of a purchased product can also be given as a consideration to their complaint.[15]

Gas cylinder might be considered as defective if the cylinders are partially filled or empty while selling. On the other hand, cylinders which are filled with excess gas also turns out to be a defect since it will invite chances of fire accidents.[16]

Food items especially cause major defects to the ones who consume it. In a case, there was a consumer who was faced with medical issue due to consumption of adulterated oil. The judgement in this case punished each victim involved in the selling process, since the medical issues cannot be compensated. However, a sum of rupees twenty-five thousand to one lakh rupee can be ordered as a fine to be paid to the consumer. Marketing or selling of soft drinks which are not meant for human consumption is also a defect. Such a defect will order the provider to pay the cost of the drink with a fine of rupees five hundred to the consumer or the complainant.[17] Consumers cannot call a hair dye as a defective one if the chemical composition of it matches the regular standards fixed which are not harmful during usage.[18] Thus, such complaints will not be entertained or admitted by the consumer redressal commissions or agencies under the Act. Once a consumer was compensated not only for the repair costs and labour costs for his defective vehicle, but also for the level of difficulty he went though. Mental stress due to defective products can also be taken to the commission, for which necessary legitimation will be carried out. The orders cannot be on the objective of favouring the consumers always.[19]

There exist cases where the complaints made by the consumers will be dismissed if the fault is not on the side of the seller or manufacturer. For example, a consumer purchased a tractor and found it to be defective in working conditions. But, the Commission after investigation has proved that the consumer has not opted for any warranty during the period. The consumer has also violated the usage by mishandling it. Thus, the complaint made was concluded with the order favouring the seller.[20]

3.2 Deficiency in services

Like the provisions made in the Act for goods and their defects, there are provisions made in the Act for deficiency in services provided also. In services, not every fault can be considered as a deficiency; instead clear analysis is made to decidewhat can be taken as a deficiency in service.

Banking is one important sector which holds more value than any other service provided. This is mainly since any discrepancy in the performance of this service will lead to extreme harm IN both mental and monetary terms to the consumer. It is notable to say that this service has an indirect effect on the economy of the country. Deficiencies

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13 Wheels World and Sipani Automobiles Ltd. v. Tejinder Singh Grewal,1995 (i) CPC 318

14 Essen Computers Ltd. v. JagratGrahakSardarChbatralaya, 1993 (3) CPR 182 (Ori)

15 Farook Haji Ismail Saya v. GavabhaiBhesania, 1991 (2) CPR 191 (Guj).

16 Dayanand A Avasare v. Bharat Petroleum Corporation Ltd., 1993 (1) CPR 278 (Mah).

17 Narayanan Vyankatkrishnan Iyengar v. Shakti Foods, 1994 (2) CPJ 652 (Mah)

18 Consumer Education & Research Society v. Godrej Soaps Ltd., 1991(1) CPR 454 (Guj).

19 S.L.N. Auto Service Station v. Herald Alfred Lewis, 1992(1) CPR 493 (Karn).

20 Bhoop Singh v. Surendra Agro Centre, 1993 (2) CPR 519 (Har).

in this service range from small mistakes in accounting. Thus, excess significance is laid on this service and provisions under the Consumer Protection Act clearly insist on preventing the consumers from such exploitation. The deficiencies are as follows:

a) Delay in repayment of deposits and interests to be paid;

b) Faults in cheque collection and passing;

c) Improper statements regarding transactions made;

d) Problems in loans and advances or any other credit facility;

e) Loss of money or jewellery from lockers; and

f) Security issues in bank.

Initially the Consumer Protection Act did not make effective or productive measures in protecting the customers from the service providers or specifically banking institutions.

A very good example of deficiency in banking service would be an incident where the employees of a bank resorted to strike against the functioning of the bank. In such a situation, the customers of the bank faced several problems being unable to access the services of the bank. The strike was against the Industrial Disputes Act of 1947, hence the State Commission tried to minimise the chances of the other branches of the bank entering in this contravening Activity. The complainants claimed for compensation since the bank was shut down and operations of the bank's customers were stopped due to the strike. After taking this issue to the court, the National Commission concluded by considering it as not the negligence of the bank, instead a very normal strike by its employees. But the bank made an appeal to the Supreme Court asking for more detailed reasons as to why they were penalised. The Supreme Court made the decisions broader by not making the bank liable to pay any compensation. This decision was made considering or judging the performance of the bank and it stated that the bank was not able to function only due to the strike, and not due to poor performance. This incident might make the effectiveness of the Consumer Protection Act low, but as days went by the level of significance given to customers increased with changes and consideration in the provisions of the Act.[21]

There was a bank where all the employees of the bank maintained a very immoral attitude towards a customer. The history of it started when the customer applied for bank loan. The customer applied for the credit amount and it got approved with all the required documents. Later the employee who was responsible for the loan advancement, asked for a sum of money as bribe. When the customer refused it, the performance of the bank went low in quality for that customer alone. Making it clear, adverse effects were spotted due to refusal of the customer to give bribe. The customer was put to such a situation that he had to sell his own immovable property and arrange for rental residence. This issue was addressed by the National Commission and the judgement was made favouring the customer. The order was to pay compensation to the customer for all the losses caused by the bank. Mental health of the customer was also taken to decide on the judgement, since the level of mental disturbance the customer goes through is extremely high.[22]

Deficiency may occur in the issuance of cheques. If a customer requests a bank for stop-payment, the bank is accountable to make the request approved. Banks cannot skip this request and pass the cheques for payment. Payments made in these sorts of cases, are considered as a deficiency in service.

Banks are not given with the right to debit any sum or amount without a written record from the customer. There was a customer who purchased a machine thinking that the amount will be generated from bank loan that has been sanctioned. The debit made is considered as a deficiency in the service, since it happened to be done without the customer's knowledge.

Another example of deficiency in banking service under the category of transfer of money was when a person requesting for transfer of money from one branch to the other and the bank official transferred the money to some other branch. This serious case was taken as a deficiency in service due to negligence.

The State Commission once dismissed the appeal made by a bank with regards to order from the district forum. The case wasof a customer who lost his travel cheques and complained to the bank about the incident. The bank should have brought the issue to an end by serving the customer with another set of travel cheques, but instead made a mistake by not considering or accepting the loss.

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[21] Consumer Unity & Trust Society, Jaipur v. Chairman and Managing Director, Bank o/Baroda, Calcutta and Another, (1995) 2 SCC 150.

[22] Mike's Private Ltd. v. State Bank of Bikaner and Jaipur, 1995 (2) CPJ 97 (NC).

The complainant took this issue to the district forum and the order was to pay a compensation of Rs. 2000 and 12% interest to the complainant. Thus, this deficiency in service though stays as a rare case, makes significance in the set of provisions made under the Act. Services provided should be pleasing to the customers or users and extension of the travel cheques in this case could have been a better idea preventing the bank from being penalised. This type of case relating to travellers' cheque cannot be on the side of the complainant always. There are cases where the complainant makes the mistake and not the bank official or the bank. A complainant once complained on the loss of a travel cheque and the order for this issue was a refund of the amount to be provided to the customer. Appeal was made by the bank and series of inquiry sessions revealed that the customer had misused the rights he had. In the past, he had asked for refund of cheque even after encashing. Thus, the case stood against the complainant due to his unethical activity which was exercised twice.[23]

Banks also involve in activities like swapping the amounts to some other account from the original account. It is well explained in an example where a person received pension every month and he found that his pension was lesser than what was offered. The pension amount to be paid was not completely credited his account. This case was considered as a deficiency in service.[24]

Refusal of the bank to return the pledged documents for loan is also a deficiency in service. A customer filed a complaint on a bank which refused to return his documents even after paying the loan amount. The complainant mentioned that he had to submit or produce these documents to another bank for loan sanctioning process. The National Commission took up this case and the result was that the bank had to pay compensation with costs and interest.[25]

Stopping the operation of an account is also a deficiency in service since the customer, the primary element of any business, is more significant than any other factors involved in banking. This is more like a misconduct if the stoppage is due to instruction from any other bank through unauthorised medium of communication.[26]

At times, banks might escape the payment of fully sanctioned loan. The customer does not always get the sanctioned amount but gets an amount little lesser. Such a mistake will direct the orders against the bank and the customer will obtain full relief under the provisions made by the Act.[27]

Banks at times make fake promises to the public to make their service popular. In that context, a bank offered to provide financial help to the youth facing unemployment. The terms and conditions initially told by the bank, did not meet the performance. There was a huge difference in the services mentioned and the services offered. National Commission considered this as a deficiency in service.[28]

Fraudulence in signature may also amount to deficiency in banking services. This can be due to less monitoring or checking with the actual signature and a false signature. Anybody can misuse an opportunity and sign on behalf of any other person. This may at times lead to withdrawal of huge amounts by faking the signature. The bank is the ultimate body responsible for the loss and it must take the liability to compensate it.

Loss of cheques by bank is also a deficiency where the presented cheques for crediting the amount will be lost due to improper care from the bank's side. A customer gave three cheques to a bank which were to be credited in his account. But unfortunately, the cheques went missing which led to problems of amount not being credited to the customer's account. The bank stated in its appeal that the cheques went missing on its own. Such silly or minor reasons cannot be considered, and the bank was directed to pay the compensation.[29]

Banks cannot randomly credit the amount to any of the customer's account. Clear instructions will be given by the customer regarding the credit and these should be strictly followed by the bank. A customer gave detailed information regarding the account to which the amount must be credited. But the bank credited it in the customer's firm account where he is a partner in that firm. Nowhere in the instruction was the firm's account mentioned to be credited. Hence, this mistake makes the service of the bank deficient.

Negligence in maintaining the lockers of the bank will lead to missing of jewellery. A customer had once faced this situation of losing the jewels kept in the locker. When

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23 In Bank of India v. Mukesh Kumar Shukla (Dr.), 1993 (1) CPJ 41 (MP)

24 Bhandari Co-operative Bank Ltd. v. DilipMadhukarKambli, 1992 (1) CPJ 68 (Mah)

25 Dosen Chemicals Pvt. Ltd. v. United Bank of India, 2003 (1) CPJ 214 (NC)

26 Prem G's International v. Central Bank of India, 1995 (2) CPJ 222 (Del)

27 Kamal Nagpal v. State Bank of India, 1995 (2) CPJ 342 (J&K)

28 State Bank of Hyderabad v. Shri Balri Lingam, 1991 (I)CPR 148 (NC)

29 B.H. Canara Bank v. K.R. Hanumantha Rao, 1992 (I)CPR 318 (Knt)

complained, the bank tried to escape the liability by stating that it was the customer's fault for not closing the locker. In addition to this information, the bank also made a point that the open locker was noticed only after fifty days.[30]

Like the above mentioned deficiencies, there are several deficiencies in the banking sector which are very minute and unidentifiable but takes equal significance as others mentioned above. Thus, banking institutions should make their maximum efforts to reduce the number of complaints against it. No matter how well the service has been provided, one discrepancy is enough to rate a bank unfit or less wanted.

As per the definition of the service under the Act, electricity is also included under the term service and the deficiencies that can possibly occur in this category are clearly defined and well explained to the commissions handling proceedings as well as the complainants seeking relief. Once there was a case where the complainant was charged extra amount of money for connecting the wires in different meters and using the flow of electricity. This was done because the owner of all the meters is one person and this happened only due to the fact that one of the meters did not work. When complained about the non-working condition of the meter to the electric board, they sent no response. Later when there was reconnection made by the consumer, they charged fine for it. This case was brought to the State Commission and the order favoured the complainant. He was given a compensation for his mental stress and hardship. An appeal was made against the order and it was straight away dismissed by the National Commission. The decision of the State Commission was considered since the fault or deficiency was completely from the side of the board.

Bribe has become a very common demand from the workers to get the consumer's work done. Especially in areas of electricity, skilled labourers always expect some monetary offerings to finish a work. With such a motive, a complainant was asked to pay a sum of amount illegally in order to get his meter box replaced. This was named as a deficiency in service by the state commission. The complainant got his claimed relief by the order of the State Commission.

Industrial firms require excess electrical energy, and this should be provided by the Board of Electricity for a reasonable charge.[31] But, there was a case where the Board of Electricity denied providing the industry with excess electric supply. The case initiated when the complainant faced issues of disconnection. Initially, there was a request from the complainant to the board of electricity asking for extra units of electricity. The board accepted the request and relevant measures were taken to provide more electricity. They even charged extra amounts for the extra units, which was regularly paid by the complainant. It went like a very common process, and later, after a few months, the connection was cut without any valid reason. The response for this was also twenty months later, which is actually a very long period of time. Thus, the order from the Commission stated the deficiency in the service provided by making them pay the compensation for the loss occurred. Such unexplained delays in making the connection available to the consumer cannot be taken as an excuse and it will be considered as a happening purely due to the negligence of the board of electricity.

A shop owner faced the issue of disconnection once, which was never restored until he complained. The complainant has been using the connection for the past ten years and this sudden immoral attitude towards a loyal consumer was taken as a deficiency in service. Having said this, the concerned Commission made decisions providing penalty to the board and favouring the complainant.

The spark from electrical wires can greatly create a damageable impact on various things it falls on. Agricultural products especially should be taken care of well, protecting them from the spark. In case there is any situation where improper maintenance makes the spark fall on the crops damaging them, the Board of Electricity should be liable to pay to compensation. This improper maintenance will definitely be held as a deficiency in service under the Act.[32]

The amendment in 1993 made changes in the Consumer Protection Act which enabled housing and construction to come under service.[33] A complainant had once filed a case on an opposite party who allotted land for the complainants. For the acquisition of land, the complainant's father paid almost half of the instalments till he was alive. Later after his death, the land was changed to the complainant's name since he was the legal heir. In the end, the instalments for acquiring the land were paid and a certain amount of consideration was also given for this.

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30 Punjab National Bank v. KB.Shetty, 1994 (2) CPR 636 (NC)

31 P.H. Sehgal and Subhash Gaggal v. Delhi Vidhyut Board, 2002 (1) CPJ (NC)

32 Haryana State Electricity Board v. Jai Forging & Stampings (P) Ltd, 1996 (2) CPR 30 (NC)

33 Lucknow Development Authority v. M.K. Gupta, 1996 (1) CPR 569 (SC)

Inspite of all this, the opposite party did not allow the complainant to acquire the land. The complainant was allotted one more 500 sq. feet of land and was asked to pay the instalments for the same. The 1000 sq. feet land which was supposed to be given for possession after payment of instalments was not given. The case ended by the Commission stating that the opposite party had made deficiency in service according to the Act. Though appeal was made by the opposite party, the National Commission suspended it in terms of providing compensation to the sufferer, the complainant.

Asking for extra amount of money after paying the whole settled or agreed amount for a construction work, will be an immoral attitude and a deficiency in service. There arose a complaint when the complainant was demanded to give more than the agreed amount reasoning that the amount paid did not cover the final cost. Also, the opposite party had not given the documents or deeds of the house for six years. This punishable act is a deficiency in service for which the opposite party is answerable. This case again went to different commissions for an appeal, but the order favoured the complainant due to the loss he faced.[34]

Incompletion in construction work is truly an unfair practice and it represents deficiency of service without any doubt. Services cannot be denied or terminated half way of its functioning and such a denial would be strictly addressed. Any service taken by a provider should be completed as agreed, especially in term of legal agreements. A complainant was put to trouble since his opposite party or the builder who signed an agreement with the complainant regarding construction of a house in a land failed to do so. The agreement was to provide the complete house constructed at the end of twelve months or before that. There was no response from the side of the opposite party regarding the construction work or a substitute accommodation for the delay. Thus, the case resorted to a conclusion mentioning that the complainant must be provided with compensation since there was deficiency in the service provided.[35]

The matters concerned with medical issues and other faulty happenings relating to medicine were dealt under the law of torts. Since the procedure and the time-consuming factor in disposal of cases were quite not satisfying, the Act came up with efficient provisions to protect the consumer from exploitation by the people in medical field who commit mistakes. Problems are wide, and they range from unqualified doctors to improper care or observance of the patient. A doctor once treated a patient with the necessary methods and medication, but the issue was that he was not suffering any disease. A normal medical check made by the doctor revealed good health condition of the patient, but the unnecessary medication and treatment provided led to the death of the patient. This critical case concluded by ordering the opposite party a compensation of Rs. 3 lakh and the cost incurred in treatment which amounted to Rs. 30,000. Thus, such mis-happenings in a service sector will be showcased or seen as a deficiency for which the opposite party is ultimately liable to handle the loss. Especially in the field of medicine, the loss occurred though compensated by the opposite party, the level of mental stress the sufferer or the family goes through is extremely high for which no monetary compensation can be made equal to the mis-happening.[36]

Unqualified doctors put their desired degrees on board or any other publicity instrument for inviting more patients and to create an impression on the minds of the patients. A doctor had put his board with a gynaecology degree to attract more delivery cases. The fact was that he was not a gynaecologist and it was only due to his unethical intentions he mentioned it on the board. The complainant was a family member of the patient who died due to the negligence of the doctor. A woman went for her delivery to this doctor, and the delivery turned to be unsuccessful since the complications in delivery were hard to be handled by the unqualified doctor. The death of the child and the mother was a very huge loss for which compensation can also not supress the family's painful state. The case was taken to the National Commission and was regarded as a deficiency in service due to the doctor's negligence. Promises made in any service should be fulfilled to the consumers irrespective of the situation faced by the providers.[37]

A fifteen-year old girl got attracted to the fancy advertisements made by the hospital for increasing the height. The victim made relevant measures to take up the treatment to increase her height from 135 cm to more. Unfortunately, the treatment given was misdirected or done in a wrong way which affected her height in a

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[34] Jatinderdev Singh Musafir v. Ludhiana Improvement Trust, 1997 (1) CPR 137 (NC)

[35] V.L. Bhanukumar v. Dega Sundara Rama Reddy & Others, 1996 (1) CPR 68 (NC)

[36] Poonam Verma v. Ashwin Patel, 1996 (2) CPJ 1 (SC)

[37] Sr. Louis (Dr.) v. Cannolil Pathumma, 1993 (1) CPJ 30 (NC)

negative manner. The fixators she had was to increase her height but according to the command of the doctors in the hospital she had to move from one place to the other every fifteen days for X-ray. At the time of discharges for this Action, there arose minor changes in the body of the girl leading to shortened left leg in a few days. The patient was bed ridden and many doctors discussed on making her normal or bringing her back to condition. Nothing could be made, and the result of the treatment was loss of 1.5 inches in her left leg. This case was purely due to negligence of the doctors and is listed under deficiency in a service. A compensation of Rs. 5 lakh and cost of Rs. 20,000 were ordered by the commissions.[38]

If a person dies due to any false medical treatment, the legal heirs of the deceased can work as a consumer or a complainant. The case had an appeal from the hospital stating that the woman who complained was not the consumer since the medical services were for the deceased, her husband. But the commission dismissed the opposite party's objection pointing out the rights of the legal heir. Thus, the death of the complainant's husband due to the services of the hospital was considered as a deficiency in service. The complainant can always not be on the relief side without considering the entire inquiry and its results at the end. A complainant once made an objection that the death of his wife was due to the improper medical services from the hospital. On inquiry, it revealed that the hospital had provided the patient with maximum care and remedial treatments, but due to unavoidable circumstances, the patient had died. Thus, these cases cannot stand against the hospital or the opposite party supporting the complainant. The commission stated that there is no deficiency in the service which was provided.[39]

Education is another important sector which is more like a business nowadays. Fraudulence is spotted in areas like consultancies and agencies which promise to arrange for overseas education or any other distance programs. Exploitation in this service has affectedstudents. Some of the very common mistakes that an educational sector can engage itself are:

a) Allotment of wrong seats during exam;

b) Delay in issuance of hall ticket without any valid reason;

c) Delay in publishing the results;

d) Providing wrong results or swapping the results due to negligence;

e) Unfair evaluation due to bribe[40]

The mentioned deficiencies amount to almost all the areas under the services offered. Any category of the service can make a mistake and it is the responsibility of the Consumer Protection Act to look through the issue which hasoccurred. Necessary actions must be taken without violating the rules and regulations of the Act as well general laws. It is also seen that the Consumer Protection Act does not direct any case against the opposite party without proper investigation. It was held that services are rendered for the consumers and the errors and mistakes in the service are neither intentional nor without their knowledge. Hence proper investigation can only reveal the degree of trueness relating to the case.

4. Issues in Consumer Protection Act, 1986

The State of Indian Consumer, 2012 report states that the Consumer Protection Act has made limited impact and is ineffective because of the poor implementation of the Act although the law is adequate. Some problems associated with the consumer fora include delays, unwanted adjournments, poor spirit of the lawyers and members of consumer fora, lack of awareness, etc. The study revealed that:

> *"Nearly 93 percentrespondents have never actually made a formal complaint, while only 3 percent respondents registered their grievances with the company and or the producer while 0.1 percent people approached sector ombudsman for redressal. A major percentage of respondents, 78 percent, respondents rated the grievance redressal process as 'difficult'."*[41]

The Evaluation Report on Impact and Effectiveness of Consumer Protection Act, 1986 remarks that the consumer fora have turned into civil courts with the slow inclusion of civil procedure code. Inadequate infrastructure, lack of resources, improper management, lack of skill among members of the consumer fora etc. are some of the reasons for ineffective functioning of the consumer fora. The study reveals that:

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38 Nadiya v. Fathima Hospital, 2002 (1) CPJ 190

39 Dr. K.Mahabola Bhat & Anr v. K.Krishna and others, 2000(3) CPR 137 (NC).

40 Abel Pacheco Gracias v. Principal Bharti Vidyapith College of Engineering, 1992 (1) CPJ 105 (Mah)

41 CUTS-International, State Of The Indian Consumer Analyses of the Implementation of the United Nations Guidelines for Consumer Protection, 1985 in India, (2012), available athttp://www.cuts-international.org/Cart/pdf/State_of_the_Indian_Consumer.pdf (Last visited on: January 12, 2016).

"Given a choice, 60 percent of the respondents would prefer mediation rather than filing a complaint. 72.3 percent of the respondents said that the complaints are not disposed of within 3- 5 months as stipulated under the Consumer Protection Act. Only 27.7 percent of the respondents said that complaints are disposed within the time limit. Only 10.2 percent of the complaints are disposed within a period of three months, 17.8 percent within 5 months, 18.8 percent takes between 5-9 months, 22.8 percent of the complaints are disposed within 9-12 months while 19.5 percent of the complaints take between 1-2 years to be disposed and 10.9 percent of the complaints take more than 2 years to be disposed.It was also identified that only 28.1 percent of the complainants/ appellants are satisfied with the functioning of the three tier redressal mechanism. The highest level of satisfaction is with the NCDRC accounting to 38.1 percent of the respondents. Overall only 33.1 percent of the respondents are satisfied with the procedures adopted by the three tier redressal mechanism. 76.9 percent, however, are satisfied with the procedure of the NCDRC. Only 15.7 percent of the complainants of the District Forums say that time limit is adhered to in the admission of complaints, 34.8 percent say on the issue of notice, 29.1 percent in the commencement of the hearing. 34.1 percent of the respondents say that the time limit is adhered in the disposal of the complaint and 7.3 percent agree that it is done in the case of compliance of orders. 55.8 percent of the respondents believe that the Forums/ Commissions decide the cases only on merit. In the District Forums 28.7 percent of the respondents said that after filing the complaint the first hearing commenced after one month, 27.2 percent said after 2 months, 22.3 percent said after 3 months, 11.7 percent say after 4 months and 10.2 percent said the hearing commenced after 5 months or more after filing the complaints." [42]

The Report of the Working Group on Consumer Protection, 2012, suggests that the Consumer Protection Act, 1986 has been ineffective and lacks proper implementation. The problems include a huge pile of pending cases (approx. 4 lakhs) and also a lack of will in the appointment of members to the fora, low compensation packages, etc.

5. Conclusion

It is no doubt that the consumer forums have played a significant role in the protection of the rights of the consumers. Unfortunately, the number of complaints filed is not sufficient to prove that consumers are pro-active in seeking remedy and fight against exploitation. Ignorance and fear of litigation continue to be major factors for not approaching the consumer fora. Although lawyers are not required for the presentation of case, the public has very less knowledge about this. The government must focus on improving the consumer education status and focus more on creating awareness in the public.

[42] Indian Institute of Public Administration, IIPA, Evaluation Report on Impact and Effectiveness Of Consumer Protection Act, 1986, (2013), available at: http://www.consumereducation.in /ResearchStudyReports/cpa_exec_sum.pdf (last visited on: January 21, 2016).

Protecting children's Right to Education: A Disaster Management perspective

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ABSTRACT

Disasters, whether natural or man-made, have left horrendous memories of death and destruction in schools across the country, yet the culture of school safety is conspicuously absent. Drawing instances of adverse impact of various disasters on education and lives of children, the articleargues that right to education cannot effectively be realized unless imparted in a safe environment. Although the State has taken certain measures in protecting this right in post-disaster situations, the concept of disaster risk reduction is conspicuously absent in the Indian legal regime. Various international legal standards as well as practices from other countries are being referred to demonstrate the gaps in the existing law and practices in India. The article demonstrates flagrant violation of building safety norms in schools which have eventually led to disasters. Despite rapping from the Court for non-implementation of the National Building Code in schools, the state of affairs on ground has remained unchanged. The state administration has often remained tragically oblivious towards such violations. In adopting a right-based approach, the article expresses the plight of victims and the need for their care and protection. Hence, in cases of man-made disasters, it explores the extent of liability of the school authorities in whose premises the disasters happened as well as the concerned state authorities whose acts or omissions have contributed to the causes of such disasters. It laments that few judicial pronouncements in the realm of man-made disasters, in general, have developed into undesirable precedents on the path of protection of the right. Unless viewed seriously, the children of this country will continue to study under unsafe roof.

Keywords: Children, Education, School safety, Disaster management, Judiciary

I. Impact of Disasters on Education

Education is a human right, universal and inalienable.[1] Yet disasters have deleterious impact primarily on child right to education as well as other rights. When education is interrupted or limited, students drop out, with negative and permanent economic and social impacts for students, their families, and communities. Researchescarried out in Bolivia, Vietnam, Indonesia and Nepal reveal that disasterswiden the gender gap in primary education, decrease pre-school enrolment ratesand increase dropout rates – indicating the need for greater consideration of children's vulnerability.[2] There is no room to suggest that outcome would be different in our country's context, hence, we must take necessary steps to ensure that access to education continues unabated in the aftermath of disasters too.

Carolyn Kousky notes that natural disasters can affect schooling in three primary ways. First, the disaster can destroy schools and interrupt children's education. Second, if children are injured or sick, they may not attend school in the same way as their pre-disaster days. Third, in developing countries in particular, disasters have a negative economic impact on the household income and may compel the parents to take children out of school and engage them into labour in order to enhance family income. If those impacts on schooling persist – they could have a perennial impact in reducing earnings in their lives.[3] In fact, studies around the globe have demonstrated that disasters could presumably affect the children's ability to learn and leave them less literate. E.g. people exposed to the 1941 – 42 famine in Greece were less literate and attained fewer years of education.[4]

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1 Universal Declaration of Human Rights, G.A. Res. 217A, Art. 26, U.N. Doc. A/810 (December 12, 1948).

2 United Nations International Strategy for Disaster Reduction (UNISDR), *Global Assessment Report on Disaster Risk Reduction*, 46 (2011).

3 Carolyn Kousky, *Impacts of Natural Disasters on Children*, Vol. 26(1) THE FUTURE OF CHILDREN 84 (2016).

4 Rema Hanna & Paulina Oliva, *Implications of Climate Change for Children in Developing Countries*, Vol. 26(1) THE FUTURE OF CHILDREN 123 – 24 (2016).

Destruction of schools and deaths of children continues unabated till date. A number of estimates suggest that at least 66.5 million children are affected by disasters annually worldwide.[5] 971 students and 31 teachers perished during 2001 Gujarat earthquake. 1,884 school buildings collapsed and 11,761 school buildings suffered damages. Some reports claim that as the ground started shaking, terrified children on the open ground started running towards the school building fearing a bomb blast.[6] This was not an isolated incident. Jammu & Kashmir earthquake in 2005 took a heavy toll on school children too. Among many such victims, more than 200 students and teachersalone lost their lives in one school building. Similarly, in 2008, 600 school children were left marooned in their school by floodwaters in Bihar.[7]

Man-made disasters are not to be ignored either. On December 23, 1995, at the DAV Public School in Dabwali, Haryana, 442 people, among whom many were school children, were charred to death at the annual prize distribution ceremony organized in a marriage hall.[8] The 'shamiyana' (nylon tent) near the entry gate caught fire due to some electrical malfunctioning and was consumed in minutes. Another horrifying tragedy was the death of 93 students of the Lord Krishna Middle School in Kumbakonam town in Thanjavur district in the state of Tamil Nadu when the thatched roof caught fire and fell on them on July 16, 2004. Lack of access to the school building hindered the rescue operations.[9]

On a whole, there is a sense of vulnerability. In such a situation, it is pertinent to analyse the impact of the disasters not only on the children's right to education but also in a 'safe' environment. The culture of safety in schools captures issues like emphasis on disaster-resilient construction of schools, incorporation of Disaster Risk Reduction (hereafter DRR) policies in education, disaster preparedness and response within the framework of internal and external environment of the school to reduce the impact of any possible threats to children. Furthermore, this article explores the extent of liability of the school authorities in whose premises the manmade disasters happened as well as the concerned State authorities whose acts or omissions have contributed to the causes of such disasters.

2. Right to Education in a safe environment

Education occupies an important place in our Constitution as the framers of our Constitution placed free and compulsory education under Article 45[10] as part of the Directive Principles of State Policy (DPSP). Finally, Article 21A[11] of the Constitution, adopted in 2002, codified the court's holding in *Unni Krishnan, J.P. and Ors. v. State of Andhra Pradesh*.[12] The Parliament did not merely affirm that right but included it in the set of Fundamental Rights. Thus, the right to education became an inalienable human right.

Further in the case of *Avinash Mehrotra v. Union of India,*[13] the Supreme Court made safe school environment an integral part of right to education. The Court held:

> *"[W]e must hold that educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety...Articles 21 and 21A of the Constitution require that India's school children receive education in safe schools...It is the*

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5 UNISDR, *supra* note 2, at 47.

6 National Disaster Management Division (NDMD), Ministry of Home Affairs (MHA), Government of India (GoI), *School Safety: A Handbook For Administrator, Education Officers, Emergency Officials, School Principals And Teachersavailable at* http://www.ndmindia.nic.in/WCDRDOCS/School%20Safety%20Version%201.0.pdf (Last visited on May 10, 2018).

7 GoI& UNDP, *Good Practices in Community Based Disaster Risk Management*,3 (2010).

8 Bhaskar Mukherjee, *Agony alive 16 yrs after Dabwali fire*, The Times of India (24 December, 2011), *available at*http://articles.timesofindia.indiatimes.com/2011-12-24/india/30554591_1_fire-incident-proper-fire-function (Last visited on May 10, 2018).

9 G. Srinivasan, *87 children die in school fire*, The Hindu (17 July, 2004), *available at*http://www.hindu.com/2004/07/17/stories/2004071707570100.htm (Last visited on May 10, 2018).

10 Art. 45 (un-amended), THE CONSTITUTION OF INDIA, 1950- Provision for free and compulsory education for children.– The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

11 Art. 21A,THE CONSTITUTION OF INDIA, 1950-Right to education– The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may by law, determine.

12 Unni Krishnan, J.P. and Ors. v. State of Andhra Pradesh, A.I.R. 1993 S.C. 2178

13 Avinash Mehrotra v.Union of India, (2009) 6 S.C.C. 398 [Avinash Mehrotra case]

fundamental right of each and every child to receive education free from fear of security and safety. The children cannot be compelled to receive education from an unsound and unsafe building."

An interesting aspect about Article 21A is that unlike other Fundamental Rights, the right to education places a burden not only on the State but also places a Fundamental Duty squarely on the parents under Article 51A(k)[14] to provide opportunities of education for his child or ward – a reciprocal affirmative burden. The Court cautioned that the State bears *"the additional burden of regulation, ensuring that schools provide safe facilities as part of a compulsory education"*.[15]

It may be recalled that in a school safety manual prepared by United National Development Program (UNDP), "Safe School" is defined as:[16]

"A process which attempts to ensure physical and psychological safety of students, teachers and supporting staff in the event of any disaster. It includes policy level interventions, multi-hazard resistant school infrastructure, continuous disaster preparedness, mitigation and prevention initiatives by students, teachers and other stakeholders."

3. Importance of Disaster Risk Reduction in school program

We cannot prevent certain natural hazards from happening; but with assessment, planning and response preparedness we can prevent these hazards from becoming disasters. Since schools are the most appropriate forums for dissemination of knowledge and imparting skills, determined application of knowledge, education and originality in the sphere of disaster management could become extremely useful in designing excellent disaster mitigation programs. Therefore, making DRR part of school curricula to promote awareness and better understanding about the hazards may in turn prove valuable in saving lives of the members of the family and community in disaster situations. For instance, geography class lessons helped Tilly Smith,a British schoolgirl, to recognize the first signs of tsunami, urging people to flee the shores during the 2004 Indian Ocean Tsunami.[17]

Hence, schools can play a significant role in educating masses. The Government of India emphasized on making disaster management a part of normal school activities, like morning assembly or school functions. Training of teaching fraternity is important in carrying forward such initiatives. Establishment of 'Disaster Managers' Clubs 'further strengthen the process. A large-scale awareness generation may be possible by observing a month-long program, such as 'Preparedness Month' where several schools can jointly participate. A network of government and non-governmental institutions may partner in order to facilitate actions for safer schools.[18]

4. Recognition of Disaster Risk Reduction within the UN Framework

School safety was given a major focus by the UNISDR when the 2006-2007 World Disaster Reduction Campaign was devoted to the theme 'Disaster Reduction Begins at School'. This theme was chosen by UNISDR because:

(a) It was in line with the Priority 3 of the Hyogo Framework for Action (HFA) 2005-2015:[19] *"Use knowledge, innovation and education to build a culture of safety and resilience at all levels"*, and

(b) Schools are the best venues for shaping durable collective values; and therefore the appropriate place for promoting a culture of prevention and disaster resilience.[20]

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14 Art. 51A Clause k, THE CONSTITUTION OF INDIA, 1950- Fundamental duties– It shall be the duty of every citizen of India who is the parent or guardian to provide opportunities for education to his child or as the case may be ward between the age of six and fourteen years.

15 AvinashMehrotra case, (2009) 6 S.C.C. 398, para. 30

16 UNDP Myanmar, *School Safety Manual*,1 – 2 (2009) *available at* http://www.adpc.net/v2007/ikm/ONLINE%20DOCUMENTS/downloads/2009/SchoolSafety_eng.pdf (Last visited on May 10, 2018).

17 Kerry-Ann N. Morris and Michelle T. Edwards, *Disaster Risk Reduction and Vulnerable Populations in Jamaica: Protecting Children within the Comprehensive Disaster Management Framework*, Vol. 18(1) CHILDREN, YOUTH AND ENVIRONMENTS 399 (2008).

18 NDMD, *supra* note 6, at 10 – 11

19 UN, Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, adopted at World Conference on Disaster Reduction, Hyogo, Japan, January 18 – 22, 2005, A/CONF.206/6 and Corr.1, chap. I, res. 2. (January 22, 2005) [Hyogo Framework]

20 Disaster Preparedness European Commission's Humanitarian aid and Civil Protection Directorate General (DIPECHO) – Bangladesh, *School Safety: Towards Building Disaster Resilient Schools in Bangladesh*, Vol. 4 Newsletter, 1 (August 2010).

In fact, the HFA enumerates various key activities towards fulfilling its objectives under Priority 3, which includes education and training. Towards that end it urges to promote:

(a) The inclusion of DRR knowledge in relevant sections of school curricula and also the use of other formal and informal channels to disseminate information among children;

(b) The integration of DRR as an intrinsic element of the UN Decade of Education for Sustainable Development (2005–2015);

(c) The implementation of local risk assessment and disaster preparedness programs in schools and institutions of higher education; and

(d) The implementation of programmes and activities in schools for learning how to minimize the effects of hazards.[21]

In sum, DRR in education involves the promotion of DRR in teaching and learning; the promotion of school safety and disaster management; and the provision of safe school environments.[22] According to the Sendai Framework, disaster risk may be reduced by increasing public education and awareness.[23] To accomplish this objective, the Framework recognizes the children and the youths as 'Agents of Change'. Hence, they should be given importance in DRR and the same may be facilitated through educational curricula.[24]

4.1 Missed Opportunity in the RTE Act

Despite our horrific experiences, we missed a precious opportunity to imbibe the safety standards in the education system, in terms of legislation. Neither the Right of Children to Free and Compulsory Education Act, 2009(hereinafter 'RTE Act'),[25] nor the RTE Rules, 2010 prescribed thereunder,[26] insist on any kind of disaster management at schools. Section 18 of the Act prescribes that non-governmental schools can only be established or function after obtaining no objection certificate of recognition from the appropriate authorities. And the certificate of recognition would be granted if the school fulfils the 'norms and standards' specified in the Schedule to the Act which insist on housing the schools in *"all weather buildings"*.[27] Failure to comply with those norms and standards shall attract withdrawal of recognition by the competent authorities.

For the pre-existing schools, the time for compliance is three years from the date of the commencement of the Act. In case of contraventions of such provisions, any person responsible for running such institutions may be fined up to an amount extending to Rs. 1 lakh and Rs. 10,000 for every day in case of an continuing offence. It is very unfortunate that norms and standards so mentioned regarding "building" in the Schedule have no specific emphasis on disaster resilient structure of the schools. Furthermore, the state of affairs of the government run schools does not inspire our confidence either. The Model Rules only makes a sweeping provision enjoining the State or the local authority to locate school in such an area to avoid floods or landslides.[28]

Yet our legislators missed the bus to bring the element of disaster management into play as a part of the School Development Plan to be prepared and recommended by the School Management Committee consisting of the local authority, parents or guardians of the children of such school, and the concerned teachers, as envisaged under the RTE Act.[29] While Section 23 of the Act lays down the minimum qualifications for the appointment of the teachers, there is no provision in law which makes training in disaster management as a mandatory component. However, Section 27 of the Act provides for the engagement of teachers in few non-educational purposes including disaster relief.[30] But the curiosity remains as to how effective a teacher could be in carrying out such a role inside or outside the school, when he has not got any formal training in the matter? In fact, better trained teachers and students shall not only enhance the disaster management of the school per se but the community as a whole. For instance, in the State of Assam, down to the sub-divisional level, Quick Response Teams for floods are

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21 Hyogo Framework,para. 18(ii).

22 UNESCO, *DRR in Education: An Imperative for Education Policymakers*,3 (2011)

23 UN General Assembly, Sendai Framework for Disaster Risk Reduction 2015-2030, para. 19(k), adopted atThird United Nations World Conference on Disaster Risk Reduction, Sendai, Japan, Mar. 14 – 18, 2015, A/CONF.224/L.2 (Apr. 7, 2015)

24 *Id.*,para. 36(a)(ii)

25 Act No. 35 of 2009

26 Ministry of Human Resource Development, GoI, Notification No. G.S.R.301(E), (April 8, 2010)

27 Sec. 19, RTE Act.

28 Rule 6(3), RTE Rules.

29 Secs. 21 &22, RTE Act.

30 The other purposes are decennial population census and duties relating to elections.

being officially constituted comprising of the School Principals of different schools in the area concerned.[31]

4.2 Few government initiatives

Way back in 2006, in Coimbatore district of Tamil Nadu, thirty schools were brought under a disaster management program under the supervision of the Chief Education Office to prepare the teachers, students and the community around these institutions to minimise loss of lives and property in the event of disasters. It was decided that each school should draft a School Safety Plan schools based on their requirements. Month-long training, mock drills, establishment of a School Safety Committee under the chairmanship of the Head of the institution, surprise checks, were among other things included in the agenda.[32] Unfortunately, those remain as sporadic efforts often made towards the cause, a concerted effort is missing. Even the follow-up to such noble initiatives are not encouraging either.

As part of the Government of India -UNDP Disaster Risk Management Program, a School Safety Program was launched. The message of the Programme is 'School safety through education and building safer schools'. The Program reached out to 4105 schools with 130,000 enrolled school children. Under this program, disaster management has been integrated within the education curriculum for middle schools and higher secondary schools affiliated to the Central Board of Secondary Education (CBSE).[33]

The Ministry of Home Affairs, Government of India, suggested for initiating School Safety Program with a district level School Safety Advisory Committee to be headed by the District Magistrate and convened by the District Education. Other members shall include representatives from the School Boards, Principals of the Schools, Police and Fire personnel, etc. This will be supplemented by Building level – School Safety Team which would not only include teachers and staff, but also members of the School Management Committee, parents and students.[34]

4.3 Scope of Disaster Risk Reduction within National Disaster Law and Policy Regime

The Disaster Management Act, 2005,[35] as such, does not specifically mention about school safety issues. However, the National Institute of Disaster Management, established under Section 42 of the Act, has certain functions with regard to DRR in education. They include development of training modules and educational materials for disaster management; promote awareness among stakeholders including college or school teachers and undertake, organize and facilitate study courses, conferences, lectures, seminars to promote awareness about the matter.

The National Policy on Disaster Management[36] encourages expansion of disaster management training in educational institutions at all levels including schools, with orientation towards practical requirements a part of the capacity development. While theintroduction of the subject of disaster management in the CBSE curriculum is an encouraging sign, the National Policy insists that all the State Governments shall also take similar steps to extend it to all schools affiliated to the respective State Education Boards. Moreover, the National Cadet Corps and Girls Scouts may be established and trained to inculcate leadership qualities, skill development in disaster management. Thus, disaster education will aim at developing a culture of preparedness and safety, besides implementing school disaster management plans.[37]

The NDMA Guidelines on School Safety Policy[38] also insist on issues like capacity building among staff and students, implementing child centered community based DRR program in the local context, main streaming risk and safety education in the school curriculum, etc.

5. Importance of safety norms in school buildings

Be it an earthquake or a fire accident, unsafe school buildings could result in greater loses than the hazard itself. Being aware of the negative consequences of unsafe buildings, a model school design guidelineshad been prepared for various seismic zones in India. Accordingly,

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31 Revenue & Disaster Management Department, Government of Assam, *Assam State Disaster Management Manual2015*, 57 – 58 (2015)

32 K.V. Prasad, *Disaster management plan for schools*, The Hindu(22August, 2006), *available at*http://hindu.com/2006/08/22/stories/2006082219690100.htm (Last visited on May 10, 2018).

33 GoI&UNDP, *supra* note 7, at 8.

34 NDMD, *supra* note 6, at 11

35 Act No. 53 of 2005.

36 National Disaster Management Authority (NDMA), MHA, GoI, *National Policy on Disaster Management 2009* (2009)

37 *Id.*, para. 10.6.1

38 NDMA, MHA, GoI, *National Disaster Management Guidelines: School Safety Policy*(2016)

engineers and architects from government departments were trained for that purpose. In Uttar Pradesh, the State government decided to design and construct 80,000 primary and upper primary classrooms located in the high seismic zones with earthquake proofed design features. Engineers and architects from government departments were trained for the purpose.[39]

In building earthquake-resistant structure, one debate often comes to the fore – whether to rebuild or retrofit the vulnerable structure. Studies with regard to schools have not yielded similar results. In America, while retro-fitting proved to be cost-effective in Costa Rica, El Salvador and Peru, the costs were higher compared to new building in Argentina, Colombia, Mexico and Venezuela.[40] Hence, our Government must be judicious in spending while retro-fitting the existing schools.

Another aspect of safe school buildings is the fact that they are often used as emergency shelters immediately after the disasters. Therefore, the United Nations Centre for Regional Development (UNCRD) Hyogo Office initiated School Earthquake Safety Initiative in 1999 and is of the view that such schools not only provide safe shelters but also spread the awareness about disaster-resilient technologies rooted in the community helping it become more sustainable. After the Gujarat earthquake, UNCRD Hyogo Office assisted the affected communities to build new disaster-resilient schools-cum-community centres and also provide trainings for local masons about earthquake-resistant technologies.[41]

The UN Convention of the Rights of the Child (CRC),[42] to which India is a party, requires the State Parties to ensure that the institutions, services and facilities responsible for the care and protection of children to conform to the safety standards by competent authorities and supervised by competent staff, both in number and suitability.[43] This makes conformity with the safety norms more relevant which would eventually afford better protection for the children at schools.

In cases of man-made disasters, there had been flagrant violation of the safety norms. Time and again, several commissions/committees as well as the courts have lamented on the laxity in conformity with the safety standards but the ground reality has remained unchanged. Justice Sampath Commission of Inquiry observed that inaccessible location, poor infrastructure and the violation of safety norms were the main reasons for the Kumbakonam school tragedy.[44] The Commission remarked: *"It was not an accident of fate, but an accident on account of utter disregard of rules for safety."* The report made no reservations to opine that the show was managed by the school authorities through *"defying the law at every step"* with the connivance of pliable officials. The government awarded *"conditional recognition"* to schools at regular intervals, stipulating the same conditions every time. While the conditions remained unfulfilled, the Government chose to ignore such non-compliance.[45] So much so, that the fire-fighters were forced to break the concreate structures to find their way to the school. Nevertheless, it turned out to be futile because in the meantime, the bodies were charred beyond recognition.[46]

Similar was the case with DAV Public School fire. In the aftermath of the disaster, while dealing with the liability of the Municipal Committee, Justice Garg Commission came to the conclusion that Rajiv Marriage Palace, where the disaster occurred, was constructed in complete violation of the sanctioned plans. No Completion Certificate was obtained by the owners and the building occupied without clearance from the Municipal Authorities. The owners of the Marriage Palace had never obtained No Objection Certificate from the Fire Officer nor made any arrangement for fire-fighting equipment and other such essential services before putting the premises to use.[47]

Perturbed by the Kumbakonam school fire tragedy, Avinash Mehrotra filed a writ petition before the Supreme Court praying to bring about safer school conditions across the country; the Court issued notice to the Union of India, State Governments and the Union Territories. The

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39 GoI and UNDP, *supra* note 7, at 8

40 UNISDR, *supra* note 2, at 112

41 UNCRD, *Reducing Vulnerability of School Children to Earthquakes*, 6 – 9 (2009).

42 G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (Nov. 20, 1989)

43 CRC art. 3, para. 3.

44 J. Venkatesan, *Kumbakonam Fire Tragedy: Notice Issued to Centre, State*, THE HINDU, (5 February, 2011), *available at*http://www.thehindu.com/news/national/tamilnadu/kumbakonam-fire-tragedy-notice-issued-to-centre-state/article1156921.ece (Last visited on May 10, 2018).

45 S. Viswanathan, *Schools in malls*, FRONTLINE, (20 October, 2006), *available at*http://www.frontlineonnet.com/fl2320/stories/20061020004903800.htm (Last visited on May 10, 2018).

46 G. Srinivasan, *supra* note 9

47 Dabwali Fire Tragedy Victims Association v. Union of India, (2010) I.L.R. 1 P&H 368, paras. 14 – 19 [*Dabwali Fire Tragedy case*]

Court appointed Mr. Colin Gonsalves, learned Senior Advocate as *Amicus Curiae*. He also suggested some guidelines which need to be followed by all schools in the country.[48] The findings were far from encouraging. The States admitted that many schools do not meet self-determined safety standards, let alone the more rigorous standards of the NBC. The Court was disturbed to notice that the affidavits filed by the States generally focus on plans for improvement, rather than schools' current conditions, because much work remain. Where States have provided detailed counts of schools and installed safety features, it emerges that thousands of schools even lack basic fire extinguishing equipment. Thousands more schools do not have adequate emergency plans or non-inflammable roofs. Unfortunately, most States failed to provide any quantitative data in their affidavits. Instead these States filed vague plans for future renovations and piecemeal schemes to improve schools safety. Many such plans were made with little technical advice, and few had any admitted force of law or barely any follow-up mechanism existed from the State Governments.[49]

The Court observed that despite best intentions and frequent agreements, those safety standards rarely bind builders in law or practice. Importantly, it noted that: *"Some building codes exist in law, but few states or municipalities have enacted a standard as rigorous as the National Building Code (NBC)"*.[50] Further, weak enforcement rendered the situation worse.[51] Hence, the Supreme Court issued directions to all public and private schools to be in conformity with the safety measures prescribed by the NBC 2005, e.g. governments to ensure that school buildings are fire-safe before granting affiliation, mandatory installation of fire extinguishers, necessary training to be imparted to staff and students by the schools, periodic, etc. evaluation.[52] The Court also directed the Education Secretaries of each State and Union Territories to file an affidavit of compliance with the aforementioned direction.[53]

There were two limitations regarding the ambit of the directions given by the Court: first, they were relating to safe school building; and secondly, they were with regard to fire accidents. Nevertheless, the judgment holds importance as school buildings are also used as temporary shelters during disasters, hence, safer the school building is, better it serves the community in distress.

A cursory look at the institutions unfortunately reveals that nothing has changed since the judgment was delivered. In 2010, in Nagpur, 40 students and six teaching staff of Chaitanya Primary School had a miraculous escape when a leaking liquefied petroleum gas (LPG) cylinder triggered fire. Courtesy to the swift action by local people, a tragedy was averted. However, neither fire extinguishers nor sandbags were found anywhere on the school campus. There were no fire-fighting facilities in the school.[54] It is pertinent to mention here that school buildings are also used as temporary shelters during other disasters, hence, safer the school building is, better it serve the community in distress.

6. Protection of the Right to Education in the aftermath of disasters

The right to education has been protected under international treaty law, in general, and various international humanitarian standards, in specific. Certain efforts have also being taken up by appropriate Governments in India for the restoration of education in the affected areas.

6.1 International Law Instruments

In the sphere of International Human Rights Law, the CRC is the principal treaty law, which is not only limited in protecting right to education under ordinary circumstances but also in post-disaster situations. Article 28 of the CRC obligates State Parties to ensure child's right to education including taking measures in encouraging regular attendance at schools and reducing of drop-out rates.[55] Article 6 recognizes that every child has the inherent right to life. As disasters pose serious threat to the lives of the children, hence, State Parties shall adopt appropriate disaster management measures ensuring survival and development of the child to the maximum extent possible.[56]

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48 Avinash Mehrotra case, para. 15

49 *Id.*, at paras.16 – 18

50 *Id.*, at para.18 (Emphasis added by the author)

51 *Id.*, at para.18

52 *Id.*,at para. 40

53 *Id.*,at para. 41

54 *See Major tragedy averted in school*, The Times of India(21March, 2010), *available at*http://articles.timesofindia.indiatimes.com/2010-03-21/nagpur/28143171_1_mid-day-meals-extinguishers-fire-safety-norms (Last visited on May 10, 2018).

55 CRC Art. 28, para. 1. State Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: . . . (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates

56 CRC, Art. 6, para. 1. States Parties recognize that every child has the inherent right to life. para. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

These provisions acquire more importance in the context of disasters which often interrupt children's right to education.

The IASCOperational Guidelines on Protection in Natural Disasters reiterate the importance of right to education. Accordingly, humanitarian interventions shall be aimed at ensuring return of children in safe learning environment at the earliest in the aftermath of disasters. School authorities shall be encouraged to relax formalities with regard to personal documentations and school uniforms at last temporarily. Most importantly, the Guidelines advocate for the occupation of the school buildings as the last resort and if it has to be done, then alternative classrooms, e.g. in tents, should be arranged to ensure continuity of education.[57]

Acknowledging the fact that school buildings are often used to accommodate affected families, the Sphere Standards recommends that alternative structures should be sought wherever possible to enable schooling to continue for children from the host and potentially also the displaced community.[58] It also adds that safe play areas should be made available for children, and access to schools and other educational facilities provided where possible.[59]

The UN Guiding Principles has stressed on ensuing right to education for all IDPs, especially free and compulsory at the primary level for the displaced children, with the State making special efforts ensuring full and equal participation of girls. Education should respect their cultural identity, language and religion.[60]

6.2 Initiativesof State of Tamil Nadu in post-Tsunami Scenario

In the aftermath of the 2004 Tsunami, the Government of Tamil Nadu (GoTN) issued several Government Orders (GOs) which in tune with the international legal standards mentioned here in above for the protection of the right, especially in the 13 affected districts of the State. In order to enable the students to continue their education in the aided and Government Schools, a GO[61] was issued asking the Tamil Nadu Text Book Society to supply text books for students free of cost. Added to this, Director of Social Welfare Department, Director of Primary Education, and the Director of School Education were asked to take necessary action for supply of free uniforms (two sets) to the affected boys and girls of all schools. Through another GO,[62] the Director of Government Examinations was permitted and ordered to issue duplicate certificates free of cost for the students who had lost their original certificates and made request to get them issued. The Government also took initiative in exempting the students from submitting their practical record notebooks and awarding the total marks of 20 to all the affected students. This GO was based on reports that the students' practical notebooks were washed away and there was shortage of time to prepare and submit them again as this would hinder their preparation of other subjects.[63] In another important GO, the Government decided to have separate Board Examinations for 10thand 12th Standard students studying in the affected schools located in the tsunami affected areas.[64] Moreover, after receiving several representations from the parents expressing their inability to pay the tuition fees resulting in discontinuation of their wards' studies, the Government undertook the responsibility of paying tuition fees, exempted students from paying the examination fees and directed the schools to comply with the same.[65]

Unfortunately, ground level implementation of many of those GOs, particularly one concerning school fees exemption was very unsatisfactory as the private schools insisted on the payment of fees stating that the reimbursement would be done only after they receive the money from the Government. Many schools charged exorbitant fees under heads other than tuition fees. Eventually, a PILwas filed before the Madras High Court

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57 *See* Brookings-Bern Project On Internal Displacement, *IASC Operational Guidelines On The Protection Of Persons In Situations Of Natural Disasters*(2011) [*IASCGuidelines*]

58 *See The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response* 213 (2004) [*Sphere Standards*].

59 *See id.*, at 217.

60 UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, principle 23, U.N. Doc. E/CN.4/1998/53/Add.2, (February 11, 1998) [*UN Guiding Principles]*.

61 G.O. No. 1, School Education Department,GoTN, (January 1, 2005).

62 G.O. No. 2, School Education Department,GoTN, (January 1, 2005).

63 G.O. No. 11, School Education (Higher Education 2) Department,GoTN, (January 17, 2005).

64 G.O. No. 10, School Education (V1) Department,GoTN, (February 2, 2005).

65 G.O. No. 33, Higher Education (G1) Department, GoTN, (February 2, 2005).

seeking to restrain educational institutions from collecting tuition fees and special fees from tsunami-hit students, the petitioner prayed for a direction to those institutions that had already collected the fees to refund them forthwith. Such an action would directly affect the life and education of students whose families had to build from the scratch. Collection of fee is clearly in violation of human rights as well as the spirit of the above-mentioned GO.[66] Replacement of textbooks and notebooks also did not reach all the beneficiaries and students without such materials were asked to leave the classrooms. While the NGOs intervened in many such matters but the desired outcome of such interventions was at different levels.[67]

7. Liability in cases of disasters in schools

Thus far it is quite evident that both the national and international legal regimes have imposed responsibility on the school authorities as well as the States to ensure the right to education. This part discusses both the civil and criminal liability of the authorities, particularly in man-made disasters.

7.1 Scope of Civil Liability

The scope of civil liability is analysed through the DAV Public School case. Following the disaster, a writ petition was filed by the Dabwali Fire Tragedy Victims Association before the Punjab and Haryana High Court whereby Justice T.P. Garg, a former Judge of High Court of Allahabad was appointed as a one man Commission for ascertaining the negligence of those connected with the incident and the amount of compensation payable to the victims or their next of kin.[68] In its eventual judgement in Dabwali Fire Tragedy case,[69] the High Court largely agreed with the findings of the Commission and held that no safety measures were taken by the School to prevent any untoward incident like fire or stampede in the course of the function; that when the entire Pandal was engulfed in fire, it was impossible for the children and the ladies to move out of a single exit gate provided for that purpose as the school authorities had not made any alternative arrangement for exit of visitors trapped inside the Pandal in case of emergency; and that no Fire Brigade or Ambulance or any other arrangement with regard to safety and security of the visitors especially ladies and children were made.[70]

The Court rightly held that the damage was foreseeable and the school had failed to exercise due care expected of a reasonable and prudent person in disregard of the safety of those who were invited to attend the function including students, parents and the staff. Therefore, the school was negligent in the discharge of its legal obligations.[71]

Thus, 14 years after the actual incident, in November 2009, the High Court delivered the aforementioned judgment where the DAV School along with the owners of the marriage hall were directed to pay the 55 per cent of the amount, the rest was divided equally among the State of Haryana, Haryana State Electricity Board and the Municipal Committee, Dabwali.[72] The Court approved the formulation of six categories of victims based on their age and economic condition of the families. It worked out a detailed scheme for calculating compensation to be paid along with 6 per cent interest from the date of filing of claim petitions before the Commission.[73] Besides ordering to pay compensation, the Court directed the State to treat the victims free of cost at State-run hospitals, or if required, at PGI, Chandigarh or AIIMS, New Delhi.[74]

Nevertheless, the actual healing touch was still a distant dream. While the State had paid its share, DAV challenged the decision; and in March 2010, the Supreme Court[75] directed them to deposit the first tranche of Rs. 10 crore as an interim amount to the executing court. Eventually, the Supreme Court upheld the decision of the High Court which compelled DAV to pay further Rs. 17 crore. In the maze of such judicial formalities only time can say as to when the final settlement would arrive.[76] The legal process

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66 *Schools collecting fees from tsunami-affected students*, The Hindu (1 September, 2005), *available at* http://www.hindu.com/2005/09/01/stories/2005090104190500.htm (Last visited on May 10, 2018)

67 TRRC, *Impact of Tsunami on Children*, 50 (2007).

68 Subhradipta Sarkar, *Ascertaining Civil Liability and Ensuring Victims' 'Right to Compensation' in Human Disasters: An Elusive Judicial Proposition*, Vol. 3(2) GNLU JOURNAL OF LAW, DEVELOPMENT&POLITICS 113 – 14 (Oct. 2013)

69 *Dabwali Fire Tragedy case*, (2010) I.L.R. 1 P&H 368

70 *Id.*, at para. 78

71 *Id.*, at para. 79 – 81

72 *Id.*, at para. 100

73 *Id.*, at para. 220

74 *Id.*, at para. 222

75 B. Bhadra Sinha, *Dabwali fire: SC tells DAV to pay victims Rs 10 crore*, Hindustan Times (16 March, 2010), *available at* http://www.hindustantimes.com/India-news/NewDelhi/Dabwali-fire-SC-tells-DAV-to-pay-victims-Rs-10-crore/Article1-519471.aspx (Last visited on May 10, 2018)

76 Sanjeev Verma, *18 yrs on, Dabwali fire victims struggle for full compensation*, Hindustan Times (18 July, 2013), *available at* http://www.hindustantimes.com/punjab/chandigarh/18-yrs-on-dabwali-fire-victims-struggle-for-full-compensation/article1-1094393.aspx (Last visited on May 10, 2018)

has been unusually lengthy and it is unsure whether such legal remedies can actually provide succour to the victims or their families.

7.2 Scope of Criminal Liability

As far as criminal liability in school disaster cases are concerned, after a decade-long trial, an encouraging outcome was the judgment of a trial court in Thanjavur district, Tamil Nadu which held the founder of the Sri Krishna Middle School in Kumbakonam guilty of various criminal offences under the Indian Penal Code (IPC) including second part of Section 304 (hereinafter304-II),[77] Section 337 (causing hurt by act of endangering life or personal safety) and Section 338 (causing grievous hurt) and sentenced him to life imprisonment and fine of Rs. 51.65 lakh. Besides, nine others including correspondent of the school, the headmistress, four employees of the School Education Department, the noon meal organiser and the cook were sentenced to five years' rigorous imprisonment and ordered to pay a total fine of Rs.3.75 lakh. The chartered engineer who certified the stability of the school building was also awarded two years' rigorous imprisonment.[78] Appeal against the judgment is lying before the Madurai Bench of the Madras High Court. The author is sceptical about the final outcome of this case, primarily due to dubious precedent set by the Supreme Court in the Uphaar judgment.

7.3 Impact of the Uphaar Cinema fire case

Although not a school disaster case, the infamous 1997 Uphaar cinema inferno in New Delhi deserves special mention here with regard to criminal liability in disaster cases. The disaster killed 59 people killed and left 103 were seriously injured in the subsequent stampede gave rise to multiple law suits – both civil and criminal.[79] The criminal case in the Uphaar cinema is an apt example of the rich and powerful hijacking the judicial process. The criminal proceeding became a farce when trial did not take place after 4½ years of the incident and investigation went on a snail pace. The Association of Victims of Uphaar Tragedy (AVUT) had to approach the Delhi High Court with a plea of speedy trial.[80]

In 2007, a trial court in Delhi found 12 people, including the two Ansal brothers guilty.[81] The court held the Ansal brothers responsible for gross violation of the Cinematographic Rules and the sanction building plan and also the building bye-laws. They were at the helm of the affairs at Uphaar and nothing would have taken place without their knowledge: *"Such reckless violations are certainly so gross and criminal in nature, that they endanger human life."*[82]

The court was of the opinion that the occurrence of the incident started from the transformer and became the direct and proximate cause of death of the patrons sitting in the balcony. In spite of their knowledge that the installation of the transformer was illegal, they allowed the same to obtain electricity connection in the cinema.[83] They were warned time and again over a period of years about the shortcomings from the structural and fire safety point of view. Unfortunately, they either ignored them or obtained the NOCs in collusion with the local bodies.[84] The Ansal brothers were convicted for various charges including, causing death by negligent act under Section 304-A of the Indian Penal Code (IPC),[85] and thereby awarding the maximum punishment of two years' rigorous imprisonment. They were also fined Rs.1,000 each for violating Section 14 of the Cinematography Act.[86] So were the Fire and MCD officials, supposedly responsible in adhering to the safety standards, connived with the hall owners and management permitting laxity of the standards. The Court sadly noted that: *"[P]ermits were*

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77 Sec. 304, The Indian Penal Code, 1860, Punishment for culpable homicide not amounting to murder. – [Part II] Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

78 S. Dorairaj, *Life term for school founder*, FRONTLINE(22 August, 2014), *available at*http://www.frontline.in/the-nation/life-term-for-school-founder/article6283309.ece (Last visited on May 10, 2018)

79 Subhradipta Sarkar, *Justice on Flames: Legal Remedy in Cases of Fire Disasters in India*, Vol. 3(1) VBU JOURNAL OF LAW& GOVERNANCE 93 – 122 (January – June, 2016)

80 AVUT v. Government of NCT of Delhi, 98 (2002) D.L.T. 175

81 State v. SushilAnsal, S.C. No. 13/07

82 *Id.*, at 499

83 *Id.*, at 553 – 54

84 *Id.*, at 507

85 Sec. 304-A, The Indian Penal Code, 1860, 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.

86 State v. Sushil Ansal, S.C. No. 13/07, Decided on November 23, 2007, (Mamta Sehgal J.) (Additional Session Court, New Delhi), 607 – 08

issued mechanically and perhaps for a price. . . The betrayal of the trust of the citizens and the civil society reposed in the administration", eventually led to such unavoidable deaths.[87]

In December 2008, while disposing of the appeal, the Delhi High Court termed the case to be of "unique nature" considering large scale of fatalities coupled with ignoring of the safety standards by all accused. The court went on to observe that in the age of rapid development "duty of care" is of immense importance in the management of such premises.[88]

Yet the court refrained from taking any decisive step which would have acted as a deterrent for such future disasters. On technical grounds, the Court rejected the revision petition filed on behalf of the victims for alteration of charges from Section 304-A to Section 304-II.[89] Though the Court upheld the order of the trial court, while sentencing the Ansal brothers, it took into consideration the mitigating factors e.g. *"advanced age with no previous criminal record and that they are educated, respectable members of the society"* and reduced their punishment from two to one year.[90]

The Court's leniency also showered on other accused as they were either acquitted or their conviction under Section 304-II was converted to Section 304-A of the IPC.[91] It acknowledged *"glaring lapses"* on the part of the Licensing Department, MCD, DVB and Electrical Inspectors' Office. It recognized the enormity of the incident and anguish of the survivors and relatives; nevertheless it expressed its helplessness of being saddled by the duty to ensure that the accused are convicted only on the basis of the proof beyond reasonable doubt – the only standard ordained by law.[92] In the following January, the Supreme Court granted bail to the Ansal brothers, in whose premises one of the worst fire disasters in recent Indian history took place.[93]

Subsequently, in 2014, a Division Bench of the Supreme Court delivered a split judgment. While Justice T.S. Thakur concurred with the reduction of the sentence by the High Court, Justice GyanSudhaMisra remained unconvinced and enhanced the punishment to the maximum of 2 years and held that the enhancement could be substituted with a fine of Rs. 50 crore to be paid by each brother and which would be utilized in developing a trauma care centre.[94]

Eventually in 2015, the matter was referred to a 3-Judge Bench. It provided further relaxation with the fine amount being whimsically reduced to Rs. 30 crore each; and in case of payment, the punishment might only be limited to the period of incarceration already undergone.[95] Thus, the Court legitimized the trading-off of prison sentence with money.

8. Conclusion

It may be concluded that school safety has not been a top priority of the law and policy makers in our country till date. Despite the fact that school children have paid through their precious lives, law and policy makers have remained largely indifferent to the phenomenon. If such a state of affairs continues, then the future is bleak and problems are aplenty. In search of an appropriate remedy, a few suggestions are offered:

1. Considering our obligations under the CRC and pursuant to the AvinashMehrotra judgment of the Supreme Court, it may be held that right to education in an unsafe environment render the Fundamental Right meaningless. Therefore, the State must ensure that access to education continues unabated in a safe environment.
2. The Avinash Mehrotra judgment has also emphasized on compliance of the school buildings according to the NBC 2005. There should not be any relaxation in terms of compliance as far as school buildings are concerned. Regarding the older schools, a cost-benefit analysis of retrofitting the school building is required and proper action must follow.
3. The State may coordinate with NGOs to monitor the state of affairs in the schools. In such a case, the NGOs with necessary expertise can involve themselves and coordinate with the Fire and Rescue

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87 *Id.*, at 606 – 07

88 Sushil Ansal v. State of Delhi through Central Bureau of Investigation (CBI), Cri. Appeal. No. 794 of 2007, Decided on December 19, 2008 (S. RavindraBhat J.) (High Court of Delhi), para. 16.5

89 AVUT v. NCT of Delhi, Cri. Revision No. 17 of 2008, Decided on December 19, 2008 (S. RavindraBhat J.) (High Court of Delhi).

90 Sushil Ansal v. State of Delhi through CBI, paras. 16.6 – 16.7

91 *Id.*, at paras. 16.8 – 16.11

92 *Id.*, at para. 16.1

93 *Apex court grants bail to Ansals*, The Hindu (31 January, 2009), *available at* http://www.hindu.com/2009/01/31/stories/2009013159841200.htm (Last visited on May 10, 2018)

94 Sushil Ansal v. State through CBI, (2014) 6 S.C.C. 173

95 Sushil Ansal v. State, 2015(10) S.C.A.L.E. 8

Services or any such government agencies including the Disaster Management Authorities established under the DM Act, to make the schools better prepared for disasters.

4. The move of CBSE to include disaster management in the school curriculum is commendable. However, the same should be done by the State Education Boards too. Joint collaboration between the Board and the Disaster Management authorities may bring out a practical-oriented syllabus for the children.
5. Schools should be under regular scrutiny to ensure that they meet the disaster management standards. Surprise checks may be carried out by the Disaster Management authorities. Reports of such checks with appropriate recommendations shall be sent to the Education Department for further action, if required.
6. The School Development Plan, approved by the School Management Committee as envisaged under the RTE Act, shall have the component of disaster management imbibed in it. Such Plans must be submitted and approved by the Disaster Management authorities.
7. School safety programs like safety drills shall be mandatorily carried out in schools periodically. Records of such activities shall be submitted to the appropriate authorities.
8. Recognition of schools is a very serious business. Relaxation from fulfilling the prescribed standards may be allowed only in exceptional cases. The RTE Act confers wide amplitude of powers in the hands of the State authorities regarding the recognition of a school after complying with certain 'norms and standards' as specified under the Schedule of the Act. However, such 'norms and standards' do not include any disaster-resilient features. Hence, an amendment to the Schedule to include safe buildings with certain emergency equipment like fire extinguisher in place would be a welcome effort.
9. In case disaster strikes, access to education shall be one of the top priorities of the Government. We must put an end to the practice of requisitioning schools for emergency shelters; rather it should be the last option. The Government shall make necessary concession to the affected students to continue their education. The efforts taken by the Tamil Nadu government in the post-tsunami scenario as well as the norms led down under the IASC Guidelines and the Sphere Standards may well serve as a beacon light.
10. It has been witnessed that the man-made disasters generally occurred due to the negligence of school authorities or dereliction of the official duty by the public servants or due to corruption. The trial court judgment in the Kumbakonam School Fire case has been a logical conclusion. Despite the Uphaarcase precedent, now the challenge is before the higher judiciary to find ingenious way to work around the same and hand down exemplary punishments to the culprits.
11. While the DAV School case may be considered as a desirable judicial precedent with regard to civil liability, it is time to move beyond the compensatory jurisprudence towards reparation of the victims. Therefore, a victim-centric judgment would also guarantee non-compensatory relief in form of restitution, rehabilitation, satisfaction, and guarantees of non-repetition.

In case these steps are considered, they may actually assist in going a long way in ensuring the children's right to education in a safe environment.

Post of Parliamentary secretaries and concept of Office of Profit: Bamboozlement of Indian democracy by political parties

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ABSTRACT

In India it is customary to appoint Parliamentary secretaries. The reason is twofold i.e. to assist the minister in charge of a particular department of a state or to oblige and endow an MLA. Article 164(1-A) was amended by Constitution (91st Amendment) of 2003 which provides capping on the size of council of ministers to 15% of total number of members of legislative body. Because every MLA cannot be a minister, conferring the post of Parliamentary secretary creates a win-win situation for every MLA of ruling party. On the contrary, under Article 191, holder of Office of profit cannot be a member of any legislative assembly and the controversyconflagrated these days because of the disqualification of 20 MLAs belonging to the ruling AamAadmi Party in Delhi for holding office of profit as they were appointed Parliamentary secretaries by the Chief Minister of Delhi.This paper is an attempt to check the constitutionality of the post of Parliamentary secretary and its link with Office of profit so as to fInd the rationality of President of India's order to disqualify 20 MLAs in Delhi.

Keywords: Parliamentary secretary, Office of profit, Democracy, Disqualification, MLA

1. Introduction

Concept of appointing Parliamentary secretaries is not new to the Parliamentary system of any country. Canada, United Kingdom, Australia, Ireland, Malaysia are few countries to name who have such posts. The inception of the post of Parliamentary secretary can be traced from Westminster system of government prevalent in United Kingdom. Popularly known as by it's another name of Assistant minister, post holder shoulders the responsibility to assist Cabinet minister in his work.

In India, appointment of MLAs on the post of Parliamentary secretary was directly related to The Constitution(Ninety First Amendment) Act 2003 which provides that the number of ministers, including the Chief Minister, in the Council of Minister in a State shall not exceed fifteen per cent of the total number of the Legislative Assembly of that State[1].

Bypassing this mandate of Indian Constitution, all the ruling parties adopted the strategy to appoint its MLAs on the position of Parliamentary Secretary. On the other hand Article 191 which provides for the disqualification for the membership of Legislative Council of a state under Clause 1(a) makes it very clear that if any person is holding office of profit under government of India or under the government of any state, he cannot be a member of any Legislative Assembly.

However, the term office of profit is nowhere defined under Indian Constitution, making us dependent on judicial approach in this regard. Power to disqualify any MLA from the membership lies with Governor (or President in case of Delhi Legislative Assembly) but he must act on the advice of Election Commission in this regard. On January 2018,on the recommendation of Election Commission, President of India disqualified 20 MLAs from the membership of Delhi Legislative Assembly.

2. Office of Profit

As the concept is not defined under Indian Constitution, Supreme Court of India tried to explain the concept as well as the need to debar holder of any office of profit under government. In *Mahadeo v. Shantibhai*[2] court explained the term office which embraces duties, position, tenure, emoluments as its basic element. Decision of court in Mahadeo's case was based on the observations made by Lord Wright in *Mcmillan v. Guest*[3] in which he summed up the definition of office as a position to which certain duties are attached which shall be public in nature.

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[1] *Article 164(1A),THE CONSTITUTION OF INDIA, 1950*

[2] *Mahadeo v. Shantibhai (1969)2 SCR 422.*

[3] *Mcmillan v. Guest (1942) AC 561.*

On the major question that whether office shall be in existence independently from its holder Supreme Court thoroughly agitated its mind in *Kanta Kathuria v. Manak Chand Surana*[4] and found that if any person is conferred with some duties and those duties are not attached to a particular office then he is not a holder of any office. Office means a position which needs a person to hold it and can be transferred from one person to another it cannot be attached to a particular personality.

Any office to become office of profit must yield profit for its holder. Profit here not only means in profit in term of money, it may be in any form or material benefit[5] . But how much the holder of office of profit is getting from a particular office may be an essential question affecting the nature of the office.

2.1 Non receipt of profit from Office of profit

How much an office is producing profit for its holder may be a question of concern, but if the holder of office of profit is not receiving any profit connected to the office can he be still called holder of office of profit? Supreme Court while widening the scope of office of profit in *Jaya Bachchan v. Union of India*[6] held that if office is yielding the profit and the same is receivable by the holder then office does not cease to be an office of profit merely on the ground that holder intentionally does not receive any profit from the office.

In this case Mrs. Jaya Bachchan, while she was a member of RajyaSabha, accepted the appointment of Chairperson of Uttar Pradesh Film Development Council by O.M. no. 14/1/46/87-C dated 22.03.1991,which also conferred a rank of Cabinet minister on Mrs. Jaya Bachchan. Various profits were also conferred on Mrs. Bachchan like daily allowance, monthly honorarium, staff car, telephone, office, residence, personal secretary, personal attendant, two class IV employees, body guard, night escort, medical treatment, free accommodation in any government circuit house and hospitality. President of India on the advice of Election Commission cancelled her membership of RajyaSabha on the ground that she was holding office of profit. To this order Mrs. Bachchan filed a writ petition under Article 32 of Indian Constitution before the Hon'ble Supreme Court of India, alleging that the post of Chairperson is decorative only and she never accepted any honorarium and other facility associated with the said post. But Supreme Court dismissed her plea and found that she is holding office of profit and it does not affect her disqualification merely on the ground that she is not fetching any kind of profit from the said office.

But compensatory allowances given to the holder of any office so as to make him capable to indemnify himself or to meet out his pocket expenses does not turn the office to be office of profit for its holder[7].

2.2 Office of Profit under the Government

To disqualify any legislator on the ground of holding of office of profit, the same should be under the Government of India or Government of any state. If a person is holding an office of profit which is not under the government, he may not be disqualified to hold the membership of any legislation body. So it is very necessary to ascertain that the office of profit in question must be an office of profit under the government.

A test was propounded by the Supreme Court of India in this regard as follows:[8]

1. Whether Government makes appointment to the office?
2. Whether Government has a right to dismiss or remove the holder from the office?
3. Whether Government pays remuneration?
4. Whether the holder is performing functions for Government?
5. Does the Government exercise any control over the performance of those functions?

Presence of all the elements is not necessary to make any office an office of profit. If any one element is present, the person can be held holder of office of profit.

2.3 Reason to disqualify holder of Office of profit

In *Ashok Kumar Bhattacharya v. Ajoy Biswas*[9] Supreme Court tried to uplift the veil from the intention of framers of Constitution that why a person holding office of profit should not be allowed to be a member of legislative assembly. Court emphasised on the independence of an MLA to perform his duties. Chances are there that a person holding office of profit under any government may find conflict between his duties as MLA and as holder of the said office. Pecuniary gains from the government as a holder of

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4 *Kanta Kathuria v. Manak Chand Surana(1969) 3 SCC 268.*

5 *Shivamurthy Swami Inamdar v. Agadi Sanganna Andanappa (1971) 3 SCC 870.*

6 *Jaya Bachchan v. Union of India (2006) 5 SCC 266.*

7 *Umarao Singh Darbara Singh (1961)1 SCR 421.*

8 *Supra note 5.*

9 *Ashok kumar Bhattacharya v. Ajoy Biswas(1985) 1 SCC 151.*

office of profit may render him incapable to perform his duties as a legislator independently.

2.4 Position of Minister *vis-a-vis* office of profit

Parliamentary secretaries are appointed to assist the Ministers so they enjoy relatively same status in terms of security, remuneration, facilities etc. Then the question arises why a minister is not considered to hold an office of profit and Parliamentary secretaries are considered to hold the office of profit as in the case of recent sacking of Aam Admi Party MLAs by President of India? The answer to this question lies in Parliament (Prevention of Disqualification) Act 1959 which exempts holders of certain offices of profit to be disqualified from the membership of legislative body. Though that Act deals with disqualifications of Member of Parliament but can be applied to Member of Legislative Assembly also. Any office held by a Minister, Minister of State or Deputy Minister for Union or for any State is exempted from the disqualification on the ground of holding of office of profit. So status, duties of Minister and Parliamentary secretariesmay seem on equal footing to one but Parliamentary secretariesare not exempted under the said Act.

3. Post of Parliamentary secretaries in India

India is a country where many political parties exist, at centre as well as at regional level. And Indian democracy has witnessed various occasions in which no single political party gets majority, which gives birth to coalition governments at union as well as at state level. In this kind of setup, where to stabilize the government it is necessary to make every MLA or MP happy, hoist to be minister by every MLA or MP is a normal thing. To curb this problem of heavy Council of Minister in 2003, 91st amendment was introduced which capped the size of a Council of minister to 15% of the total number of membership of the legislative body[10]. This amendment gave birth to the post of Parliamentary Secretary. Creation of this post paved a way for political parties to bypass Indian Constitution.

This Amendment also produced other problems for states which hadfewer seats in their Legislative Assembly; like in the state of Sikkim the size of the Legislative Assembly is just 32, which means that all the departments of state must be shared by only 5 Ministers which also increases their burden. To help them out, perhaps, creation of the post of Parliamentary Secretary was the only solution. It is also not possible that Ministers are specialized to handle the problems of every department. A Minister having charge of so many departments must act for textile industry on one day and for jails on other.

It was not only Delhi that had 20 Parliamentary Secretaries; this practice is adopted in other states as well. The post of Parliamentary Secretaryhas been challenged before Indian judicial system on various occasions in past as well, as shown below:

a) Karnataka: Chief Minister Mr. Siddaramaiah in 2015 appointed 10 Parliamentary secretariesto assist the ministers in various departments and also conferred the status of minister on them making them entitled to get salary equivalent to Ministers.[11] This move was countered by the government by alleging that it will increase the efficiency of concerned Minister and the work will get boost.

b) Rajasthan: At present Rajasthan is having 10 Parliamentary secretaries in the Vasundhara Raje led Government. And all the Parliamentary secretaries are entitled to salaries and allowances equivalent to the Ministers in Rajasthan under The Rajasthan Ministers (2nd Amendment) Act 2017. To protect their Parliamentary secretaries from disqualification, Rajasthan Government passed Rajasthan Legislative Assembly Members(Prevention of Disqualification) Act 2017. And Government stated and justified the appointments on the ground of providing assistance to Minister-in-Charge.

c) West Bengal: At present West Bengal does not have any Parliamentary Secretary, because the appointment of 26 Parliamentary secretaries was struck down by Calcutta High Court in 2015. These 26 Parliamentary secretaries were appointed by Mamta Banerjee led TMC in 2013 and 2014 by introducing a Bill named West Bengal Parliamentary secretaries(Appointment, Salaries, Allowances and Miscellaneous Provisions) Bill 2012. Considering this Bill as unconstitutional and against the spirit of Article 164(1-A), Calcutta High Court struck down the same.[12]

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[10] *Article 164(1A),Supranote,1.*

[11] *Special Correspondent, "CM appoints 10 Parliamentary Secretaries", The Hindu, Bengaluru, (06 November 2015),available athttp://www.thehindu.com/news/cities/bangalore/cm-appoints-10-parliamentary-secretaries/article7848433.ece# (Last visited on March 30, 2018).*

[12] *Vishak Bhattacharya v.The State of West Bengal and others W.P. 7326(W) of 2013.*

d) Jharkhand: As of now, Jharkhand does not have any Parliamentary Secretary. But in 2005, the then ruling party BJP having Mr. Arjun Munda as Chief Minister appointed 4 Parliamentary Secretaries. A situation arose when these four MLAs, who failed to secure Ministers' berths for themselves, raised their voice against the government as rebels, but rules were not framed to give them salary on time. Thus they themselves resigned from the post of Parliamentary Secretary.

e) Punjab: Right now there are no Parliamentary secretaries in the state of Punjab where recently Captain Amarinder Singh took charge as Chief Minister of Congress party. But concept of Parliamentary secretaries is not new to the state of Punjab. The previous Akali Dal-BhartiyaJanta Party government which ruled for two consecutive terms had twenty five Chief Parliamentary secretaries with the status of Minister.

f) Puducherry: Mr. K. Lakshminarayanan was appointed as Parliamentary Secretary and is serving on the same post.[13] Chief Minister defended his appointment on the ground that he is only getting compensatory allowance apart from salary to which he is entitled as a MLA. Puducherry is also having Puducherry Members of the Legislative Assembly (Prevention of Disqualification) Act 1994 to protect the post of Parliamentary Secretary from the clutches of Indian Constitution.

g) Tamil Nadu: Right now Tamil Nadu does not have any Parliamentary Secretary and it is so from last 40 years approximately. In 1978, nine Parliamentary secretaries were appointed by MG Ramachandaran, the then Chief minister of the state.

h) Haryana: There are no Parliamentary secretaries in the state of Haryana, after the orders of Punjab and Haryana High Court in 2014 in which four MLAs appointed as Chief Parliamentary secretaries were made to resign from the post of Chief Parliamentary Secretaries. Though it was contended by the BJP led government that these posts have been created to help the Ministers and to lower down the burden on them but Punjab and Haryana High Court ruled out this contention and Haryana Government decided not to appeal against this decision to Supreme Court.[14]

I) Gujarat: Concept of Parliamentary secretarieswas introduced in 1960 when the state of Gujarat was formed. Mr. Vijay Rupani, who is now Chief Minister of Gujarat, was also on the same position in previous government, and he has appointed eleven Parliamentary Secretaries.

j) Telangana: Telanganadoes not have any post of Parliamentary secretaries as the appointments made by Telangana government in 2014,appointing six MLAs on the post of Parliamentary secretaries, were challenged before Andhra Pradesh and Telangana High Court and the order appointing Parliamentary secretaries was held unconstitutional in 2015.

k) Himachal Pradesh:Himachal has just faced elections a couple of months ago and does not have any Parliamentary Secretary. But previous government appointed nine Chief Parliamentary secretaries to assist and aid the Ministers of various departments.

l) Uttarakhand: BJP led government in Uttarakhand does not have any Parliamentary secretaries at present in the government. But previous Congress government appointed twelve of its MLAs as Parliamentary Secretaries. The appointments were challenged by BJP leader Mr. Prakash Pant before High Court of Uttarakhand, but meanwhile elections took place replacing the Congress government with BJP.

m) Arunachal Pradesh: The highest number of Parliamentary secretaries in India is in Arunachal Pradesh. This state, where BJP is in rule, has 24 Parliamentary Secretaries. They are conferred with the status equivalent to the Ministers. To protect the post, it was contended by the present government that Parliamentary secretaries are not getting any extra salary or perks apart from their entitlement as MLA.

n) Nagaland: After Arunachal Pradesh, Nagaland is on second position in having highest number of Parliamentary Secretaries. Initially there were 26 Parliamentary secretaries which are now reduced to 16.

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[13] *Press Trust of India, Lakshminarayanan is Parliamentary Secretary to CM, Business Standard, Puducherry (04 January 2017), available at https://www.business-standard.com/article/pti-stories/lakshminarayanan-is-parliamentary-secretary-to-cm-117010400526_1.html (Last visited on February 03, 2018).*

[14] *Pawan Sharma, Four Haryana Chief Parliamentary Secretaries resign, Hindustan Times,(18 July 2017), available at https://www.hindustantimes.com/india-news/4-haryana-chief-parliamentary-secretaries-resign/story-2A0lVbe2T9l6FhAmG0d2GN.html (Last visited on February 04, 2018).*

o) Meghalaya: Chief Minister MukulSangma has appointed 17 Parliamentary secretaries in his government and confered the status of Minister on them under Meghalaya Parliamentary secretaries (Appointment, Salaries, Allowances, and Miscellaneous Provisions) Act 2005. The Act was challenged before Meghalaya High Court and was considered unconstitutional by Meghalaya High Court on 09 November 2017, after which all the Parliamentary secretaries resigned from thier position.[15]

p) Mizoram: The state had seven Parliamentary secretaries but all of them resigned lateron.

q) Manipur:Twelve Parliamentary secretaries were appointed in Manipur under the BJP government. But after the decision of Supreme Court in 2017, Congress raised a dispute about the appointment of Parliamentary Secretaries.[16] Later on, all resigned from their posts.

Apart from above mentioned states Assam, Maharashtra, Odisha, Jammu and Kashmir, Andhra Pradesh, Uttar Pradesh, Bihar, Tripura and Kerala do not have Parliamentary Secretaries.

4. Conclusion

Article 239-AA[17] provides that there shall be a Council of Minister consisting of not more than 10% of the total number of members of Legislative Assembly of Delhi (National Capital Territory). Appointment of 20 Parliamentary secretaries by the Chief Minister of Delhi Mr. ArvindKejriwal was challenged before Election Commission. The contention of AamAdami Party that no Parliamentary secretary is entitled to extra salary or perks so holding this position is not equivalent to the holding of office of profit.

But as in the landmark case of Jaya Bachchan[18] Supreme Court had held that the five point test laid down in Shivamurthy Swami Inamdar case[19] all points need not to exist together. If any point is present the office will be assumed to be office of profit.

Removing 20 MLAs from legislative assembly in Delhi is the first example of its kind. As discussed above, on various occasions judiciary has struck down the appointments of Parliamentary secretaries but it is a rarest case in which President used his power and remover 20 MLAs on the advice of Election Commission.

To sum up, the order of President of India is not unconstitutional as he acted on the advice of Election Commission as is prescribed under Indian Constitution. Perhaps Constitution's 91st Amendment was to create a checking mechanism on political parties and they found a better way to bypass the mandate of Constitution by creating the post of Parliamentary Secretary.

It is also true that Minister may find it difficult to discharge his duties while holding so many departments at a particular time but creation of the post of Parliamentary Secretary will not ease them. Creating strong bureaucracy and removing their scarcity is the need of today's democracy rather than looking for excuses to bypass Indian Constitution to make MLAs happy.

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[15] *TNN, 17 Meghalaya Parliamentary Secretaries Resign, Times of India, (10 November 2017), available at, https://timesofindia.indiatimes.com/city/shillong/17-meghalaya-parliamentary-secretaries-resign/articleshow/61588283.cms (Last visited on February 04, 2018).*

[16] *TNN,Manipur Cong: Appointment of Parliamentary Secretaries illegal, Times of India, (26 October 2017) available at,https://timesofindia.indiatimes.com/city/imphal/manipur-cong-appointment-of-parliament-secretaries-illegal/articleshow/61233558.cms(Last visited on February 07, 2018).*

[17] *Inserted by the Constitution (69th Amendment) Act 1991 wef 01.02.1992.*

[18] *Jaya Bachchan v. Union of India (2006) 5 SCC 266.*

[19] *Supra note 5.*

Freedom of Speech & Expression in Social Networking: An Analysis with Special Reference to Hate Speech

Dr. Gagandeep Kaur*

ABSTRACT

The term 'Hate Speech' means 'extremist speech' that reflects a sense of anger, frustration and disaffection against anything on the planet. In the lap of Information and Communication Technology (ICT),the internet has become the nervous system of the present 'Digital Society'.However, the anonymity, immediacy, borderless and global nature of the internet has also made it an ideal tool for extremists and hatemongers to promote hate. The internet serves as the 'Sophisticated Frontier' for spreading malice as trillions can be accessed through an inexpensive and unencumbered social network. This 'social networking' platform has enabled previously diverse and fragmented groups to connect, unite and to create a sense of engendered collective identity. Online Hate is a 'Virus' whose infection spreads much as a disease spreads through a vulnerable population. The virus of hate online does not kill directly, but its effects can be lethal. Hate speech in cyberspace is a sub-set of anti-social behaviour that has given way to increase in certain type of criminal behaviour like identity theft, blackmailing, financial frauds, cyber stalking and several pranks. These activities have weakened the social bonds and eroded thequality of life. The Indian Constitution recognizes 'Freedom of Speech and Expression' as one of the most cherished 'Fundamental Right' with certain exceptions. However, most of the hate speeches on the internet go unreported as no one files a complaint against such content available on social media. This article is written with an objective to highlight three matters: emerging virus of 'Viral Hate' on the Social Networking sites, Indian legislation for regulation of hate speeches in cyberspace, and landmark decisions of Supreme Court on balancing freedom of speech and expression on the Internet.

Keywords: Hate Speech, Cyberspace, Freedom of Speech and Expression, The IT Act, 2000 (as amended in 2008), Legislation

1. Introduction

Human being is one of the super-most creations of God on this cosmos who is blessed with the five senses of look (eyes), hear (ears), taste (tongue), touch (skin) and smell (nose). The magic of words and the power of speech is beautifully depicted by Novalis as:[1]

> "All that is visible, clings to the invisible,
> The audible to the inaudible,
> The tangible to the intangible;
> Perhaps the thinkable to the unthinkable."

Words or Speech are seals of the mind – of infinite experiences. The speech itself has no content besides for what it brings out from the mind or the heart.

The roots of fundamental right to Freedom of Speech and Expression in India may be traced to basic jurisprudential philosophies namely: 'On Liberty' by John Stuart Mill,[2] 'Liberal Thoughts' by Ronald Dworkin, 'Liberal Society and Theory of Justice' by John Rawls, and 'Positivism and Free Speech' by Justice Oliver Wendell Holmes. These philosophers have made the 'Free Speech' as one of the Constitutional guarantees for liberal democracy in Universal Declaration of Human Rights (1948), European Convention on Human Rights and Fundamental Freedoms (1950), International Convention on Human Rights; and International Covenant on Civil and Political Liberties (1966).

One of the oldest and most widely accepted theories that justify protection of Free Speech relies on the role of speech in the 'Search for Truth'. The 'Truth Theory' argues that only by allowing freedom of speech, and the resulting clash of competing ideas, human beings will find the truth. It is the effort to reconcile new ideas with old assumptions that leads the listener to a clearer and more accurate perception of the truth.[3] Therefore, in India, Article 19(2) of the Constitution guarantees freedom of speech and expression to all citizens of India. This Article is subjected to certain restrictions, namely; (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order, (v) decency or morality or in

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[1] Graham McGregor and R. S. White (eds.), RECEPTION AND RESPONSE: HEARER CREATIVITY AND THE ANALYSIS OF SPOKEN AND WRITTEN TEXTS, 89 (Routledge, 2015).

[2] John S. Mill, ON LIBERTY, (Longman, Roberts & Green, 4thEdn., 1869 Originally published in 1859).

[3] Susan H. Williams, Feminist Jurisprudence and Free Speech Theory, Vol. 68 TULTANE LAW REVIEW 1563-1564(1993-1994).

relation to contempt of court, and (vi) defamation or incitement to an offence.[4]

2. Hate Speech: Definition, Nature and Scope

Hate speech is an extensive expression that continues largely to be applied in everyday conversation as a generic term in which people may be plainly venting their resentment against authorities. Hate speech has disrupted the balance between freedom of expression and respect for dignity.[5] Internet intermediaries that mediate online communication such as Facebook, Twitter and Google have advanced their own definitions of hate speech that bind users to a set of rules and allow companies to restrict certain forms of expression. National bodies have not provided any adequate definition. Presently, the expression 'Hate Speech' is defined as follows:

Black's Law Dictionary, 9th edn. defines the expression 'hate speech' as under: "Hate speech is speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence."

Merriam Webster defines the expression 'hate speech' as under:"Speech that is intended to insult, offend, or intimidate a person because of some trait (as race, religion, sexual orientation, national origin, or disability)."[6]

In an attempt to reconstruct the legal concept(s) hate speech from the occurrences and meanings of various linked or associated concept –terms that appear in the relevant bodies of law and legal practices are:

> *"Terms such as 'group defamation', 'incitement to hatred', 'the circulation of ideas based on inferiority', 'racist propaganda', 'speech based on xenophobia, homophobia, Islamophobia, and anti-Semitism', 'group vilification', 'violation of dignity', 'discriminatory harassment', 'racist fighting words', 'Holocaust denial', and so ons."*[7]

In the case of Ramesh v. Union of India the Supreme Court has observed that:

> *"The effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view."*

Hate speech online is situated at the intersection of manifold strain: it is the utterance of conflicts between different groups within and across societies; it is a vivid instance of how technologies with a transformative influential such as the internet fetch with them both opportunities and defiance. It denotes complex balancing between fundamental rights of speech and expression and defences of human decorum.[9]

Hate Speech is speech or expression that is capable of instilling or inciting hatred of or prejudice towards, a person or group of people on a specified ground including race, nationality, ethnicity, country of origin, sexuality, gender identity, ethno-religious identity and religion. The most commonly cited problem posed by hate speech laws is their apparent inconsistency with free speech principles.[10] Hate speech enacts hatred, not just a psychological dislike for another human being but a manifestation of prejudice, systematic and institutionalized marginalization which can be identified as well as proved by relevant evidence.[11]

In the new millennium, the Internet has become the nervous system of the present 'Digital Society' and one of the cherished modes of communication. However,the transnational and borderless nature, anonymity, immediacy and global nature of the internet has also made it an ideal tool for extremists and hatemongers to promote hate. The expression 'hate' in hate speech is an undefined and recent challenge that the Internet has become the 'Sophisticated Frontier' for spreading malice or hate speech, as trillions can be accessed through an inexpensive and unencumbered social network.

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4 Article 19, THE CONSTITUTION OF INDIA, 1950.

5 Gagliardone, et al, COUNTERING ONLINE HATE SPEECH, 10-11 (UNESCO Series on Internet Freedom Series, UNESCO Publishing, 2015).

6 Retrieved from https://www.merriam-webster.com/dictionary/hate%20speech, visited on 28 March, 2018.

7 Alexander Brown, What is Hate Speech? Part 1 : The Myth of Hate, Law and Philosophy, available at: https://ueaeprints.uea.ac.uk/63210/1/Published_manuscript.pdf (Last visited on 28 March, 2018.)

8 Ramesh v. Union of India [(1988) 1 SCC 668 : 1988 SCC (Cri) 266 : AIR 1988 SC 775].

9 Supra, note 5

10 Katharine Gelber and Adrienne Sarah Ackary Stone (eds.), HATE SPEECH AND FREEDOM OF SPEECH IN AUSTRALIA, 10-13 (Federation Press, 2007).

11 Id., p. 15.

3. Concept of Cyberspace and Social Networking: A Reflection

In 1982, William Gibson published an important story in Omni, "Burning Chrome" that was nominated for Nebula Award.[12] It represented the first use of the word 'Cyberspace'. On the basis of early stories, William Gibson became a leading writer on science fiction and came up with 'Neuromancer' published in 1984 that provided a glimpse of a novel way of communicating and distribute ideas in the virtual world.[13] Cyberspace is *"multi-dimensional, artificial, or virtual reality wherein objects seen or heard are neither physical nor, necessarily, presentations of physical objects, but are rather-in form, character, and action-made up of data of pure information"*.[14] Cyberspace is a virtual reality, the contents of which *"exist, in effect, everywhere, nowhere in particular, and only on the Net."*[15] It is observed that in fact there is no *"temporal reality in cyberspace."*[16]

The usefulness of the cyberspace and the internet to dispense views and opinions has been realized both by the advocates of the republic and by racist groups. The Internet is filled with a multitude of variegated commercial and personal users. It is a gift for exercising freedom of free expression. However, among the views available for consumption on the Web are those that defame people based on their race, ethnicity, national origin, gender, and sexual preference. Hate groups take advantage of this relatively economical mean for ideological dispersion. They distribute pamphlets, letters, and images to groups of users who can anonymously participate in racist meetings, think tanks, and planning committees. One of the downsides of the Internet is that it furnishes a global forum for the advocates of intolerance and inequality. This 'social networking' has enabled previously diverse and fragmented groups to connect, engendering a collective identity and sense of unity as well as the community.

Social Networking is just one component of what is called Web 2.0, the next generation of websites and services that emphasize 'Collaboration and Connectivity'.[17] Web 2.0 has changed the way the world connects and communicates through Facebook, Twitter, MySpace, Blogs, Wikis like never before. Social networking has generated a lot of buzzes, media coverage, and conversation, communication, sharing of views and opinion. Companies, organizations, and individuals around the world are profiting from their participation on popular social networks. A Social Networking is a cluster of people connected on world wide web (www). Technically speaking, a social network is a simple application that lives on our desktop or web browser.[18]

Some popular Social Networking websites are as follows:[19]

Sr. No.	Social Networking Websites	Web Address	Objective
1.	Facebook	www.facebook.com	It began as a community for Harvard students, and later Facebook opened doors to anyone with an email address in September 2006 and emerged as the world-wide platform of connectivity.

[12] The Nebula Awards annually recognize the best works of science fiction or fantasy published in the United States.

[13] Gale, A STUDY GUIDE FOR WILLIAM GIBSON'S "NEUROMANCER": NOVELS FOR STUDENTS, 5 (Cengage Learning, 2015).

[14] Alexander Tsesis, Hate in Cyberspace: Regulating Hate Speech on the Internet, Vol. 38 SAN DIEGO LW REVIEW 817-820 (2001).

[15] Matthew R. Burnstein, Conflicts on the Net: Choice of Law in Transnational Cyberspace, 29 VAND. J. TRANSNAT'L L. 75, 78 (1996). Also see: Willard Uncapher, Trouble in Cyberspace: Civil Liberties at Peril in the Inorniation Age, HUMANIST 5,9 (1991).

[16] Andrew E. Costa, Minimum Contacts in Cyberspace: A Tavonomy of the Case Law, Vol. 35 HOUS. L. REV. 453, 465 (1998).

[17] Patrice-Anne Rutledge, THE TRUTH ABOUT PROFITING FROM SOCIAL NETWORKING, 121 (Pearson Education Inc., 2008).

[18] Social Networking consists of a login page, a user-account, a profile, and a bunch of games and tools to make the time people spend with family and friends. There are lot of sophisticated software and hardware that constantly run to enable these applications to function. See: Peter K. Ryan, SOCIAL NETWORKING, DIGITAL AND INFORMATION LITERACY SERIES, 10 (The Rosen Publishing Group, 2011).

[19] These popular Social Networking Websites do not involve in spreading Hate Speech. However, the users may upload objectionable content and communicat by using them.

Sr. No.	Social Networking Websites	Web Address	Objective
2.	hi5	www.hi5.com	It aims for an international audience with a localized interface available in multiple languages.
3.	LinkedIn	www.linkedIn	The biggest and most remarkable of the business networking sites, it offers profiles of more than 20 million professionals and is especially familiar with recruiters.
4.	MySpace	www.myspace.com	MySpace is spreading from being a youth-dominated site to enclose members of all ages. It is a powerful networking tool for the people who think alike i.e. artists, marketers, authors of novels, stories, and so forth.
5.	Orkut	www.orkut.com	Google founded Orkut, but that has not translated into universal popularity. Its most significant user base was in Brazil and India. Now it is not in use.
6.	Ryze	www.ryze.com	Another business-oriented social site, it offers a number of special interest works.
7.	XING	www.xing.com	An active business-oriented social networking site that is popular in Europe,XING was renamed from open BC/Open Business Club in November 2006.
8.	Flickr Photobucket Zooomr	www.flickr.com www.photobucket.com www.zooomr.com	An online platform that people use to share photos and to build social networks or social relations with other people.
9.	Digg Delicio Stumble Upon Reddit Slashdot	www.digg.com http://del.icio.us www.stumbleUpon.com www.reddit.com www.slashdot.org	Social bookmarking is a centralized online service which allows users to add, annotate, edit, and share bookmarks of web documents. Many online bookmark management services have launched since 1996. Delicious, founded in 2003, popularized the terms "social bookmarking" and "tagging".
10.	Revver Veoh Google YouTube	www.revver.com www.veoh.com video.google.com www.youtube.com	A web platform that lets people upload and share their video clips with the public at large or to invited guests. Acquired by Google in 2006, YouTube became the most popular video-sharing site on the Web. It is world's most popular video-sharing social networking platform that has actually made the entire world as 'Global Village.'
11.	Twitter Jaiku	www.twitter.com www.jaiku.com	Ablog that lets users publish short text updates. Bloggers can usually use a number of service for the updates including instant messaging, e-mail, or Twitter. The posts are called microposts, while the act of using these services to update your blog is called microblogging.
12.	Dogsters Catster	www.dogster.com www.catster.com	For animal lovers, dogs (Dogster) and cats (Catster) social networking websites are available for their owners.

Table: Popular Social Networking Websites

Social Networking is a social space through which events occur via electromagnetic waves. Like other electromagnetic occurrences such as telephone conversations, illegal transactions, etc. fall within the purview of states. Just as governments are empowered to regulate activities occurring within their borders, so they can also regulate this new social space known as cyberspace. Social media is rife with hate speech. A quick glance through the comments section of a racially charged YouTube video demonstrates how pervasive the problem is.

Savvy social networkers have found ways to promote their business, products and even themselves on the variety of social networking available on the net. The most effective social networking is all about building relationships, engaging with others, and soliciting word-of-mouth marketing.

4. Online Hate Groups on Social Networking Platform

There are several groups which are operating abhor websites to disseminate dislike messages across the globe. Types of hate groups may be categorized on the basis of several factors which include (i) Anti-immigrant, (ii) Anti-Muslim, (iii) Black separatist, (iv) Christian Identity, (v) General hate, (vi) Holocaust denial, (vii) Ku Klux Klan, (viii) Neo-Confederate,(ix) Neo-Nazi, (x) Racist skinheads, (xi) Radical traditional Catholicism, (xii) White nationalist, and (xiii) White Power music. Anti-immigrantonline groups are characterized as xenophobic, publishing racist propaganda, and confronting or harassing immigrants and their supporters.[20] Anti-LGBT website groups or Anti-Gaywebsite groups can refer to activities against LGBT people, violence against LGBT people, LGBT rights opposition and religious opposition to homosexuality. Hate group under the category "Black separatist" operating several hate websites like "*Race of devils*".[21] Black separatism wants to create a separate homeland as the general perception among black separatists is that black people cannot grow in white dominated society. In brief the following table depicts hate groups and their common objectives. The following lists gives a glimpse of hate groups at international level and anyone can become its member by login.

Hate Groups Social Networking Websites	Target & Objective
• Ku Klux Klan (KKK) groups[22] : Cocoa, FL, Hoxie, AR, Bushnell, FL (America) • Neo-Nazi groups[23] : Westland, MI, California, West Virginia (America) • Anti-Hindu and Anti-Muslim Groups • White Nationalist groups • Christian Identity groups • Neo-Confederate groups • Anti-gay, Holocaust denial, racist music Groups • Traditionalist Catholic and others with hate websites • Southern Poverty Law Center (SPLC): Hate Watch[24]	Hate groups recognize their targets like who are the most receptive and easy to get influenced, particularly children and adolescent are their easy targets used to spread viral hate.

[20] Ramesh Chandra Pathak, Evaluative Study of Internet Hate Groups and Role of Global Media , Vol. 5 (5), INTERNATIONAL JOURNAL OF SCIENTIFIC AND RESEARCH PUBLICATIONS 1-3 (2015).

[21] Hate Group, available at http://dictionnaire.sensagent.leparisien.fr /Hate%20group/en-en/ (Last visited on April 19, 2018.)

[22] Ku Klux Klan,available at https://www.history.com/topics/ku-klux-klan (Last visited on April 28, 2018).

[23] "Looking for the 2017 list of active hate groups" A 2017 Spring Issue, February 15, 2017 available at https://www.splcenter.org/fighting-hate/intelligence-report/2017/active-hate-groups-2016 visited on (Last visited on April 28, 2018).

[24] SPLC was founded by Morris Dees and Joseph J. Levin Jr. in 1971 as a civil rights law firm in Ontgomery. Civil rights leader Julian Bond served as president of the board between 1971 and 1979. The SPLC classifies organizations that propagate "known falsehoods". The list includes the names as: 186 separate Ku Klux Klan (KKK) groups, 196 neo-Nazi groups, 111 white nationalist groups, 98 white power skinhead groups, 39 Christian Identity groups, 93 neo-Confederate groups, 113 black separatist groups, 159 patriot movement groups, 90 general hate groups subdivided into anti-gay, anti-immigrant, Holocaust denial, white power music, radical traditionalist, Catholic groups, and other groups espousing a variety of hateful doctrines.available at: https://www.splcenter.org/,(Last visited on April 28, 2018).

5. 'Virus' of Viral Hate in Social Networking: Anti-Social Behaviouron Internet

The spread of hate online is a 'Virus' whose infection spreads much as a disease spreads through a vulnerable population. The virus of hate online does not kill directly, but its effects can be lethal. Online hate is a serious illness that normalizes bigotry, diminishes discourse, mislead kids, coming generations, and blights the lives of its online targets.

Hate speech in cyberspace is a sub-set of anti-social behaviour that has given way to increase in the certain type of criminal behaviour like Cyber terrorism, identity theft, blackmailing, financial frauds, consumer frauds, scams and several pranks.Their activities contain acts of felony, marches, rallies,speeches, meetings, leafleting or publishing. Hate groups always advocate or engage in transgression or other criminal activity.

Hate speech covers content which may not be reviled in character but is competent to stimulate violence against a particular section of the society. A few days ago, an allegedly abusive post by a class eleventh student on Facebook sparked communal oppression in West Bengal. Similarly, in May 2017, violence erupted in Saharanpur between the Thakur and Dalit communities fuelled by rumours and stimulant posts on Facebook. In Karnataka, hate messages on Facebook were also circulated via familiar messaging services like Whatsapp which assisted violence against the targeted communities.[25]

This 'Virus' of hate speech hasthe potential to trigger the following behaviour:

5.1 **Identity Theft:** The criminal minded groups spread hate messages through fake websites. This offence is also known as 'Identity Theft' that includes sending offensive messages from the ID of any person (by hacking the account or making new email account after concealment of credentials) without consent and knowledge of the concerned person. Under the Information Technology Act, 2000 (2008) Section 66C makes identity theft as an offence. Similarly, Section 66D makes it an offence to "cheat by personation" by means of any 'communication device' or 'computer resource'. Both offences are punishable by imprisonment of upto three years or with a fine of up to Rs. 1 lakh.

5.2 **Website Defacement:** Website defacement is novice offence against websites with an intention to cheat innocent visitors of the website. It is an attack on a website that changes the visual appearance of the site or a webpage. These are typically the work of defacers, who break into a web serverand replace the hosted website with one of their own. Defacement is generally used to spread messages by politically motivated "cyber protesters" or hacktivists. The common offence includes defacement of government websites and seditious remarks.

5.3 **Cyber Stalking:** Cyber stalking means 'to stalk' or 'to follow' someone on the Internet. Stalking is done by various modes for gathering multiple information about the target. For spreading hate online, anti-social elements use to follow the posts of the concerned target, note and take down personal details i.e. contact details and address, note down favorite colour, favorite food & restaurant, download pictures, shopping choices, and friends list. This may lead to online harassment and online abuse.[26]

5.4 **Vishing:** As indicated by the word 'Vishing'- this has come from "voice," and "phishing". Vishing is the act of using the telephone in an attempt to scam the user. Rather than email, vishing, for the most part, depends on robotized telephone calls. Criminals set up a mechanized dialling framework to the content or call individuals in a specific district or region code (or in some cases, they utilize stolen client telephone numbers from banks or credit unions) to gain financial reward.

5.5 **Online Hate Groups:** Hate group is an organized group or movement that advocates and practices hatred, hostility, or violence towards members of a race, ethnicity, religion, gender, sexual orientation or other designated section of society. Hate groups are using internet with an aim is to propagate hatred communication and polluted agenda. Terrorist organizations like ISIS, Al-Qaida and others organisations are using digital online media to disseminate their hate monopolies. Hate groups

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[25] Devika Agarwal ,Casteist remarks on social media now punishable: What fighting online Hate Speech in India Entails, dated July 15, 2017, available at http://www.firstpost.com /india/casteist-remarks-on-social-media-now-punishable-what-fighting-online-hate-speech-in-india-entails-3815175.html, (Last visited on 26 March 2018).

[26] Louise Ellison and YamanAkdeniz, Cyber-stalking: the Regulation of Harassment on the Internet, available at http://www.cyber-rights.org/documents/stalking_article.pdf (Last visited on October 2, 2017).

vocalize their beliefs and members execute on their beliefs. Factors that contribute is the vulnerability of its members. Several websites are operating in a pattern that usually separates hardcore haters from rhetorical haters. Therefore, hate websites are seen as a pre-requisite of hate crimes. Sometimes hate websites became a vital condition of their possibility. Prominent are: Anti-Immigrant, Black Separatists, Anti-Muslim, Anti- Semitic, Anti-LGBT, Anti-Religion.[27]

6. Legislation Regulating Hate Speech in India

Hate speech has not been defined in any law in India. However, legal provisions in certain legislations prohibit select forms of speech as an exception to freedom of speech. Presently, in our country, the following legislations have a bearing on hate speech. The Indian legal framework has enacted several statutory provisions dealing with the subject which are can be divided as under:

6.1 Pre-Internet Laws on Hate Speech

The pre-internet laws on Hate Speech are as follows:

1. The Indian Penal Code, 1860: Section 124A IPC penalises sedition. Section 153A IPC prohibits "preferment of animosity between separate groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony". Section 153B IPC penalizes "imputations, assertions detrimental to national integration". Section 295A IPC punishes" intentional and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs". Section 298 IPC penalizes "uttering, words, etc., with deliberate intent to wound the religious feelings of any person". Section 505(1) and (2) IPC penalises publication or circulation of any statement, rumour or report causing public annoyance and antipathy, hatred or ill-will between classes.
2. The Representation of The People Act, 1951: Section 8 disqualifies a person from contesting the election if he is convicted for indulging in acts amounting to illegitimate use of freedom of speech and expression. Section 123(3A) and Section 125 prohibits promotion of enmity on grounds of religion, race, caste, community or language in connection with election as a corrupt electoral practice and prohibits it.
3. The Code of Criminal Procedure, 1973: Section 95 authorizes the State Government, to forfeit publications that are punishable under sections 124A, 153A, 153B, 292, 293 or 295A IPC. Section 107 enables the Executive Magistrate to thwart a person from committing a aperture of the harmony or disquieting the public tranquility or to do any wrongful act that may probably cause a breach of the peace or disturb the public tranquility. Section 144 empowers the District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf to issue directions in urgent cases of nuisance or apprehended danger. The above offences are cognizable and thus, have serious repercussions on liberties of citizens and empowers a police officer to arrest without orders from a magistrate and without a warrant as in Section 155 Cr.P.C. 1973.
4. The Unlawful Activities (Prevention) Act, 1967: Section 2(f) defines the term unlawful activity, Section 10 provides penalty of two years and fine for being members of an unlawful association. Section 11 states penalty for dealing with funds of an unlawful association.
5. The Protection of Civil Rights Act, 1955: Section 7 penalises incitement to and encouragement of untouchability through words, either spoken or written or by signs or by visible representations or otherwise.
6. The Religious Institutions (Prevention of Misuse) Act, 1988: Section 3(g) prohibits religious institution or its manager to allow the use of any premises belonging to or under the control of, the institution for promoting or attempting to promote disharmony, feelings of enmity, hatred, ill-will between different religious, racial, language or regional groups or castes or communities.
7. The Cable Television Network Regulation Act, 1995: Sections 5 and 6 of the Act prohibits transmission or re-transmission of a programme through cable network in contravention of the prescribed programme code or advertisement code. These codes have been defined in Rule 6 and 7 respectively of the Cable Television Network Rules, 1994.
8. The Cinematograph Act, 1952: Sections 4, 5B and 7 empower the Board of Film Certification to prohibit and regulate the screening of an objectionable film.

[27] Hate on Social Media,available at https://www.safehome.org /resources/hate-on-social-media(Last visited on 17 April 2018).

6.2 Post-Internet Laws on Hate Speech

The only provision in the Information Technology Act, 2000 dealing with the transmission of offensive messages through communication service was Section 66A, was struck down by the Supreme Court in Shreya Singhal case[28] over concerns surrounding its misuse. It was held that:

1. Freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved. Restrictions which can be imposed on freedom of expression can be only on the heads specified in Article 19(2) and none other. Restrictions cannot be imposed on the ground of "interest of general public" contemplated by Article 19(6).[29]
2. Section 66-A of the Information Technology Act, 2000 (2008) is unconstitutional because it violates the fundamental rights of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution.
3. Section 66-A penalises speech and expression on the ground that it causes annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will. These grounds are outside the purview of Article 19(2). Hence the said section is unconstitutional.[30]
4. Section 66-A also suffers from the vice of vagueness because expressions mentioned therein convey different meanings to different persons and depend on the subjective opinion of the complainant and the statutory authority without any objective standard or norm.[31]

According to Section 69 of the Information Technology Act, 2000 (added in 2008) the Central Government or a State Government or any of its officers specially authorized by the Central Government or the State Government may order for interception or monitoring or decryption of any information through any computer resource. This interception is possible only if they are satisfied that it is necessary or expedient so to do, in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence. Section 69-A prescribes the power to issue directions for blocking of public access of any information through any computer resource.

Very frequently the implementation of Sections 69, 69-A is seen in India in order to prevent the spread of Online Hate. In 2017-2018 the internet services have been blocked keeping in view the sensitivity of matter in the case of arrest of Ram Rahim Dera SachaSauda at Hisar, SC/ST reservation, Rape Cases, etc. In Saharanpur district internet and telecom services were shut down for two days after authorities arrested a Dalit leader following violent clashes between Dalits and members of a dominant caste. In Punchkula violence and in Nashik district, internet services were blocked for a few hours services after protests by farmers turned violent.[32]

In the Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3(2) (b) stipulates that the intermediary shall observe 'Due Diligence'and must inform the users of computer resource not to host, manifest, upload, modify, announce, transmit, update or share any information that is disgracefully harmful, harassing, blasphemous calumnious, obscene, lascivious, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically offensive, disparaging, relating or inspiriting money laundering or gambling, or otherwise illegal in any manner. According to the Rule 3(2)(i), intermediary has liability to enumerate terms and conditions that will prevent the transmission of any material that has potential to threaten the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes encouragement to the commission of any cognizable offence or hinder investigation of any offence or is impertinent to any other nation.

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[28] ShreyaSinghal v. Union of India, (2015) 5 SCC 1.

[29] Sakal Papers (P) Ltd. v. Union of India, (1962) 3 SCR 842 at 866.

[30] See: See Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 at 226-27.

[31] See: State of M.P. v. Baldeo Prasad, (1961) 1 SCR 970 at 979; HarakchandRatanchandBanthia v. Union of India, (1969) 2 SCC 166 at 183, para 21; K.A. Abbas v. Union of India, (1970) 2 SCC 780 at 799, paras 45-46; Burstyn v. Wilson, 96 L Ed 1098 at 1120-22; Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 at 199-200.This information is taken from ShreyaSinghal v. Union of India, 2015 SCC OnLine SC 248 at page 22.

[32] India: 20 Internet Shutdowns in 2017, available at https://www.hrw.org/news/2017/06/15/india-20-internet-shutdowns-2017(Last visited on April 19, 2018).

7. Policies of Social Networking Websites to Regulate Online Hate Speech[33]

Social media platforms have taken diverse initiatives to restrain hate speech content on their websites. According to Facebook's community standards:

> *"Content that invades people based on their real or perceived race, ethnicity, national origin, religion, sex, gender or gender identity, sexual orientation, disability or disease" is considered hate speech and prohibited by Facebook. However, the Facebook policy states that it would allow "clear attempts at humour or satire" that would otherwise be considered an efficacious threat/attack."*

Twitter has a notification policy in place which applies to promoted tweets and bans the promotion of "hate content, sensitive topics, and violence globally". In February 2017, Twitter rolled out it's 'safe search' feature which allows users to hide content which is deemed to be 'sensitive'. In July 2017, Twitter banned the editor of a right-wing site for "participating in or instigating targeted abuse of individuals" and also suspended the accounts of prominent leaders of a movement aimed at spreading racism, xenophobia and sexism.

Following reports that one of the London Bridge attackers had been influenced by YouTube videos of an American Islamic preacher, YouTube made changes to its policy and placed various restrictions on abusive videos which do not indispensably meet the criterion for removal. For instance, under YouTube's new policy, offensive videos (which do not have the effect of inciting violence), cannot be commented on or recommended by users. YouTube also precludes such videos from being monetised through advertising (a restriction which also existed under YouTube's earlier policy). [34]

8. Judicial Approach towards Viral Hate Speech in India

A writ petition has been preferred by an organization in the nature of public interest for the exercise of extraordinary jurisdiction of Supreme Court under Article 32 of the Constitution of India to remedy the concerns that have arisen because of hate speeches in the case of *Pravasi Bhalai Sangathan v. Union of India* in 2014. In this case with the quorum of the 3 Judge Bench of J J.Dr B.S. Chauhan, M. Yusuf Eqbal and Dr A.K. Sikri, the Supreme Court exhibited judicial restraint and refused to frame guidelines prohibiting political hate speech, and had instead requested the Law Commission to look into it. The Law Commission, in turn, acted at the behest of observations made by the Supreme Court in *Pravasi Bhalai Sangathan v. Union of India*[35] and constituted T.K. Viswanathan committee.[36]

> However, the court noted with approval international case law on the issues, particularly the observations in the Canadian case *Saskatchewan v. Whatcott*.[37] Relying on Whatcott, the Supreme Court provides a definition of hate speech that includes the following statements:
>
> *"Hate speech is an effort to marginalise individuals based on their membership in a group. Using an expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable that can range from discrimination to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to thesubstantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy."* [38]

The Supreme Court of Canada in *Saskatchewan v. Whatcott,*[39] succeeded in bringing out the human rights obligations directing to restraint on promulgation of hate

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[33] IFJOnline Harassment SocialMediaPolicy available at, http://www.ifj.org/fileadmin/documents/IFJ_Online_Harassment_ Social_ Media_ Policy.pdf (Last visited on April 17, 2018).

[34] The Guardian, Islamic State claims responsibility for terror attack on London - as it happenedavailable at, https://www.theguardian.com/uk-news/live/2017/jun/03/london-bridge-closed-after-serious-police-incident-live,(Last visited on April 15, 2018).

[35] (2014) 11 SCC 477.

[36] Amber Sinha, "New Recommendations to Regulate Online Hate Speech Could Pose More Problems than Solutions", available at from https://thewire.in/law/new-recommendations-regulate-online-hate-speech-problems(Last visited on March 24, 2018).

[37] (2013) SCC 11 (Can SC).

[38] This extract is taken from PravasiBhalaiSangathan v. Union of India, (2014) 11 SCC 477 : (2014) 3 SCC (Cri) 400 : 2014 SCC OnLine SC 221 at page 485.

[39] 2013 SCC 11 (Can SC)].

speeches for safety of human rights. It has defined the expression hate speech with some modifications. The three main prescriptions of 'hatred' have been highlighted as follows:

1. The courts must apply the hate speech prohibition objectively. The question courts must inquire is whether a reasonable man, apprised of the context and circumstances, would view the expression as exposing the protected group to ill-will.
2. The legislative term 'hatred' or 'contempt' must be interpreted as being restricted to those utmost manifestations of the emotion described by the words 'detestation' and 'vilification'. This filters out expressions which, while repugnant and offensive, does not incite the level of abhorrence, de-legitimization and rejection that peril, cause discrimination or other hurtful consequence.
3. The tribunals must concenter their analysis on the result of the expression at issue, namely, whether it is probable to expose the targeted person or group to hatred by others. The repugnancy of the ideas being verbalized is not satisfactory to justify restricting the expression, and whether or not the creator of the expression intended to excite hatred or discriminative treatment is irrelevant. The key is to determine the probable consequence of the expression on its audience, keeping in mind the legislative objectives to subjugate or eliminate discrimination.

The Court again went into the subject of hate speech in Jafar Imam *Naqvi v. Election Commission of India*.[40] The petitioners filed a writ petition challenging the vitriolic speeches made by the candidates in the election and prayed for issue of writ of mandamus to the Election Commission for taking suitable proceeding against such speeches. However, the Court discardedthe petition on the ground that the petition under Article 32 of the Constitution regarding speeches delivered during election campaign does not qualify as public interest litigation and that the Court cannot legislate on matters where the legislative intent is clear.

The discourse of hate speech has assumed more significance in the age of internet, since the reach of internet allows offensive speeches to affect a larger audience in a short span of time. Recognizing this issue, the Human Rights Council's Report of the Special Rapporteur on the promotion and safety of the right to freedom of opinion and expression on content regulation on the internet, expressed that freedom of expression can be restricted on the following grounds, namely:

i. Child Pornography (to defend the rights of children),
ii. Hate Speech (to shield the rights of affected communities)
iii. Advocacy of national, racial or religious hatred that constitutes an encouragement to discrimination, violence or oppression (to preserve the rights of others, such as the right to life).
iv. Defamation (to guard the rights and reputation of others against unwarranted attacks)
v. Direct and public incitement to commit race murder (to protect the rights others).

9. Conclusion and Suggestions

In the interactiveenvironment of Web 2.0, social networking connects millions of people around the globe. It takes just one "friend to friend" to infect a circle of hundreds or thousands of persons with weird, hateful lies that may go unchallenged at the legal platform. Since the advent of YouTube, Wikipedia, Facebook, MySpace, Twitter and other Web 2.0 technologies, a sudden wave of bigotry spewing videos, hate-oriented affinity groups, racist online commentary, and objectionable images have encouraged violence across the internet around the world.

It is little more than twenty years that the internet has blossomed as a way to link the world. But, at the same time, the approachability and vast accessibility celebrated by netizenshave sadly allowed it to become an efficacious and virulent platform for many forms of ill-will that are directly associated to growing online activities. The power of internet lies in its viral nature. Links, viral emails, "re-tweets" enable lies to self-propagate with appalling speed. Hate begets hate, and its widespread appearance makes it seem increasingly acceptable and normal in a world where tradition-cum-cultural standards of morality, honesty, tolerance and civility are deteriorated.[41]

It is submitted that in India, there are several provisions in the pre-Internet legislations to deal with hate speech. However, these provisions are inadequate keeping in view:

[40] AIR 2014 SC 2537.

[41] Abraham H. Foxman, Christopher Wolf, VIRAL HATE: CONTAINING ITS SPREAD ON THE INTERNET, 10-11 (St. Martin's Press, 2013).

1. The ease with which websites, social media pages, videos-audio downloads, and instant messages are created as well as disseminated online. Viral propaganda is almost impracticable to trace, control, and combat.
2. The herculean challenges which distinguish offline hate speech from online hate speech are related to the latter's permanence, itinerancy,[42] anonymity and cross-jurisdictional nature. Evidences on the basis of circumstantial evidence serve weak collaboration as many websites are spoofed and are operated in dark net.
3. Hate speech affecting people in a particular region may be posted by an internet user in another country/region.[43] The internet's speed and reach makes it difficult for governments to enforce national legislation in the virtual space.

It is suggested that it is ripe time to appropriately identify the elements behind the origin of this eviland respond to online hate speech legally as well as technically. Technically includes the strict application of 'Doctrine of Due Diligence' by intermediaries. It is observed that the unconstitutionality of Section 66A of the Information Technology Act, 2000 (2008) in ShreyaSinghal case is a setback to the cyber law in India. The Hon'ble Supreme Court could regulate powers of police in the arrest cases. The complete striking down of this provision has created a vacuum in legal jurisprudence to deal with this emerging menace at the global level.

[42] Hate speech exists on various sites for a long time when the content is shared by multiple users online.

[43] A 2015 Report by the UNESCO titled, 'Countering Online Hate Speech'. available at: http://unesdoc.unesco.org /images/0023/002332/233231e.pdf(Last visited on April 17, 2018).

Surrogacy and its socio-legal aspects

Saif Rasul Khan*

ABSTRACT

Surrogacy is advancement in medical science that affords numerous childless couples a chance to have a family. It is a practice that garners conflicting interpretations due to its intricate nature. Commercial surrogacy has, over the time, transformed into a formal commercial activity and its regulation has been a matter of concern globally. In India, the subject is enveloped in debate and the legal framework is under review. This paper is an attempt to comprehend this complex subject, its possible regulation and legal framework from the prism of human rights law, social and ethical facets, and to find plausible solutions to address the numerous multifaceted concerns of this practice. . Further, the paper shall examine and review the proposed Surrogacy (Prohibition) Bill, 2016 to identify its loopholes and abuse of certain fundamental human rights. It is a study to comprehend the multi-layered complexities of surrogacy from the prism of human rights law, ethics and social facets.

Keywords : Surrogacy, Law, Human rights, Ethics, Surrogacy (Regulation) Bill, 2016

1. Introduction

Surrogacy is a modern medical advancement. It provides couples a chance of having a normal family with the help of a surrogate mother. This process has been successfully utilized by many around the world. It has transformed into a commercial activity growing exponentially estimated to be around $2 billion a year business venture.[1] However, this has created difficulties in terms of its regulation and protection of surrogate mothers and the children. Numerous cases of abuse by foreign nationals, custody rights, denial of child by the surrogate mother at the end of the term of pregnancy, exploitation by middlemen, unregulated organizational structure, etc have emerged over time. Consequently, most states have banned commercial surrogacy. This resulted in creation of certain specific markets for surrogacy, India being one of them. In India, commercial surrogacy is widely practiced due to the low-cost and excellent medical services. In 2016, the government drafted a legislation to regulate surrogacy and ban its commercial form. With this background, this paperaims to understand the concept of surrogacy, its ever-increasing demand, and the international perspective towards the practice.

2. Key concepts

The Latin term for surrogacy is "*Surrogatus*", which means a substitute i.e. a person appointed to act in the place of another.[2]

The Merriam Webster Dictionary defines it as, "*The practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby in order to give it to someone who cannot have children.*"[3]

"The action of a woman having a baby for another woman who is unable to do so herself" is the definition given by Cambridge Dictionary.[4]

The associated term, surrogate motherhood is defined by Encyclopaedia Britannica as: "*Practice in which a woman (the surrogate mother) bears a child for a couple unable to produce children in the usual way, usually because the wife is infertile or otherwise unable to undergo pregnancy.*"[5]

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1 Shannon Mathew, The Surrogacy Bill: What it Says and What It Doesn't, THE YP FOUNDATION (March 24, 2017),available at http://www.theypfoundation.org/news-2/2017/3/24/the-problem-with-the-surrogacy-bill (Last visited on April 20, 2018)

2 Etymonline.com. (2017). Online Etymology Dictionary. [online], Surrogate, available athttps://www.etymonline.com /word/surrogate (Last visited on April 13, 2018)

3 Merriam-Webster's collegiate dictionary (10th ed.). (1999). Springfield, MA: Merriam-Webster Incorporated., Surrogacy (March 30, 2018)available athttps://www.merriam-webster.com/dictionary/surrogacy (Last visitedon April 13, 2018)

4 "Surrogacy", Cambridge University Press. (2008). Cambridge online dictionary,Surrogacy(March 30,2018), available at Cambridge University Press. (2008) .available athttps://dictionary.cambridge.org/dictionary/english/surrogacy (Last visited on April 13, 2018)

5 "Surrogate motherhood"Encyclopaedia Britannica,available athttps://www.britannica.com/topic/surrogate-motherhood#accordion-article-history. (Last visited on April 13, 2018).

The Surrogacy Regulation Bill, 2016[6] defines the term as: "*Surrogacy means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth.*"[7]

These definitions provide a basic understanding of the term. In essence, surrogacy is the method by which a woman, who is generally unable to or incapable of rearing a child and thereby avails of a service by another woman, who shall hand over the child on birth to the intended parents. Surrogacy has different types and forms based on certain factors. There is Gestational and Traditional surrogacy, based on genetic relations;[8] Compensated and Altruistic surrogacy based on the factor of payment; Agency and Independent surrogacy based on whether professional services are availed of by the intended parents and Domestic and International surrogacy based on geography.

There are certain essential terms connected with surrogacy which are important. These include intended couple;[9] surrogate mother;[10] egg/sperm donors; in vitro fertilization;[11] surrogacy clinics.[12] These terms are intimately associated with the process of surrogacy and therefore, crucial for understanding surrogacy in a cohesive manner. Though primarily medical in nature, the essence of a legal framework shall depend on the aptness of these definitions.

3. India: The International hub of Commercial Surrogacy

India is a leading medical tourism hub. The country holds a prominent position in terms of offering medical services at competitive prices. Foreigners in particular and those who are incapable of availing the services in their own countries come to India for quality services at inexpensive rates.[13] With reference to surrogacy, the same trend has been observed. Indian fertility services are at par with international standards, at least in well renowned hospitals and clinics. Couples who are unable to undertake such services in their own nations engage the services of a surrogate mother in India.

The surrogate mothers are often those who come from poorer backgrounds or are in need of money and therefore, tend to be exploited for their desperation. There are many inter-related ethical, social and human rights issues with commercial surrogacy. Since surrogacy is not officially regulated in India, the many lacunae are misused to suit one's needs.[14] Furthermore, there is a robust network of black market in India. The black market of surrogacy services includes an intricate network of potential mothers, medical specialists, hospitals and clinics and middle-men who provide such services predominantly intended for the international crowd. Even though it is economical as compared to other nations,

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6 The Surrogacy Regulation Bill, 2016, Bill No. 257 of 2016.

7 Id.sec. 2(zb).

8 These two are the basic types of surrogacy in terms of the medical process involved. In Gestational surrogacy, the surrogate mother does not contribute in any way other than being implanted with the embryo of the intended couple. She does not provide her eggs in this case. In Traditional surrogacy, the surrogate mother in addition to being pregnant, also provides her eggs and thereby infuses her genetic material into the baby. In this process, there is an obvious genetic connection between the surrogate mother and the child born through surrogacy.

9 Id. sec. 2®. Intending couple means "a couple who have been medically certified to be an infertile couple and who intend to become parents through surrogacy".

10 Id. sec. 2(ze). Surrogate mother means "a woman bearing a child who is genetically related to the intending couple, through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of section 4".

11 In Vitro Fertilization is a medical process by which the egg and sperm is fertilized outside the woman's uterus. The sperm and egg of the intended parents is collected, which is then fertilized in a test tube or a culture dish and thereafter implanted into the surrogate's uterus. The sperm or the egg may be of a donor as well if the intended parents are infertile. The Surrogacy Definitions and Important Terms You Need to Know, About Surrogacy, available athttps://surrogate.com/about-surrogacy/surrogacy-101/surrogacy-definition/. (Last visited on April 13, 2018);See In Vitro Fertilization, Mayo Clinic, available athttps://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 (Last visited on April 13, 2018)

12 Supra note 6, sec.2(zc)

13 Sandra Schulz, In India, Surrogacy has Become a Global Business, SPIEGEL ONLINE, available at http://www.spiegel.de/international/world/the -life-factory-in-india-surrogacy-has-become-a-global-business-a-580209.html(Last visited on April 14, 2018);See, A. Pande,Gestational Surrogacy in India: New Dynamics of Reproductive LabourinCRITICAL PERSPECTIVES ON WORK AND EMPLOYMENT IN GLOBALIZING INDIA(Springer, Singapore, 2017)

14 Anil Malhotra, More questions than answers over rent-a-womb market, THE HINDU(July 24, 2010),

available athttp://www.thehindu.com/opinion/open-page/More-questions-than-answers-over-rent-a-womb-market/article16208847.ece (Last visited on April 14, 2018)

surrogacy is a multi-billion market in India.[15]

The Indian legislators have forwarded a bill that is expected to end this commercial form of surrogacy. The problem with this change is that this will give the black market an impetus to breed and thereby establish a larger network of illegal activities; an alternative unaccountable black market.[16] The primary concern is regarding the human rights abuse of the surrogate mothers and unregulated financial dynamics of the system. Though the thought is noble, the Bill may inadvertently create more complications, including violation of fundamental rights of different stakeholders, the freedom to choose and make decisions and financial independence of those women who are unfortunately dependent on surrogacy for their livelihood.[17] Since surrogacy involves multi-faceted issues of ethics, human rights, health concerns and those of the rights of various stakeholders in the process, it creates a very complex system whereby drafting a legislation which ensures these aspects is difficult and requires detailed study and research.

4. Foreign Laws on Surrogacy

Surrogacy in its altruistic form is permitted in almost majority of the countries globally. Commercial surrogacy evokes conflicting opinions and countries around the world have diverse attitude towards this practice. While in some countries it is permitted legally, in others, it is banned. Even within a country, there are different practices. For instance, in United States, some states within the federation permit commercial surrogacy, while others do not. The same is observed in case of Australia.

In the United Kingdom, commercial surrogacy is prohibited under the Surrogacy Arrangements Act, 1985[18] and any contravention of the law may result in maximum of three months' imprisonment.[19] The law clearly stipulates that no person shall in any form participate in any commercial form of surrogacy including initiation, participation, offer or agreement or provide any information that may be used to negotiate acts of commercial basis.[20] The Act does not stipulate any defining eligibility conditions for the surrogate mother or the intended parents. The commercial perspective excludes any reasonable payment made for the benefit of the surrogate mother. Any form of advertising for commercial surrogacy is explicitly prohibited as well under the Act.[21] Under the law, the surrogate mother remains the legal guardian of the child, even if they are genetically unrelated. A transfer of guardianship to the intended parents through adoption order or a parental order from a court is necessary to transfer the legal guardianship of the child.

Thailand was a major commercial surrogacy hub in the Asian-subcontinent. The country was well-known for providing low-cost but high-quality surrogacy services. However, in time, several issues of commercial surrogacy came to the forefront, with prominent legal battles[22] on numerous intricate aspects of surrogacy that resulted in its ban in 2015. The Thai government adopted a new legislation[23] calling for a ban on commercial surrogacy for all international intended parents. Exceptions are made for

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15 Arijit Paladhi, India's Commercial Surrogacy Ban Could Spawn a Thriving Black Market, LIVE MINT(November 22, 2016)available athttps://www.livemint.com/Opinion/H8ruZUyF594O05poCs4quK/Indias-commercial-surrogacy-ban-could-spawn-a-thriving-blac.html (Last visited on April 14, 2018);See, Raywat Deonandan, Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy. Vol. 8, RISK MANAGEMENT AND HEALTHCARE POLICY 111-119 (2015)doi:10.2147/RMHP.S63862.

16 Supra note 13

17 A detailed discussion on the Surrogacy Bill is provided under the heading "The Surrogacy Bill: Synopsis and Analysis", infra.

18 Surrogacy Arrangements Act 1985 (U.K.).

19 Id. sec. 4

20 Id. sec. 2

21 Id. sec. 3

22 Two prominent cases changed the landscape of commercial surrogacy in Thailand, first the "Baby Gammy" case and the second, the Mitsutoki Shigeta case. The former involved allegations of desertion of child with Down syndrome by his Australian parents, born to a Thai surrogate mother. Baby Gammy: Surrogacy row family cleared of abandoning child with Down syndrome in Thailand, A.B.C. NEWS(April 14, 2016),available at, http://www.abc.net.au/news/2016-04-14/baby-gammy-twin-must-remain-with-family-wa-court-rules/7326196 (Last visited on April 14, 2018)

The latter was a case of a Japanese businessman Mr. Mitsutoki Shigeta, who had fathered sixteen children, born through surrogacy. After thorough investigations, he was granted custody of only three of his children in 2015. Eventually he fought for custody of the remaining children and was granted the custody of the remaining thirteen children in 2018. Mitsutoki Shigeta: 'Baby factory' dad wins paternity rights, B.B.C. NEWS (February 20, 2018),available athttp://www.bbc.com/news/world-asia-43123658 (Last visited on April 14, 2018).

23 The Protection for Children Born Through Assisted Reproductive Technologies Act (ART Act) (Thailand).

married heterosexual Thai couples, however, the many eligibility requirements[24] make the process a cumbersome one. Infringement of the provisions of the legislation by engaging in commercial surrogacy may result in, upon conviction imprisonment for up to ten years or a fine of up to 200,000 Baht.[25] Further, any agent engaging in such services, upon conviction may be imprisoned for up to five years and/or a fine of up to 100,000 Baht.[26]

A similar approach was followed by Nepal. Nepal was another preferred hub for international couples. The cost-effective surrogacy services made it easy for the intended parents to hire the services of a surrogate mother. This practice was halted by the Supreme Court in August 2015, which was followed by a formal ban by the Nepalese government in 2016.[27]

In Russia, surrogacy services have been practiced since 2011, and were primarily used by the local population.[28] The laws on surrogacy are quite liberal in the country. However, there seems to be a change in the outlook of the country. The legal foundation of surrogacy is elucidated in the Federal Law No. 323-FZ 'On the fundamentals of protection of the public health', 2011,[29] which provides detailed provisions for surrogacy under Article 55. The article is titled, 'Use of assisted reproductive technologies'. The Article defines auxiliary reproductive services[30], surrogate motherhood[31], and provides that the process should be approved by the authorized federal executive body.[32] It enumerates a list of conditions required, both on the part of the intended parents[33] and the surrogate mother[34] for a legal surrogacy process. The law provides its citizens the right to cryopreservation including storage of sex cells, tissues of reproductive organs and human embryos[35] but bans the use of such resources for industrial purposes[36]. Donation of sex cells is permitted to citizens between the age of eighteen and thirty-five years old, subject to a medical examination of health and genetics.[37] If any such donor sex cells or embryos are utilized, then the requisite information shall be provided to those who avail of such services.[38] The Family Code of the Russian Federation, No. 223-FZ [39], provides that the consent of the surrogate mother is needed before the intended parents

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24 Id. The Act provides that the couple must be Thai nationals and lawful spouses. If one is not a Thai national, then they should be married for at least three years. {sec. 21(1)}. The surrogate mother should be a blood relative of either of the spouses but not the parents or descendant of the couple. {secs. 21(2) & (3)}. Furthermore, she must have undergone pregnancy before, i.e. she must be a mother. {sec. 21(4)}. In this case, the consent of the husband of the prospective surrogate is compulsory{sec.21(4)}. Using the eggs of the surrogate mother is completely prohibited. {sec. 22(2)}. A clear agreement should be made before the pregnancy, clearly stipulating the legal status of the agreement and the future child. (sec. 3).

25 Id. sec. 24, sec.48

26 Id. sec. 27, sec. 49

27 See Rachel Abrams, Nepal Bans Surrogacy, Leaving Couples with Few Low-Cost Options, THE NEW YORK TIMES(May 2, 2016),available at https://www.nytimes.com/2016/05/03/world/asia/nepal-bans-surrogacy-leaving-couples-with-few-low-cost-options.html (Last visited on April 14, 2018)

28 Anastasia Maunilova, Russia Considers Ban on Immoral Commercial Surrogacy Industry, NEWSDEEPLY, (November 23, 2017),available athttps://www.newsdeeply.com/womenandgirls/articles/2017/11/23/russia-considers-ban-on-immoral-commercial-surrogacy-industry (Last visited on April 15, 2018)

29 Federal Law on the Fundamentals of Protection of Citizens' Health in Russian Federation 2011. (Russia)

30 Id. Art. 55(1) "Auxiliary reproductive technologies are methods of treating infertility, in which individual or all stages of conception and early development of embryos are carried out outside the maternal organism (including using donor and (or) cryopreserved germ cells, tissues reproductive organs and embryos, as well as surrogate motherhood)"

31 Id. Art 55(9)"Surrogate motherhood is the bearing and birth of a child (including premature birth) under a contract concluded between a surrogate mother (a woman who foetuses a foetus after carrying a donor embryo) and potential parents whose sex cells were used for fertilization, or a single woman, for which bearing and birth of a child is impossible for medical reasons"

32 Id. Art. 55(2)

33 The Law provides for surrogacy services to both married and unmarried men and women. The services shall be based on a mutually informed and voluntary consent and agreement. It explicitly provides that a single woman has the right to avail of such services, subject to a free and informed consent. {art. 55(3)}. The identification of the sex of the child is prohibited unless it is for medical reasons, such as a genetically inherited disease.

34 A surrogate mother shall be a woman aged between twenty and thirty-five, who is a mother herself of at least one child. If she is married, then the surrogate mother requires the written consent of the spouse. The entire process is subject to 'written informed voluntary consent' and depends on the medical health of the surrogate mother. It is however, prohibited for a surrogate mother to be the egg donor simultaneously, thus excluding gestational surrogacy.

35 Id. Art. 55(5)

36 Id. Art. 55(6)

37 Id. Art. 55(7)

38 Id. Art. 55(8). It also includes information regarding the race, nationality of the donor.

39 The Family Code of the Russian Federation, No. 223-FZ, December 29, 1995. (Russia)

are given the custody of the child and their names are entered in the Register of Births as the parents of the child.[40] A Russian senator, Anton Belyakov has proposed a ban on all forms of surrogacy, both commercial and altruistic citing that the process is immoral and is a major cause of abuse for the mother and the child.[41] The Bill is under consideration and will be taken up by the Russian Duma in the next session of Parliament. There are conflicting views on child-birth through surrogacy and the decision of the Duma will surely have grave repercussions in the country and on international surrogacy.

5. Issues in Surrogacy

Surrogacy as a practice may be acknowledged as a form of hope for parents who are unable to conceive a child. Though surrogacy is commonly used for helping such couples become parents; there is nonetheless the continual fear and possibility of exploitation and abuse of the surrogate mother. It is essentially a commodification of the surrogate mother as an object which shall be used to grow a baby. As observed in most cases, surrogate mothers generally cross the threshold for the desperate need of money. The surrogate mother makes a monetary valuation her body for the intending parents, promising to raise the baby in her womb with the same care and love as any biological mother. However, due to this emotional and physical bond, there are cases when such surrogate mothers refuse to give the child at the end of the pregnancy.

5.1 Social and Ethical considerations

Surrogacy is not merely a medical procedure. It encompasses the entire life-cycle of birth and one which ultimately results in the creation of a new being. When one agrees to become a surrogate mother, she is not only giving her physical body but her mind and soul as well. This is a very intimate, humane and maternal process and one that creates issues due to the emotional value attached to this process of child-birth. In a commercial setting, the surrogate mother is valued based on certain conditions like health of the surrogate, ability, care and compassion needed to raise a baby and the ability to give the baby to the intended parents when it is time, etc. among others. The irony is that while the surrogate is expected to raise a baby in the manner as a natural mother, yet when the term ends, she is expected to surrender the baby and sever all ties with the new-born. Though this is not the case in all circumstances, there is this issue of emotional attachment that may give rise to issues of custody and renunciation of the infant. On the other end of the spectrum, there are surrogate mothers who perceive this as a purely business and financial activity. For such mothers, being a surrogate is simply an activity by which they can provide basic necessities of life to their own family and children. This also raises the question of morality and ethics and whether it is right to engage services of a woman simply as a means to conceive a child, and particularly when she is undertaking the task due to the ominous circumstances in her life.

Furthermore, another matter closely related to surrogacy is the concept of assisted reproductive techniques. This forms a part of the process within the framework of surrogacy. The term essentially refers to the methods by which one can aim to enjoy the reproductive rights with medical intervention and assistance.[42] This involves aspects such as sperm and egg donations, embryo donation, egg freezing, artificial insemination, etc. This applies particularly in cases of gestational surrogacy. Such modern medical advancements result in conflict with law and ethics. The commodification of reproductive objects, such as sperms, eggs, embryos etc. raises questions of coercion, exploitation, undue inducement and corruption.

5.2 Reproductive Rights

Reproductive rights have been acknowledged as a human right in international legal framework. The formal

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[40] Id. Arts. 51, 52

[41] Russia ban on surrogacy would be disaster for infertile couples, THE BEARR TRUST (January 17, 2018), available athttp://www.bearr.org/russian-ban-on-surrogacy-would-be-disaster-for-infertile-couples/ (Last visited onApril 15, 2018)

[42] The World Health Organization and International Committee for Monitoring Assisted Reproductive Technology (ICMART) defines the term 'assisted reproductive technology' as, "all treatments or procedures that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of establishing a pregnancy. This includes, but is not limited to, in vitro fertilization and embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy." The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO), Human Reproduction, Vol.24 No.11 REVISED GLOSSARY ON ART TERMINOLOGY 2683-2687 (2009), available athttp://www.who.int/reproductivehealth/publications/infertility/art_terminology.pdf?ua=1 (Last visited on April 19, 2018)

recognition of this right was made in the World Conference on Population in 1994.[43] Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number and spacing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.[44] The Cairo Conference stated that these rights are already "*embraced by national laws, international human rights documents and other consensus documents.*" [45]

5.3 Rights of Women

The United Nations Convention on the Elimination of All Forms of Discrimination against Women[46] is the most decisive international legislation that guarantees the rights of women globally. These rights safeguard the rights of pregnant women and extends to surrogate mothers as well.[47] There are numerous provisions that extend for the welfare and protection of surrogate mothers, though it is not so provided explicitly. The various rights may be extended in case of gestational surrogacy,[48] as these rights afford safeguards for pregnant woman. However, the Convention perceives maternity as a 'social function', which may be difficult to reconcile with the concept of commercial surrogacy. Nevertheless, these rights do provide certain fundamental safeguards that are essential for surrogate mothers.

Article 11(2) obliges State Parties to take appropriate measures to prevent any discrimination on "*grounds of marriage or maternity and to ensure their effective right to work*".[49] These rights specifically include prevention of "*imposition of sanctions, dismissal on grounds of pregnancy or marital status*", "*maternity leave with pay or with comparable social benefits*", providing required "*social services to parents*", and "*special protection for women during pregnancy when working in dangerous conditions*".[50] Article 11(3) provides that such legislations must be attuned to the developments in "*scientific and technological knowledge*" and revised periodically to ensure modernization with changing times.[51]

Article 12 focuses on health rights and requires State Parties to provide "*equal access to health care services, including those related to family planning.*" [52] Specifically, the Convention provides for "*appropriate services in connection with pregnancy, confinement and the post-natal period*".[53] It also obliges the state to afford "*free services whenever possible, including adequate nutrition during pregnancy and lactation.*"[54] These provisions are essential for the overall well-being of the pregnant woman. These basic health rights should be provided to every surrogate mother as well. Furthermore, the stress on post-natal healthcare is extremely important as it is generally overlooked; particularly in a country like India where commercial surrogacy is practiced in an unregulated environment and most surrogates are not provided these fundamental health care rights. This results in exploitation and abuse of the surrogate mother, especially in the post-natal period.

Article 14 extends to rural women and their right to family planning.[55] Article 16 enumerates various rights in relation to marriage and family relations.[56] These rights form the core of family rights for women. Banning commercial surrogacy may violate some of these rights as it will deny the intending couple and in particular the woman the right to "*decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.*"[57]

5.4 Child Rights

Regarding children, the Convention on the Rights of the Child[58] is the most prominent document which addresses the numerous human rights concerns of children. This

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43 International Conference on Population and Development, 1994., A/CONF.171/13/Rev.1, available athttp://www.un.org/popin/icpd/conference/offeng/poa.html (Last visited on April 19, 2018); See, Barbara Stark, Transnational Surrogacy and International Human Rights Law, 18 ILSA J. INT'L & COMP. L. 369 (2011-2012), available athttp://scholarlycommons.law.hofstra.edu/faculty_scholarship/630 (Last visited on April 19, 2018)

44 Id. at para. 7.3

45 Id.

46 The United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979. (hereinafter referred to as CEDAW)

47 Id. art. 2

48 See, Amelia Gentleman, India Nurtures Business of Surrogate Motherhood, THE NEW YORK TIMES (March 10, 2008), available athttp://nytimes.com/2008/03/10/world/asia/10surrogate.html. (Last visited on April 19, 2018)

49 Id. art. 11

50 Id.

51 Id.

52 CEDAW, supra note 46. art. 12

53 Id.

54 Id.

55 CEDAW, supra note 46, art. 14

56 CEDAW, supra note 46, art. 16

57 Id. art. 16(e)

58 Convention on the Rights of the Child, 1989. (hereinafter referred to as CRC)

document which has been most widely ratified[59] provides a wide-range of fundamental rights for children within the broad framework of the Universal Declaration of Human Rights[60] and includes aspects of International Humanitarian Law. Article 2 of the Convention explicitly prohibits any form of discrimination including *"birth or other status"*.[61] In addition to non-discrimination, the 'best interest of the child' is a prominent principle that is reiterated in the document multiple times to stress on its importance and relevance.

The Convention provides broad set of rights which encompasses survival and development rights, protection rights, right to development and participation rights. In all circumstances, the child shall be protected from abuse, violence, torture or any such inhumane treatment. The Convention obliges states to ensure these basic guarantees to every child within their boundaries by bringing in relevant domestic legislations.

One particular article is of relevance in relation to surrogacy and the rights of the child, i.e. Article 7. Article 7 provides that the birth of a child shall be registered immediately, and the child is entitled to a name, nationality and care of his/her parents.[62] In case of trans-national surrogacy, this becomes a major problem, particularly when there is conflict with the national law. These difficulties may be detrimental for the welfare of the child and its care and protection and thereby, result in violation of human rights of the child.

5.5 Family Rights

The right to 'Found a Family' is an internationally recognized and documented right. It extends the right to men and women of full age, the right to marry and to 'Found a Family'.[63] This right, if liberally interpreted, shall include the freedom to a child birth via surrogacy in case of inability of the couple to conceive a child. A ban on surrogacy may violate this fundamental right of those couples who have no other choice but to avail of surrogacy.

5.6 Exclusion of the LGBTQ Community

The LGBTQ community is another section that may be adversely affected by any change in surrogacy laws. Many LGBTQ couples avail of surrogacy services to have a family. Due to their biological structure, surrogacy is the only option for such couples to conceive a child having a biological and genetic relation to one of the parents.

The legal recognition of LGBTQ rights has been a continued struggle and there is a vast difference in the legal jurisprudence in the matter globally. Even though it may not be so recognized, it is a well-known fact that if commercial surrogacy is banned worldwide, the LGBTQ community will have adoption as their only alternative, unless one can avail of the services altruistically. There is no international legal framework on the rights of the LGBTQ community, sexual orientation and gender identity. However, the Yogyakarta Principles[64] may provide a foundation for the recognition of the rights of the LGBTQ community. Though they are non-binding and not an instrument which has garnered much support, but these Principles have been greatly influential in safeguarding the rights of the sexual minorities. Principle 17 recognizes the right to the highest attainable standard of health which explicitly includes sexual and reproductive health.[65] Principle 24, titled 'The Right to Found a Family' enumerates numerous rights regarding the right to a family, non-discrimination, right to marriage or registered partnerships and access to all necessary legislative, administrative and medical facilities required to form a family unit.[66] Thus, a ban on commercial surrogacy may adversely affect their chance to have a family.

6. The Surrogacy(Regulation) Bill, 2016: Synopsis and Analysis

The Surrogacy (Regulation) Bill, 2016[67] aims to regulate

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59 There are 189 State Parties to the Convention. It is the most-widely recognized and appreciated international instrument.

60 Universal Declaration of Human Rights, 1948, General Assembly Resolution 217 A(III)

61 CRC supra note 58, art. 2

62 Id. art. 7. This right is also provided under the International Bill of Human Rights, i.e. Article 15 of the Universal Declaration of Human Rights, 1948 and Article 24 of the International Covenant on Civil and Political Rights, 1966.

63 UDHR supra note 60, art. 16. Article 23 of the International Covenant on Civil and Political Rights, 1966 reiterates the same right. It provides that 'family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

64 The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2007

65 Id. Principle 17

66 Id. Principle 24

67 Surrogacy, supra note 6

the practice of commercial surrogacy within the legal framework of India.[68] In its Statement of Objects and Reasons, it is stated that India has become a commercial hub for surrogacy that results in blatant exploitation of women and children born through surrogacy.[69] To limit the activities of such potential abuse and misuse of the medical practice, the Bill has been drafted for framing a legal framework to regulate surrogacy. A reference is also made to the 228th Law Commission Report[70] on ban on commercial surrogacy in the Bill.

The Bill calls for a complete ban on commercial surrogacy and permits only altruistic surrogacy. Itfocuses on the regulation of surrogacy and establishment of authorities and bodies.This is evident form the short preamble to the Bill which reads as:"*To constitute National Surrogacy Board, State Surrogacy Boards and appointment of appropriate authorities for regulation of the practice and process of surrogacy and for matters connected therewith or incidental thereto*". [71]

There is an extensive list of definitions in the Bill, covering important terminologies and explanations.[72] The eligibility of the intending parents[73] and the surrogate[74] is enumerated in the Bill. The intending parents shall be Indian nationals, who have been married for a minimum of five years but without any child; who are proved to be infertile and are aged between twenty-three to fifty years for females and twenty-six to fifty-five years for males.[75] The couple is required to produce evidentiary proof of the need for surrogate services and infertility by providing a certificate of essentiality issued by the appropriate authority[76] and of infertility by the District Medical Board.[77] Furthermore, an order of parentage and custody is required to be passed by the Magistrate of the first class or above.[78] The Bill excludes all couples who may have adopted a child or may have conceived a child through surrogacy before. Thus, surrogacy under the Bill is restricted only to child-less heterosexual couples.

Regarding the surrogate mother, the Bill states that she shall be a close relative of the couple, aged between twenty-five and thirty-five years and should be a mother herself.[79] However, the meaning of 'close relative' is not specified. The procedure shall be undertaken subject to an informed written consent of the surrogate mother.[80] Such a surrogate shall be permitted to act as a surrogate only once in her life. Additionally, certificate of medical and psychological heath is required from a medical practitioner.

The Bill extends detailed provisions regarding the constitution of Surrogacy Boards at the National[81] and State[82] Level and for the establishment of appropriate authorities[83] for the implementation of the provisions in the Bill. The Bill states that surrogacy clinics should be registered and shall apply for a certificate of registration from the appropriate authorities.[84] There are numerous provisions cited in the Bill for its regulation[85] including a complete ban on commercial surrogacy, advertising and storing of human embryo or gamete, except for legal purposes.[86]

The Bill criminalizes the act of commercial surrogacy; its advertising, promotion and propagation, selling of human

68 The Hon'ble Supreme Court in one of its most decisive judgements in the case of held that commercial surrogacy has transformed into an industry and there is an ever-increasing demand for such services. The court defined certain pertinent terms and observed that sometimes surrogacy is referred to by the emotionally charged and potentially offensive terms such as 'wombs for rent', 'outsourced pregnancies' or 'baby farms'.Baby Manji Yamada v. Union of India and Anr. (2008) 13 SCC 518.

69 Id. Statement of Objects and Reasons

70 228th Report of the Law Commission of India (2009). On August 5, 2009 the Law Commission of India submitted the 228th Law Commission Report titled "Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy". The Report discussed the issue of assisted reproduction, and its increasing demand in India. It also highlighted the social, moral and legal issues assisted reproduction. Furthermore, references were made to the Indian Baby M case and the case of the gay Israeli couple. The Report reviewed the Draft Assisted Reproductive Technology (Regulation) Bill and Rules, 2008.

71 Id.

72 Id. Chapter I, Preliminary, sec. 2

73 Id. sec. 4(iii)©

74 Id. sec. 4(iii)(b)

75 Id. sec. 4(iii)(c)(I)

76 Id. Sec. 4

77 The Bill explains the term 'District Medical Board' as a medical board under the Chairpersonship of Chief Medical Officer or Chief Civil Surgeon or Joint Director of Health Services of the district and comprising of at least two other specialists, namely, the chief gynaecologist or obstetrician and chief paediatrician of the district.

78 Id. sec. 4(iii)(a)(II)

79 Id. sec. 4(iii)(b)(I)

80 Id. sec. 6

81 Id. secs. 14-22

82 Id. secs. 23-31

83 Id. secs. 32-34

84 Id. secs. 10-13

85 Id. sec. 3

86 Id.

embryos or its import for surrogacy purposes, abandonment of the child born through surrogacy and any form exploitation of the surrogate mother or the child with imprisonment for a term which shall not be less than ten years and with fine which may extend to ten lakh rupees.[87] A couple that may avail of such commercial surrogacy shall be subjected to criminal sanction which may result in imprisonment for a term not less than five years and fine up to five lakhs rupees.[88] This is in case of first offence. In case of subsequent offence, imprisonment may extend to ten years and fine may extend to ten lakh rupees. There are other offences and penalties provided under the Bill and provisions have been made for any offence which does not have a specific punishment elsewhere in the Act.[90]

There are many limitations, issues and lacunae in the Surrogacy (Regulation) Bill, 2016. Though the introduction of the Bill has been welcomed as a step to regulate and provide clarity for an issue that has been a grey area for ages; it has been, nonetheless, criticised for its myopic and regressive provisions. There are provisions in the Bill which are in clear violation of basic legal principles of the Constitution of India.[91] The Bill essentially perceives commercial surrogacy as a sinful act that needs to be eradicated by excessive regulation and stringent norms. It views surrogacy from a moral high ground, from a right and wrong perspective rather than approaching it in nuanced manner accounting for the intricate and multitudinous aspects of this medical practice. Similarly, abortion is prohibited as well, "*except in conditions as may be prescribed*" and subject to the consent of the surrogate mother and the Medical Termination of Pregnancy Act, 1971. This provision is extremely vague, and it explicitly excludes the intending couple from the decision.

At the very outset, it is observed that the Bill is discriminatory in nature. It permits altruistic surrogacy to heterosexual couples only, thereby excluding a whole range of persons from it. Single persons, divorced or widowed persons, live-in partners[92], homosexuals[93] have been excluded. In addition, any couple who has had a child previously is also debarred from engaging in surrogacy services. This provision is in clear violation of Article 14 of the Constitution of India, which guarantees everyone equality before the law. Such a provision also violates internationally recognized human rights instruments, including the Universal Declaration of Human Rights[94] and the International Covenant on Civil and Political Rights, 1966[95]. Every human should be treated equally before the law; exclusion of selected categories undermines the pre-eminence of the principle of equality and promotes arbitrariness. The Rajya Sabha Standing Committee in its report[96] refers to this restriction and recommends that the eligibility criteria should be expanded to include other categories of persons, including live-in couples, divorced women and widows[97]. Unfortunately, the Report fails to mention homosexual couples in the list, thereby approving of the discriminatory practice. The Report extends the eligibility to Non-Resident Indians, Persons of Indian Origin, and Overseas Citizen of India cardholders but not to foreign nationals.[98]

The complete ban on commercial surrogacy may violate the woman's right to livelihood which is guaranteed under Article 21 of the Constitution[99]. Surrogate mothers do not do this out of preference but out of compulsion due to their poverty. They depend on this for their daily bread and butter. A ban on commercial surrogacy may render many families without a livelihood and a source of income. The Report of the Standing Committee on Health and Family Welfare, Rajya Sabha[100] reflected on the same notion. It stated that denying surrogacy to such women who are able to provide for their families and children is unfair and a

87 Id. sec. 35

88 Id. sec. 37

89 Id.

90 Id. Chapter VII.

91 Chithra P. George, The Government Must Rethink the Surrogacy Bill, THE WIRE (September 8, 2016),available athttps://thewire.in/law/why-the-government-needs-to-rethink-the-surrogacy-bill (Last visited on April 20, 2018)

92 See, Badri Prasad v. Dy. Director of Consolidation & Ors. AIR 1978 SCC 1557, Tusla & Ors. v. Durghatiya & Ors., (2008) 4 SCC 520., D Veluswamy v. D Patchaiammal, Criminal Appeal Nos. 2028-2029 of 2010., S Khushboo v. Kanniammal & Anr. (2010) 5 SCC 600., Indra Sarma v. V.K.V. Sarma, 2013 (14) SCALE 448.

93 Yogyakarta, supra note 64.

94 Universal, supra note 60. Art. 7

95 International Covenant on Civil and Political Rights, 1966, art. 26

96 Report of the Standing Committee on Health and Family Welfare, Parliament of India, Rajya Sabha, Report No. 102, Surrogacy (Regulation) Bill, 2016, PRS INDIA (August 17, 2017), available at http://www.prsindia.org/uploads/media/Surrogacy/SCR-%20Surrogacy%20Bill, %202016.pdf (Last visited on April 20, 2018)

97 Id. para. 5.40.

98 Id. para. 5.42.

99 See, Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nandkarni, A.I.R. 1983 S.C. 109; Olga Tellis v. Bombay Municipal Corporation, A.I.R. 1986 S.C. 180

100 Report, supra note 96.

reflection of the patriarchal outlook wherein decisions taken by women are not respected.[101] Assessment of the ground realities is a must before any legislation is drafted and forwarded to the Parliament. It is imperative to understand and comprehend the conditions in the real world; however, in this case it seems that the legislators failed to make the required assessment. It reflects the disconnect between the legislative and the people it represents. The focus of the Bill is misguided. Instead of finding an easy solution in banning commercial surrogacy, the legislators should have drafted a law with stronger protection for women in terms of potential abuse and exploitation. Instead of banning commercial surrogacy, compensated surrogacy should be adopted.

Another problem with the ban is that it may give rise to many illegal forms of trade and black markets. A ban does not mean that the demand for such services would also come to complete halt; the problems of supply and demand will surely create black markets and illegal forms of surrogacy services.[102] Considering the precedent set by the large-scale organ transplant and trafficking rackets[103] and trans-national women and child abuse and trafficking; it will not be surprising if such a ban results in making the conditions far worse for the various parties involved. The black markets would grow at an exponential rate and consequently make it tremendously problematic to identify the victims and regulate the activities. Such illegal forms of subversive services will surely be more exploitative and detrimental for the surrogate mothers and the children born through such services.

Furthermore, the limitation of hiring a close relative as the surrogate may violate the right to privacy of the couple and the surrogate mother as it would be known to everyone. The intended parents undergo severe mental and psychological pain and agony due to their inability to conceive a child. This subject is extremely sensitive in nature and is not discussed publicly. Unfortunately, the organizational structure as provided in the Bill leaves no space for any privacy in the matter. Requiring a close relative may result in this disclose, much to the discontentment of the couple. There are excessive formalities and regulations in the Bill, particularly in terms of disclosure of personal intimate details. Such provisions clearly violate the right to privacy of the intending couple and the surrogate mother as well.

The ban also violates internationally recognized human rights such as the right to procreation, right to Found a Family, Right to enjoyment of benefits of scientific and technological progress[104]. These set of rights are guaranteed to all as basic human rights.

Regarding the eligibility requirements, the definition of 'infertility' as given in the Bill is extremely restricted in nature and it does not conform to the definition as provided by the World Health Organization[105]. It does not account for infertility which may result from others causes such as genetic disorders, endometriosis, multiple miscarriages, cervical cancer,[106] etc. Furthermore, the provision regarding 'close relative' is also problematic as it is undefined and subjective and there always is the probability of exploitation by relatives[107]. Instead of limiting it to a close relative, it should be extended to both related and unrelated women. In addition, having a close relative as a surrogate may create other problems regarding the nature of relationship of the surrogate mother to the child, the psychological barriers and ethical concerns for the family as a unit.

Criminalization of the acts and punishing the intending parents for opting for surrogacy is unfair. Such severe punishment will affect the child born through surrogacy and may even deny the child a normal childhood. The

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101 Id. para 5.18.

102 Nidhi Gupta, What's wrong with the Surrogacy Bill, THE HINDU (September 9, 2016),available at http://www.thehindu.com /thread/politics-and-policy/ article9090866.ece (Last visited on April 20, 2018)

103 Even with the existence of a law, i.e. Transplantation of Human Organs and Tissues Act, 2011, there continues to thrive an illegal market of organ trade in India. See, Maneka Rao, India's laws on organ transplants do little to protect the rights of organ donors, SCROLL (December 14, 2017), available at https://scroll.in/pulse/861390/indias-laws-on-organ-transplants-to-little-to-protect-rights-of-organ-donors (Last visited on April 20, 2018)

104 Aneesh V. Pillai, The Surrogacy (Regulation) Bill, 2016: A Critical Appraisal, LIVE LAW(January 22, 2017), available at http://www.livelaw.in/surrogacy-regulation-bill-2016- critical-appraisal/ (Last visited on April 20, 2018)

105 The World Health Organization defines Infertility as "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse." Sexual and reproductive health, Infertility definitions and terminology, WORLD HEALTH ORGANIZATION, available at http://www.who.int/reproductivehealth/topics/infertility/definitions/en/. (Last visited on April 20, 2018)

106 Gita Aravamudan, Surrogacy Bill 2016 imposes unjust bans and does not focus on the real issues, FIRSTPOST(August 28, 2016),available at https://www.firstpost.com/india/surrogacy-bill-2016-imposes-unjust-bans-and-does-not-focus-on-the-real-issues-2980460.html/amp (Last visited on April 20, 2018)

107 Report, supra note 96, para. 5.21

interest of the child is made secondary to the penal provisions. Furthermore, the Bill provides for only minimum term of imprisonment and not the maximum term. This is a serious overlook in the drafting of the Bill.

The Bill needs a serious and constructive review. The Bill in the current format is futile and will create even bigger problems which this Bill will not be able to address.

7. Conclusions and Recommendations

Surrogacy is a multi-faceted, sensitive and contentious subject. There are multitudinous aspects and the subject invokes very divergent views. It is not a subject that can be studied and analysed in isolation. There are diverse aspects of medical sciences, sociology, psychology, business and law. Each of these aspects must be understood and evaluated before arriving at a conclusion. Commercial surrogacy makes matters even more difficult and intricate. It is a practice which is in vogue in parts of the world and affords numerous childless parents an avenue to have a family. Though noble in its core, the process is marred with controversy due to the many cases of custody issues, abuse and exploitation of surrogate mothers and children and a deplorable commodification of this medical process as a business activity. While many countries have deemed fit to ban this practice as a commercial activity, India has only recently decided to regulate this practice. The Bill has been enveloped in debate and condemnation due to its nature, structure and unwarranted regulation akin to a police state. The Bill is still under review and if passed in the present form, the Bill will only multiply the complications and concerns. The present status of surrogacy demands a much-needed restructuring and reformation attuned to the realities on the ground in the country.

Firstly, commercial surrogacy should not be banned in India, it should be replaced with compensated surrogacy. In a country of over a billion population, there is a dearth of employment and job opportunities. India is a developing nation and it has not achieved the level of economic prosperity that ensures every individual with a comfortable life. There are many who live in poverty and struggle each day to survive. In such circumstances, surrogacy services have come to aid many women who are able to provide for their families due to this practice. The legislators need to find a plausible solution that accounts for these women who depend on this for their survival. The solution is compensated surrogacy whereby the surrogate mother is adequately compensated for her contribution and is not forced to provide such services altruistically. The primary reason forwarded for a ban on commercial surrogacy is that it is abusive and offensive in nature and it gives rise to many legal and custody issues. If these are the main concerns, a ban is not going to resolve them. Rather, a law which addresses these concerns and regulates compensated surrogacy is needed.

Secondly, the law, i.e. the Surrogacy (Regulation) Bill, 2016 needs to be reconsidered and reframed. The law in its current form is regressive and adopts a very biased view of surrogacy as a moral wrong. The law is structured to make all the decisions for women, criminalize an activity which is a modern medical marvel and regulate the practice like an authoritarian state. The perception of surrogacy in terms of black and white is misguided and reflective of the myopic view of the legislators. Instead of a blanket ban on commercial surrogacy, the focus needs to shift to preventing discrimination and abuse and ensuring that the surrogacy contracts are made properly by the concerned parties and it truly implemented. Commercial surrogacy will not cease to exist simply because of a ban in place. This is evident based on past precedents and the extremely poor implementation system in the country. The Bill should provide provisions for women who voluntarily opt for such procedures and thereby provide them with a legal recourse in cases of abuse.

Furthermore, the Bill is extremely stringent in its eligibility criteria. Such a restrictive legal provision excludes many from the prospects of having a family. This needs to change and broadened to include single persons, divorced and widowed persons, and even the LBTQcommunity. India needs to decriminalize Section 377 of the Indian Penal Code and grant legal recognition to the community. The legal recognition and legislative support to transgenders is a step forward for this community, but the rest continue to remain in the shadows of shame and prejudice. Additionally, the age requirements, the time period of five years for infertility and the excessive administrative and regulatory nature of the Bill should be diluted. Establishing numerous authorities and granting them with unaccountable power will be detrimental in the future. The need for certification and authentication from these authorities will make the process tremendously hard and frustrating for the intending couples. Such an authoritarian attitude for a fundamental right such as having a family is unwarranted. The Bill should remove these unnecessary hindrances and pave way for a more accommodating and humane law on surrogacy.

Thirdly, surrogacy should be viewed from a human rights perspective. The existence and widespread practice of

commercial surrogacy cannot be ignored simply because it is convenient for the legislators. A human-rights based approach should be outlined whereby the surrogate mothers and the intending couples are made aware of the complex intricacies involved in this process. Collaboration with different sections of society and interested stakeholders is needed to spread awareness and information which shall thereby establish a more well-informed structure within the country. Medical specialists, legal experts, psychologists, social workers etc. need to come together to enlighten and educate these women of the diverse aspects and counsel them accordingly to ensure that they are able to engage in such services without abuse and manipulation. Collaboration and education is key in this matter and a need of hour in India.

Fourthly, the legislators need to revive the deep frozen Assisted Reproduction Technology (A.R.T.) Bill[108]. Surrogacy should fall within the broader realm of assisted reproduction. This Bill is a kneejerk reaction, while the former A.R.T. Bill is a much well-structured legislation. The Surrogacy Bill exempts ART centres that do not perform surrogacy cases. The Bill is directed towards regulating women and their choices, rather than bringing all such centres under the purview of the surrogacy law. The focus should shift towards establishing a framework and organizational structure whereby all I.V.F. centres, A.R.T. clinics and such related centres are identified and registered under a common registry system. Such clinics should conform to a basic standard of medical practice and afford a woman with all the facilities and benefits of modern science, while safeguarding their fundamental legal rights.

A holistic outlook and methodology is required in this matter. Irrational and ill-conceived decisions will worsen the situation. Only by appreciating the multitudinous aspects of surrogacy can a functional law be passed on the matter. The proposal to ban the practice cannot ensure its demise nor the improvement of the vulnerable sections of persons involved in this practice. Surrogacy is a sensitive subject and it warrants a similar attitude and *modus operandi*.

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[108] The Assisted Reproductive Technology (Regulation) Bill, 2014.

Social Security and Corporate Insolvency with Respect to Rights of Workers

Amit Randev*

ABSTRACT

The laborers or the work force play a significant role in the growth and development of the economy of every country, so it is very important to regulate their working conditions and to protect their rights, especially in this era of globalization where there is cut-throat competition among the enterprises to get a hold over the market. The greedy employers can exploit the workers in any way in order to increase their profits and for reducing the cost of production. To curb such sort of problems, the Indian Labour Laws have been developed in the light of constitutional mandates that promotes the principle of social security to the workers and also in consistency with various international labour standards laid down by International Labour Organization (ILO)from time to time since its inception in the year 1919 in the form of conventions, protocols, recommendations and declarations etc.for the protection and promotion of workers' rights. The paper undertakes a brief study of the Indian legislative framework ensuring social security to the workers in the form of employee's pension and provident fund schemes, workmen health insurance and other medical benefits schemes, disability benefits, maternity relief and gratuity schemes so that the workers can work freely and efficiently without any fear of social risks. The paper also touches upon the status of worker rights at the time of corporate insolvency as per the provisions provided under the Companies Act and newly enacted Insolvency and Bankruptcy Code, 2016. The paper points out the various lacunas existing under the present legislative framework that needs to be looked into so that these legislations can benefit the workers in reality.

Keywords: Social Security, Corporate Insolvency, Rights of workers, Disability benefits, Gratuity

1. Introduction

India is a welfare state and aims to provide an access to social security for the poor and vulnerable classes of the society in order to provide them with a respectable subsistence. This noble intention of the legislators is clearly reflected in our constitutional provisions where Article 41and Article 42 which fall under Part IV of the Constitution i.e. Directive Principles of the State Policy "*requires the state to make suitable provisions in order to secure right to work, education, and public assistance in cases of unemployment, old age, sickness and disablement*"[1] and also "*to make suitable provisions in order to provide just and human working condition and maternity relief.*"[2] In addition to these, the subjects like social security and labor welfare that mainly includes working conditions, provident fund, pension, workmen's compensation and maternity relief are mentioned under Concurrent list which implies that both the state and central government can make laws on these subjects.[3] All these constitutional provisions emerged in the light of international legal documents like the Universal Declaration of Human Rights (UDHR) and International Covenant on Economic, Social and Cultural Rights that embodied an access to social security as one of the basic human right.[4]

The concept of social security differs from society to society and exists in different magnitudes depending upon the social, political and economic development of the country.[5] In India, right from the era of pre-independence, abundance of legislations has been brought by our legislators for the protection of the workers' rights in the light of universal labor standards laid down by the International Labor Organization and for the purpose of providing an access to social security.

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1 Art. 41, THE CONSTITUTION OF INDIA, 1950

2 *Id.*, Art.42

3 *Id.*, Item No: 23 & 24, List III of Seventh Schedule

4 P. Ishwara Bhat, *Constitutional Dimensions of Social Security Laws In India, available at* http://crsgpp.nujs.edu/wp-content/uploads/2017/02/Article -6-Prof.-Bhat-Shuvro.pdf(Last visited on May 5, 2018)

5 A.M. Sarma, ASPECTS OF LABOUR WELFARE AND SOCIAL SECURITY, 184 (Himalaya Publishing House, 13thEdn., 2016)

2. Social Security System in India: Prevalent Legislative Framework

In the presence of such constitutional mandates, the state is now under legal obligation to provide social assistance to every workman against all the social risks involved in the working condition including medical crisis, labor accidents, unemployment, old age etc., because a common workman does not possess enough financial resources to cope up with such adversities and has no other option to earn his basic needs under those circumstances.[6] Apart from being an obligation, ensuring social security has become an indispensible part of political governance in this era of globalization and has also become important for economic development of the country. When the labor force is clubbed with the social assistance, the efficiency of workmen naturally improves as now he can work without any threat of such social risks.[7]

Due to all these factors, the social security system in India has become multi-faceted and includes a bundle of regulations, policies and schemes ensuring social assistance to the workmen. These can be broadly categorized into:

2.1 Employee's Pension and Provident Fund Schemes

The Indian legislative framework currently provides three major schemes namely:

a) The Employees' Provident Fund Scheme, 1952;

b) The Employees' Pension Scheme, 1995; and,

c) The Employees' Deposit Linked Insurance Scheme, 1976.

All these three legislations provide for the establishment of provident fund, pension fund and deposit-linked insurance funds for the welfare of the workmen in order to ensure financial stability and to provide them with better retirement benefits. These legislation apply on every industrial establishment engaging 20 or more employees.[8] Generally the schemes provides different pension plans on the occurrence of events like superannuation and disability, widow's pension on the death of the husband, and even provide pension to the children and orphan.[9] Under the Employees' Provident Fund Scheme, the employer and the employee make an equal contribution towards the provident fund which is fixed at the rate of 12% of the worker's pay. Though the employee is at liberty to exceed the prescribed contribution amount as per his/her choice,he cannot compel the employer to do the same. As per the latest amendment made under the said Act in the year 2014, such equal contributions both from the employee and employer is necessary if the employee's pay does not exceed Rs. 15,000 per month.[10]

Even the Hon'ble Supreme Court of India in the case of *D.S. Nakara & Others v. Union of India*[11] held that the benefit of the pension plans shall not be limited only to the employees who are getting retired after the enactment of the said legislation, but such benefits must be given with retrospective effect. The employers shall not get into the technicality of the legislation while providing the pension but focus on the goal of social security that needs to be attained by providing monetary incentives to the employees in their old age.

2.2 Workmen Health Insurance and other Medical Benefits Schemes

The Employee's State Insurance Act was enacted in the year 1948 with the objective of providing financial assistance to the employees and to their families in the case of medical contingency, and other monetary benefits in case of sickness, maternity and includes monthly pension to the dependents of the deceased or workmen who are disabled.[12] This enactment is applicable on all establishments that come under the purview of the term factory that includes: *"All the premises where 10 or more workers are employed for wages on any day within 12 preceding months carrying on some manufacturing works with the aid of power or where 20 or more workmen carrying on such work without the power assistance."*[13] In

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[6] *Laws relating to Social Security and Compensation, Business. Gov.In, available at* https://archive.india.gov.in/business/legal_aspects/social_security.php(Last visited on May 5, 2018)

[7] Bhat, *Supra note* 4, at 85.

[8] Sulekha Kaul, *India: Laws relating to Social Security in India,(September 8, 2017), available at* http://www.mondaq.com/ india/x/627178/Employee+Benefits+Compensation/Laws+Relating+To+Social+Security+In+India(Last visited on May 3, 2018)

[9] Dezan Shira, *Introduction to the social security system in India, India Briefing (May 4, 2017), available at* https://www.india-briefing.com/news/introduction-social-security-system-india-6014.html/ (Last visited on May 4, 2018)

[10] Ajay Raghavan, *Wage ceiling under EPF Act increased to INR 15,000, Employment Law Alliance (November 11, 2014)available at* https://www.employmentlawalliance.com/firms/trilegal/articles/wage-ceiling-under-epf-act-increased-to-inr-15-000 (Last visited on May 5,2018)

[11] D.S. Nakara & Others v. Union of India AIR 1983 SC 130

[12] Statement of Objective, The Employees' State Insurance Act, 1948

[13] *Id.,* Sec. 2 (12)

fact the Act includes all the categories of employees, whether temporary or permanent or on contractual basis, drawing wages not more than Rs. 21,000/month. This threshold has been recently enhanced from the previously limit ofRs. 15,000/month by virtue of The ESI (Central) Amendment Rules, 2016 that came into force from Jan 1, 2017. In addition to this some more modified maternity incentives have been introduced for the women workmen by The Employees' State Insurance (Central) Amendment Rules, 2017 got notified on 20 January,2017.[14]

2.3 Disability Benefits

The Workmen's Compensation Act, 1923is one significant piece of legislation that ensures social security to the employees and to their dependents by providing them financial assistance in case of injuries caused in the course of their employment that may cause death or disability.[15] Actually the engagement of an employee under certain working conditions made him more prone to the occupational diseases that cannot be ignored. Apart from taking various precautionary measures, it is important that an employee who is ready to face such high amount of risk must be compensated by the employer for the same.[16] In fact the legislation consists of Anon-exhaustive list of injuries that are deemed to result in permanent or permanent partial disablement under Part I and II of Schedule I of the Act.

Here disablement means: "*Any loss of capacity to work or anything that reduces the earning capacity of an employee or made him unable to perform an activity which he was previous capable of performing*".[17] The amount of compensation in an event of disablement is calculated by keeping in mind factors like the nature of work in which the injured employee indulged or monthly wages of the injured employee and other relevant factors.[18] In case of any injury resulting into death, the amount of compensation shall be calculated by multiplying the relevant factor with the amount equivalent to 50% of the monthly salary of the concerned employee or an amount of Rs.80, 000 whichever is more.[19]

In the case of *Partap Narain Singh Dev v. Shri Niwas Sabata*,[20] the Hon'ble Supreme Court held that imposition of interest and penalty on the employers who fail to provide compensation to their employees for injury caused in the course of the employment is justified any day.

2.4 Maternity Relief

The Maternity Benefit Act, 1961 was enacted with the objective of regulating the working conditions of women for certain period of time before or after delivery in order to ensure maternity and other benefits.[21] The Act is applicable on: "*All the establishments being a factory or mines either belonging to the government or to the private entity providing employment to 10 or more workers on any particular day of preceding 12 months*".[22] Under the provisions of this Act every women employee is entitled for the payment of maternity benefit in the form of average paid salary for maximum period of 12 weeks, by remaining absent from the work.[23] In addition to this, there are some other maternity benefits that are ensured to every women employee, like in case of miscarriage or medical termination of pregnancy she is entitled to get 6 weeks paid maternity leave, in fact she can claim: "*An additional one month paid leave in the event of any medical contingency occurring due to delivery, premature birth, miscarriage, medical termination*".[24] Keeping in mind the health status of pregnant women employee, a provision has been enshrined in the Act that provides that no establishment can compel its women employee to do any work which is of rigorous nature or involves long hours of standing or otherwise had adverse impact of her pregnancy.[25]

The Maternity Benefit (Amendment) Act, 2017enhances the time period for the paid maternity leave up to 26 weeks for the first two children and 12 weeks for the third child. By virtue of this provision India is now placed at the third position in the world after Canada (50 weeks) and Norway (44 weeks) in terms of providing maternity leave to the female employees. The amendment also led to the introduction of certain new provisions ensuring the element of social security especially to the female employees, including an option to work from home after the termination of her maternity leave if she is able to negotiate with the employer, provision to secure maternity leave of 12 weeks in case she adopts a child below the age of 3 months, and now all the establishments providing

[14] Latest Notifications/Amendments, Ministry of Labour and Employment, Government of India, available at https://labour.gov.in/latest-notificationamendments(Last visited on May 4, 2018)

[15] Sec. 3, The Workmen's Compensation Act, 1923

[16] Shira, *Supra note* 9

[17] Sec. 2(g) & (l), The Workmen's Compensation Act, 1923

[18] *Id.*, Sec.4

[19] *Id.*

[20] Kaul, *Supra note* 8

[21] Preamble of The Maternity Benefit Act, 1961

[22] *Id.*, Sec.2

[23] *Id.*, Sec.5(3)

[24] *Id.*, Sec.10

[25] *Id.*, Sec.4(3)

employment to 50 or more workers shall endeavor to provide crèche facilities for the employees.[26] Therefore this amendment is an important step towards women's rights to get maternity relief as enshrined under Article 42 of the Indian Constitution.

2.5 Gratuity Schemes

Gratuity is basically a reward or voluntary payment made by the employer to his employees for their continuous and commendable services for the organization in the past.[27] In India, the payment of gratuity to the eligible employees is made in accordance with the provisions mentioned under The Payment of Gratuity Act, 1972. This was enacted with the objective to establish a uniform scheme for the payment of gratuity and is applicable on "*every factory, mine, oilfield, plantation, port, railway company and on every establishment that involves the engagement of 10 or more employees on any day within 12 preceding months.*" [28]

Every employee of a qualified establishment shall be entitled for the gratuity, "*if he has rendered his services for the continuous period of not less than 5 years on the event of his superannuation, retirement or resignation or death or disablement due to accident or disease.*"[29] But at the same time his right of gratuity can be forfeited if his services are terminated because of any act or omission causing any loss or destruction to the employer's property to the extent of the loss caused, whereas under certain circumstances his gratuity can be fully forfeited if he is caught doing violent action or any misconduct of such nature or committed any offence involving moral turpitude.[30] The amount of gratuity generally has tax exemption under Income Tax Act, 1961 provided the amount of gratuity is calculated as fifteen days salary for every completed year of service and shall not in any case exceed ten lakhs rupees.[31]

3. Corporate Insolvency and Worker Rights

The latest Insolvency and Bankruptcy Code, 2016 acts as a recovery tool for the workers to get their due payments from the insolvent debtors on the completion of the liquidation process but genesis of this concept can be traced back to the Companies Act 1956 which provide for the order of preference that need to be followed in case of winding process of the company.[32]

Section 530 of the said Act provides the order that need to followed in regard of making payments during the winding-up process of the company. It says that firstly all the payments that the company owe towards the central or state government or towards the local authorities, either in the form of taxes, revenue, cesses or rates accrued within last 12 months shall be paid.[33] Secondly, all the wages or salaries which are due to the employees for the services rendered by him/her towards the company as every employee is dependent on the company for his/her subsistence and it would not be easy for him/her to get a new job immediately.[34] And subsequently the payment due towards the holiday's remuneration, employer contribution made towards the employee gratuity and even the employee's compensation is paid.[35] Lastly all the investigation expenses which are made by the company in the winding up process are paid.[36]

This concept lasted for around 30 years before the insertion of Section 529A through The Companies (Amendment) Act, 1985 which focuses on the protection of the workers and secured creditors rights at the time of winding up process and provides that: "*The debts payable to the workmen and secured creditors of the Company shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate the equal proportions.*" [37]

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[26] Nishvitha, *An overview on the Maternity Benefit (Amendment) Act,* 2017, available at https://www.icsi.edu/Portals/22/Article%20on%20MBA%20Act,%202017.pdf(Last visited on May5, 2018)

[27] *A Brief Summary on Payment of Gratuity Act, 1972, Lawyers Club India, available at* http://www.lawyersclubindia.com/articles/A-Brief-Summary-on-Payment-of-Gratuity-Act--7617.asp (Last visited on May 4, 2018)

[28] Sec. 1(3), The Payment of Gratuity Act, 1972

[29] *Id.,* Sec. 4

[30] Rule 7, The Payment of Gratuity (Central) Rules, 1972

[31] *All about The Payments of Gratuity Act, 1972, (March 26,2012) available at* https://taxguru.in/income-tax/all-about-payment-of-payment-of-gratuity-act-1972-in-brief-including-the-recent-amendments.html(Last visited on May 5, 2018)

[32] Karan Gandhi, *Preferential payments on winding up of the Company, (January 7, 2014) available at* http://www.mondaq.com/india/x/284708/Insolvency+Bankruptcy/Preferential+Payments+On+Winding+Up+Of+The+Company (Last visited on May 4, 2018)

[33] Sec. 530 (1) (a), The Companies Act, 1956

[34] *Id.,* Sec. 530 (1) (b)

[35] *Id.,* Sec. 530 (1) (c),(d),(e),(f)

[36] *Id.,* Sec. 530 (1) (g)

[37] *Id.,* Sec. 529A

The same provision was carried forward and brought under Section 53 of the Insolvency and Bankruptcy Code, 2016 which provides the following order of prioritythat starts from the payment of operational costs that include the resolution process cost and liquidation process cost,[38] then the dues of the secured creditors and that of the workers whose salaries are not paid are met here. One thing can be taken into consideration that both the secured creditors and the workers are on the same footings,[39] thereafter the debts of unsecured financial lenders are paid,[40] and then any amount due to the central or state government is paid and finally all the miscellaneous dues are paid including the dues of preference and equity share holders.

This improves the ease of doing business in India and would surely contribute to uplift the Indian ranking under World Bank's Resolving Insolvency which is currently 136 as now the financial institution would find themselves motivate enough to provide loans and other financial assistance to the small and new entrepreneurs because of the presence of such an exhaustive procedure to which they can resort to at the time of any financial default. And, on the other hand,this would also be very fruitful for the workers, as now they would provide their services without any threat of being cheated by the employers and will get priority over the government institutions at the time of liquidation that showcases a glaring example of social security under corporate insolvency.

4. Conclusion

From the above discussion it can be rightly concluded, that though the Indian legislative framework has covered a good ground by providing the social security benefits to the workers that cover employee's pension and provident fund schemes, health insurance and other medical benefits schemes, disability benefits, maternity relief and gratuity schemes, still there are some loopholes that the researcher has figured out while writing this paper.Firstly, all these social security schemes are restricted only to the organized sector while the unorganized sector that comprises the majority of our employment sector still do not have access to these beneficiary schemes. Secondly, due to lack of negotiation and bargaining power of the employees against the mighty employer, sometimes it becomes difficult for them to avail these social security benefits. Thirdly, all the social security legislations are not updated and modified as the amount of monetary assistance under them are still nominal and unreasonable according to the current requirements.Finally, in the event of corporate insolvency, the workers that are affected the most are the one who work at the grass root level as in this era of high unemployment rate it is very difficult for them to look for alternative jobs with the kind of caliber they have. Therefore, some more productive initiativesshould be taken in this regard to improve the implementation procedure of all these legislations so that they benefit the workers in reality rather than on paper only.

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[38] Sec.53 (a), The Insolvency and Bankruptcy Code, 2016

[39] *Id.*, Sec.53 (b)

[40] *Id.*, Sec.53 (d)

The Question of Electoral Recall In India: Panacea or Pandora's Box?

Karthik Shiva. B*

ABSTRACT

Winston Churchill defined the very essence of democratic elections as:"A little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper".The sum total of all these little crosses decides the fate of the nation for the next five years. Promptly after the elections, the little man is forgotten, neglected and ignored until the next elections. Electoral politics in India is inevitably driven by the vote bank and impending elections. Special packages are doled out to states, decisions of the Supreme Court are kept on hold, tall promises are madeand unabashed rhetoric takes place without any sense of political propriety once the poll bugle is sounded. The focus of electoral reform in India has been to initiate a shift in the politics of vote bank to a politics of growth, performance and development. During the 2014 general elections, the panIndia introduction of the NOTA option in the EVMs pursuant to the decision of the Supreme Court in People's Union for Civil Liberties v. Union of Indiawas viewed as the first step towards the provision of right to recall in India. Despite this, till now the Indian public has no option to recall an elected candidate for wrongdoing or underperformance, unless he relinquishes his office or his tenure ends.Hence, the right to recall is argued to be an apt tool to ensure continuous accountability of the representatives to the electorate as opposed to the periodic accountability by way of elections. In this background, this article is an attempt to analyse the concept of recall, its historical background, the constitutional and international perspective of recall, recall of elections in other countries and the challenges and problems in the instituting such a right and whether it is a right panacea or opens a pandora's box.

Keywords: Accountability, Constitutional law, Democracy, Electoral Reforms, Recall

1. Introduction

Democracy is one of the basic hallmarks of the Constitution of India[1] and it envisages a parliamentary form of government with the members of political office in India being generally elected directly by the people themselves.[2] However, taking into account the size, magnitude and other unique factors surrounding Indian polity, we have adopted a system of indirect democracy wherein the elected representatives of the people legislate and govern on their behalf. It also referred to as 'representative democracy'.

Thus, the general public has a very limited role to play in day-to-day functioning of the government. Having this in mind, the role of election assumes even greater significance in a country like India. The system of election provides the electors with the opportunity of affirming or negating the performance of a government by their positive or negative mandate. Thus, elections in itself, acts a check on the government as they will have to answer to peoples' judgement periodically.

The Oxford Dictionary of Law defines election as:*"The process of choosing by vote a member of therepresentative body, such as the House of Commons or a local authority"*[3]. Black's Law Dictionary defines election as:*"The process of selecting a person for an office usually a public office.*[4]*"* The right to recall refers to the right of electors of a State to recall the elected representatives or to call for fresh elections before the completion of the full tenure of an elected representative. Sometimes, it also referred to as 'citizen-initiated election.'

According to the Black's Law Dictionary, 'recall election' means an election in which voters have the opportunity to remove a public official from office.[5] Recall is a term used to describe a process whereby the electorate can petition to trigger a vote on the suitability of an existing elected representative to continue in office. It is considered to be a significant and direct democratic tool for the electorate to remove an ineffective elected representative.[6]

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1 The Preamble, THE CONSTITUTION OF INDIA, 1950.

2 The only major exception to this rule is the Rajya Sabha election as well as election for the post of President and Vice-President, wherein the elected representatives forming part of the electoral college elect them.

3 Jonathan Law & Elizabeth A. Martin (eds.), OXFORD DICTIONARY OF LAW, 192(Oxford University Press, 7thed., 2010).

4 Bryan A. Garner (ed.), BLACK'S LAW DICTIONARY,595(9th ed., 2006)

5 Id. at 1381.

6 Gareth Griffith & Lenny Roth, *Recall Elections,Parliament of New South Wales, available at* https://www.parliament.nsw.gov.au/researchpapers/Documents/recall-elections/Recall%20Elections%20E%20Brief.pdf, (Last visited on: May 12, 2018).

Thus, recall is a direct democracy procedure that allows the appropriate authority and/or a specified number of citizens to demand a vote for the electorate on whether an elected holder of public office should be removed from that office before the end of his or her term. As per the aforesaid definition, recall can be initiated when certain prescribed conditions are satisfied as opposed to other processes which terminate the elected representatives period in office such as impeachment.

A direct democratic tool is the one which involves the process of legally interrupting the tenure of an elected official by way of initiative and/or the vote of the electorate. When the initiative and the decision to do this come exclusively from the legally established authorities, such as the legislative or the judicial branch, and do not require the voters' involvement at any phase of the process, the procedure is more properly called impeachment.[7]

The problem of criminalisation of politics[8] has resulted in electoral politics being viewed as lucrative business for making money. Most of the candidates[9] who contest in election come from shady backgrounds and by questionable methods. They spend ill-gotten wealth from criminal activities and manage to get elected by hook or crook. Given that their tenure of political office is assured, they continue to engage in corrupt and unlawful practices neglecting the interests of the general public. Moreover, the electors are not in a position to do anything about this situation and are caughtin a predicament with the same elected representative who does not represent their interests.

In this background, it is widely advocated that the introduction of the right to recall would act as serious check on such candidates who will be under the constant scrutiny of the electors. Whenever an elected representative acts in a manner inconsistent with the nature of his office, the people can initiate an action for recall against him by following the procedure prescribed.

2. Historical background of Right to Recall

The historical background of recall elections can be traced to the Athenian Constitution of Aristotle in 350 B.C.,which provided for removal of members of the senate.[10] In India, Shri Madhusudan Das, the Minister for Local Self-Government and Public Works of the Government of Bihar and Orissa, was the first legislator to introduce in 1922 in the Bihar and Orrisa Legislative Council the right to recall in the local legislative act[11] therein[12]. This dynamic and radical provision of 'recall' provided for a duly elected representative who loses the solemn confidence reposed on him by the electors to relinquish the duly acquired coveted seat.[13]

The practice of right to recall in India can be found in local body elections in the states of Madhya Pradesh,[14] Chhattisgarh, Rajasthan and Punjab.[15] In Chhattisgarh, an elected president of the local body the procedure for recall can be initiated if three-fourths of the elected representatives within the local body forward a petition to the district collector demanding recall of the elected president.[16]

The Act provides that once such a petition is made, re-election is called for and if more than fifty percent of the voters vote against the incumbent president, then he will be recalled.[17] It also lays down on the district collector the duty of verifying the signatures made on the petition[18] and provides that the right to recall can be used only once during the tenure of an elected president.

On receipt of the petition, the State government shall forward the same to the State Election Commission which has the duty to hold the recall election.[19] It also provides that in case of general local elections, the petition for recall cannot be made till the expiry of two years from the date of election and if a president is elected by bye-election, recall cannot be made it the completion of half of his term.

2.1 Constitutional perspective of Right to Recall

The procedure and law relating to elections can be found specifically in Part XV of the Constitution of India which elaborately deals with matters relating to elections. It is also referred to in other parts of the Constitution of India particularly those relating to Parliament and legislature of

7 *Direct Democracy: The International IDEA Handbook 2008*, International Institute for Democracy and Electoral Assistance, 135.

8 N.N Vohra, Report on Criminalisation of Politics, Ministry of Home Affairs (1993), Government of India.

9 Trilochan Sastry, *Civil Society, Indian Elections and Democracy Today, Working Paper No. 465, Indian Institute of Management Bangalore available at* https://adrindia.org/sites/default/files/Civil_Society_Indian_Elections_and_Democracy_Today_Prof_Sastry.pdf, (Last visited on: May 12, 2018).

10 Frederic G. Canyon (trans.), ARISTOTLE'S CONSTITUTION OF ATHENS,part 43.

11 Bihar and Orrisa Local Self Government Act, 1923.

12 CONSTITUENT ASSEMBLY DEBATES,Vol. IV, July 18, 1946.

13 Surasinha Patnaik, *Madhusudan Das - Precursor of the Co-operative Movement, ORRISA REVIEW, April 2005, available at* http://odisha.gov.in/e-magazine/Orissareview/apr2005/englishpdf/madhusudan_das.pdf, (Last visited onMay 12, 2018).

14 Sec. 47, Madhya Pradesh Municipalities Act 1961.

15 Punjab Panchayat Act, 1994.

16 Sec. 47, Chhattisgarh Municipalities Act 1961.

17 Sec. 47 (1), *Id.*

18 Sec. 47 (2), *Id.*

19 Sec. 47 (3), *Id.*

the States. The first person to call for the power to recall albeit not as a fundamental right was Shri Lakshmi Narayan Saha of Orrisa who proposed the same in state legislative assemblies.[20]

The Constituent Assembly rejected the proposal and Shri Sardar Vallabhbhai Patel dismissed the need for such a provision on the ground that a person who has lost the confidence of the people would or rather should resign on his own accord. He further stated that legislating the power of recall taking account of negligible number of persons who refuse to resign even after losing the confidence of the people is unwarranted and amounts to disfiguring the Constitution.

The right to recall has not been incorporated in the constitutional framework of India. However, it is pertinent to note that during the drafting stage of the Constitution, an amendment[21] to include the right to recall as a fundamental right was put forth by one of the members of the Constituent Assembly, Shri Loknath Misra, by way of draft article 8-A.[22] Explaining the need for the right to 'recall', he stressed on the fact that members of legislative bodies who are required to represent the general public actually represent narrow party interests. Hence, the right to recall is necessary to ensure proper democracy.

He further asserted that the right to recall is as significant as the right to elect and it will ensure that the interest of the represented is given as much importance as that of the political party to which the legislator belongs. However, the proposal to insert a right to 'recall' was rejected by the Constituent Assembly. Another attempt to include the right of recall was made by Shri H.V Kamath by providing for recall of members of the Parliament[23] and members of legislative assemblies[24] on the ground of failure to discharge duties. These attempts were also negated by the Constituent Assembly.

2.2 International law perspective of Right to Recall

The right to vote empowers citizens to influence governmental decision-making and to safeguard their other human rights.So, another significant aspect of the discussion on the right to recall is the status of the right to recall in international law. To comprehend the notion of right to recall it also necessary to deliberate on the status of right to vote in international law.

The Universal Declaration of Human Rights, 1948 provides in Article 21, the right of people to take part in the government of the country, directly or through freely chosen representatives and it further provides that the will of the people shall form the basis of government. It also provides for periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[25]

Similar rights are guaranteed to all citizens as per Article 25 of the International Covenant on Civil and Political Rights, 1966. Article 25 lies at the core of democratic government based on the consent of the people which is in conformity with the principles of the Covenant. It also provides that the right to vote can be subject to reasonable restrictions and restrictions based on racial, religious or other similar considerations are not permitted.[26]

Though Article 25of ICCPR is based on the UDHR, the former varies in two substantial aspects from the latter document.The ICCPR provides the right to vote to all 'citizens' as opposed to all 'people' as provided in the UDHR.Similarly,the UDHR states that the "will of the people shall be the basis of the authority of government" which tends to recognise the sovereignty of the people is absent in the aforesaid article of the ICCPR. It is argued that Article 25 of the ICCPR deals with the right to participate in public affairs – including the right to genuine and periodic elections – but it does not purport to condition governmental authority on respect for the will of the people.[27]

The right to vote is also secured under various other human rights instruments, including Article 13 of the African Charter on Human and People's Rights, Article 23 of the American Convention on Human Rights and Article 3 of Protocol I of the European Convention on Human Rights.[28]

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20 CONSTITUENT ASSEMBLY DEBATES,Vol. IV, July 18, 1946.

21 Amendment No. 273 of the New List by Shri Lokanath Misra, CONSTITUENT ASSEMBLY DEBATES, Vol. VII, November 29, 1948.

22 The draft article also provides for the right to be registered as a voter, the right to elections and state funding of election, the right of universal adult suffrage and provides that even an unopposed candidate has to obtain at least one-third of the valid votes to be elected as a representative.

23 CONSTITUENT ASSEMBLY DEBATES, Vol. VIII, May 19, 1949.

24 CONSTITUENT ASSEMBLY DEBATES,Vol. VIII, June 2, 1949.

25 Art. 21, Universal Declaration on Human Rights, Dec. 10, 1948, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

26 UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7.

27 Dr. Lawrence Emeka Modeme, *Right to Political Participation in International Law: A Rebuttal of the Democratic Entitlement Claim, available at* https://www.academia.edu/576129/Right_to_Political_Participation_in_International_Law_A_Rebuttal_of_the_Democratic_Entitlement_Claim, (Last visited onMay 12, 2018).

28 Alexander Kirshner, *International Status of the Right to Vote,Democracy Coalition Project,available at* http://archive.fairvote.org/media/rtv/kirshner.pdf, (Last visited onMay 12, 2018).

The Inter-American Democratic Charter of the Organisation of American States (OAS) is very unique and noteworthy in the sense that, it is the only international/regional instrument which deals comprehensively and entirely on democracy[29] and its interplay with human rights, development, combating poverty and so on. It is the first charter to enshrine the 'right to democracy' to the people and imposes an obligation on the states to uphold and defend democracy. The Charter further provides for a collective response to unconstitutional interruption to the democratic order of a member state by empowering the OAS General Assembly to suspend the membership of the member state where such a variation has been made.[30]

The only major international document which makes a direct reference to the right to recall is the Inter-Parliamentary Union[31] (IPU) Resolution in the 98th Inter-Parliamentary Conference[32] held in Cairo in the year 1998 titled 'Ensuring Lasting Democracy by Forging Close Links Between Parliament and the People'. It calls upon the States to strengthen representative parliamentary democracy with constitutional instruments, including petitions and referenda, parliamentary recall and the right to initiate legislation, wherever these may be appropriate and feasible in the light of the constitutional system and established political culture.

Though the right to vote is treated as a human right in international law subject to reasonable restriction, the same cannot be said regarding the right to recall elected representatives. There is no explicit obligation on the States in International Law to grant the right to recall to its citizens. However, there is an implicit justification in granting the right to recall as it stems from the principle that the will of people should be the basis for authority of government. Once the government loses the confidence and support of the people they ought not to continue to represent them.

2.3 Comparative perspective of Right to Recall

One of the first countries to recognize the right to recall is Switzerland where 6 out of the 26 cantons allow the right to recall to the voters with the Bern canton of Switzerland or Swiss Federation providing the right as early as in 1843. It is triggered by accrual of specified number of signatures which varies from canton to canton. The required number of signatures in the recall petition is not based on a percentage of the electorate and instead a fixed number, say 1000 in Schaffhauses and 15,000 in Ticino.[33]

In the United States of America, the right to recall is provided in 19 states and there have been only two successful recall attempts in USA: the recall of Governor Lynn J. Frazierin North Dakota in 1921 and the other one being the recall of California Governor Gary Davis in year 2003. The process varies across states, but broadly requires an application to be filed to circulate a recall petition, following which the petition is circulated. The petition has to be signed by a specific number of people within a specified time and then submitted to the election officials for verification of signatures.[34] Similarly the right to recall has also been incorporated in Great Britain only in recent times by the enactment of the Recall of MP Act, 2015.[35]

It is pertinent to note that both USA and UK which provides for the right to recall in their electoral system do not guarantee the right to vote as constitutional right. The Constitution of Uganda contains an explicit provision in Article 84(1) providing for the right to recall of elected representatives by the people, though it has been rendered ineffectual by its shift from the movement political system to a multi-party system. Other countries such as Ecuador, Ethiopia, Peru and Taiwan also have reference to the principle of revoking the mandate of elected officials as a right of the people though there are pronounced differences amongst them.

In Venezuela, recall of elected officials is a substantive feature of the form of government, as government is defined in the Constitution as: "Democratic, participatory, elective, decentralized, alternative, responsible, pluralistic, and with revocable mandates". The Peruvian Constitution calls the right to revoke and remove officials a 'fundamental right' of the person. The Cuban Constitution contains a similar statement inspired by the 'principles of socialist democracy', according to which *"those elected must render an account of their work and may be recalled at any time"*.[36]

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[29] Art. 1,Organization of American States (OAS), Charter of the Organisation of American States, 30 April 1948, available at: http://www.refworld.org/docid/3ae6b3624.html,(Last visited on: 12 May 2018).

[30] Art. 21,Id.

[31] The Inter-Parliamentary Union is a global inter-parliamentary organisation which works towards fostering parliamentary democracy and global peace. It has also been granted special consultative status by the United Nations Economic and Social Council.

[32] The Inter-Parliamentary Conference (now known as theIPU Assembly) is the principal statutory body that expresses the views of the Inter-Parliamentary Union on political issues.

[33] 255thReport of Law Commission of India (2015), para12.17.

[34] *Id,* at para.12.14.

[35] The question of recall came into consideration after the MP expense scandal in the year 2009.

[36] *Supra note* 7 at para.141.

3. Need for Right to Recall in Indian context

Recall is essentially a means of ensuring vertical accountability as opposed to horizontal accountability. The demand for right to recall has been made by the civil society from the year 2011 particularly in the wake of the startling corruption allegations against the elected representatives which badly dented their image among the general public. The demand for the Right to recall was made by Gandhian activist and anti-corruption crusader Anna Hazare in the year 2011 so as to curb corruption and ensure good governance.[37] The demand was rejected by the erstwhile UPA government and it also did not find favour from the other elected representatives as well the Chief Election Commissioner of India S.Y Qureshi.

It is a means to ensure continuous legislative accountability of the elected representative to the voters rather than periodic accountability. The supporters of recall provisions look at the right to recall mechanism to make elected representatives more continuously, rather than periodically, responsible and responsive to the will and desires of the electorate. With recall procedures available, it is argued, there is no need for the electorate to tolerate an incompetent, corrupt, and/or unresponsive official until that representative's term is over.

Whenever an incumbent government or representative does not retain power it can be argued that the situation is nothing but an implicit exercise of the right to recall in the general elections by the voters. The only difference is that it is triggered by lapse of tenure of the elected representative unlike the right the recall where the re-election or recall is triggered by the electors themselves.

3.1 Challenges in the Right to Recall

The biggest challenge of the implementation of the right to recall is that there is no agreed procedural outline if and when the right to recall is granted. Other challenges include the percentage of the electors needed to sign the petition, the suitability of initiating recall through signature, the authority competent to decide the validity of the signatures, the grounds (if any) for the initiation of the recall, the minimum period for which the right to recall cannot be exercised. Similarly, the other relevant questions are as to whether the voters who did not participate in the original elections are entitled to initiate recall elections, number of recall petitions that can be made as well as the effect of recall as a disqualification of the recalled candidates and so on.[38]

There is also an argument that the right to recall will act as a constant threat by undermining the independence of elected representatives who will be compelled to act on populist preference and prejudice at the expense of minority interests.The existence of the right to recall will result in short-term gains being preferred over long-term unpopular but beneficial policies. Another critique of recall is that it goes against the sound reasoning of our founding fathers in fixing of a five-year term for elected representatives which is essential to draft and implement good policies and ensure stability.

Right to recall is argued to be a threat as itincentivises representatives to focus on the local and constituency issues rather than larger public interest issues. It is also argued that the right to recall is a violation of the principles of natural justice in so far as no opportunity of being heard is given to representative before being recalled. Another noteworthy criticism of the right to recall is that it ignores larger issues of political reform such as decriminalisation, curbing money in politics, internal democracy and increased public awareness necessary to improve the quality of representation, and progress in these areas will make the right to recall redundant.

The next crucial point is the question of expenditure and the time which will be required to make the right to recall feasible is highly uneconomical and unsuitable to a country like India. The Right to recall, as it is usually applied, is especially dangerous and liable to misuse in India that follows the First-Past-the-Post system wherein most of the winning candidates do not have a support of 50% of their electorate in the first place. Thus, by applying the right to recall in India, most the elected representative can be replaced in one-go which would lead to an unwarranted predicament and thus Law Commission of India has suggested that right to recall is not suitable in India.

3.2 Proposed Right to Recall bill – way forward?

The Representation of the People Amendment Bill, 2016 as introduced by Shri Varun Gandhi in the Lok Sabha proposes to establish the right to recall by amending the Representation of the People Act, 1951. It defines the term 'recall petition' in the following words:*"Recall petition means a petition calling for vacation of seat of a Member of Parliament of the House of the People or the Legislative Assembly of a State, as the case may be."*

It also aims to check that recall petitions are not frivolously[39] resorted to and also provides for criminal punishment[40] for certain offence connected with the recall

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[37] Amit Agnihotri, *Hazare's right to recall impractical, The New Indian Express (18 September, 2011), available at* http://www.newindianexpress.com/nation/article363830.ece?pageToolsFontSize=130%25 (Last visited onMay 13, 2018).

[38] 255thReport of Law Commission of India (2015), para.12.2.

[39] Cl. 3, The Representation of the People Amendment Bill, 2016 (as introduced in Lok Sabha on November 3, 2016).

[40] Id.

petition so as to prevent its misuse. The right to recall can be initiated on a petition signed by at least one fourth of the total electors in a constituency and addressed to the speaker who shall forward the same to the Election Commission after looking into its *prima facie* validity.

The process for verification of signatures and first review by the Speaker of the concerned House is also laid down under the proposed bill. The Election Commission has to verify the signatures within 90 days from the date of submission by the Speaker of the House concerned. It also provides for the designation of Chief Petition officer who is entrusted with the task of conducting the recall election. The Chief Petition Officers from the Election Commission have been designated to supervise and execute the process with a view to ensure transparency and independence.

The bill declares that the recall election is to be conducted using electronic voting machines and the recall petition will be deemed to successful once three-fourths of the total electors in a constituency vote for the recall. The threshold for success of a recall petition is fixed at a higher level so to ensure that a representative is not recalled by a small margin of voters and the recall is in accordance with the people's mandate. The bill further aims at preventing harassment of elected representatives impeding them from exercising their duties. The process for recall has several safeguards incorporated in it such as an initial recall petition to kick start the process and electronic based voting to finally decide its outcome.

4. Conclusion and suggestions

There is always a gap between principle and practice, between aspiration and reality. A critic's definition of politics is that it refers to the process of getting votes from the poor and campaign funds from the rich, by promising to protect each from the other. Right to recall at the level of MPs/MLAs is very difficult to work in India due to large size of the constituencies, low turnout for voting and expenditure required for recall proceedings.

Moreover, there is a need for a study of the logistical and administrative challenges that may arise out of the recognition of the right to recall and any hasty measure will serve only to aggravate the problem. However, by introduction of compulsory voting, use of modern technology, it may be possible in near future to have right to recall for MPs/MLAs also. It will help in cleansing political system in India which is certainly going through the worst time at present.

In conclusion, it has to be understood that granting of the right to recall cannot be treated as one-stop solution for all the problems plaguing the Indian electoral system and democracy. However, it is suggested that the right to recall can be expanded on a choice-basis to all local body elections which is practical and feasible in the current scenario. But this has to be viewed along with the need to make voting compulsory by providing the NOTA option which will ensure that the recall elections take place only in exceptional circumstances. There is also a need for an attitudinal shift in the outlook of the electors and the representatives so as to improve our system of democracy and governance. Only then will the electoral reforms be a real success and it can create a real impact on the general public and make India a model democracy for the world as a whole.

Criminal Law (Amendment) Ordinance 2018: A Specious Cure for a Prodigious Problem

Prashant Joshi*

ABSTRACT

With the increasing instances of sexual abuse of children, the government in an effort to counter the crime introduced the Criminal Law (Amendment) Ordinance, 2018. Under it, changes have been made in Indian Penal Code and Prevention of Children from Sexual Abuse Act making capital punishment possible for the crime of rape of a child less than 12 years of age. The objective of this enactment is to protect children from rape by creating deterrence through rigorous punishment. However, this exercise reflects a lack of legislative and executive sapience. Except stringent punishment, the ordinance does not talk about any progressive measures such as setting up of new fast track courts. Moreover, ordinance is also silent on various procedural issues and dismaying low conviction rates under POCSO. Nor is this the first time that capital punishment has been introduced for an offence related to rape.Also, the ordinance in itself has some major legal irregularities which have been dwelt upon in this paper. This ordinance is nothing more than a knee-jerk reaction to the nation's fury. Introducing a problematic and superficial measure with such sense of haste, the government is only providing lip service to this grave and complex issue of child abuse. By critically analyzing the ordinance, the purpose herein is to signalize and discuss in detail the fundamental flaws of this ordinance and to provide suggestions to improve the intended effects of the ordinance.

Keywords: Rape, Sexual abuse, Children, Death penalty, Deterrence

1. Introduction

After recent horrid cases of child rapes in Kathua and Unnao, followed by an immense public outcry, the government of India introduced Criminal Law (Amendment) Ordinance 2018, amendingIndian Penal Code 1860 (IPC), Protection of Child from Sexual Offences Act 2012 (POCSO), Code of Criminal Procedure 1973 (CrPC) and Evidence Act 1872, thus making the offence of rape of a minor girl punishable with death. The important changes the ordinance made[1] are as follows:

1.1 Amendment to IPC

a) Section 376 IPC: Minimum amount of punishment for rape has been made ten years. Life imprisonment remains the maximum punishment.

b) In case of a person committing rape on a woman less than sixteen years of age, now minimum punishment of twenty years can be given due to the addition of a new clause (3) to Section 376.

c) A new Section 376AB has been added which gives the minimum punishment of twenty years rigorous imprisonment to a person committing rape on a girl less than twelve years of age. Maximum punishment is extended to death penalty.

d) Section 376DA and 376DB providefor the minimum punishment of life imprisonment for persons engaged in gang rape of girl aged less than 16 years and 12 years respectively.

e) Death penalty can also be awarded to persons involved in gang rape of a girl of age less than 12 years.

f) Section 376 (2) (a), the sentence "*within the limits of the police station to which such police officer is appointed*" has been omitted. This omission implies, no matter where a police officer commits rape, he is to be punished with rigorous imprisonment of minimum ten years.

1.2 Amendment to POCSO Act and Evidence Act

Section 42 of the POCSO Act has been also amended to add newly inserted IPC provisions i.e. Section 376AB, Section 376DA, and Section 376DB.

At a cursory glance, these provisions look good to many people, seeing this as government's befitting reply to the cause. However, this legislation is not more than a patellar reflex action of the Cabinet done to mollify the rising anger of the public on the issue of increasing instances of child abuse. Death sentence and harsher punishments are being used as a tool to control public sentiments.

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[1] Criminal Law (Amendment) Ordinance, 2018

By analyzing the ordinance, it can be said that this is an improvident step which will only create problems. The ordinance does not cover child abuse of a male child. By amending POCSO Act, Sec 24 of the newly enacted legislation provides different punishment for the same crime on the basis of gender. Also, by limiting the investigation time to 2 months, it took death penalty as frivolous matter. Amongst various procedural issues, these above mentioned provisions will only make it deplorable. Giving such a stringent punishment without addressing such essential questions, this particular enactment shows substandard effort of the Union Cabinet. Quite apart from whether the ordinance answers these charges, it poses a number of questions. It raises the logical concern that the government does not have time and appropriate disposition to consider the appalling conditions of child abuse from perspectives of law, jurisprudence or human rights.It is a policy not for justice for rape victims, but for appeasement of the general public, that is picking apart the government after recent incidents of child abuse.

For example a boy aged 12 years indulges in a sexual intercourse with 14 years old girl, both giving their consent for the same. In that case, male can be charged for rape crime.[2] POCSO is gender-neutral in nature. But in case where there is a consenting sexual intercourse between a minor couple, male can be charged for rape under IPC. In this situation, male is treated as CCL (Children in Conflict with Law), whereas female is considered as CNCP(Children in Need of Care and Protection). But technically they both are CCL as well as CNCP.

Criminal Law (Amendment) Ordinance 2018 does not solve this discriminating issue of POCSO. Additionally, pendency of suit and low conviction rate under POCSO is also a serious concern on which the new ordinance is silent on. Over 90,000 cases registered under POCSO were pending at the end of 2016.[3] Moreover, trial was completed in mere 10,884 of such cases with a total conviction rate of about 29.6%, which is much less as compared to conviction rate of under IPC. In 2016, from 64,138 cases of child abuse registered under POCSO, only 1,869 cases — or less than 3% — resulted in convictions.[4] Among various other reasons, one of main causes for low conviction rates is witness turning hostile. According to a study of[5] special courts of Delhi, which are established under POCSO Act, it was found that in only 26.7% cases, accused can be convicted on the basis of victim's testimony. On the other hand, victim turned hostile in as many as 67.5% cases.

Criminal Law (Amendment) Ordinance 2018is just adding more rigorous punishment to an already enacted POCSO, but without paying any heed to its efficacious implementation. Just making stringent provisions that provides for rigorous punishment without actually making an effort towards the effectuation of the same is a futile attempt which will never give the intended results.[6] A law without implementation is not a law at first place. Ceaseless addition to any law without making serious efforts to clear hindrances for its betterment can only be understood as a measure for assuaging the public.

2. Is Death Penalty really a deterrent?

By imposing death penalty for rape of a girl below 12 years of age, the government may feel that it is enough for the cause, but it should be duly noted that death penalty may not serve as a deterrent for a crime. The Justice J. S.Verma committee, which was formed after the December 2012 Delhi gang rape and murder case, in its report reasoned out that death penalty would be anatavisticaction in the field of sentencing and reformation. The panel categorically rejected capital punishment for the offence of rape and concluded that deterrent effect of death penalty on grave offences is not proven anywhere.[7]

Also, a report named *"The Death Penalty"*[8] published by Law Commission of India recommended that capital punishment should be abolished except in cases of waging war against the state and terrorism. With all these reports stating death penalty is not a viable deterrent, imposing it in such a hasty manner only shows lack of insight on part of the government. In *Bacchan Singh vs Union of India*,[9] Justice P.N Bhagwati, quoted Arthur Koestler and stated that:

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2 Sec. 375, Indian Penal Code, 1860.

3 Crime in India- National Crime Records Bureau (2016)

4 Shalini Nair, *Death poor Deterrent: Three per cent convictions, 94% accused know victims in child rape cases,* The Indian Express, (23 April 2018), available at http://indianexpress.com /article/india/death-poor-deterrent-three-per-cent-convictions-94-accused-know-victims-in-child-rape-cases-5146888/ (Last visited on May 3,2018)

5 Centre For Child And The Law, National Law School of India University, Bangalore, *Report of Study on the working of Special Courts under the POCSO Act, 2012 in Delhi, (2015), available at* https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct 2012.pdf/ (Last visited on May 3,2018)

6 Aneesha Mathur, *Delhi: Many POCSO cases pending due to infrastructure deficiencies, says judges,* The Indian Express (October 25, 2016), available at http://indianexpress.com/article/cities/delhi/delhi-many-pocso-cases-pending-due-to-infrastructure-deficiencies-say-judges-3101421/(Last visited on May 4,2018)

7 *Report of the Committee on Amendments to Criminal Law, (2013), available at* http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf/ (Last visited on May 5,2018)

8 262nd Report of the Law Commission of India (2015)

9 Bacchan Singh v. Union of India (1982) AIR 1980 SC 898

"When pickpockets were punished by hanging in England, other thieves exercised their talents in the crowds surrounding the scaffold where the convicted pickpocket was being hanged. Statistics compiled during the last 50 years in England show that out of 250 men hanged, 170 had previously attended one or even two public executions and yet they were not deterred from committing the offence of murder, which ultimately led to their conviction and hanging. It is a myth nurtured by superstition and fear that death penalty has some special terror for the criminal which acts as a deterrent against the commission of the crime."

There are several incidents of the offenders killing their victims, so strict anti-rape laws are perceived not to be deterrents but measures that further incite rapists to attack the victims. As a matter of fact, the inference that stringent laws are enough to act as a deterrent to crime is a based on unfounded reasoning, as there is sufficient data to prove that heinous rape instances have only increased despite the enactment of Criminal Law (Amendment) Act, 2013 which provides capital punishment for sexual assaults that result in death of the victim or make the victim's persistently vegetative. Since 2013, there has been a considerable rise in no. of rape case, especially against children.

According to the NCRB[10] data for 2016, cases of rape of children have raised by over 82% as compared to 2015. Such a sharp spike has been registered for the first time. The data states that while in 2015, 10,854 cases of rape under Section 376 of the IPC and under Sections 4 and 6 of the POCSO Act were registered across the country,[11] in 2016, the figures shockingly increased up to 19,765 registered cases.The number of rapes reported each year in Delhi has more than tripled over the course of five years, registering an increase of 277% from 572 in 2011 to 2,155 in 2016, according to datareleased recently by the Delhi Police.[12]

Furthermore, Sec 13 of Criminal Law (Amendment) Ordinance 2018 stipulates police investigation is to be completed within 2 months from the date of filing FIR.[13] However, limiting time of investigation without actually grossly improving the facilities and infrastructure of the courts and refining several other peculiarities of the process could lead to precipitous conviction. One such hindrance to the adherence of time limit is delay in incurring Forensic Science Laboratory reports, which are an essential evidence for prosecution to further its case. As on January 31, 2015, there was a total no. of 6206 pending cases in 30 Central Forensic Science Laboratories across India according to Home Minister's reply in Lok Sabha.[14] Capital punishment is not a triviliality, therefore restraining the time-limit of an investigation that can establish a conviction which may end up giving death penalty, without really aiding and improving the process itself is a heedless action.

Also, by making equal punishment for rape and murder, this ordinance will only increase the risk of victim getting killed by the offender after rape as victim is the sole witness of the crime. An offender may want tominimize the chances of capital punishment by ensuring the death of the victim so that the only conviction made is done on the ground of forensic evidence, which has a lesser chance of resulting in a conviction than the testimony of an actual witness. In this process it has displayed its lack of thinking, its lack of commitment to and shunning of facts and research, and, showcased a glaring absence of vision or understanding of rape. As Albert Einstein said, *"No problem can be solved from the same level of consciousness that created it."*

3. Dissimilarity in ordinance on the basis of gender

A major legal inconsistency created by the ordinance is that it creates a situation in which on the basis of gender of the victim, courts have to give different punishment for the offence of same magnitude which will not pass the test of intelligible differentia, thus giving rise to a discriminatory situation.

Sec 24 of the Criminal Law (Amendment) Ordinance 2018 states: *"In section 42 of the Protection of Children from Sexual Offences Act, 2012, for the figures and letters "376A, 376C, 376D", the figures and letters "376A, 376AB, 376B, 376C, 376D, 376DA, 376DB" shall be substituted."*

When a case of sexual abuse of child gets registered, whichever act (IPC or POCSO) that gives greater punishment is to be applied.[15] If a case of rape of male child comes before the authority, provisions of POCSO Act are to be applied as it is not punishable under IPC. Prior to this ordinance, though for the same crime, different codes are applicable, the punishment under POCSO and IPC is similar. But by extending the maximum punishment up to death penalty under IPC, henceforth if in a case the victim is girl child below 12 years of age, the offender can be awarded capital punishment. But when the victim is a boy,

[10] Crime in India- National Crime Records Bureau (2016)

[11] Crime in India- National Crime Records Bureau (2015)

[12] Crime in Delhi available at http://www.delhipolice.nic.in /PDF/CRIME%20IN_%20DELHI.pdf/ (Last visited on May 6,2018)

[13] Amendment to Sec. 173 of Code of Criminal Procedure, 1973

[14] http://mha.gov.in/MHA1/Par2017/pdfs/par2015-pdfs/ls-030315/1329.pdf/ (Last visited on May 8,2018)

[15] Sec. 42, Protection of Child from Sexual Offences Act, 2012.

these newly added sections of IPC do not apply and the courts will have to refer to POCSO for the punishment, in which the maximum punishment is life imprisonment. Thus, this amendment has created different quantum of punishment for the crime of same magnitude which is to be differentiated on the basis of gender. A male victim will be treated unalike. It is not a reasonable classification and hence transgresses the cardinal rule of equality enshrined in Article 14 of the Indian Constitution. Likewise, no one can be discriminated only on the ground of sex.[16] Among equals the law should be equal and should be equally administered, that the like should be treated alike.[17]

Moreover, this ordinance makes two laws applicable on same situation, one being more severe and drastic than the other. So, a court has to apply drastic law in one case (rape of a female child) and ordinary law in other case (rape of a male child). In this situation, the person getting charged under drastic law is said to be discriminated as the drastic law does not lay down any rational or reasonable principle behind this distinction.[18] A person who is proceeded against under the more drastic procedure is bound to complain as to why the drastic procedure is exercised against him and not against the others, even though those others are similarly circumstanced.[19] Therefore, by amending POCSO Act, this ordinance created legal anomalies and loopholes. It will have far-reaching consequences and negative effects rather than making any good to present situation.

By amending CrPC, Criminal Law (Amendment) Ordinance 2018 created a confounding legal problem. Before amendment, Clause 1A of Sec 173 of the CrPC states that: *"The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station."*

Sec 13 of Criminal Law (Amendment) Ordinance, 2018 reads:

"In section 173 of the Code of Criminal Procedure,

(I) *In sub-section (1A), for the words "rape of a child may be completed within three months", the words, figures and letters "an offence under Sections 376, 376A, 376AB, 3768, 376C, 376D, 376DA, 376DB or Section 376E of the Indian Penal Code shall be completed within two months" shall be substituted."*

The reason Sec. 173 of CrPC before amendment had mentioned "child"is because it is gender neutral in nature. POCSO Act 2012 is also gender neutral in nature as anyone below 18 years of age can be a victim irrespective of its gender.[20] However, IPC only refer to women as a potential victim for the crime of rape.[21] Sections 376, 376A, 376AB, 376B, 376C, 376D, and 376DAmention only women in particular. So, in case of sexual abuse of a female child, Sec. 13 makes the deadline for the investigation to be 2 months. But in case of a male child, the ordinance is silent upon it and does not prescribe any time limitation, creating an anomaly. Police now does not have any stipulation of time for its probe. Absence of any time-cap may cause inordinate delay in the investigation in case of sexual abuse of male child, hence violating the fundamental principle of justice. This provision will ultimately deteriorate the condition of a male child victim; rather recuperating them. Thus, instead of improving the present-day law, the newly introduced ordinance is creating an irregularity in it. This differentiation between the time periods of investigation on the basis of gender will only create further problems rather solving them.

4. Conclusion

An amendment is meant to be improving the current position of the law, therefore it should be progressive in nature. That being said, the ordinance is oblivious of the several shortcomings of current rape laws and has ubiquitous obstacles in its implementation. Furthermore, differentiating on the basis of gender and containing many inconsistencies in itself, this legislation is retrogressive, to say the least. To genuinely protect children from such heinous crimes, the ordinance should provide a solution for low conviction rates, absence of appropriate infrastructure like lack of polices personnel and special courts. It should aim to facilitate the victim in getting justice without facing several impediments in its path. The ordinance, however, without redressing any on the above-mentioned issues, created several legal and procedural anomalies.

Following are some suggestions for the better effectuation of Criminal Law (Amendment) Ordinance 2018:

a) In as many as 95% of cases, the victims are known to offenders.[22] Thus it should come as no surprise why there are abundant cases of hostile victims. Also, it is difficult for the victim to go against its relatives in case of sexual abuse. With more rigorous provisions, victim's family may build pressure to drop charges as the conviction may result in death penalty. Thus, it is suggested that after the case is registered, if the

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16 Art. 15, The Indian Constitution, 1950.

17 Sir Ivor Jennings, THE LAW AND THE CONSTITUTION, Vol. 1, 49, (University of London Press, 3rdEdn., 1948)

18 Northern India Caterers V. State of Punjab, (1967) AIR 1581

19 Ibid.

20 Sec. 2(d), Protection of Child from Sexual Offences Act, 2012.

21 Sec. 375, Indian Penal Code, 1860.

22 Crime in India- National Crime Records Bureau (2016)

accused is closely related to the victim (for example its father or uncle), victim should be taken under authority's charge and should be given proper care and counselling until the conviction is sought.

b) Special Courts that are efficient in dealing with the cases of sexual abuse of children should be established in every district. Appointment of judges and police personnel is to be done to meet with requisite manpower to remove unnecessary delay in the proceedings.

c) A system of proper rehabilitation of the victim should be introduced. Child friendly methods must be adopted to create an environment in which the victim can proceed without any hesitation and fear.

A law devoid of its suitable implementation can never give intended results. Mere presence of law, however stringent it may be, is not going to do any right or good. With necessary improvements, this ordinance may become standalone law to provide justice to all. But without removing any of the corollaries, it will have far-reaching

Rohingya refugee crisis: Indian legal perspective

Deepanshi Mehrotra*

ABSTRACT

For decades, ethnic tensions have simmered in the Rakhine State of Myanmar, with frequent outbreaks of violence and deaths of thousands of innocent people. Recent riots have led to an increase in the misery of Rohingyas, a stateless community which is known by all, but recognized by none. This has led to their migration in large numbers to the neighbouring countries of Bangladesh, India, Thailand, Malaysia and Indonesia.This paper aims to conceptualise the background and genesis of Rohingyas by giving a chronological account of their history and culture. There will also be a focus on how this has led to a rise in tension and alleged ethnic cleansing in the Rakhine State of Myanmar. The paper will elaborately deal with the position of India in the Rohingya Refugee crisis and how it has diverted from its general practice of providing aid and refuge to those in need of it. Through the medium of this paper, the conflict between international law and domestic law of the state that has come to the forefront as a result of the persistent crisis will be highlighted and how this inconsistency can be resolved shall also be discussed. The paper would emphasize upon the impact of the stance taken by India on the state itself as well as its reputation in the international community, along with focusing on the challenges that India is facing as a result of the huge influx of refugees in the country and the challenges it might face if it allows to give them refuge. Certain suggestions and recommendations shall be put forth which need to be implemented with immediate effect so as to maintain a balance between the rights of the refugees as well as the national interest of the state.

Keywords: Rohingyas, Conflict of Law, Impact, Challenges, Suggestions

1. Introduction

Rohingya are essentially Muslim people belonging to the Rakhine (Arakan) State of Myanmar, earlier known as Burma, constituting a sizeable population of 800,000 in Myanmar's total population of 60 million people. But they are not recognised as citizens of the country and are therefore robbed of basic civil, political, social and cultural rights. The Myanmar government passed the Burma Citizenship Law in 1982 which recognized eight national races to be native to Burma but excluded Rohingya from them. This meant that Rohingya had to "conclusively establish"[1] that their ancestors settled in Burma before 1948.

Rohingyas are considered to be a stateless minority group in Myanmar, who have been subjected to systematic persecution and grave human rights abuses by authorities for decades. As a result of the strained situation in the Rakhine State and the tensions persistent in the region, a large number of Rohingyas have fled to the neighbouring states of Bangladesh, India, Indonesia and Malaysia, in an attempt to escape persecution. The ongoing conflict in Myanmar has created an unprecedented humanitarian crisis with over half a million families in desperate need of shelter, food and water. The suffering of the Rohingya has caused an international outcry against Myanmar's government and army.

A sizeable number of the refugee population has also entered India and seek help and refuge from the Indian state. But the Indian government, in a landmark decision, has refused to provide help to Rohingya and has decided to identify and deport "illegal immigrants" from the country. On August 14, 2017, the Union Minister of State for Home Affairs, KirenRijiju informed the Parliament that the central government had directed the state authorities to identify and make preparations to deport illegal immigrants staying in the country including Rohingyas. India has also prohibited the entry of Rohingya refugees in the state. This position of India violates the Refugee Convention of 1951 and various other conventions that ensure human rights of minorities, to which India is a signatory to.

2. Background to the Crisis

Rohingyas are people of South-Asian origin who dwell in the independent region of Arakan, modern-day Rakhine State, since the eighth century. Various attempts have been made to erase these historical ties of Rohingya with the Rakhine state. They are not recognized as native to the

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[1] Section 42, The Burma Citizenship Act, 1982.

region, neither by the government nor by the local Buddhist population, and have been subjected to blatant abuse and human rights violations since decades. They are considered as immigrants from Bangladesh which has led to efforts being made to wipe them out of the region. As a result some 200,000 Rohingyas were displaced in the year 1978, 250,000 in the year 1991, 14,000 in the year 2012 and the eruption of recent riots in 2016 and 2017 has led to displacement of more than 600,000 Rohingya.

After 1962, Burma government had started oppression of Rohingya and by 1977, Burma started registering citizens which initiated Operation Nagamin (Operation Dragon King), of screening out "foreigners". Rohingya claimed commission of widespread atrocities by the government, the army and the local Buddhist population, which drove nearly 200,000 Rohingya out of Myanmar and into Bangladesh as refugees.[2] Between 1991 and 1992 wide-scale atrocities were committed against Rohingyas which resulted in another 250,000 refugees fleeing to Bangladesh. In 2012, ethnic violence again erupted in Myanmar between the Rohingyas and the Buddhists in which Rohingyas were targeted by the army. Complete villages were destroyed and the military police committed heinous crimes and atrocities against Rohingya. As of June 2012, an estimated 650 people were dead, 1,200 were missing and 80,000 were displaced.[3] This led to a wave of refugees who flee Myanmar to save their life and dignity.

On August 25, 2017, some armed militants belonging to Arakan Rohingya Salvation Army (ARSA) attacked border guard police using improvised explosive devices and guns which resulted in the killing of 12 security officers. Immediate military counter-offensive was initiated leading to several Rohingya families fleeing the violence and entering neighbouring countries, displacing over 600,000 refugees.

3. Current Situation of the Community

The Genocide Prevention Advisory Network, an international network of experts on the causes, consequences, and prevention of genocide and other mass atrocities, has issued an alert regarding Rohingyas in Myanmar. Rohingya Refugee influx into the neighbouring states is the highest monthly exodus of refugees anywhere on the planet since the Rwandan genocide[4], and since Myanmar has refused to recognize Rohingyas as their citizens, official refugee status cannot be granted to them. As a result they do not have access to food rations from World Food Programme or other basic services like healthcare and education. There are very high chances of most of these people spending their entire life as refugees and the lack of requisite concrete response from any of the concerned state governments regarding the future course to be taken, has left the entire community delirious and wretched.

The International Rescue Committee (IRC) and Relief International (RI) carried out a multi-sector assessment between September 29, 2017 and October 3, 2017 with the primary objective of understanding the priority needs of the influx of Undocumented Myanmar Nationals (UMN), Rohingyas, in Bangladesh, as well as the locations in which assistance is most needed from the humanitarian community.[5] They reported the presence of an estimated 515,000 Rohingya in Bangladesh who fled violence from Myanmar in 2017 attacks, raising the total number of displaced people in Bangladesh to 800,000. The community is reported to be living in miserable circumstances. There are urgent and massive humanitarian needs of these refugees that are required to be fulfilled with immediate effect. UNHCR's representative in Bangladesh, Shinji Kubo has said that Rohingyas are highly vulnerable and immediate action needs to take place to improvise their situation to prevent their further re-victimization in exile.

Other countries in the Asian sub-continent, including India, Indonesia, Thailand and Malaysia, have showcased their sympathy towards the deplorable conditions of the Rohingya community. But the same countries have miserably failed to provide any concrete aid to them. A wave of refugees has fled Myanmar to save their life and dignity. Many of these refugees came to India and settled in

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2 Anders Corr, *Secret 1978 Document Indicates Burma Recognized Rohingya Legal Residence, FORBES (29 December, 2016) available at* https://www.forbes.com/sites/anderscorr/2016/12/29/secret-1978-document-indicates-burma-recognized-rohingya-legal-residence/#6e15e20c5a79 (Last visited on January 10, 2018).

3 *Burma violence: 20,000 displaced in Rakhine state,* BBC NEWS(28 October, 2012)available athttp://www.bbc.com/news/world-asia-20114326(Last visited on January 15, 2018).

4 *Rwanda: How the genocide happened,* BBC NEWS(17May, 2011) available athttp://www.bbc.com/news/world-africa-13431486 (Last visited onJanuary18, 2018).

5 International Rescue Committee and Relief International, *Assessment Report: Undocumented Myanmar Nationals Influx to Cox's Bazar, Bangladesh,* (7 October, 2017).

makeshift camps in Delhi and Haryana, where they have been living in deplorable and unhygienic conditions.[6] Another round of violence erupted in October 2012 which led to a mass exodus of refugees out of Myanmar by train or by boat. The condition of these "boat people"[7] were exacerbated by the Thai and Malaysian navy, who while patrolling in their waters forced the makeshift rafts into deeper waters, leaving them to die. Some of these refugees walked to Bangladesh and live there in dreadful conditions. Therefore it is evidently clear that the focus of solving the massive refugee crisis in the subcontinent should not only be to send the Rohingyas back to Myanmar, but also to provide short-term help and long-term sanctuary to the deprived community.

4. Position of India in this Refugee crisis

India is the biggest nation in the Asian subcontinent and a neighbour to both Bangladesh and Myanmar and yet it is silent on the whole issue of increase in the number of Rohingya refugees in the subcontinent. Indian government has termed Rohingya refugees residing in its territory as illegal immigrants[8] and has issued an order on August 8, 2017 to push out nearly 40,000 Rohingya refugees residing in its territory since 2012, and to stop others from entering, a decision not conducive to its international ambitions.

4.1 Diversion from general practice

For generations India has always extended a helpful hand to refugees from various countries, a tradition which has been recently changed by the Modi Government as they have decided to block the entry of Rohingya in the country and expel the 40,000 who have been living in India.

India has had a practice of helping refugees and providing all sorts of aid to people in distress, disregarding the country to which they belong. India had given refuge to Tibetans in 1960s, Sri Lankans in 1980s and Afghans in 1990s and recently Modi government even modified the visa regulations to help minorities fleeing violence from Pakistan, Afghanistan and Bangladesh. As of end of the year 2014, there were nearly 300,000 refugees from 28 countries[9] in India and all those who sought refuge had faced persecution or were "genuinely at risk" in their home states and were forced to flee.

But the refusal of India to help Rohingyas has raised a serious outcry in the international community.Rather there have been instances where various important leaders of the country have deliberately abstained from commenting on the refugee crisis. Prime Minister NarendraModi himself visited Myanmar in early September 2017 but refused to refer to the Rohingya crisis in his press statement in Naypyidaw. India also refused to approve the declaration, passed in a Parliamentarian Conference of 50 Nations, which was endorsed by every other South Asian country, because it referenced to Rohingya. Foreign Minister SushmaSwaraj visited Bangladesh on October 22, 2017 anddid not spare time to visit the refugee camps in Cox Bazar. It was only after much urging from Bangladesh Prime Minister Sheikh Hasina and a lot of pressure from the international community that India initiated Operation Insaniyat wherein 3,000 family bags in the name of humanitarian aid were dispatched to Myanmar.

To surmount all of this, Indian government has termed Rohingya refugees residing in its territory as illegal immigrants[10] and has issued an order authorising the Border Security Forces to use "rude and crude methods" to prevent infiltrators from entering. There has been alleged use of chilly sprays and stun grenades to block refugees from entering Indian borders and forcible removal of the ones already living inside various states of the country has also begun. India terms Rohingya as "illegal migrants" and a "security threat" and since India is not a signatory to any UN Refugee Convention, it is not duty-bound to provide refuge to the Rohingyas.

4.2 Conflict between International Law and Municipal Law

The common law states have been practicing the principle

6 Jaffar Ullah and Anr. v. Union of India and Ors. (Writ Petition (Civil) No. 859 of 2013 [PIL]), available at http://www.hrln.org/hrln/images/stories/pdf/petition-on-rohingyas-refugees-jaffar-ullah-and-anr-versus-union-of-india-a-ors.pdf.

7 Jonathan Pearlman, *Who are the Rohingya boat people?*, THE TELEGRAPH (21 May, 2015)available at http://www.telegraph.co.uk /news/worldnews/asia /burmamyanmar/11620933/Who-are-the-Rohingya-boat-people.html (Last visited on January17, 2018).

8 Vijaita Singh, *Rohingya are illegal immigrants, not refugees:* Rajnath, THE HINDU (22September, 2017) available athttp://www.thehindu.com/news/national/rohingya-are-illegal-immigrants-rajnath/article19726476.ece(Last visited on January 18, 2018).

9 Bela Bhatia, *India is complicit in the Rohingya suffering,* ALJAZEERA (7OCTOBER, 2017) available athttp://www.aljazeera.com/indepth/opinion/india-complicit-rohingya-suffering-171006070126544.html(Last visited on January 11, 2018).

10 Vijaita Singh, *Rohingya are illegal immigrants, not refugees:* Rajnath, THE HINDU (22September, 2017)available athttp://www.thehindu.com/news/national/rohingya-are-illegal-immigrants-rajnath/article19726476.ece(Last visited on January 18, 2018).

of non-incorporation of rules of international law into the domestic law if the domestic law of the state is silent in this regard. India, being a common law state, follows the same principle. Therefore since India is not a signatory to the Refugee Convention of 1951 and its subsequent Protocol of 1967, it cannot be forced to abide by its provisions, especially Article 33 which deals with Non-Refoulement. India also does not have any specific legislation that explicitly deals with refugees in the country and therefore, the judicial system is very constrained when dealing with refugees.But India, along with other developing countries and the East European (Socialist) States, supported the concept of jus cogens when it was first introduced in the Vienna Convention on the Law of Treaties in 1967 and the principle of Non-Refoulement is considered a fundamental rule of Customary International Law which has also attained a jus cogens character, and as such if the Indian government decides to deport the refugees then it would be violating the mandatory principle of Non-Refoulement. This principle prohibits any country from deporting refugees and asylum seekers where there is "*a likelihood of persecution based on race, religion, nationality, membership of a particular social group or political opinion*".[11] Customary International Law is not only a process but also a result where rules can be found and can be normatively clothed.[12] It is a compilation of unwritten and written law, characteristic of which is to be considered as "general international law", thereby making it applicable and binding on all the states and subjects of international law.

In the absence of any concrete legislation which would deal with refugees, the most important set of legislations that would be applicable to refugees in India includes the Passport (Entry into India) Act 1920, the Passport Act 1967, the Foreigner's Act 1946, and the Registration of Foreigners in India Act 1939. These enactments make no distinction between aliens or foreigners and refugees and hence refugees face the risk of arrest or deportation if they enter the country without valid passport or other necessary travel documents. These legislations also give the central government an absolute power to expel or deport a non-citizen (foreigner or alien). As such the government is authorised to deport a person on the ground of national security in the interest of the citizens of the country, and in such cases even the international law and international conventions cannot be applied. In the light of these provisions the courts are bound to adhere to and give preference to the municipal law over the international law.

4.3 Resolution of the conflict

Every common law state has been following the doctrine of non-application of international law in the sphere of municipal law, if the municipal law is silent in that regard. But there have been developments since the inception of this doctrine and India, in various treaties and conventions, hasrecognised essential principles of international law and has also incorporated some of them in the municipal law of the state. In the recent times, it is a common conception that the rules of municipal law must be in consonance with the rules of international law.[13] Therefore the position is quite clear that if an international law runs counter to municipal law then it cannot be relied upon, but if an international law does not clash with any Indian law then it must be considered accommodated in it. The courts while applying the doctrine of incorporation in the case of human rights treaties ignore Article 253 of the Constitution of India and the prerogative of the Union Government to become or not to become a party to any international convention and even overlooks the issue of state responsibility in international law for the violation of any treaty. The courts now seem to be more willing to incorporate the provisions of human rights treaties into the domestic law without insisting on the requirement of their transformation into the law of the land through a formal legislation.

Even though India is not a signatory to the Refugee Convention and its subsequent Protocol, yet it is a signatory to a number of other international instruments dealing with human rights, refugee issues and other related matters. Furthermore the Indian Constitution also guarantees certain rights to persons residing in its territory regardless of them being citizens or non-citizens.[14] The Constitution guarantees certain essential fundamental rights to the refugees, namely, right to equality under Article 14, right to life and personal liberty under Article 21, right to protection against arbitrary arrest and detention under Article 22, right to protection in respect of

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[11] UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner)Note on Non-Refoulement (Submitted by the High Commissioner),* THE UN REFUGEE AGENCY (23 August, 1977) available athttp://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html (Last visited on January 13, 2018).

[12] Robert Kolb, THEORY OF INTERNATIONAL LAW 128 (Hart Publishing, 2016).

[13] Gramophone Company of India Limited v. BirendraPandey, A.I.R. 1984 S.C. 677

[14] NHRC v. Arunachal Pradesh A.I.R. 1996 S.C. 1234

conviction of offences under Article 20, freedom of religion under Article 25 and right to approach the Supreme Court for the enforcement of the above-mentioned rights under Article 32.

In *Vishaka and Ors. v. State of Rajasthan and Ors.*[15], the Supreme Court held that international conventions which are non-inconsistent with the fundamental rights enshrined in Part III of the Constitution and are in harmony with the spirit of these rights, must be read into these provisions to enlarge their meaning and content and to promote the objective of constitutional guarantee. Henceforth, it has become a rule in judicial construction to give due regard to international norms and conventions for construing the domestic law of the state when a void has to be filled and no inconsistency is observed.[16] The Indian courts practice this principle according to which if any international law restricts the rights of individuals then it needs to be formulated as a statute before its application in India, but if a rule of international law protects and augments the rights of individuals then it is directly enforceable and the legislature need not frame a legislation in this regard.[17]

In the Inaugural Speech on Refugees in the SAARC Region, held in New Delhi in May 1997, Chief Justice J.S. Verma applied the principles of Vishakacase to refugee protection and stated that in the absence of any national laws to satisfy the need of protecting refugees, the provisions of the 1951 Refugee Convention and its Protocols can be relied on, provided there is no conflict with any provisions in the municipal laws. This is an essential method of judicial construction that has been recognized by the courts in enforcing the obligations of the state for the protection of the basic human rights of individuals. Therefore, even though India is not a signatory to the Refugee Convention, the courts in India recognize all the provisions of International Treaties which have acquired the status of Customary International Law and consider them incorporated within the framework of the domestic law in so far as it is consistent with the existing municipal laws and also to fill up a void in the domestic law.

5. Impact of India's stance on Rohingayas

The stance taken by India or rather the abstention of India from participating in any discourse conducted with Myanmar, has been taken to be a sign of weakness and has led to reduced influence in the South-Asian subcontinent. India's refusal to help Rohingya refugees and to not allow them inside the Indian territory has increased the burden on Bangladesh, where the maximum refugee population resides. This has resulted in strained relations between India and one of its important allies, Bangladesh and has also affected its position of having any principled leadership in the subcontinent.

This stand would also have an adverse impact on India's demand to become a permanent member of the United Nations Security Council as it have failed in portraying of having any principled leadership in the subcontinent. Those questioning India's push for a Security Council seat have often cited its record as a fence sitter at the United Nations and this incident will further push back India's demand to become a permanent member.

India is considered one of the world leaders of the third world countries and as such owes some duty and responsibility to the international community and therefore should have been prompt in ensuring a safe, voluntary and dignified return of the refugees, to maintain its influence in South-East Asia.Whereas on the other hand, China has taken advantage of these events and has suggested a logical and helpful three-phase model to resolve the refugee crisis in South-East Asia, India's sphere of influence. The happening of these events has increased Chinese influence in India's neighbouring countries including Sri Lanka and Myanmar, both part of the String of Pearls strategy of China.This has resulted in India becoming weak and vulnerable and has negated its position as a regional, sub-continental and Asian leader and regaining that stature will require a more proactive stance in being part of the solution to the crisis.

India has an age-old unbroken history of welcoming and providing refuge to people in distress and has been according protection and refuge to refugees and asylum seekers but has neither become a party to the 1951 Refugee Convention or its 1967 Protocol. But since India does not have any legislation of its own which would deal with refugees, various issues relating to determination of the refugee status, rights and duties of refugees, cessation and exclusion of refugee status, local integration, re-settlement and voluntary repatriation remain unresolved and ambiguous.

But India is a signatory to several International Conventions and Treaties which include the Universal

[15] Vishaka and Ors. v. State of Rajasthan and Ors., 1997 (6) SCC 241

[16] Nilabhati Behera v. State of Orissa, 1993 (2) SCC 746

[17] Maganbhai Ishwarlal Patel v. Union of India, AIR 1969 (3) SC 783

Declaration of Human Rights, International Convention on the Elimination of all Forms of Racial Discrimination, International Covenant on Civil and Political Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, International Convention on Protection of all Persons Against Enforced Disappearances, the Bangkok Principles in 1966 and the New York Declaration for Refugees and Migrants, thereby making Non-Refoulement a binding principle on the state of India. Even the Supreme Court of India had recognised the principle of Non-Refoulement to be an essential ingredient guaranteed under Article 21 of the Constitution[18], irrespective of the nationality of the individual. Therefore it will be very difficult for India to substantiate its stand in front of both the international community and the Supreme Court in the case that has been filed by two Rohingya refugees against the government's order of deportation.[19]

Even if India decides to provide refuge to Rohingya, it would put a severe strain on the limited amount of resources available in the country and change the demography and the social structure of the Indian society. Moreover since 2014 most of these Rohingya refugees have shifted towards Jammu and Kashmir and are affecting the demography in the most hostile state in the country and have therefore become susceptible to communal and anti-Indian elements.Another important challenge that the state of India would face if they allow refugees inside the country would be their integration into everyday life, including constructive and productive engagement. The economy of India is still rising and the government does not have enough resources to provide better living standards along with necessary amenities to all.This would lead to a similar crisis that took place after the 1971 Indo-Pak War when India decided to take in a huge influx of refugees from Bangladesh, then East Pakistan and the economy was on the verge of collapse due to the mass influx.

6. Suggestions and Conclusion

The problem with regard to refugee law in India persists due to lack of any legislation that would specifically deal with refugees coming from other countries. Hence the Parliament should formulate a legal framework which would specifically deal with refugees in India and would help the Judiciary and other important authorities in resolving any future conflict relating to refugees in India. Such legislation would provide great relief to genuine refugees and asylum seekers and necessary guidelines to the authorities concerned and to all thosewhosework relates to the application of humanitarian principles of refugee law. This legislation would introduce transparency, accountability and fairness in India's refugee policy.

The state of India owes some duty and has some responsibility towards these refugees, as has been evidently and abundantly shown in the above-states cases and conventions. As such, India needs to make a distinction between who might and might not be a security threat and categorize refugees accordingly, instead of casting the entire community away.

Even if India decides to give refuge to the refugees, it should assign them the status of a refugee and not an asylum-seeker so that they can be rightfully returned back to their homeland once the fear of persecution dissolves. Asylum-seekers seek a more permanent shelter than just a temporary refuge and therefore should be deterred.

The international conventions and treaties dealing with refugees fail to incorporate the principle of burden sharing. There is no proper system of burden sharing in international refugee law and the necessary conventions speak only about the importance of sharing without making any concrete provisions to ensure its performance. This has led to enlargement of burden on the neighbouring countries, including India. Therefore efforts should be made and amendments introduced to the Refugee Convention so that it can aptly incorporate norms with regard to sharing the burden of refugee influx among state with the help of the homeland of the refugees.

The government of India needs to maintain a balance between the domestic law of the state and its international obligations as well as between the refugee influx and the pre-existing citizens of the country, and instead of passing a blanket order of ousting an entire community for allegedly having terrorist ties and being a national threat, needs to come up with concrete solutions which will not adversely affect their reputation in the international sphere; simultaneously ensuring that the rights of its own citizens are secured and safeguarded against any possible violation.

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[18] DonghLian Kham v. Union of India, 226 (2016) D.L.T. 208 (India);Ktaer Abbas Al Qutaifi v. Union of India 1999 Cri LJ 919

[19] Mohammad Salimullah and Anr. v. Union of India (Writ Petition (Civil) No. 793 of 2017)

Issues related to Legality of Fantasy Sports in Indian Context

Shubham Patel*

ABSTRACT

Since time immemorial, sports have provided humans the opportunity to compete as well as engage socially. But with the passing of time, people started to feel the need of being related to sports in ways other than just being fans, and this lead to the advent of Fantasy Sports. Fantasy Sports developed over decades, but after the internet boom, have gained popularity all over the world and India also has not remained untouched to this.In India laws related to gambling are domain of individual states to legislate upon. However, following a general principle the law does not provides legal status to the games which are predominantly based on the chance factor. Most of these laws were drafted before games like fantasy sports could have been contemplated. This paper analyses the skill and chance debate, its application in the context of fantasy sports along with judicial decisions on the point, and would then delve into situations where the fantasy sports offered tend to shift towards probable illegality, finally pointing out what needs to be done in order to facilitate the growth of such sports.

Keywords: Fantasy Sports, Skill, Chance, Gambling, Law

1. Introduction

The history of human involvement in games and sportscan almost be traced back to the times of origins itself. Active engagement and participation in the gaming activities was not only a recreational activity, but also had manifestations of a social activityproviding opportunities to engage in the same. However with the development of time, the nature of the games changed, and with them changed the opportunities allied to them. To consider that the opportunities still related to social interaction or the entertainment would only be a naïve construction, games now have opened avenues like promotion of brands, consumer engagement, targeting fans and cultivating interests.[1] With the growth of sports and people's interest in them, people no more wanted to be mere fans, they wanted to engage in sports in a more personal manner, and to cater to this need, fantasy sports came into picture.

Fantasy Sports provide a chance to a sport enthusiast to act as a person who is related to the teams and players playing, albeit in virtual manner, and at the same time chance of winning if he outperforms others. Due to this reason and the money involved, fantasy sports are becoming a rage in present times; it has already became a multi-billion dollar industry, with almost 5% of population of the U.K.[2] and 21% of the U.S. population involved in playing it in one form or the other.[3] In Indian context the numbers are estimated to be around 20 million which is ever growing[4] and a market which would, according to certain studies, bearound 1 billion dollars by 2021.[5]

Due to the involvement of money, the interest of states comes into picture as most of the states do not allow games which are based merely on chance; it is here the contextualization of such sports becomes necessary. This paper would examine the growth of fantasy sports, their adoption in Indian context and issues related therein. In the course of this paper the term 'participant' refers to an individual who participates in the fantasy games, either daily or league basis, *'player'* connotes real life individual players who are selected by the participants in their fantasy teams.

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1 Introduction - Contextualising Gaming Laws in India in The Laws Relating to Fantasy Sports Games in India 9 (The Sports Law & Policy Centre, 2018).

2 Marc Saba, There's A Perfect Storm Brewing For European Daily Fantasy Sports, LEGAL SPORTS REPORT (26 June 2015) available at https://www.legalsportsreport.com /1966/european-daily-fantasy-sports-growth/ (Last visited on May 7, 2018).

3 Fantasy Sport Trade Association (FSTA), Fantasy Sport Demographic Information,(2017), available at https://fsta.org/ research/industry-demographics/ (Last visited on May 7, 2018).

4 GauravLaghate, How fantasy sports is becoming a multi-billion business globally, The Economic Times (23 March 2018), available at https://economictimes.indiatimes.com/news/sports/how-fantasy-sports-is-becoming-a-multi-billion-dollar-business-globally/articleshow/63436060.cms (Last visited on May 6, 2018).

5 Statista, Online gaming market value across India in 2016 and 2012* (in million U.S. dollars), (2017), available at https://www.statista.com/statistics/754586/india-online-gaming-market-size/ (Last visited on May 7, 2018).

2. Contextualizing Fantasy Sports

Fantasy Sports are the games where a participant assembles a virtual team of players, choosing among players who will be playing in a particular tournament, league or match.While this is being done, the player has to remain within the limits of prescribed virtual money or any other condition which is required to be followed in order to create a team. After forming such a team, the participant then competes with others on the basis of real time performance of the player. Based on the performance of a player, points are awarded on pre-decided criteria[6] and the winners are decided on the basis of whose virtual team accumulated maximum points.[7] In simpler terms, fantasy sports give a chance to the participants to act as the managers[8] or coaches[9] of a team along with some "*bragging rights*".[10] The entire idea is based on the notion of attachment with sports in other ways than being a mere fan. There are basically two types of leagues i.e. free-to-play and pay-to-play, in latter the participants have to pay a fee to join in, and if they win they get the prize money, it is this form whose legality is usually put to test.

2.1 Historical Developments

The history of the evolution of fantasy sports is a rather interesting one. It developed over the course of decades with several people evolving it in context of different sports, and this happened a lot earlier than how it is understood in its present form i.e. the online one.

Origin of fantasy sports, as are known today, can be traced to the halls of the Harvard University of 1960s, where Bill Gamson, a social psychology professor and a baseball enthusiast wanted to be related to sport in ways other than being a fan.[11] He created a game, dubbed as 'The Baseball Seminar', where each participant received an imaginary budget of $100,000 to create a fantasy team using the real world players. The game had a $10 entry fee and the participant whose fantasy team had scored most points, based on pre-determined statistical categories was adjudged winner.[12] One of the participants was Robert Skylar, who mentioned about the same to Daniel Okrent, one of this mentees.[13]

The next major development came in 1980s when Daniel Okrent, who is generallyconsidered the father of fantasy sports[14], along with his friends created a more formalized system of calculation of points of a particular fantasy team.[15] The central idea was that the performance of the players in the ongoing season would provide the basis of scoring; the scoring in turn was to be done on 8 categories - four based on hitting and four based on pitching.[16] The participant who led the scoring tab at the end of the season would be the winner of the league.[17] The method/game devised by Okrent was named 'Rotisserie Baseball' after the restaurant where its rules were finalized[18] and to this date all the major baseball fantasy leagues follow almost similar formats.[19] Fantasy baseball became very popular after the advent of Rotisserie, and consecutively spread to other sports too.

Major breakthrough came during mid-1990s when household availability to internet increased. It played a pivotal role in sky-rocketing the popularity of fantasy sports and took it from the contours of "*activities for outcasts, engaged by those presumed to be overly bookish and socially challenged*"[20] to the activity of the masses. It gave rise to websites providing online platforms to play fantasy

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6 References can be made to the pre-determined criteria provided in fantasy sports websites.

7 GowreeGokhale, Rishabh Sharma, The 'Skill' element in Fantasy Sports Games, in The Laws Relating to Fantasy Sports Games in India 9 (The Sports Law & Policy Centre, 2018).

8 The Sports Law & Policy Centre, Bengaluru Paid Fantasy Sports Games - Recent Developments Under Indian Law pdf

9 Nishith Desai Associates, The Curious Case of the Indian Gambling Laws - Legal Issues Demystified, (2017), available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/The_Curious_Case_of_the_Indian_Gaming_Laws.pdf (Last visited on May 8, 2018).

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11 Justin Fielkow, From Fantasy to Reality: The Evolution and Legality of Fantasy Sports,THE SPORTS ESQUERIES (18 May 2015), available at https://charlesfranklinlaw.com/wp-content/uploads/2016/12/2015.05.18-From-Fantasy-to-Reality_-The-Evolution-and-Legality-of-Fantasy-Sports-Fielkow-The-Sports-Esquires-Revised.pdf (Last viewed on May 8, 2018).

12 Geoffrey Hancock, Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law,Vol. 31 T. JEFFERSON LAW REVIEW 317 (2008-2009).

13 Marc Edelman, A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime,Vol. 3 HARVARD JOURNALOF SPORTS & ENTERTAINMENT LAW 1 (2012).

14 Michael J. Thompson, Give me $25 on Red and Derek Jeter for $26: Do Fantasy Sports League Constitute Gambling?,Vol. 8 SPORTS LAW JOURNAL 21 (2001).

15 Elizabeth, supra note 8.

16 Bo J. Bernard, Vincent H. Eade, Gambling in a Fantasy World: An Exploratory Study of Rotisserie Baseball Games,Vol. 9(1) UNLV GAMING RESEARCH & REVIEW JOURNAL 29 (2005).

17 Id.

18 Hancock, supra note 10.

19 Hancock, supra note 10; Elizabeth, supra note 8.

20 Bernard, supra note 14.

sports and at the same time reduced the erstwhile daunting task of computation of statistics to judge the outcome of the fantasy league, which earlier invariably included a lot of paperwork. The websites now keep a track of the data and calculation as well as host the leagues and in several instances allows people across borders to participate in a particular league.[21] It was due to internet that the traditional sports and entertainment companies started to explore the online fantasy sport arena. In 1995 ESPN launched its first entirely internet operated fantasy baseball league and by 2000 fantasy leagues for other sports were started.[22]

2.2 Formats of Fantasy sports

The fantasy sports industry today basically follows two formats i.e. 'Traditional Fantasy Sports' and 'Daily Fantasy Sports'.[23] The Traditional Fantasy Sports (TFS) are the fantasy leagues which go on for the entire season. The participants in TFS draft their teams at the starting of the season, they have the ability to alter the teams on fixed time intervals on the basis of performance of the players etc., the winner is decided when the real life sport event concludes.[24] There is a certain faction of participants who thought that the season long leagues were too lengthy commitments,[25] and to resolve this Daily Fantasy Sports (DFS) came into being in around 2009. The DFS usually last for the time of a particular match, and hence has increased the ability of the participants to actively participate in several leagues at a time. The participants can compete one-on-one, against several players at once and in guaranteed pool prize events.[26]

2.3 Fantasy Sports in India

The fantasy sports in India are crusading strongly and adding new participants into its folds every passing day. Fantasy sports for the first time were launched in India by ESPN in 2001, but the same was shut down in 2003. Since the advent of Dream11 in 2011, the fantasy sports are growing strongly with new platforms entering market almost every week. Initially fantasy sports were restricted to cricket majorly, however now the same has also expanded to other sports like football, basketball and kabaddi too, partially owing to the rise in organization of indigenous sports leagues. Fantasy sports are provided on both free-to-play basis and pay-to-play basis.[27] With around 400 million internet users and the number of local sports leagues rising, it is expected that the number of participants would rise too; statistics provide that the number of participants in fantasy sports, as of now, is about 20 million, with an expectation to touch the 50 million mark by 2020. [28]

3. Contours of Legality

Unlike western ideology, India had a long standing historical and cultural context wherein gambling had a place in society and was not seen as an activity with a stigma attached to it. However, with advent of British in India, the activity was bought within the legal scrutiny and was no longer a valid activity. Gambling in public forum[29] as well as keeping of a 'common gaming house'[30] was criminalized. As an exception to this general rule 'games of mere skill' were not criminalized.

Under the present scheme of laws, the power to legislate and frame laws on 'betting and gambling' has been vested to the states by the Constitution of India.[31] However The Public Gambling Act, 1867, has still maintained its form and has been generally adopted by certain states, while some otherstates have enacted their own legislations. Few common factors which follow in almost all the legislations, barring few, are that most of the state legislations provide that game involving skill would be valid, and most of these laws enacted before the advent of online/virtual gambling avenues.[32] The only exceptions to the latter factor are Sikkim[33] and Nagaland[34] as both the states have contemplated space for online games, with Nagaland in particular recognizing fantasy sports as game of skill.

The games involving 'mere skill' are legal, however the term 'mere skill' has not been defined and hence what constitutes skill and which games fall under the same has been left open to judicial interpretation. The Supreme Court interpreted that the words 'mere skill' mean

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21 Hancock, supra note 10.
22 Edelman, supra note 11.
23 Elizabeth, supra note 8.
24 Id.
25 Nathaniel Ehrman, Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports, Vol. 22SPORTS LAW JOURNAL 79 (Spring 2015).
26 Elizabeth, supra note 8.
27 NandanKamath, R. SeshankShekar, Paid Fantasy Sports Games - Recent Developments Under Indian Law in The Laws Relating to Fantasy Sports Games in India 21 (The Sports Law & Policy Centre, 2018).
28 See, Laghate, supra note 3.
29 Sec 4, The Public Gambling Act, 1867.
30 Sec 1, The Public Gambling Act, 1867.
31 Entry No. 34, List II, Seventh Schedule, THE CONSTITUTION OF INDIA, 1950.
32 Nishith Desai Associates, supra note 7.
33 The Sikkim Online Gaming (Regulation) Act, 2008.
34 The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2016.

"*preponderantly of skill*"[35] which would mean that even if elements of chance are involved but skill plays major role the game would fall under 'mere skill' and would be valid. The test adopted by the Indian courts to determine whether a game involves skill or chance is the 'dominant factor' or 'predominance' test.[36] The test primarily evolved in the US and provides that in order for a skill to be the dominant factor certain qualifications must be satisfied; them being:

(1) Distinct possibility of exercising of the skills by the participant must be there as well as there must be sufficient data in order to calculate an informed judgment;

(2) The opportunity to exercise skill must be there and the skill must be possessed by a general class of participants; and

(3) Skill of competitors must have a bearing on the results and must control the final result, and not merely some part of the larger scheme. [37]

The Supreme Court applying the predominance test in Satyanaayana case[38], with regards to the game of rummy, found that it required considerable skill in deciding which card should be held or discarded and consecutively held that it was a game of skill and hence valid. Similarly in Lakshmanan case[39] the court found that a person placing a bet in horse racing needed to assess the relative skills of horse and the jockey, including their training and trends in past races and hence placing bets on horse racing is a game of skill.

4. The Conundrum: Skill vs. Chance

As discussed in the earlier part, for a game to be legal in India such a game must involve the elements of skill and not chance. Gambling generally is considered as a transaction which involves the "*classic elements of consideration, chance and prize*"; and a fantasy contest involves all these classic elements too.[40] It is in this background that it becomes necessary to evaluate the fantasy sports on the altar of requirement of skill.

It is argued by the proponents in favor of fantasy sports that it is a game of skill as the participant while creating his team has to take into consideration several factors including each player's form, fitness and injuries trends, history in a venue and against a particular opponent and other factors which may influence the performance and the selections have to be made within the limits of virtual amount prescribed (which is to ensure that the participant does not end with choosing all high rated players). Thus a participant would have to access the relative value of the player in the backdrop of the statistics[41] in order to form an optimum team. During this consideration and evaluation a participant simultaneously has to keep his prejudices at bay and avoid overrating the favorite team and underrating the rival ones.[42] Along with this, most leagues prescribe a cap on certain type of players.[43] It all needs considerable skill and analysis on part of the participant which ultimately helps him win, and such a person, who has knowledge and statistical insights, would have edge over participants who have limited or little knowledge or have put up a random lineup.[44]

On the other hand the critics of fantasy sports point out that the matter of skill employed is irrelevant (more so in DFS) as how despite being statistically sound how a player would perform on a given day is a matter of pure chance. It is submitted that what needs to be understood is that even if all the factors mentioned are followed it doesn't guarantees a winning lineup every time, rather the factors act to reduce the amount of risk in determining the lineup, and the presence of chance does not automatically render fantasy sport illegal, because elimination of all shreds of chance is nowhere a requirement in law[45], what is required is predominance of skill.[46]

A distinction between betting and fantasy sport needs to be taken into consideration as well, as in the former a participant bets on the skills of the players directly, whereas the latter is concerned with the skills of the participant, i.e. forming a balanced team, are put into test.

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35 R.M.D. Chamarbaugwalla v. Union of India, AIR 1957 SC 628 [R.M.D. Chamarbaugwalla case]

36 Gowree, supra note 5.

37 Morrow v. State, 511 P.2d 127; Jeffrey Standen, The Special Exemption for Fantasy Sports, Vol. 42(3) NOTHERN KENTUCKY LAW REVIEW 427 (2015).

38 State of Andhra Pradesh v. K.Satyanarayana, AIR 1968 SC 825

39 Dr. K. R. Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153

40 Standen, supra note 35.

41 AbhinavShrivastava, Fantasy Sports Games in the Online Context in The Laws Relating to Fantasy Sports Games in India 15 (The Sports Law & Policy Centre, 2018).

42 Id.

43 A suitable illustration would be of IPL fantasy league where the participant has to take care of the number of foreign players, uncapped and capped players in his virtual team.

44 Gowree, supra note 5.

45 Travis Heller, Betting on Skills for Fantasy Sports,Vol. 4(1) SAVANNAH LAW REVIEW 273(2017).

46 R.M.D. Chamarbaugwalla case, AIR 1957 SC 628

Nevertheless, setting the conundrum at rest, the courts in several jurisdictions have held that the fantasy sport falls under the game of skill and hence do no attract the mar of anti-gambling legislations.[47] In India, the Punjab and Haryana High Court was the first one to deal with the issue of legality of fantasy sports. The court, while vexed with the question of validity of fantasy games provided by Dream11, made an in-depth analysis of the rules of the game and held that it is a game of skill and requires the same level of skill, discretion and judgment as required in horse racing.[48] An appeal was made to the Supreme Court against the judgment of the Punjab and Haryana High Court where an order for dismissal of the appeal was passed[49], and thus the case can be construed as binding on all the states with respect to the format of the game analyzed.[50] In another major step Nagaland became one of the first states to officially recognize the 'virtual sport fantasy league games' and 'virtual team selection games' as a games of skill.[51] Both the abovementioned developments are of enormous importance for the fantasy sports industry as due to itse recognition as a game of skill it now enjoys the much needed constitutional protection.[52]

However, what is worthy of notice and is an evident concern is the situation where a participant is allowed to form sets of different teams to participate within a same league/game. Since it has been held that whether a game is dependent upon skill or chance is a question of fact and needs to be decided on the basis of facts and circumstance of each case,[53] hence a case to case basis analysis is warranted. It is submitted that although it has been held that the fantasy sports generally fall under the category of skill in general and hence do not fall under gambling[54], but the situation highlighted in the aforementioned illustration calls for a separate analysis to ascertain whether participation in such a scenario would still constitute as game of skill. In this scenario, it is submitted that, participation deviates from the realm of skill and moves closer towards factor of chance, as the participant tries to hedge his chance of losing money by placing multiple teams using different set of players into the play simultaneously. In such a scenario, a participant can choose different sets of random players hoping that any of them would perform in the match merely on the luck/chance basis and all the factors which are needed to be taken into consideration for a fantasy sport to be a game of skill (as described earlier) start vanishing. It is here that the chance replaces skill as the predominant factor, and the game turns tide towards probable illegality.An in-depth analysis is needed by the providers of fantasy sports, and if a situation arises then by the courts, with regards the involvement of skill element in such form of participation.

There are certain reservations expressed by the courts that the online version of a game should be treated as a new format for which a new and independent evaluation should be made in order to determine whether the game involves skill or chance, rather than treating it as the direct equivalent of its offline version.[55] However, what needs to be taken into consideration is that in fantasy sports there is a lack of any influence by the physical surrounding[56] i.e. selection of a team or the scoring subsequent to it is not altered by physical presence, which is generally not the case with other form of games like cards. It is in this regards that the fantasy sports should be considered as the direct equivalent of their offline counterparts and there should be a uniform treatment accorded irrespective of the fact which media is used to play.

5. Conclusion

Fantasy Sports have captured a sweet spot among the sports enthusiasts and new people are adding to its fold every day, it has already crossed the billion dollar mark worldwide, and is predicted to touch the 1 billion dollar mark by 2021 within India. The lack of concrete laws and conclusive precedent on legality of the fantasy games had marred the scenario of fantasy sports in India for a long

47 Humphrey v. Viacom Inc., No. 06-2768 DMC, W.L. 279748 (New Jersey District Court)

48 ShriVarunGumber v. Union Territory of Chandigarh and Ors., CWP No. 7559 of 2017, Decided on April 18, 2017 (AmitRawalJ.) (High Court of Punjab & Haryana)

49 ShriVarunGumber v. Union Territory of Chandigarh and Ors.,Diary No. 27511/2017, Order Dated September 15, 2017 (RohintonFaliNariman, Sanjay KishanKaul JJ.) (Supreme Court of India)

50 Gowree, supra note 5.

51 The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2016; Ganesh Prasad, MukundThirumalaiSrikanth, Salient Features of The Nagaland Gaming Act, 2016, MONDAQ (21 April 2016), available at http://www.mondaq.com/india/x/485310/Gaming/Salient+Features+Of+The+Nagaland+Gaming+Act+2016 (Last visited on May 10, 2018).

52 Art. 19(1)(g), THE CONSTITUTION OF INDIA, 1950.

53 ManoranjithanManamyilMandram v. State of Tamil Nadu, AIR 2005 Mad 261

54 ShriVarunGumber v. Union Territory of Chandigarh and Ors., CWP No. 7559 of 2017, Decided on April 18, 2017 (AmitRawal J.) (High Court of Punjab & Haryana)

55 Mahalakshmi Cultural Association v. Director Inspector General of Police, SLP (C) 15371 of 2012 (SC).

56 Abhinav, supra note 39.

time, and potentially acted as chilling effect which affected the growth of the market for the games. However the Gumber case as[57] well as the legislation enacted in Nagaland are welcome signs.

It can be concluded, based on the national as well as international legal precedents, that fantasy sports are game of skill. However at the same time, what should be kept in mind is that the judgment in Gumber case deals with only a particular format of the fantasy sports, and a condition may arise where some other format of fantasy sport may be adjudged as a game of chance and hence illegal, as the game play of each fantasy sport would be analyzed on case to case basis. Moreover, what needs to be kept in mind is that the judgment by itself does not make the sport legal as the under the constitutional scheme the matter falls under state list and states are empowered to pass legislations not allowing conduction of fantasy sports, if they will to do so.[58]

With the rise in number of the participants the states must also take the matter into consideration and make proper amendments in gambling and betting laws, upon their own discretion providing whether such games are legal to play or not. Cues can be taken from the law passed in Nagaland in this regards. This step would bring a two pronged change as:

(1) The residents of the particular state would have clear idea whether they can participate or not in such sports; and

(2) The service providers would also have an opportunity to provide better experience to customers based on the regulation of the particular state.

Moreover allowing registering and conducting fantasy sports business in their respective states can create a new source of revenue in the form of taxes. Passing of a legislation expressly recognizing and allowing license to such businesses would provide a win-win scenario for all the related parties i.e. the state, the game operator and the

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[57] ShriVarunGumber v. Union Territory of Chandigarh and Ors., CWP No. 7559 of 2017, Decided on April 18, 2017 (AmitRawal J.) (High Court of Punjab & Haryana)

[58] The Telangana Gaming Act, 1974, vide The Telangana Gaming (Amendment) Act, 2017 amendments were made to prohibit all forms of gaming where money is consideration, whether games of skill or games of chance; The Orissa Prevention of Gambling Act, 1955 prohibits all form of gambling or gaming which include money or other stakes.

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