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Research Papers

Book Review

Case Comment

Pragyaan: Journal of Law

From the Chief Editor

It gives us great pleasure to present to readers, the Volume11, Issue 2, of the Pragyaan:Journal of law, which is the product of our correspondence, collaboration and contribution over the years by the esteemed scholars whose scholarly research articles are published in our Journal.

This Volume of the Pragyaan is fully immersed with publications which have attracted high quality submissions with variety of research topics under taken by Indian legal fraternity. We are pleased to present eighteen articles which in them selves are putting forth better understanding of arange of issues which are of contemporaneous importance.

The objective of Pragyaan:Journal of law is to publish up-to-date, high-quality and original research papers along with relevant and in sight ful reviews by adopting double-blind review process. As such, the journala spires to be vibrant, engaging, accessible, and at the same time makes it integrative and challenging.

We offer scholars to contribute the ir research work, either individually or collaboratively for their own development and simultaneously for making the journal a leading journal among legal fraternity.

We acknowledge the support of our faculty advisors, the hard work of editorial staff and the interest shown by the contributors and readers that we have been able to come out successfully twice in a year. We express our sincere thanks to all our contributors, members of Advisory board and referees whose untired efforts made the publication of the journal possible.

Prof. (Dr.) R.N. Sharma

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Factors that Contributeto Low Claim Consciousness Among Sports Injury Victims in Developing Countries

Dr. Dennis Odigie*

ABSTRACT

The law relating to sports injury is an integral of sports law. Despite the importance of sports to human existence and societal development, sports law has remained largely undeveloped due to a number of factors, including inadequate legal framework and poor public policy on compensation for sports injury, near absence of insurance policies against injury, low claim consciousness among sports participants, poverty, high cost of litigation and illiteracy. Viewed against the background of any of the identified diametric scenarios, the sport injury victim continually bears the brunt. The foregoing viewed against the need to compensate sports participants for injury suffered in the course of sports participation makes the discussion topical. The paper suggests ways by which the challenges that inhibit claim enthusiasm for sports injury victims could be frontally and concludes that implementation of the recommendations is imperative for the entrenchment of a robust and affordable compensation regime for sports injury.

Keywords: Compensation, sports injury, sports development, litigation, sports law

1. Introduction

Sports constitute a vital tool for national development and unity barring cultural, political and religious differences in the society. [1]Sports injury is attendant to participation in sporting events. The common types of sports injury[2] include twists, bruises, sprains[3], fracture, and contusion[4], splints[5], compartment syndrome[6], brain injury[7] and concussion[8]. Usually, athletes and sports participants regard minor injuries as incidents that are necessarily incidental to the sporting activity they engage in and therefore ought to be ignored. However, when the injury is severe enough to adversely affect a sportsman's career, there would be need to find someone liable. Such situations include defect on the pitch or court, dangerous defect in the equipment, inadequate supervision or training where required, incorrect instructions from a formal instructor or trainer, unsafe or poorly maintained equipment and facilities[9], negligence or battery. The above types of accident would not be considered part of the normal, reasonable conduct that a participant in a sport would consent to and could give rise to a valid compensation claim. The sports injury victim is often in the dilemma of balancing interests and choices between obvious primordial prejudices and preferences, in the form of adherence to specious and enigmatic professional norm of forbidding litigation against tortfeasor colleague on the one hand and the quest for sustainable regime of sports law on the other.

This article articulates reasons for low claim consciousness among the victims of sports injury. It commences by providing a brief conceptual framework relating to compensation for sports injury. Thereafter, it proceeds to explain nature of compensation for sports injury victims before dwelling on the examination of factors that constrain sports injury claims which a focus of this article. Before providing concluding remarks and recommendations, the article looks albeit in brief, at the development of the law relating to sports injury claims in England.

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1 *Walker v Crystal Place Football Club* [1910] 1 K.B, at p. 87.

2 https://medical-dictionary-the freedictionary.com (accessed 28 February 2020).

3 This is a partial or complete tear of a ligament, a strong band of tissue that connects bones to one another and stabilizes joints.A strain is a partial or complete tear of muscle or tendon. (strong connective tissue that links muscles to bones)

4 This refers to the collection of blood at the site of an injury and discolours the skin.

5 caused by overuse or by stress fractures that result from the repeated foot pounding associated with activities such as aerobics, long-distance running, basketball, and volleyball.

6 This is a potentially debilitating condition in which the muscles of the lower leg grow too large to be contained within membranes that enclose them.

7 The primary cause of fatal sports-related injuries is common in boxing tournaments.

8 This condition is also called mild traumatic brain injury or MTBI, can result from even minor blows to the head.

9 https://www.inbrief.co.uk/sports-law/sports-injury-compensation-claims/ (accessed 20 February 2020)

2. Conceptual Framework on Compensation for Sports Injury

Generally, it is believed that most injuries suffered by competitors in sporting activities are not actionable. This notion is predicated on the fact that in some species of sports, participants or spectators are deemed to have voluntarily assumed the risk of injury that accompany the sporting event, provided the injury was not intentional[10]. The foregoing scenario finds expression in the principle of *volenti non fit injuria* which has been variously defined by jurists. In *Nettleship v Weston*[11], Lord Denning explained the concept of volenti in the following terms;

> *volenti* means that the claimant has waived his right to pursue an action for an act of negligence that has occurred. To do this, [t] he [claimant] must agree, either expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant, or more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him.

In *Harrison v Vincent*[12], it was also held that injury suffered in the flurry and excitement of a motorcycle race was not actionable. The inherent danger in sporting events makes it difficult to establish liability in negligence for injuries sustained.

The foregoing accounts largely for a spectator's difficulty in suing a competitor for injuries sustained in the normal course of sporting event. In *Wooldridge v Sumner*[13], the plaintiff, a photographer was covering a sporting activity when a galloping horse went off track and knocked him down, causing him injuries. In an action by the plaintiff, it was held that spectators of a game should ordinarily expect such situations. It was further held that the accident resulted from a miscalculation or error of judgment on the part of the participant in the game. Commenting, Diplock L. J said:

> A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition, notwithstanding that such an act may involve an error of judgement or lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety. The spectator takes the risk because such an act involves no breach of the duty of care owed by the participant to him. He does not take the risk by virtue of the doctrine expressed or obscured by the *maxim volenti non fit injuria*.

In the Australian case of *Rootes v Shelton*[14] Barwick C.J said, "by engaging in a sport…the participants may be held to have accepted risks which are inherent in that sport". On a similar note, Lord Bingham L.C.J, stated in *Smolden v Whitworth*[15], thus;

> A sporting competitor, properly intent on winning the contest, was (and was entitled to be) all but oblivious to spectators. It therefore followed that he would have to be shown to have very blatantly disregarded the safety of spectators before he could be held to have failed to exercise such care as was reasonable in all the circumstances.

However, where a plaintiff did not consent to the risk of being injured, the defence of volenti non fit injuria would not avail the defendant. A plaintiff will not be regarded to have consented to the injury where defendant acted negligently. In other words, a defendant can only be exonerated from liability where an injury occasioned to a plaintiff was not caused by his negligence. In *Woolridge v Sumner*[16], the plaintiff, a photographer was covering a sporting activity when a galloping horse went off track and knocked him down, causing him injuries. In his judgment, Lord Diplock opined;

> The consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk…and requires on the part of the claimant at the time at which he gives his consent full knowledge of the nature and extent of the risk that he ran. There is no basis in law for saying that a sports participant must be regarded as accepting the risk of injury that is caused by negligence of another player. In such a case, the breach of the duty of care has still occurred and, as the rugby cases in particular illustrate, *volenti* does not give defendants a "get out of jail free" card to be deployed in cases where the negligent act occurs in the course of a sporting event.

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[10] http://legal-dictionary.thefreedictionary.com/sports+law(accessed 30 August 2020).
[11] [1971] 2 QB 691, at p. 701.
[12] [1982] RTR 863.
[13] [1963] 2 QB 43.
[14] [1968] ALR 33.
[15] [1997] ELR. 249.

In *Nettleship v Weston*[17], the plaintiff gave the defendant driving lessons. On the third lesson, the defendant drove negligently and hit a lamp-post. The plaintiff's action for injury sustained was successful. The defence of *volenti failed*. It was held that plaintiff did not consent to run the risk of injury as he had checked whether the car was covered for passenger's insurance. In his judgment, Lord Denning said; "Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant".

The application of the Lord Atkin's "Neighbour principle" to sports cases is more problematic in that although it is not difficult to establish who a player's "neighbour" is, the difficulty emerges in attempting to define how poor a player's standard of play must be before it is considered to be negligent. Sir John Donaldson MR approved the trial judge's approach in holding as follows;

> It is not for me in this court to define exhaustively the duty of care between players in a football game. Nor, in my judgment, is there any need because there was here such an obvious breach of the defendant's duty of care towards the claimant. He was clearly guilty, as I find the facts, of serious and dangerous foul play which showed a reckless disregard of the claimant's safety and which fell far below the standards which might reasonably be expected in anyone pursuing the game.

The case of *Smoldon v Whitworth and Nola*n[18], witnessed the first time a Rugby League player sued a referee for negligence. The claim was successful on the grounds that the referee had negligently failed to enforce the laws of the game in relation to the scrum culminating in a catastrophic injury to Mr Smolden. The foregoing places the applicability of the concept of *volenti non fit injury* in the realm of relativity. Thus, the fact that a spectator is deemed to have voluntarily assumed the risk of the attendant injury in a game cannot be regarded as one without exceptions.

The kinds of injuries that occur in a sporting environment are usually physical and at times tend to have major problems. Bone fractures are quite frequent. In training sessions, the possibilities of injuries thrive especially if they are involved in body contact sports like rugby. In addition, if there is poor handling of the sports equipment by the team members or trainers then injuries do happen. In other instances, they occur because of the malfunction of the said equipment and these accidents can all lead to people claiming for sports injury compensation[19].

3. Nature of Compensation for Sports Injury

The Black's Law Dictionary[20] defined damages as monetary compensation for loss or injury to a person or property. Damages are usually a lump sum award. The courts have variously defined the concept of damages. In Seven Up Bottling Company Plc v Abiola and Sons Bottling Company Ltd & Anor, the Supreme Court described damages as:

> Pecuniary compensation obtainable when successful in an action for a wrong done which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at the time unconditionally and generally.[21]

Damages no matter how low or colossal can fully compensate a shattered human frame, or restore the happiness that was hitherto enjoyed by the victim shall be examined later in this thesis. In Iyere v. Bendel Feed and Flour Mill Ltd,[22] Muhammad, JSC said[23]

> Money certainly, cannot renew a shattered human frame. However, monetary compensation can be awarded so that the court must do the best it can in the light of the circumstances of each case as the object of the award of damages, is to compensate the plaintiff fairly and adequately but not necessarily punishing the defendant.

However, the law attempts to pacify personal injury victim by the award of damages with a view to putting him in a position as near as he was before the accident[24]. In *U.B.A. Plc v. Ogundokun*,[25] the court held that the rationale for awarding damages was to compensate the aggrieved party for the loss or place him in as near as possible to the

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[16] [1963] 2 QB 43.
[17] [1971] 2 QB 691 at 701.
[18] [1996] EWCA Civ 1225.
[19] https://www.accidentclaimsadvice.org.uk/sports-injury-compensation/ accessed on 10/8/2020
[20] Garner B.A. Ed, *Black's Law Dictionary*, 9th Edition, USA, (Thomson West Publishing Co, 2009) 445
[21] (2002) 2 NWLR (Pt 750) 40 at 68
[22] (2008) 18 NWLR (Pt. 1119) 300
[23] At.347
[24] This is on the principle of *restitution in intergrum*
[25] (2009) 6 NWLR (Pt. 1138) 450

position he would have been if he had not suffered damage or injury for which he is claiming compensation. This is done by the award of two categories of damages, namely; general and special damages[26].

3.1 Special damages

This include expenses which can be ascertained by mathematical exactitude, which in the context of this discussion include cost of pre-trial treatment such as nursing fees, drugs, taxi fares to and fro hospital and loss of earnings, cost of special equipment and so forth. The amount is usually from the time of the accident up to the time of judgment[27]. The law requires strict proof of special damages because it is an ascertainable type of damage. Once special damage is proved, the court has no option but to award what was proved. In Ilki v. Samuels, Diplock L.J., said; 'Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularised, otherwise, it cannot be recovered'[28].

3.2 General damages

General damages include loses which are not capable of exact quantification. They include all non-financial losses (past and future)[29].The main heads of general damages in personal injury cases include:

a. Pain and suffering
b. Loss of amenities of life
c. Loss of expectation of life
d. Future loss of earnings or earning capacity in case of permanent disability
e. Future expenses attributable to the injury[30].

McGregor on damages said[31];

> The person physically injured may recover both for his pecuniary losses and his non-pecuniary losses. Of these the pecuniary losses themselves comprise separate items viz the loss of earning and other gains which the plaintiff would have made had he not been injured and the medical and other expenses to which he is put as a result of the injury and the courts have sub-divided the non-pecuniary losses into three categories, viz pain and suffering, loss of amenities of life and loss of expectation of life.

Loss of expectation of life was explained by Havers .J. in Alexander v. John Wright & Son (Blackwell) Ltd as follows[32].

> Loss of expectation of life, or rather, to put it in a more accurate form, the loss of the prospect of a predominantly happy life. This is a mathematical calculation to be arrived at by deciding how many years the plaintiff would in the normal course of events live, and then see to what extent it is taken into consideration, but the real matter to take into consideration is what his prospects of a reasonably happy life were.

Loss of amenity which refers to things that the victim was able to do before the accident, but could no longer do as a result of the accident. This head of damage must be supported by evidence. The aim of special damages is to put an individual back in the position financially as if the accident had never occurred. Sports injury could be proved by photographs, medical certificates, and evidence of medical expenses like receipts for the purchase of drugs. Essentially, a sports injury victim must prove that the tortfeasor owed him a duty of care, that the duty of care was breached and that the breach resulted in the injury. In cases of serious injury resulting in inability of the victim to engage in further participation of sporting activities, the factors that would be taken into consideration in assessing compensation include cost of medical care and special equipment, transport and housing modifications[33].

4. Factors Inhibiting Sports Injury Claims.

Over the years, the culture of lukewarm attitude towards litigating sports injuries has become deep rooted in sports participants and spectators. The reasons for the conundrum are not far-fetched, especially in developing countries. Many believe that sports being more of a recreational than professional venture ought to be a source of unity and social intercourse, than an event whose hazardous antecedents should provide a platform for litigation. Some of the reasons are discussed in the subsequent paragraphs. The totality of the identified problems which are discussed below has largely contributed to the under development of sports law.

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[26] Erhabor, J, 'Assessment of Damages in of Personal Injury Cases', Ed. Lawrence Atsegbua, *Contemporary Issues in Law*, Benin City, (Uniben Press, 2013) 481 at 482.
[27] *Okuneye v Lagos City Council* (1973) 2 CCHCJ 38.
[28] (1963) 2 ALL E.R 879
[29] *Julius Berger (Nig) Plc v Ogundehin* (2014) 2 NWLR (Pt. 1391) 388 at 429, paras E-G
[30] At p. 429.
[31] McGregor, H.,*Mcgregor on Damages*, (19th Edn)., London: Sweet and Maxwell Ltd, 2014.
[32] [1959]2 Lloyds Rep. 383 at, p. 388.
[33] https://www.inbrief.co.uk/sports-law/sports-injury-compensation-claims/accessed12/8/2020 (accessed 20 August 2020).

4.1 Near Total Lack of Insurance Policies on Sports Injury

Apart from professional soccer team players, there is hardly any other category that can boast of an established regime of insurance policy for sports participants. This inadequacy leaves many indigent sports injury victims in a state of hopelessness, and substantially accounts for the absence of reparation for most sports injury victims. The result is that in most cases, victims take responsibility for treatment of injuries sustained. Nonetheless, a school that chooses to provide insurance to its student-athletes has a legal duty to ensure that all of them have insurance coverage before permitting them to participate. Failure to provide insurance cover for any student who sustains injury during sporting activity would attract liability to the school authority. In *Williams v. East Baton Rouge Parish School Board*[34], the court said;

Because of the nature of contact sports, students are exposed to situations where they can and/or will be harmed. Coaches, should not knowingly allow a student who has neither applied for the school's insurance nor completed the insurance-waiver form to play and be put in harm's way. Therefore, defendants did have a duty to ensure plaintiff had insurance or completed the waiver form before allowing him to play. This duty was breached when plaintiff was permitted to participate in the game even after plaintiff told his coach he had not completed the form.

4.2 Poverty and High Cost of Living

Poverty is a scourge which adversely affects lifestyle and standard of living. Litigation is an expensive venture in many parts of the world including Nigeria, where poverty is a major denominator and correlation of the socio-economic preferences and prejudices of the average Nigerian[35] who is ordinarily unable to afford the basic comfort for him and family. Apart from the game of football, many other sports participants are poorly remunerated. This uncomplimentary scenario translates to inability to afford the basic comfort befitting of an ideal productive man.

Apart from the fact that injury is assumed a part of most sporting activities, a good number of sports injuries are caused by colleagues in the course of sporting event. Where such accidents occur, the offending athlete would usually show some compassion, support and help for the victim. Therefore, litigation is hardly conceived by the victim against the tortfeasor. Furthermore, most sports are hardly insured in Nigeria. Even if the victim choses to litigate the incident and gets judgment, the defendant is unlikely to be able to afford the judgment sum. Choosing the option of litigation in sports injury may breed bad blood between the claimant and other team players who may begin to see him as atone hearted. This mind set is given credence by the general notion that once the average Nigerian is taken to court by a friend or professional colleague, the relationship that once existed between them may give way to bad blood and acrimony.

4.3 Poor Institutional and Near Absence of Legal Frameworks on Compensation for Sports Injury.

Most developing countries lack the institutional framework for compensation for sports injuries. In Nigeria, for example, the only known institutional body for sports is the National Sports Institute[36] which is basically concerned with the training of sports men and women, and the establishment of the Institute and a Governing Council. No mention was made of compensation for sports injury. Ministry of Sports and Youth Development has no monitoring departments to ensure that organizers of sporting events comply with known standards in such events. No machinery is put in place for punishing erring sporting event organizers. No special forum[37] exists for sports injury victims to seek compensation for injury suffered. This gap has rendered the statute valueless for sports participants. A review of the statute is necessary to provide for compensation for sports injuries.

Most extant laws that relate to human capital and social development failed to take cognizance of the interest of sports injury victims. The Constitution of the Federal Republic of Nigeria[38] failed to provide for sports governance and development. There is no bill in sight at the National Assembly on the welfare of sports participants and governance of sports event organizers. There is a near total lack of legislative provisions for the welfare and compensation of sports injury victims. This situation leaves most sports participants to their fate in the event of

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[34] No. 97 CA 2645.

[35] Prominent among which is poverty which according to the United Nations Statement of June 1998 is a denial of choices and opportunities, a violation of human dignity. It means lack of basic capacity to participate effectively in society. It means not having enough to feed and clothe a family, not having a school or clinic to go to; not having the land on which to grow one's food or a job to earn one's living, not having access to credit. It means insecurity, powerlessness and exclusion of individuals, households and communities. It means susceptibility to violence, and it often implies living on marginal or fragile environments without access to clean water or sanitation. Available at [http//www.helium.com/items/1587576-poor-service-delivery] Accessed on 26/7/2020

[36] Laws of the Federation,2004

[37] Court of Arbitration of Sports.

[38] 1999, as amended.

accidents resulting in injury or disability. However, the National or State Houses of Assemblies can exercise their legislative powers under sections 4(1) and (4) respectively, of the Constitution of the Federal Republic of Nigeria 1999 for the establishment of legal departments and legal aid in sports ministries. The National or State Houses of Assemblies could under section 6(4)(a) of the constitution[39] establish special courts, tribunals or arbitration panel for resolution of disputes relating to or arising from sports activities. The section provides;

> Nothing in the foregoing provisions of this section shall be construed as precluding the National Assembly or any House of Assembly from establishing courts, other than those to which this section relates….

By this way, a robust, affordable and friendly legal and compensation regime for sport injury victims would be put in place.

4.4 High Cost of Litigation.

The cost of living in most developing countries, including Nigeria is on the increase. Increase in cost of living translates to reduction in purchasing power of the individual, inability to afford the basic necessities of life including quality housing, food, clothing and medical care. A visible denominator of cost of living is inflation which has been defined as the rate at which the general level of prices for goods and services is rising and, consequently, the purchasing power of currency is falling[40].

Consumer prices in Nigeria have experienced astronomical and unprecedented rise in quick succession[41], constraining the Nigerian nation to struggle with rising import cost due to a weak naira after lower oil prices culminating in sharp decline in foreign reserves, higher cost of food, housing, transport, electricity tariffs and inability to afford medical care[42]. An injured athlete who is stricken by any of these negative vagaries due to poor remuneration would have litigation as an option in his scale of spending preference.

4.5 Athlete's Contributory Negligence

Contributory negligence involves voluntarily exposing one's self to an unreasonable risk of harm. It is a defence that is available to a defendant in an action where a part of the negligent act that resulted in the injury is traceable to the defendant. A good example is where the claimant ignores the team doctor's medical advice, he would be held to have contributed to any complication that arises from such nonchalance. In *Benedict v St. Luke's Hospital*[43], The court described a situation that could amount to an athlete's contributory negligence as follows:

> A patient is required to cooperate in a reasonable manner with his treatment. This means that a patient has a duty to listen to his doctor, truthfully provide information to his doctor upon request, follow reasonable advice given by his doctor, and cooperate in a reasonable manner with his treatment. A patient also has a duty to disclose material and significant information about his condition or habits when requested to do so by his physician…

A successful plea of contributory negligence exculpates the defendant from liability. It is suggested that insurance policy for student athletes should be made compulsory by the appropriate education ministry.

4.6 Arbitration Clauses in Player/Team Agreement

Most team owners build in arbitration clauses in the agreement players sign with them. By these clauses aggrieved players are constrained from litigating the team owners without first submitting to arbitration[44]. In South Africa, for example, the National Sports League (NSL) superintends the relationship between sports organizers and sports participants/employees. It is mandatory for professional footballers to register with the NSL. This makes it possible for such footballers to become bound by the NSL Constitution. Article 18.1 of the NSL[45] Constitution provides;

> … all participants in professional football are required, and undertake as a condition of membership and/or registration with the NSL, to refer all and any disputes and differences, other than those of a disciplinary nature, as between them to the Dispute Resolution Chamber rather than to courts or administrative tribunals.

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[39] Constitution of the Federal Republic of Nigeria, 1999.

[40] It has also been defined as the rate at which the general level of prices for goods and services is rising and, consequently, the purchasing power of currency is falling. Central banks attempt to limit inflation, and avoid deflation, in order to keep the economy running smoothly. Available at nairamatrics.com/nigeras-inflation.rate-2006-2016, Accessed on 2/10/2020.

[41] The percentage rates of inflation in Nigeria in the recent months were stated as follow: November 2015,9.37%, December 2015,9.55%, January 2016,9.62%, February 2016, 11.38%, March 2016,12.77%, April 2016,13.72%, May 2016,15.58%, June 2016,16.48%, July 2016 17.13 %August 2016,17.61% September 2016,17.85%- Available at nairamatrics.com/nigeras-inflation.rate-2006-2016,Accessed on 30/9/2020.

[42] MatraDubiel, 'Nigeria's Inflation Rate 1996-2016',http://www.tradingeconomics.com/nigeria/inflation-cpi(accessed 28 September 2020).

[43] 365 N.W.2d 499, 505 (N.D. 1985).

[44] *See generally* Briggs, W.B.,*Injury Grievances in the National Football League,* 63 L. INST. J. 164 (1989).

[45] National Soccer League. The League adjudicates sports disputes through its forum called the Dispute Resolution Chamber (DRC).

The NSL resolves disputes through its disputes resolution channel known as Dispute Resolution Chamber (DRC). The chamber resolves sports disputes by way of Alternative Dispute Resolution (ADR)[46] method. By this way, no aggrieved footballer is allowed to institute action in court without first exhausting the opportunity provided by NSL, DRC. Any action instituted without first utilizing this window would have the matter struck out for failure to comply with the condition precedent laid down by NSL Constitution. An aggrieved footballer can only commence his action in court on being dissatisfied with the decision of NSL. Article 24 of the NSL Constitution provides for primary resolution of disputes through ADR as follows;

> A club, official, player, coach, agent or any person subjected to the provisions of this constitution, may not seek recourse in a court of law or administrative tribunal on any issue that may be determined in terms of this constitution or rules of the League or SAFA or the statutes of FIFA unless all procedures prescribed in these prescripts have been exhausted[47].

However, it has been held that the condition precedent for commencement of legal action in the NSL did not oust the jurisdiction of the court. In other words, where an aggrieved footballer insists on commencing his action directly in court, without first exploring the window provided by NSL could be referred to the NSL for alternative dispute resolution, after which the claimant could come to court upon being dissatisfied with the ADR resolution. In *Augustine v Ajax Football Club*[48] Commissioner Taylor held that the court had the discretion to determine the dispute or refer it to private arbitration as per agreement between the parties. Commissioner Taylor further held that it was preferable to refer disputes arising from sporting activities to private adjudication bodies like the NSL in view of the fact that it had a suitable, and specialist, dispute resolution tribunal with specialist skills and knowledge[49].

As is the case with sports related disputes in other countries discussed above, despite undertaking to refer all the disputes and differences between them to the NSL DRC[50] rather than to court and administrative tribunals, some participants in professional football insist on referring their disputes to courts or other tribunals for resolution in exercise of their rights. In *Soul Mmethi v DNM Investments CC t/a Bloemfontein Celtic Football Club*[51] the claimant, a professional footballer instituted his action against the defendant in the Labour Court by virtue of Section 77 of the Basic Conditions of Employment Act. The defendant raised a preliminary objection to the court's jurisdiction on grounds that the claimant did not fulfil the condition precedent by first referring the dispute to NSL DRC. Judge Molahlehi said;

> …arbitration clauses in general, including the provisions of the NSL Constitution and Rules, do not oust the inherent jurisdiction of the courts. He added that the court will always have jurisdiction over (sports related) disputes. But that did not mean parties to an agreement could simply ignore the agreement and approach the courts. Therefore, rather than seeking have disputes resolved elsewhere, it would be more prudent for those involved in professional football to refer their disputes to the NSL DRC. At the NSL DRC disputes are dealt with by a specialist tribunal and with specific reference to football.

In a similar development, in *Fabian McCarthy v Sundowns Football Club*[52] & Others, Judge Cloete said:

> Whether the player – employee is protesting the unlawfulness or unfairness of the employer's conduct, the boundaries of lawfulness, and particularly fairness, in the context of sport only can be fully comprehended with reference to the special nature of employment in sport…This is more so where one would be required to deal with concepts such as 'just cause' or 'sporting just

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[46] ADR is the resolving of disputes without resorting to the court. There are various forms of ADR ranging from conciliation, mediation, conciliation/arbitration or mediation/arbitration, arbitration and in some instances expert determination. Typically, conciliation and mediation involve negotiations between the parties to a dispute assisted by a neutral person who tries to bring the parties to an agreement. Conciliation and mediation are almost similar and are very often confused as the same process. But conciliation and mediation are different. In conciliation proceedings, the conciliator generally suggests solutions to the parties. In mediation proceedings, on the other hand, the mediator simply assists the parties to negotiate and reach their own settlement.8 Conciliation-Arbitration (Con-Arb) or Mediation-Arbitration (Med-Arb) involve the parties attempting to resolve the dispute through conciliation or mediation and if that fails arbitration starts immediately after the conciliation or mediation (as the case may be). Arbitration is the adjudication of a dispute by a third party – the arbitrator – that is appointed to adjudicate the dispute between the parties. In some instances, the arbitrator's decision is final and binding.

[47] As cited by Farai Razano, in *Keeping Sport Out of the Courts the National Soccer League Dispute Resolution Chamber-A Model for Sports Dispute Resolution in South Africa and Africa*, African *Sports and Law and Business Bulletin 2014, vol. 2 at, p. 6.*

[48] (2002) 23 ILJ 405.

[49] Dispute Resolution Chamber.

[50] Dispute Resolution Chamber which is NSL's forum for sports disputes resolution.

[51] [2011] 32 ILJ 659 (LC).

[52] [2000] JOL 10381 (LC).

cause' or other principles of the growing body of lex sportivain determining the fairness or unfairness of a dismissal in the football context. A court would not have easily dispensed of the matter without the need to hear evidence or argument on these principles, something that a specialist tribunal such as the NSL DRC can easily do.

Most times, the players may get less than the reparation they would have been awarded by the court of law.

4.7 Injury arising from the use of Defective Sports Equipment and Accessories

Sports equipment like industrial or household equipment are susceptible to manufacturing defect. When the use of defective equipment causes harm, a cause of action arises in product liability. Product liability is a tort which imposes liability on manufacturers and sellers of products that are manufactured or sold in defective condition. A product is defective if it is unreasonably dangerous to the user. Liability is attracted by physical or emotional injury to the ultimate consumer[53]. The *locus classicus* on the tort of product liability is *Donoghue v. Stevenson*[54] where the plaintiff discovered decomposed remains of a snail which floated out of the ginger beer bottle during the refilling of the tumbler. As a result, she suffered from shock and severe gastro-enteritis hence sued successfully.

A sportsman is an ultimate user of sports kit and other equipment such as football, boots, racing car, tennis balls and racket. Manufacturers of defective products and potentially dangerous products have often been identified as wrongdoers in terms of compromising the sanctity of duty of care in manufacturing process, probably in a bid to reduce cost of production and maximise profit. The scenario was aptly described by Aniagolu J.S.C in a Nigerian case of *Constance Ngonadi v. Nigerian Bottling Co. Ltd*[55] as:

> "nothing appears to be elementary in this country where it is often the unhappy lot of consumers to be inflicted with shoddy and unmerchantable goods by some pretentious manufacturers, entrepreneurs, shady middlemen and unprincipled retailer whose avowed interest seems only, and always, to be to maximize their profits leaving honesty a discounted and shattered commodity".

In other jurisdictions, strict liability is enforced against manufacturers who put defective products in the overt market for consumers' use. In *Greenman v. Yuba Power Production Inc*[56], a man was injured while using an all-purpose power tool given to him as present by his wife. The injured consumer brought an action. The Supreme Court of California held the manufacturer liable and stated in its judgment:

> a manufacturer is strictly liable in tort when an article he places on the market knowing that it is to be used without inspecting for defects, proves to have a defect that causes injury to a human being…the purpose of such liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturer that put such product on the market rather than by the injured persons who are powerless to protect themselves.

Strict liability is advocated against manufacturers of defective[57] products. The greater the potential danger inherent in a product, the more stringent the need to protect users against those dangers are[58]. In *Solu v. Total Nig. Ltd*,[59] the plaintiff successfully maintained an action against the defendant company, for injuries sustained by members of his family following the explosion of a refilled gas cylinder which he had bought for cooking in the home.

Despite the possibility of injury being suffered by sports participants from the use of defective sports equipment, the authors know of no known reported case where a victim of sports injury arising from the use of defective sports equipment has been compensated by the manufacturer of such equipment. The reason for this situation is presumably because those who sustain injury from the use of defective sports accessories are reluctant to litigate the manufacturers concerned. The foregoing situation is capable of impacting negatively on the development of sports law and compensation regime for sports injury.

The use of a sport equipment that is not fit for purpose should give rise to a cause of action. In *Bristol Tramways*

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[53] Odigie, D., *Law of Tort(Text and Cases)*,Benin:Ambik Press.

[54] *[1932] A.C 562*

[55] *Constance Ngonadi v. Nig. Bottling Co. Ltd* [1985] 1 NWLR (Pt.4) 739, where the plaintiff /appellant sustained severe injuries from a brand of kerosene refrigerator which was sold to her by the defendant/respondent.

[56] [1963]27 Cal.Reporter 697.

[57] There are three basic types of defects, namely; (1) Manufacturing Defect: where the product is well designed, but the way in which it was made makes it unsafe; (2) Design Defect; where the design or packaging style of the product is unsafe, such that the entire product line is unreasonably dangerous; (3) Insufficient Instructions or Warnings, where the manufacturer designs a product that's perfectly safe and has no manufacturing defects, but fails to include proper warnings or instructions for safe operation.

[58] See also, *Dominion Natural Gas Co. Ltd v. Collins and Perkins* [1909], A.C 640.

[59] [1989] 1 C.L.R.. Q.

Carriage Co. Ltd v. Fiat Motors Ltd[60], the defendant supplied buses to plaintiff who had specifically ordered for vehicles that would be suitable for heavy passenger work in Bristol, a hilly city. The buses turned out to be unsuitable for this purpose. The seller was held liable. In *Asford Shire Council v. Dependable Motors Limited*[61], the defendant was held liable for selling to plaintiff tractors not fit for road construction work. In the same vein, a sports garment which turns out to be unwholesome would attract liability to the manufacturer. It is irrelevant that the defect was in the packaging. In *Grant v. Australian Knitting Mills*[62], the plaintiff bought some underpants, which were manufactured by the defendant. The plaintiff wore the pants and contacted dermatitis due to the fact that it contained excess sulphite. At the trial, the defendant established that it had manufactured 4,737,600 pairs of underpants and put same in the market yet no one contained excess sulphite.

Remedies in the tort of negligence against manufacturers imply that the manufacturer has breached the duty of care by reason of which the consumer has suffered injury. This could be quite challenging to the victim consumer if he chooses to proceed against the manufacturer on the basis of negligence which could easily be struck down by the defence of fool proof by the manufacturer. It is submitted that a more convenient way is to seek a remedy in contract and situate the cause of action on breach of implied warranty as to fitness for purpose. A product that occasions injury to a consumer in the course of use is obviously not fit for purpose, and renders the manufacturer liable for breach of implied warranty. In *Constance Ngonadi v. Nigerian Bottling Company Ltd*[63], the plaintiff relied on section 14 of the Sale of Goods Act, which stipulates implied warranty of fitness for purpose for consumer goods. The section 14 provides:-

> subject to the provision of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except there is an implied warranty or condition as to quality or fitness for particular purpose which may be annexed by the usage of trade;

4.8 Gambling and Betting

The practice of pools betting has been widely practiced in many African countries for decades without much effort in the direction of defining the activity as game or economic activity. Recently, other forms of gambling have become popular. Some are popularly referred to as lotto or other acronyms ascribed to those directly related to prediction of international football matches. The modus operandi of the foregoing categorises the specie of gambling and betting on the platform of taking chances by predicting the outcome of professional tournaments.

Due to absence of defined legal framework on this category of human endeavour, it has become difficult to *strictosensu*[64] categorise such activities as a specie of sports. On the foregoing score, it is doubtful if a participant who suffers emotional injury of psychological trauma in the course of play would be entitled to redress. Any loss arising from gambling would arguably be at best one that is predicated on mental distress. In *International Messengers Nig. Ltd v. Engr. David Nwachukwu*[65], it was held that nervous shock, mental distress or loss of valuable opportunity cannot be equated with personal injury, and can therefore not be sustained in a claim for personal injury.

4.9 Impunity specter in referring

The referee would be liable to a participant who sustains injury in the course of sporting activity. It is reasonable to expect that there would be health and safety guidelines in place. Players are entitled to look to referees for enforcement of the rules in order to ensure their safety by participants, including obedience to the rules of the game[66]. Sports coaches, fitness instructors and personal trainers usually have sports insurance to safeguard themselves against claims arising from acts of negligence. In *Smoldon v Whitworth and Nolan*[67], arugby league player sued a referee for negligence. The claim was successful on grounds that the referee had negligently failed to enforce the laws of the game in relation to the scrum culminating in a catastrophic injury to Mr. Smolden.

The leading case on liability of referees for sporting injuries is *Vowles v Evans*[68] where the claimant was badly injured during a rugby match when the scrum collapsed, and

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[60] [1990] 2 K. B 831.
[61] [1961] A.C 336.
[62] (supra).
[63] (supra).
[64] Meaning: In the strict sense.
[65] [2004]12 NWLR (Pt.891)543.
[66] Albert;R,.'*Sports Law and personal Injury*',www.russell.co.uk/media/2043/sports_law_and_the_person al_injury_department_july2008.pdf (accessed 5 July 2020).
[67] [1996] EWCA Civ 1225.
[68] [2003] 1 W.L.R. 1607.

brought an action against the referee. A prop forward had previously left the field with an injury, and in breach of the rules, the referee had permitted a flanker to take his place in the front row without enquiring as to his previous experience of playing prop. The argument that a referee owed no duty of care to players was rejected by the Court of Appeal where Lord Phillips M.R. said;

> The role of the referee is to enforce the rules. Where a referee undertakes to perform that role it seems to us manifestly fair, just and reasonable that the players should be entitled to rely upon the referee to exercise reasonable care in so doing.

The standard of care to be expected of the referee depends on all the circumstances, including the nature of the game. This decision was criticized as the negligent cause of the scrum collapse. For the referee, it was argued that there was no duty of care owed by the referee to the players, or at least by an amateur referee. While rejecting the foregoing argument, Lord Phillips M.R. of the English Court of Appeal said:

The Court of Appeal upheld the approach taken in the earlier rugby case of *Smolden v. Whitworth* (1997) E.L.R. 249, that the referee of a fast moving game cannot reasonably be expected to avoid errors of judgment, oversights or lapses. In practice, "the threshold of liability must properly be a high one", and the facts and circumstances of the case must show that threshold had been crossed.

4.10 The Psychology of Professional Bond among Sports Participants

There is a generally acceptable notion among sports participants that injury is a necessary hazard of sporting activity, regardless of the circumstances surrounding how it was sustained. In addition, sports participants see co-participants as members of the same family bonded by profession. The foregoing straddles the sports injury victim's interest between two diametric scenarios, namely; to overlook the injury, shun litigation against tortfeasor colleagues in order to preserve the hitherto professional bond and fraternal relationship between them, or litigate against the colleague tortfeasor whose negligence has resulted in injury to the victim in the hope of getting reparation in order to be compensated. The former literally translates to low claim consciousness, while the latter portends the need to entrench a sustainable regime of compensation system for sports injury. The foregoing has continued to pose choice issues for sports injury victims in terms of prejudices and preferences on whether or not to litigate torts associated with sports.

5.0 Inter-jurisdictional Perspectives to Compensation for Sports Injuries.

It is apposite to consider the position of liability for sports injury in other jurisdictions in order to appreciate the position of the law, and identify salient inter-jurisdictional differentials. In England and Wales, the tortuous liability of sports players for injury to co-participants has seen a massive growth in recourse to the law and in jurisprudential development in the 20 years since *Condon v Basi*[69]. This initial Court of Appeal judgment, of just two pages in length, established that a sports participant could be liable in tort to another player if injury was caused by negligent challenge. In the intervening period, cases have discussed variously whether reckless disregard is the appropriate standard of care to be applied, whether volenti can be raised as a defence and whether a variable standard of care applies in these "sports torts".

In *MPC v Caldwell*[70], the claimant was a professional jockey who was involved in an accident during a race. His injuries were sustained when the two defendants suddenly moved closer to the inside rail, riding across the path of a horse that was slightly behind theirs but in front of the claimant's. The horse fell, bringing down the claimant's horse in turn and causing his career-ending injuries. Both defendants were found guilty by the race stewards of careless riding and banned for three days; they had been careless in not leaving sufficient room between their horses and the horse behind them, which held the inside line and therefore ought not to have been impeded. In his judgment, Judge LJ held;

> …there was a distinction in sporting contests between conduct that could properly be regarded as negligent and that amounting to "errors of judgment, oversights or lapses of attention" of which any participant might be guilty. This reflects the observations of di Nicola and Mendel off that "much of sport's appeal comes from its unrestrained qualities, the delight of its unpredictability, the exploitation of human error, and the thrill of its sheer physicalness [sic].

In the United Kingdom, 20 years prior to Caldwell, elite-level sports participants have litigated against their fellow players, referees, sports clubs and sports governing authorities in order to seek recompense for injuries that compromised their ability to earn a living. In the context of this analysis, the cases of *Smolden v Whitworth*[71] and *Vowles v Evans*[72], are revisited, highlighting that the concept of games being played within their playing culture where decisions made and actions performed in the heat

[69] [1985] 1 WLR 866; [1985] 2 All ER 453.
[70] [1982] AC 341.
[71] [1996] EWCA Civ 1225.
[72] [1997] PIQR 133.

of the contest extends to the non-playing match officials. The result may be to place a much greater emphasis on the governing bodies of sport to control the behaviour of those that play its game, which in turn may lead to a greater number of these governing bodies becoming the focus of negligence actions in the future.

In other cases, notably *Smoldonand Vowles*, amateur participants sought compensation for the infliction of devastating injuries in the course of sport participation. In each of these cases the starting-point was the truism that, in law, negligence occurs when an individual fails to exercise the reasonable standard of care that is expected in the circumstances. Thus, the claimant must establish that the defendant owed a duty of care; that the duty was breached; and that the breach of duty caused unforeseeable injury. This general principle of negligence, developed by Lord Atkin in *Donoghue v Stevenson*[73], was first applied in the United Kingdom to a case of on-field sporting injury in Condon. That case established that co-participants owed each other a duty to take reasonable care to avoid causing injury to other players but that the defendant in such a case could raise the defence of *volenti* based on the mere fact that the injury was sustained during the course of sports participation.

6.0 Concluding Remarks and Recommendations

In the course of this work, we have identified some of the daunting challenges that confront sports injury victims in the quest for reparation. Most of the challenges are systemic and have rendered the jurisprudence of sports law and compensation regime for sports injury largely undeveloped in developing countries. It is observed that public policy makers delight in showering praises and gifts on athletes for successes recorded in games competitions, while paying little or no attention to the welfare and safety of participants and compensation for injured sports participants. In view of the high poverty level in most developing countries and lack of legal aid facilities for sports injury victims, the tendency is for victims to continually go without a remedy for injury suffered. Overall, the sure way to entrench sustainable compensation regime for sports injury victims is for public policy makers to garner the required political will to implement the following recommendations. We are optimistic that a sincere and religious implementation of the recommendations would usher a new dawn for the welfare of sports injury victims.

In order to give the issues raised in this work some meaningful consideration, it is apt to make recommendations that would strengthen the regime of sports injury compensation by de-emphasizing strict adherence to aspects of primordial traditions of sports participants who believe it is an aberration for sports injury

[73] *McCord v Swansea City AFC Ltd* [1932] AC, 562.

Concept and implication of the term 'Government property' under Wildlife (Protection) Act, 1972

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ABSTRACT

The concept of ownership of wildlife vested in the Government, is mentioned in Section 39 of the Wildlife (Protection) Act, 1972 that wild animal to be a Government property but in the situation when something happens to that wild animal, free roaming wild animal is no one's property. This concept having wider connotation now, as it includes specified plants as well. Establishing the fact that the seized property is a Government property is foremost requirement for criminal proceeding under the Act.
Keywords: wildlife, Government property, seizure, wild animal.

Introduction

In Wildlife (Protection) Act, 1972 the term 'Government Property' has been mentioned many times, that has a specific connotation which has a different meaning that a layman would understand it to be. The term holds the key to complete understanding of many aspect of the Act, specifically when it comes to offences related to wildlife and particularly to the provisions which relates to seizure in wildlife offences and things used in that offence. Prior to 1991 Amendment the scope of the term Government property was very restricted but now it has been greatly increased, it encompasses wild animal and their parts or products, specified plants (i.e., plants included in schedule VI) and their parts or derivatives, ivory imported into India and articles made thereof, and vehicle, vessel, weapon, trap or tool used for committing an offence under the Act.

What is 'Government Property'

As per Section 2(14) any property which is mentioned in Section 39 and Section 17 (H) of the Wildlife (Protection) Act, 1972 is a 'Government property".According to Section 39 other that vermin [Section 39(1(a))] any Wild animal, etc. as mentioned below shall be the property of the State Government and, where such animal is hunted in a sanctuary or National Park declared by the Central, is as:

(i) hunted under Section 11 or Section 29 or Sub-section (6) of Section 35 or

(ii) kept or bred in captivity or

(iii) hunted in contravention of any provisions of this Act or any rule or order made thereunder, or

(iv) found dead, or

(v) killed by mistake or

(vi) animal article, trophy or uncured trophy or meat derived from any wild animal in respect of which any offence against this Act or any rule or order made thereunder has been committed; or

(vii) ivory imported into India and an article made from such ivory in respect of which any offence against this Act or any rule or order made thereunder has been committed or

(viii) vehicle, vessel, weapon, trap or tool that has been used for committing an offence and has been seized under the provision of this Act.

In State of U.P. & Anr. Vs. Lalloo Singh, Criminal Appeal No. 963 of 2001, SC it is mentioned that there is twin condition mentioned in the Act, when any vehicle, vessel, weapon, trap or tools has been used for committing an offence as the vehicle etc. must have been used for committing an offence and it has been seized. Mere seizure of the property without any material to show that the same has been used for committing the offence does not make the seized property, the property of the government. But it was also noted that under sub-section (1) of Section 50 of the Act action can be taken if the concerned official has reasonable grounds of believing that any person has committed an offence under the Act.[1]

It was observed by the Hon'ble Kerala High Court in Mathew Vs. Range Office, that it is not at the time when the vehicle is seized that it becomes the property of the government, but when it is found by a court that a person committed the offence under the Act, the vehicle which he used for the commission of the offence will become the property of the Government. Court also noted it is not

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correct to said that the interim custody of the vehicle can not be given to the owner of the vehicle by virtue of what is said in Section 31(1)(d) of the Act.

Can a 'Government property' be released by Magistrate or officials:

Owing to the wrong interpretation of the term, sometime officials release the item which was seized after compounding of the case which is a clear violation of section 54(2) of the Act, which prohibits the release of 'Government Property'-

54(2)- On payment of such sum of money or such value, or both, as the case may be, to such officer, the suspected person, if in custody, shall be discharged, and the property, other than Government property, if any seized, shall be released and no further proceedings in respect of the offence shall be taken against such person.

In Mahendra Singh & Others Vs. State, the court observed that while omitting section 50(2), the legislature has not taken away the power of the court to release the vehicle. Had it been so, the word "to be dealt with according to law" would not have been used in Section 50(4) and word 'may' would not have been used in Section 52(2). The Court has jurisdiction to release, among other things, the vehicle in favour of the registered owner, on such condition as it may deem fit[3]. In State of Maharastra Vs. Gajanan D. Jambhulkar, Bombay High Court observed that vehicle should not normally be released till culmination of proceedings, if prima facie the involvement of vehicle is disclosed. If for any exceptional reason the court feel that the vehicle is not prima facie involved in respect of the commission of offence under the Act, the court should impose stringent conditions while ordering its release so that at the conclusion of the trial, if forfeiture is to be ordered, the vehicle is available in the same condition in which it was seized[4].

The term 'Government property' also mentioned in Section 11(3) as- *any wild animal killed or wounded in defense of any person shall be Government property*, this section appear to be redundant in view of the more exhaustive definition under section 39 but this provision provide safeguard to every wild animal against 'any one' and provide exemption only in case of defense not otherwise. In other words, it can be said that if 'any one' done any harm to wild animal by killing or inflict any wound to them otherwise than in self-defense, in such situation make every wild animal a Government property and the person would be liable under provisions of this Act.

Hon'ble Supreme Court noted in PCCF Vs. J.K. Johnson & Others, 2011 that the key word in Section 39(1)(d) are "… *has been used for committing an offence*…", the kind of absolute vesting of the seized property in the state government, on mere suspicion of an offence committed against the 1972 Act, could not have been intended by the Parliament. This provision does not ger attracted where the items, suspected to have been used for committing an offence, are seized under the provisions of the Act. There must be categorical finding by the competent court of law about the use of seized items[5].

Prior to the 1991 amendment in the Act, Section 50(1)(c) stipulated that an enforcement authority could seize any captive animal, wild animal, animal article, trophy or uncured trophy in possession of any person if the same appeared to him to be Government property. But the property which is not a Government property as per the provision of the Act could not be seized, if it could be done the person was liable to be prosecuted and punished for wrongful seizure under Section 53 of the Act. After amendment of 1991 the provision of Section 50(1)(c) made somewhat flexible, an enforcement authority can now seize any wildlife item, whether Government property or not, in respect of which an offence under the Act has been committed. But it is still essential for the enforcement authorities to make sure whether or not the seized item is Government property because of following reasons:

a. Any item which is not a Government property, can be released by a competent authority if the offence is compoundable.

b. If it is established that the it is Government property, the competent authority according to Section 50(6) of the Act may arrange for sale of any meat, uncured trophy, specified plant or part or derivative thereof, which has been seized under the Act and it is proved that the item in question are not Government property, the proceeds to the sale shale be returned to the owner.[6]

Section 39 of the Act, which plays a key role in defining the concept of Government property, is included in Chapter V of the Act which deals with the trade and commerce in wildlife items but the concept of the term is much mote wider than just a tool for regulating trade and commerce. It

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[1] State of U.P. &Anr. Vs. Lalloo Singh, Criminal Appeal No. 963 of 2001, SC
[2] Mathew Vs. Range Office, III (2004) CCR 578 Kerala High Court.
[3] Wild Life Laws in India by Surendra Mehra, revised and updated edition 2021.
[4] Maharastra Vs. Gajanan D. Jambhulkar, Bombay High Court, 2002.
[5] PCCF Vs. J. K. Johnson & Others, Civil Appeal no. 2534/2011
[6] "Concept of Government property in the Wildlife (Protection) Act, 1972" by S. S. Bist, The Forester Oct, 1998, page 767

is first and foremost requirement for the enforcement authorities to establish the seized item is a Government property for legal proceeding. It provides the legal basis for seizing and disposing of wild animals and plants with their parts, products and derivatives involved in the offence under the Act.

Is Plant also become a 'Government Property':

Now, not only specified wild animals while specified plant also consider as a 'Government Property'. By Amendment Act 44 of 1991, specified plants (Schedule VI)s have been inserted under Section 17(H) which says that every specified plants to be a 'Government property' :

1. When specified plant and derivative thereof, in respect of which any offence against this Act or any rule or order made thereunder has been committed, shall be the property of the State Government, and,
2. When specified plant and part or derivative thereof has been collected or acquired from a Sanctuary or National Park declared by the Central Government, such plant or part or derivative thereof shall be the property of the Central Government.

There are some restrictions also mentioned in the Act against such property, any person who by any means obtains the possession of Government property, should within 48 hours from obtaining such possession, report the fact to and hand over such property to the nearest police station or authorized officials (Section 39(2)) and no person shall acquire or possess or transfer or gift or sell or destroy or damage any Government property without previous permission in writing or the Chief Wild Life Warden or the authorized officials (Section 39(3)).

Conclusion:

Allied Acts of the Wildlife (Protection) Act, 1972 only mentioned the word "property" in its different provisions like The Code of Criminal Procedure, 1973 empowers the police officers to seize *any property which may be alleged or suspected…,* under Section 102(1); Customs Act, 1962 empowers a custom *official to seize any property imported or exported illegally* and Indian Forest Act, 1927 defines the term '*Forest Produce*' under section 2(4). The concept of Government property in the Act in its present form is not only complicated but also plagued with a number of anomalies.

A Cause Célèbr: Freedom of Speech and Expression vis-à-vis Hate Speech

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ABSTRACT

In ancient and modern times, humanity has yearned for freedom of expression. Censorship or appropriate limits, on the other hand, are an ancient and worldwide phenomenon. The framers of Indian constitutions acknowledged the coexistence of conflicting rights and constraints, and enacted Article 19 with a specific endorsement to reasonable restrictions. This has expanded as a result of the Indian Judicial System's progressive judgments. In an organised community, freedom of expression cannot be absolute, which raises important questions about the allowable bounds of restrictions on freedom of expression. This research paper focuses, consider the nature of the restriction, its scope and extent, as well as its duration and timing with regard to judicial deliberations.

Keywords: Hate speech, Resentment, Test of reasonableness, Freedom of speech and expression, Restrictions on freedom of speech

Introduction

There are three distinct elements that legislatures and courts can use to define and identify "hate speech", namely — content-based element, intent-based element and harm-based element (or impact- based element).[1] "Content" has relation with the subject-matter, but is not synonymous with the subject-matter. "Content" has more to do with the expression, language and message which should be to vilify, demean and incite psychosocial hatred or physical violence against the targeted group. The content-based element involves open use of words and phrases generally considered to be offensive to a particular community and objectively offensive to the society. It can include use of certain symbols and iconography. By applying objective standards, one knows or has reasonable grounds to know that the content would allow anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender.[2]

The intent- based element of "hate speech" requires the speaker's message to intend only to promote hatred, violence or resentment against a particular class or group without communicating any legitimate message. This requires subjective intent on the part of the speaker to target the group or person associated with the class/group. The harm or impact- based element refers to the consequences of the "hate speech", that is, harm to the victim which can be violent or such as loss of self-esteem, economic or social subordination, physical and mental stress, silencing of the victim and effective exclusion from the political arena. Nevertheless, the three elements are not watertight silos and do overlap and are interconnected and linked. Only when they are present that they produce structural continuity to constitute "hate speech".[3]

To ensure maximization of free speech and not create "free speaker's burden", the assessment should be from the perspective of the top of the reasonable member of the public, excluding and disregarding sensitive, emotional and atypical. Thus the test is "the man on the top of a Clap ham omnibus".

The Supreme Court observed[4] that the effect of the words must be judged from the standard of reasonable, strong-minded, firm, and courageous men and not by those who are weak and ones with vacillating minds, nor of those who scent danger in every hostile point of view. It is almost akin or marginally lower than the prudent man's test. The test of reasonableness involves recognition of boundaries within which reasonable responses will fall, and not identification

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[1] Marwick, Alice E. and Miller, Ross W.:"Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape" (10-6-2014) (Fordham Center on Law and Information Policy Report),

[2] Richano Delgado, "Words that Wound : A Tort Action for Racial Insults, Epithets, and Name-Caling", 17 Harv CR-CLL Rev 133 (1982); Mari J. Matsuda :"Public Response to Racist Speech : Considering the Victim's Story", 87 Much L Rev 2320 (1989); Kenneth D. Ward:"Free Speech and the Development of Liberal Virtues : An Examination of the Controversies Involving Flag Burning and Hate Speech", 52 U Miami K Rev 733 (1998), referred to

[3] Amish Devgan v. Union of India, (2021) 1 SCC 1 : 2020 SCC OnLine SC 994

[4] In Ramesh, v. Union of India (1988) 1 SCC 668

of a finite number of acceptable reasonable responses. Reasonableness always has reference to evil sought to be remedied and requires examination of the proportion of the imposition. Further, this does not mean exclusion of particular circumstances as frequently different persons acting reasonably will respond in different ways in the context and circumstances. This means taking into account peculiarities of the situation and occasion and whether the group is likely to get offended. At the same time, a tolerant society is entitled to expect tolerance as they are bound to extend to others.[5]

The context, as indicated above, has a certain key variable, namely, "who" and "what" is involved and "where" and the "occasion, time and under what circumstances" the case arises. The "who" is always plural for it encompasses the speaker who utters the statement that constitutes "hate speech" and also the audience to whom the statement is addressed which includes both the target and the others. Variable context review recognizes that all speeches are not alike. This is not only because of group affiliations, but in the context of dominant group hate speech against a vulnerable and discriminated group, and also the impact of hate speech depends on the person who has uttered the words. The variable recognizes that a speech by "a person of influence" such as a top government or executive functionary, opposition leader, political or social leader of following, or a credible anchor on a TV show carries a far more credibility and inn pact than a statement made by a common person on the street. Latter may be driven by anger, emotions, wrong perceptions or misinformation. This may affect their intent. Impact of their speech would be mere indifference, meet correction/criticism by peers, or sometimes negligible to warrant attention and hold that they were likely to incite or had attempted to promote hatred, enmity, etc. between different religious, racial, language or regional groups.

Further, certain categories of speakers may be granted a degree of latitude in terms of the State response to their speech. Communities with a history of deprivation, oppression, and persecution may sometimes speak in relation to their lived experiences, resulting in the words and tone being harsher and more critical than usual. Their historical experience often comes to be accepted by the society as the rule, resulting in their words losing the gravity that they otherwise deserve. In such a situation, it is likely for persons from these communities to reject the tenet of civility, as polemical speech and symbols that capture the emotional loading can play a strong role in mobilising. Such speech should be viewed not from the position of a person of privilege or a community without such a historical experience, but rather, the courts should be more circumspect when penalising such speech. This is recognition of the denial of dignity in the past, and the effort should be reconciliatory. Nevertheless, such speech should not provoke and "incite" — as distinguished from discussion or advocacy — "hatred" and violence towards the targeted group. Likelihood or similar statutory mandate to violence, public disorder or "hatred" when satisfied would result in penal action as per law. Every right and indulgence has a limit. Further, when the offending act creates public disorder and violence, whether alone or with others, then the aspect of "who" and question of indulgence would lose significance and may be of little consequence.[6]

Persons of influence, keeping in view their reach, impact and authority they wield on the general public or the specific class to which they belong, owe a duty and have to be more responsible.

They are expected to know and perceive the meaning conveyed by the words spoken or written, including the possible meaning that is likely to be conveyed. With experience and knowledge, they are expected to have a higher level of communication skills. It is reasonable to hold that they would be careful in using the words that convey their intent. The reasonable man's test would always take into consideration the maker. In other words, the expression "reasonable man" would take into account the impact a particular person would have and accordingly apply the standard, just like we substitute the reasonable man's test to that of the reasonable professional when we apply the test of professional negligence. This is not to say that persons of influence like journalists do not enjoy the same freedom of speech and expression as other citizens, as this would be a grossly incorrect understanding of what has been stated above. This is not to dilute satisfaction of the three elements, "harm or impact element" and in a given case even "intent" and/or "content element".[7]

It is necessary to draw a distinction between "free speech" which includes the right to comment, favour or criticise government policies; and "hate speech" creating or spreading hatred against a targeted community or group. The former is primarily concerned with political, social and economic issues and policy matters, the latter would not primarily focus

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[5] Ramesh v. Union of India, (1988) 1 SCC 668 : 1988 SCC (Cri) 266, followed

[6] Michel Rosenfeld : Hate Speech in Constitutional Jurisprudence .° A Comparative Analysis, 24 Cardozo Law Review 1523 (2002-03); Myra Mrx Ferree, William A. Gamson, Jurgen Gerhards and Dieter Rucht:"Four Models of the Public Sphere in Modern Democracies", published in Theory and Society, Vol. 31, No.3 (June, 2002), pp. 289-324

[7] Bolam v. Friern Hospital Management Committee, (1957) 1 WLR 582 : (1957) 2 All ER 118

on the subject-matter but on the substance of the message which is to cause humiliation and alienation of the targeted group. The object of criminalising the latter type of speech is to protect the dignity and to ensure political and social equality between different identities and groups regardless of caste, creed, religion, sex, gender identity, sexual orientation, linguistic preference, etc.

There is a difference between "Government established by law" and "persons for the time being engaged in carrying on administration". Comment or criticism of the government action in howsoever strong words must be protected and cannot be a ground to take penal action unless the words written or spoken, etc. have a pernicious tendency or intention of creating public disorder. Without exciting those feelings which generate inclination to cause public disorder by acts of violence, political views and criticism cannot be made subject-matter of penal action. There is distinction between serious and aggravated forms of breaches of public order that endanger public peace and minor breaches that do not affect the public at large. In consonance with the constitutional mandate of reasonable restrictions and doctrine of proportionality in facts of each case it has to be ascertained whether the act meets the top of Clapham omnibus test and whether the act was "likely" to lead to disturbance of the current life of the community so as to amount to disturbance of public order; or it may affect an individual or some individuals leaving the tranquillity of the society undisturbed. The latter and acts excluded on application of the top of Clapham omnibus test are not covered. Therefore, anti-democratic speech in general and political extremist speech in particular, which has no useful purpose, if and only when in the nature of incitement to violence that "creates", or is "likely to create" or "promotes" or is "likely to promote" public disorder, would not be protected.[8]

Sometimes, difficulty may arise and the courts and authorities would have to exercise discernment and caution in deciding whether the "content" is a political or policy comment, or creates or spreads hatred against the targeted group or community. This is of importance and significance as overlap is possible and principles have to be evolved to distinguish. Proponents of affirmative action and those opposing it, are perfectly and equally entitled to raise their concerns and even criticise the policies adopted even when sanctioned by a statute or meeting constitutional scrutiny, without any fear or concern that they would be prosecuted or penalized. However, penal action would be justified when the speech proceeds beyond and is of the natune which defames, stigmatises and insults the targeted group provoking violence or psychosocial hatred. T The "content" should reflect hate which tends to vilify, humiliate and incite hatred or violence against the targeted group based upon the identity of the group beyond and besides the subject-matter. The law of "hate speech" recognises that all speakers are entitled to "good faith" and "(no) legitimate purpose" protection. "Good faith" means that the conduct should display fidelity as well as a conscientious approach in honouring the values that tend to minimise insult, humiliation or intimidation. The latter being objective, whereas the former is subjective. The important requirement of "good faith" is that the person must exercise prudence, caution and diligence. It requires due care to avoid or minimise consequences. "Good faith" or "no-legitimate purpose" exceptions would apply with greater rigour to protect any genuine academic, artistic, religious or scientific purpose, or for that matter any purpose that is in public Interest, or publication of a fair and accurate report of any event or matter of public interest. Such works would get protection when they were not undertaken with a specific intent to cause harm. These are important and significant safeguards. They highlight the importance of intention in "hate speech" adjudication . "Hate speech" has no redeeming or legitimate purpose other than hatred towards a particular group. A publication which contains unnecessary asides which appear to have no real purpose other than to disparage will tend to evidence that the publications were written with a mala fide intention. However, opinions may not reflect mala fide intention.[9]

Participants in discussion about controversial and sensitive topics relating to religion, caste, creed, etc. can express divergent and sometimes extreme views, but should not be considered as "hate speech" by itself, as subscribing to such a view would stifle all legitimate discussions and debates in the public domain. Many times, such discussions and debates help in understanding different viewpoints and bridge the gap. Rational criticism of religious tenets, which is acceptable as legitimate criticism, is not an offence for no reasonable person of normal susceptibilities would object to it. Question is primarily one of intent and purpose. Accordingly, "good faith" and "no legitimate purpose" exceptions would apply when applicable.[10]

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[8] Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955 : (1962) 2 Cri LJ 103; Arun Ghosh v. State of W.B., (1970) 1 SCC 98 : 1970 SCC (Cri) 67

[9] Racial and Religious Tolerance, 2001 (Victoria, Australia)

[10] Lalai Singh Yadav v. State of U.P., 1971 SCC Online All 396 : 1971 Cri M 1773

Challenges in Recognition of Forest Rights in Southern Rajasthan

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ABSTRACT

India is the home of approximately 200 million traditional forest dwellers commonly known as Indigenous peoples who derive their livelihood from these forests and its forest produce since ancient ages. They have spent several generations in these dense and hilly forests. But since the colonial times, these people have been denied their rights over the forest land and the natural resources. These indigenous dwellers were held responsible for degradation of forest and its resources and on this basis they were evicted through enactment of various laws and regulations. But these indigenous dwellers and forest tribes continued their fight for the rights and constantly opposed such laws and demanded recognition of their rights on their land. And as a result, for the first time Government of India recognized the dwelling and forest right of the tribes and two important legislations were introduced including Panchayat Extension to the Scheduled Area Act,1996 (PESA) which emphasized the idea of self-governance in the tribal areas of India and later on, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. In this paper, researcher offers an assessment of Forest Right Act along with few recommendations that would help in improving the implementation and status of this Act in Southern Rajasthan.

Keywords: Forest Land, Forest Rights, Community Rights, Individual or Community Claim.

In India, since the time of Britishers many tribes were denied of their right to access the forest land which they had been cultivating and using from the time immemorial and this has resulted in the dragging of the tribes in the hunger, food insecurity and poverty. According to UNDP, 2012 approximately 23% of India's landscape falls in forest areas and 200 million Indigenous peoples are dependent on forest for their livelihood[1]. This historical injustice with tribes and other forest dwellers ended with the enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 which is commonly known as Forest Rights Act (FRA) which enforced on 1st January 2008 after the notification of the administrative rules[2]. This Act asserts traditional rights over forest land and resources to the tribal population. However, in possession of the land prior to 13 December, 2005 and other traditional forest dwellers have to give evidence for their possession of the forest land for the last three generations which is 75 years[3]. FRA applies to all the forest lands and assigns both individual as well as community rights. This Act also includes the right to hold and right to live in the forest land and right to traditional practices of cultivation on the forest land. Community rights recognize the rights of ownership and access to collect and use Minor Forest Produce. This Act gives rights on a forest area diverted into land for certain Government facilities such as schools, hospitals, community centers, and the Gram Sabha. These should be only for the development projects for tribes.

The main objectives of the Forest Rights Act are:

- To protect the culture of the scheduled tribes living in this area.
- To ensure land tenure livelihood and food security of the forest Scheduled Tribes and other traditional forest dwellers.
- To strengthen the conservation of forests by including the responsibilities and authority on forest rights holders for sustainable use, conservation of biodiversity and maintenance of ecological balance.

Under this Act, Individual and Community claims are filed to the Gram Sabha and this Act empowers the Gram Sabha to initiate the process of claiming the individual

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[1] https://www.un.org/esa/forests/wp-content/uploads/2018/04/UNFF13BkgdStudyForestsSCP.pdf(last visited on date 15/09/2021)
[2] https://tribal.nic.in/FRA/data/FRARulesBook.pdf (last visited on date 18/09/2021)
[3] ibid

forest rights and community forest rights by receiving their claims, consolidating and verifying these claims and preparing maps to identify the area of each required claim. The forest right committee constituted by the Gram Sabha will receive and prepare the list of claimants and verify those claims. After this, the forest right committee presents these findings on the nature and extent of claims to the Gram Sabha or appropriate resolutions, if any, are passed and forwarded to sub divisional level committee. Then, Sub divisional level committees investigate the claims and it is for responsible for increasing awareness about various provisions of FRA to the members of the Gram Sabha and ensuring the transparency and fairness in Gram Sabha meetings. The District Level Committee serves as the final arbitrator on forest rights including approving the record of forest rights prepared by the Sub Divisional Level Committee. The District Level Committee also ensures that all the information pertaining to the Act reaches the Gram Sabha through the Sub Divisional Level Committee. Addition to these committees, one State level monitoring committee is also required to be constituted by the State Government for monitoring the process and recognizing forest rights. If someone's claim has been rejected he should appeal against the claim rejection by Gram Sabha in Sub Divisional Level Committee and in Divisional Level Committee for Sub Divisional Committee.

Since the Act was being implemented very few Community claims have been filed and the rate of rejection is very high. After 15 years of the enactment of this landmark Act, very few claimants are conferred their land rights.

The researcher identifies the limitation of legislation and investigates the obstacles in implementation of Forest Right Act in TSP area of Rajasthan. There are 20 States that fall under the Forest Right Act and the state of Rajasthan is also one of them. Rajasthan state is situated in the North Western part of the country and it is the largest state of the country. Rajasthan covers an area of 3,42,239 square km, which is 10.40 percent of the country.[4] The forest cover in the state is 32,737sq km, which is 9.57 % of it's geographical area[5]. Rajasthan's population also includes many indigenous communities and Scheduled Tribes (ST) which 8.8% of the total ST population in India. The Scheduled areas in Rajasthan comprises 8 districts of South Eastern part of Rajasthan which has 5697 villages of the southern part of Rajasthan having tribal population more than 50%. As per the census 2011, total population of Scheduled area in India is 64,63,353 out of which Scheduled tribe population is 45,57,917 which is 70.4 3% of the total population of the scheduled area[6]. Till 28-2-2021, total claims of 4264820 are filed out of which 41,14,501 individual and 1,50,319 community claims. Within these total claims, total 20,01,919 claims are passed out of which 19, 24,417 claims are individual and 77,502 are community claims. And out of these total claims, 38, 03,185 have been disposed off.[7]

And in Rajasthan, total 84690claims are filed out of which 82957 were individual rights claims and 1733 claims were related to community right. According to the latest data, total number of titles distributed were 44,456 out of which 44,100 are related to individual rights and 356 are related to community rights.[8] Researcher used primary and secondary data in this article. Case study has been conducted to check the actual position and challenges in implementation of FRA.

Table-1

Status of Individual claims[9]

S.N.	Name of district	Total Claim	Accepted claim	Rejected Claim	Pending Claim	Total distributed land (H)
1	Banswada	21555	14404 (66.82%)	7151 (33.18%)	-	4794.68 (0.333)
2	Pratapgarh	15735	8749 (55.60%)	6986 (44.40%)	-	5821.26 (0.665)
3	Dungarpur	10568	4890 (46.27%)	3899 (36.89%)	1779 (16.83%)	3145.41 (0.643)
4	Udaipur	19701	10006 (50.79%)	7009 (35.58%)	2686 (13.63%)	7530.81 (0.753)

Under Table 1, the tribal majority population region of Rajasthan i.e.,Banswara, Pratapgarh, Dungarpur and Udaipur total individual claims alongwith accepted and rejected claims under the Forest Rights Act have been analyzed. It is clear from the analysis of this data that out of the total claims submitted in Dungarpur district, only 46% of the claims have been accepted and more than half of the claims have been rejected in the district. Banswara district in which the highest number of claims were accepted and the leases were issued, which is 66.82 percent. It is clear from the data of these different districts that about half of the tribal families are not able claim their

[4] https://fsi.nic.in/(last visited on date 20/09/2021)
[5] https://fsi.nic.in/isfr19/vol2/isfr-2019-vol-ii-rajasthan.pdf(last visited on date 21/09/2021)
[6] https://rajbhawan.rajasthan.gov.in/(last visited on date 22/09/2021)
[7] https://tribal.nic.in/(last visited on date 13/09/2021)
[8] https://rajbhawan.rajasthan.gov.in/content/rajbhawan/en/tribalwelfare.html(last visited on date 22/09/2021)
[9] https://tad.rajasthan.gov.in/(last visited on date 15/09/2021)

livelihood related land rights as they are not issued pattas. Some of the claims about possessions after 2005, which does not fall under the purview of this Act.

There are also other claims which have been rejected due to lack of documents. And the field observation and interviews conducted by the researcher also revealed that even those who have got leases have been given very less area then they are actually occupied. Even today there are many such families who have been residing in these forests for years but due to illiteracy and natural wrath, these people could not collect evidence of occupied land or were destroyed by natural disaster. In these forest areas, many such families still have the right to lease on forest land under this Act, but due to technical flaws, they are deprived of getting these rights. In Dungarpur and Udaipur districts, even after almost 13 years of implementation of the Act, 16.83 percent and 13.63 percent respectively, claims are still pending.

If we observe data of accepted claims, we find the lease of land on an average of 0.33 hectares in Banswara district, 0.66 hectares in Pratapgarh district, and 0.64 hectares in Dungarpur district and 0.75 hectares in Udaipur district. According to these figures it is clear that on an average less than one hectare of land has been received by claimants.

Table-2

Status of Community Claims[10]

S.N.	Name of district	Total Claim	Accepted claim	Rejected Claim	Pending Claim	Total distributed land (H)
1	Banswada	685	223 (32.55%)	462 (67.45%)	-	165.48 (0.742)
2	Pratapgarh	-	-	-	-	
3	Dungarpur	165	59 (35.76%)	106 (64.24%)	-	1409.11 (23.883)
4	Udaipur	448	31 (6.92%)	213 (47.54%)	204 (45.54%)	3219.68 (103.861)

The above table 2 shows the community claims, accepted and rejected, submitted under Forest Rights Act in Banswara, Pratapgarh, Dungarpur and Udaipur which are tribal dominated districts. Analysis of this data shows that almost two-third of community land claims have been rejected. Even in the tribal-dominated Pratapgarh district, not a single community claim has been submitted. And in this context, it has been observed from regional surveys and interviews that the community land is being used but claims are not submitted due to lack of documentary evidence and information. Among these tribal dominated districts, Udaipur is the district where least 6.92 percent community claims were accepted and 45.54 percent of the claims are still pending. This land were to be given for schools, community buildings; community sports grounds, crematoriums and religious places.

The tribal families who submitted the claims have been residing in the forest area for many years. After a long agitation, the process of giving land to them is going on. Thus, submission of so few community claims indicates typical procedure of community claims and lack of awareness in community.

Case study -1

Keval Chand is living in a village which is situated 50 km far from district headquarter of Banswada. He is a member of a tribal family, several generations of Keval Chand spend their life in this village and his family is living here about hundreds of years and are dependent on these forests. Even after the freedom of India they have not been granted any ownership on their forest land. But with the enactment of this Forest right Act 2006, they had rays of hope to get ownership of their land. In 2008, Keval Chand submitted his claim for his land of cultivation and land of cattle grazing in forest right, under forest right act. His claim was partiallydisposed and lease was released but he got ownership of only 0.24 hectares of land he did not get any lease about cattle grazing land and his claim for grassland for cattle grazing was rejected as a whole. He told that his ancestors fight for this forest land rights but till date he did not get his rights.

Case study- 2

Jamnalal and his family live in a small village of Pratapgarh district which is the tribal belt. He has lived here approximately for 80 years. There are 6 members in the family of Jamnalal and they all are illiterate. Jamnalal also applied for claims of residence, cultivation land and grazing land of cattles and he got 0.58 hectares land in lease. But when we observe this lease document these lease document were incomplete as it does not provide any information about the boundaries of land, no declaration about the neighbourhood land nor the length and width of the land. And because of these drawbacks Jamnalal has faced so many problems in banks, electricity department etc. as these institutions are could not certify his lease document by physical verification. And as a result, he is deprived from the benefits of electricity connection and loan. Similarly, he was also deprived of so many governmental welfare policies.

[10] https://tad.rajasthan.gov.in/(last visited on date 15/09/2021)

Case study-3

Lakshmi Bai lived in pai village of Udaipur district. She also applied for land for cultivation and grassland to claim her forest rights. Lakshmi Bai doesn't go to school but she is literate. She is widow. She has two Sons but they are minor. She told us that she has had possessions on the land for 70 years and she applied for the forest rights in 2008 but could not get any lease till date. She is deprived of any reason about the rejection of her claim but she is thinking positively about her forest rights. Her neighbors got the lease on their land but she doesn't. Her family totally depends on the forest land .When researchers saw the list of rejected claims of forest right her name was listed but she has no information about rejection of her claim. She did not receive any opportunity to prove the rights relating to the forest land. She does not possess any penalty receipt. She informed that penalty receipt was in possession of her husband but now she has misplaced it. And since the forest right committee demands only the receipt, which she is unable to provide, her claim was rejected.

Drawbacks:

? *Lack of transparency:* The Forest Department and Revenue Department have finalized the Forest Right Committee from their offices and they enrolled some villagers as Forest Right Committee Members and after that they pass these names by Gram Sabha. Actually the person whose name was in the Forest Right Committee has no information about committee membership. Sometimes these villagers will not have proper knowledge about forest right claim procedure. The members of this forest committee are not even aware about functions of this committee and therefore the committee does not function .Result of this is that the people of those areas are deprived of their legal rights.

? *Intervention of Government officials :* Primary right for initiation about forest right claim is to the Gram Sabha and right to formation of Forest Right Committee But government officials of Revenue Department and Forest Department directly or indirectly intervene in constitution of Forest Right Committee.

? *Lack of coordination in Committee Members:* There is no proper coordination in Forest Right Committee members and the committee mostly depends on the foresters or members belonging to the Forest Department. Ultimately the meetings of the Forest Right Committee are not held at timely.

? *Lack of evidence about forest land:* The tribes by nature do not live in one place for a long time and they have not constructed houses. Most of them live in very poor condition. Many times they have been displaced from their place. They face many natural disasters like floods, heavy rain and earthquakes etc. In these circumstances, it is not possible for dwellers to reserve or secure documents of forest land or related to their possession which is required to prove their claims.

? *Lack of Uniform Policy:* In different places different Policies are adopted by the officials. In some places they give all claimed forest land to the claimant but sometimes they pass few claims and sometimes they reject all. Where claimant claims for two type of land like land for cultivation and land for cattle grazing, officials accept only their land for cultivation. Sometimes they accept claim for only small piece of land from their position.

Conclusion:

Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, the main objective of the Act has been to regulate the land occupied by the Scheduled Tribes and other traditional residents living in the forest area. About half of the residing families have been issued land leases. The complexity of the technical language and format of the provisions mentioned in the Act has been the biggest problem of implementing this Act in practical form. In the name of investigation of documentary evidence, there has not been a fair procedure of the Forest Department. The Forest Department became practically the focal point of this Act. The role of the Forest Rights Committee remained only a formal one. The rights of the Forest Rights Committee also became dependent on the Forest Department, due to which most of the claims were rejected; the claims accepted by the Gram Sabha were also canceled by the Forest Department. In this way, there has been a lot of contradiction between the decisions of the Forest Department, Local Administration and Forest Rights Committee. The land mentioned in the sanctioned leases is very less in proportion to the land mentioned in the submitted claims.

They were given leases of agricultural land only to most of the families, while the lease of pasture land or grassland was given to very few families. Similarly, they have been deprived of housing leases. The total area of the land of the occupiers was mentioned in the leases issued by the government. It does not show the measurement of length and width. Due to which the boundary of the land of their possession is not clear. Similarly, the neighborhood is not even mentioned in these issued leases. Due to non-inclusion of essential facts in the leases issued by the government, the electricity department of the government is not accepting this. The bank also does not sanction any kind of loan. In summary, it can be said that the purpose of

the Act made by the government was to give the ownership rights of the occupied land to the Scheduled Tribe families residing in the forest area before 2005 and other traditional forest dwellers also on the basis of three generations. Due to illiteracy, lack of legal knowledge and lack of awareness, these tribal families should have got the rights as per the objective of the Act. It could not be found, there have been many flaws behind it, including technical information of the application, documentary evidence, mutual tussle between the concerned departments and the informal role of the Forest Rights Committees.

Suggestions:

There is a need for sustainable management between natural resources and tribal communities. Participation of various tribes and forest management groups will increase. It is clear by field survey and analysis that without proper implementation and transparency in procedure for applying this Act will not have a long term effect. No local adapted plans and policies for raising awareness which is must.

Administration of Justice in Tribal North Cachar Hills, Assam

Dr. Widonlule Newme*

ABSTRACT

India has an independent judiciary structure based on Common Law. Administration of Justice is the firmest pillar of the Government.In India, the system of judiciary is well structured and independent howeverin tribal areas specifically in North-East India the judicial system seems to be quite different from the rest in their structure and approaches. The enforcement of tribal justice delivery system is very strong in North-East India. They have their unique traditional customary law dealing with both the civil and criminal cases and it isconstitutionally protected.In these areas, it is the Customary Court that dispensed justice parallel to the formal judicial law Courtmaking pluralism a prominent feature of the Indian legal system. Tribal administration of justice is given due recognition under the Indian Constitution. Under the Indian Constitution, Articles 244 (2) and 275 (1) deals with the provisions as to the administration of tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram. In this research article a study is conducted on the administration of tribal justice system under the Autonomous District Council in North Cachar Hills, Assam based on doctrinal method.

Keywords: Tribal, Administration, Justice, Autonomous, North Cachar Hills.

Introduction

Justice is a legal theory through which fairness is administered. The country India has an independent judiciary structure based on Common Law but the judicial system of the tribal specifically in North-East seems to be quite different from the rest of India in the past and differs even now. In India, before the advent of the British, justice was administered by the King, or someone appointed by the King based on the religious principles of Hindus or Muslims. But with the advent of the British government, they were governed by the Indian Procedural Codes and Penal Laws of India; and justice was heard in the Law Court. Unlike the rest, in North-East,Indian Codes and Penal Laws are applied only in spirit but not in letter. The tribal of this region are guided by their unique traditional customary law dealing with both the civil and criminal cases and are in practice since time immemorial. In these areas, it is the Customary Court that dispensed justice parallel to the judicial law court which signifies that the tribal were quite advanced in their administration processes.[1] Tribal administration of justice is given due recognition under the Indian Constitution.

Constitutional Provisions Relating to Administration of Justice in Tribal Areas

Under the Indian Constitution, Articles 244 (2) and 275 (1) deals with the provisions as to the administration of tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram. Besides that special provision were also provided under Articles 371 A and 371 G of the Constitution for the State of Nagaland and Mizoram to deal with administration of civil and criminal justice involving decisions according to customary law and procedures.

The Sixth Schedule of the Indian Constitution is a key to the administration of tribal areas. The Schedule is based on the recommendations of North-East Frontiers (Assam) Tribal and Excluded Areas Sub-Committee, popularly known as the "Bordoloi Sub-Committee"and the idea behind the creation of Sixth Schedule was to set up an Autonomous District and Regional Councils asa separate administrative units for having full autonomy with regards to administration, legislative and most judicial functions which would provide the tribal's maximum autonomy to safeguard their distinct customs and traditions.

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[1] Sanjib Goswami. (2010). Legal Pluralism and the Administration of Justice in North East India [Online] available at: http://www.aija.org.au/NA1%202010/ Papers/Goswami% 205.pdf (last visited on August 1, 2021).

The areas specified in Parts I, II, IIA and III shown in the table below are Autonomous Districts in North-Eastern India –

TABLE	
PART I (Assam)	PART II (Meghalaya)
1. The North Cachar Hills District 2. The Karbi-Anglong District 3. The Bodoland Territorial Area District	1. The Khasi Hills District 2. The Jaintia Hills District 3. The Garo Hills District
PART II A (Tripura)	PART III (Mizoram)
1. The Tripura Tribal Areas District	1. The Chakma District 2. The Mara District 3. The Lai District

Tribal Justice System in North Cachar Hills

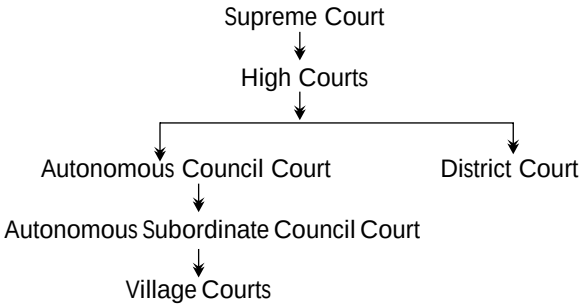
"Tribal justice system is one of the most visible manifestations of the exercise of tribal sovereignty." [2]It is a local tribal approach used for resolving disputes in attaining safety and enhancing access to justice. In North Cachar Hills (presently known as Dima Hasao District), the Autonomous District Council was established on 29 April 1952 at Haflong, the District Headquarter. In N.C.Hills, the Rules for administration of criminal and civil justice were first notified by the British under the Scheduled District Act 1874 how ever many Rules under the notification were found to be unsuitable. Later in 1955, after the establishment of the Autonomous Council, new set of Rules was issued by the elected Council named as "The North Cachar Hills Autonomous District (*Administration of Justice) Rules, 1955*", by which it framed three-tiered judicial systems viz.,

1. The District Council Court[3];
2. The Subordinate District Council Court[4]; and
3. The Village Courts.

The aforementioned courts deals with petty civil and criminal cases in which both the disputing parties are tribals and reside within the jurisdiction. The court is governed by the Customary Law. Cases that do not fall under the domain of the Autonomous Council Court were earlier tried by the Deputy Commissioner Court. But by the passing of the "*Assam Administration of Justice in the North Cachar Hills District Act, 2009*"all the suits, cases, appeal, application, proceedings or other business relating to both the civil and criminal justice pending before the Court of Deputy Commissioner or the Assistants to Deputy Commissioner stand transferred[5] to the District Court, Haflong established on 24 August 2016 and is governed by the provisions of the Code of Civil Procedure, 1908 and Code of Criminal Procedure, 1973 as amended.[6]

The present scenario of the Tribal Court under the N.C. Hills Autonomous District Council is depicted as under:-

Hierarchy of Autonomous District Council Court in North Cachar Hills



The Autonomous Council Court:

The Autonomous Council Court is the highest Court of Appeal under the District Council. It consists of one or more Judicial Officers as prescribed by the District Council with approval of the Governor[7]. The Council Court adjudicate civil cases according to the law, justice, equity and good conscience consistent with the circumstances of the case.[8]

In criminal cases, "the Council Court or the Governor may direct an appeal to be presented to the Council Court from any order passed by the Subordinate Autonomous Council Court or Village Court within 90 days of the date of order appealed against.[9] It may also enhance, reduce, cancel or modify any sentence or findings passed by such Court or remand the case for retrial.[10]"Rule 33 (1) provides that "if it appears to the Council Court that-

a. A fair and impartial inquiry or trial cannot be held in any Village Court or the Subordinate District Council Court;
b. Some question of law, tribal or otherwise, of unusual difficulty is likely to arise; or

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[2] Jill Elizabeth Tompkins, Defining the Indian Civil Rights Act's "Sufficiently Trained" Tribal Court Judge , Vol. 4(1) AMERICAN INDIAN LAW JOURNAL 53 (2015).
[3] District Council Court has been renamed as Autonomous Council Court in 1997.
[4] Subordinate District Council Court has been renamed as Subordinate Autonomous Council Court in 1997.
[5] Sec.3 (2) (ii), Assam Administration of Justice in the North Cachar Hills District Act (AAJNCHDA) 2009.
[6] AAJNCHDA, Sec.3 (2) (iii).
[7] Rule 10 (1), North Cachar Hills Autonomous District (Administration of Justice) Rules(NCHADR) 1955.
[8] NCHADR, Rule 47 (1).
[9] NCHADR, Rule 39.
[10] NCHADR, Rule 32 (2).

c. An order is expedient for the ends of justice or is required by any provisions of these rules or any law applicable to the case, it may order-

i. That any offence be inquired into or tried by another Village Court or the Subordinate District Council Court;

ii. That any particular case or class be transferred from one Village Court to another Village Court or from one Village Court to the Subordinate District Council Court;

iii. That any particular case be transferred to and tried before itself."

"There shall be no preliminary enquiries by regulars or village police unless the Court thinks fit. Recognisance to appear need not be taken unless it seems necessary to the Court. It shall also not be necessary to examine witnesses upon oath or affirmation unless the accused so desires but when taken, witness must state correct statement or else shall be punishable for giving false evidence.[11]"

The Subordinate Autonomous Council Court:

The Subordinate Council Court shall be "presided over by one or more judicial officers as may be prescribed and appointed by the District Council with approval of the Governor and if there is more than one judicial officer than such Judicial Officer as may be nominated by the District Council shall act as a President and Recorder of the Court."[12] Rule 23(1) provides that "the Subordinate Council Court shall not be competent to try the following suits and cases -

a. To which the provisions of sub-paragraph (1) of paragraph 5 of the Sixth Schedule to the Constitution apply, unless the Court has been authorised by the Governor to exercised such powers for the trial of particular class or classes of cases and suits specified in that behalf by the Governor as required under the said sub-paragraph (1) of paragraph 5 of the Sixth Schedule;

b. In which one of the parties is a person not belonging to a Schedule Tribes;

c. In respect of offences-

i. Under Sections 124-A, 147 and 163 of the Indian Penal Code;

ii. Under Chapter X of the same Code in so far as they relate to the contempt of a lawful authority other than an authority constituted by the District Council;

iii. Of giving or fabricating false evidence, as specified in Section 193 of the same Code, in any case triable by a Court other than a Court

[11] NCHADR, Rule 46.
[12] NCHADR, Rule 7 (1).

methods of revising its rules and procedures, but it is not so in the case of tribal justice system. Customary laws are handed down generation to generation through the social mechanism of cultural transmission.

4. Tribal justice system is largely un-codified but regular justice system is fully codified.
5. Tribal justice system applies Indian Codes and Laws only in spirit not in letter whereas regular justice system is bound by the letter of the Codes and Laws.
6. Tribal justice system is applicable only to the tribal communities whereas regular justice system is applicable to all.
7. Tribal justice system is simple and lucid whereas regular justice system is often too complicated for the common man to understand.
8. Tribal justice system involves minimal procedure, cost effective and ensures timely delivery of justice whereas regular justice system is very expensive, not easily accessible and always delays in giving justice.
9. In tribal justice system penalty is less harsh as compared to the regular justice system.
10. Last but not the least tribal justice system is not uniform. It varies from tribe to tribe whereas regular justice system is a uniform law.

Conclusion

Regardless of tribal society transition to modernity, tribal justice delivery system has survived and managed to carve out a niche for itself in the presence of a plethora of central legislations and this shows its resilience on the mounting onslaught of formal law Court. At the end it is pertinent to cite the observation made by the Department-related Parliamentary Standing Committee in its Twenty-Sixth Report on Demands for Grants (2008-2009) of Ministry of Law and Justice that-

"Though, there were no written rules for administration of tribal villages, but the customs and traditions were almost compatible with the modern concepts of jurisprudence. The tribal councils in North-East State were functioning on the lines of the system evolved for parliamentary democracy, which is in vogue now a day. The council derived their authority from the expression of the will and power of the people. They had the support of both social and supernatural. Thus, the concept of parliamentary democracy is not new to the tribal society."

[13] NCHADR, Rule 14.
[14] NCHADR, Rule 41.
[15] NCHADR, Rule 42.
[16] NCHADR, Rule 43 (1).

Position of Personal Laws Under Indian Constitution

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Mr. Hradyesh Chaturvedi**

ABSTRACT

India is a land of different religion with different colors. And India is the country which provide fundamental rights to the citizens as the protecting shield from every evil. Indian Constitution provide Article 25freedom of religion under which one can follow ones religion without any fear and as the citizen of India we also have the fundamental rights through which we can fight with the devil of discrimination Article 14 right to equality, Article 15 nobody can discriminate on the basis of sex race, religion and caste etc, Article 16 state has to provide equal opportunity to everyone and Article 17 Untouchability should be abolished from its roots. Through this paper we want to show that what is the current scenario of the different religion whether they walk with constitution or both of them have different paths.

Keywords: Article 14, Fundamental Rights, Untouchability, Discrimination. Equal opportunity

Introduction

India has number of varieties culturally, geographically, religiously and linguistically. It has multiple religion and multiple sects in a single religion. In the ancient times, people are governed by religion. Religious law was considered above all laws because of notion that it is made by God himself. Thus some customs has been developed between persons practicing same religion in their mutual relation or mutual dealings such as the procedures relating to marriage and divorces. But, the positive law concept has revolutionized the legal theory.

According to it, laws are made by the authority i.e. sovereign or legislature to which the task of legislation has been conferred. This positive law concept is always in confrontation with religious law. People of any religion are very sensitive with regard to their religious practices and whenever state tries to interfere or alter their religious practices state has to face protest and agitation of people.

In medieval period of Indian history when Muslim came India and their community started to grow in India, the question before the kings was always that which law should be applicable to Muslim, in their personal dealings or on Hindus in their .In this period the applied law in the personal relation of individual is according to their religion or if sometimes depends upon the king as well.

Even the Britishers had not interfered in personal law of individual. They continued the practice that Hindu will be governed according to Hindu personal law and Muslim will be governed according to Muslim personal law. But in the case of conflict of inter-religious person, the statutory law will be applicable.

So, the practice of not to interfere in the domain of public law was continued even in the Constitution. The constitution guarantees every individual to profess and practice his religion. India got independence in 1947 after division of its territory between two nations on religious base. Large community of Muslim religion was still living in India; they had high expectations from the constituent assembly. Though, the constituent assembly did not specifically enumerated 'secularism' as noble objectives in original constitution but their intention was always to work on secular path. Later on secularism[1] was added in the preamble as noble objective but even prior to that though the term secular was invisible yet. Its essence was always there in fundamental rights.

But, the dispute between positive law and personal law was not resolved even through the constitution. Every religion has some practices which are discriminatory or not according to the egalitarian society which must be reformed and change. It is evident from the history that we have banned the 'Sati Pratha' and several other practices those are superstitions and unreasonable.

The conflict between personal law and power of the state to reform those personal laws and to abandon certain practices is not new and never ending. Still we need to find some workable solution to resolve this so that both the law could work harmoniously.

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[1] Added by 42nd Amendmend of Consitution of India, 1976
[2] 310 U.S. 296 (1940)

Scheme Of Protection of Personal Law Under The Constitution With Respect to Freedom of Religion

The constitution of India guarantees freedom of religion as fundamental right. Article 25 guarantees every individual to profess, practice and propagate his religion. It is necessary for his spiritual development.

However, right guaranteed in the article 25 is not absolute but subject to certain restriction. These restrictions could be imposed by legislature in public interest.

Personal laws which are or became a part of religious exercise are protected under the Art. 25because there is a little difference between religious law and personal law.

Religious law is a law which governs the relation of person and ideal. On the other hand personal law governs the relation of mutual dealing of member of a particular religion. Hence a personal law is not necessarily a part of religious law. There is a difference between freedom to believe and freedom to act. The US Supreme Court in the case of Contwellv. Connecticet (1940)[2] observed the difference in above mentioned two terms and stated that freedom of belief denotes the faith or trust in the devotees or ideals of a religion which is absolute on the other hand freedom to act affected the society and hits the personal dealing of an individual which can never be absolute but subject to certain limitation and restriction imposed by state or legislature.[3]

The same interpretation has been adopted in Indian legal jurisprudence of fundamental right to religion. It protects freedom of conscience and professes any religion but restriction can be imposed upon matters of practice and propagation.

Indian constitution protects the practices of any religion on which are exclusively essential feature of that religion without which the core of that religion will be distorted. However, no uniform rule can be laid down to identify whether a particular practice is an essential practice under that religion or not. This is a subjective analysis.

Thus under the Indian Constitutional law only those practice of personal law is protected which are essential feature of the religion not otherwise. If any practice is not an essential practice it will be subject to the limitation and restriction imposed under article 25.

Dr. B.R. Ambedkar in constituent assembly stated that, the concept of religion in this country is so vast that it covers almost all aspect from birth to death. It is expected that no sensible state, in the name of social reform or any other kind of limitation would affect the very essence of any religion. The life of an individual and religion are so closely interwoven that it is hard to differentiate between religious and personal law however it is clear that they are different because they operate in different spheres.

Now it is well established situation that the personal law is neither synonym and co-extensive with religion. All that is included in religious scriptures may not form the essence of a religion. Allahabad High court in an ancient case of Govind v. Inayatullah (1885)[4] stated that every law is influenced by the social or economic provisions of the time which certainly not form the permanent foundation of law. If all that is contained in the scriptures were equally essentials it would hardly be possible today to find out a good follower of any religion.

Thus, we can say that Article 25 which guarantees freedom of religion does only up to the extent when they form an essential religious practice. The Constitution of India nowhere specifically protects the personal law of the Individuals. Even from close study of British India, we would find in later developments that Muslim personal law is not applicable on Muslims because of it is personal law but because there is legislation to that effect. The constituent assembly was not agreed to guarantee inviolability of personal laws.

On the other hand, Constitution casts a positive direction to frame uniform civil code under article 44[5] so that all people whatever religion they profess can be subject to common personal law.

If we read Article 25[6] and Article 44 harmoniously, we would find that intention of constituent assembly was never

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[3] ibid

[4] (1885) ILR 7 All 775

[5] Art. 44. Uniform civil code for the citizens The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India

[6] 25. Freedom of conscience and free profession, practice and propagation of religion
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law:
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly

[7] AIR 1952 Bom 84

[8] *Id.*

to be immunizing personal law from state control. Instead of personal law, they want a common and uniform code of personal law. Entry 5 of concurrent list also empowers the legislature to enact laws regarding all matters in respect of which parties in judicial proceedings before the commencement of the constitution subject to their personal law. Though, the personal law is allowed to be continued till competent legislature was not in a position to legislate. This continuance is authorized by a presidential order under article 372(1).

Thus, we may formally say that the assembly has never such intention to immunize the personal laws of different religion. They always wanted to reform the personal law and uniformity in them.

Judicial Review of Any Customary Practice Under Personal Law

Supreme Court is considered as guardian of the constitution and final interpreter of the law. It has numerous powers with respect to protection of justice in the nation. To exercise such wide responsibility Supreme Court is empowered with numerous powers.

Judicial Review is one of such power given to the Supreme Court to protect the inviolability of fundamental rights. It is one of the powers to the Supreme Court by which it protects the invasion of legislature and executive upon fundamental right but from the very inception of the constitution, issue always was there that whether the personal law of an individual or a religion can be judicially reviewed or not.

Every personal law whether a Hindu, Muslim, Jews, Christian has some discriminatory usages or customs which they practiced from an ancient age. Since most of personal are dominantly patriarchal, they are discriminatory towards woman. In such condition, it became highly essential that whether the court can review the personal law practice custom usage or not. This is highly essential to establish an egalitarian society and to achieve social justice which is set out as an objective in the preamble.

Here, we will discuss that how this chaotic position subsisted till 70 years of independence.

First ever decision which started this chaos was *Narasu Appa Mali v. State of Bombay*[7] though this was a two judge bench yet its interpretation dominated the relation of personal law and fundamental rights.

In this judgment it was concluded that personal law cannot be judicially reviewed or checked upon the fundamental rights. The judgment was unfortunate as well as the reasoning which was adopted.

[9] 1980 AIR 707
[10] 1994 SCC, Supl. (1) 713

[11] 1996 AIR 1697
[12] (1997) 3 SCC 573
[13] Writ Petition (Civil) No. 373 of 2006

Relevancy of Patient's Right to Informed Consent in Time of Pandemic

Dr. Faizanur Rahman*
Mohammad Haroon**

ABSTRACT

The human body is subject to genetic and environmental influences, negative effects of the environment on health may cause diseases. Medicine- an inexact science had emerged to cure diseases and meet health care needs. It deals with the diagnosis, treatment, prevention, and control of diseases.[1] Everyone has the right to adequate health and medical care. Health care providers owe ethical as well as legal obligations to provide all necessary treatment and care for all who are suffering from any kind of disease. During the treatment, patients would have the right to be informed what happens to their body, risks, benefits and alternatives of a given course of treatment. When a healthcare provider recommends a specific procedure, the patient has the right to accept or refuse it, if he decides to move forward will need to give informed consent first.[2] This process is known as 'informed consent to which the healthcare providers are made ethically and legally bound to get before the procedure applied to treat the patient. In the time of the Covid-19 pandemic, patients could not exercise their basic rights like the right to health, access to health care, health care choices and informed consent etc. This paper deals with the legal and ethical issues relating to informed consent in the health care setting during the pandemic time.

Keywords: Covid-19 Pandemic, Healthcare Rights, Healthcare Providers, Informed Consent, Medical, Patient

Introduction: Doctrine of Informed Consent in Medical Settings

Any medical treatment or surgical operation involves interference with the human body. A person of legal age and sound mind has the right to choose whether or not to undergo a particular course of treatment. In the medical setting, informed consent allows patients to participate in their medical care and choose which treatments they do or do not want to receive. When a healthcare provider recommends a specific medical treatment, the patient has the option of agreeing to all of it or only some of it. This collaborative or shared decision-making process is an ethical and legal obligation of healthcare providers which empowers patients to make educated and informed decisions about their health and health care. The process enables the patient to ask questions and accept or deny treatment. It includes four essential components:

(I) Patient's ability to make a decision,

(ii) All essential explanation of information needed to make the decision,

(iii) The patient understands the medical information and

(iv) His/her voluntary decision to get treatment.

The basis of the idea is a common law doctrine "volenti non fit injuria" which states that if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to bring an action against the other party in the law of torts.[3] In cases of medical procedures, health care providers are not liable for harms result to a patient if they followed treatment after fulfilling all requisites of valid informed consent.

Medical Procedures and Informed Consent

Almost every medical procedure or operation involves interference with the patient's body which requires the consent of the patient. But in emergencies, informed consent is not always required. In most cases of surgeries, blood transfusions, anaesthesia, radiation, chemotherapy, vaccinations and medical tests like a biopsy, blood tests like HIV testing etc. require informed consent. There are certainly other ways like research or clinical trials where informed consent is also required. It provides information to trial participants, allowing them to make informed decisions about whether or not to participate in the study.[4] The procedure is similar to informed consent in the healthcare setting. It entails discussing the study's purpose and procedure, as well as pertinent study information, such

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[1] K. Kannan, Medicine and Law (Oxford University Press, New Delhi, 2014).
[2] Lily Srivastava, Law and Medicine (Universal law Publishing Co., New Delhi, 2015).
[3] Avtar Singh and Harpreet Kaur, Introduction to Law of Torts (LexisNexis, India, Gurugram, 2016).
[4] Rega Surya Rao and P. Aravinda, Lectures on Law and Medicine (Gogia Law Agency, Hyderabad, 2014).

as risks and benefits, ability to comprehend information, and voluntary decision to participate in a research setting.

Need to Sign Consent Form

A consent form must be completed and signed by the patient prior to the procedure. This form is a legal document that demonstrates the patient's involvement in the decision and his agreement to have the procedure performed. The consent form must include the patient's condition's diagnosis, the name and purpose of treatment, its benefits and risks, and alternative procedures, as well as the benefits and risks of each alternative. When the form is signed, it means: the patient has received all the relevant information about the procedure from the healthcare provider. The information can be used to determine whether the patient wants to accept or deny the procedure. Once the consent form is signed healthcare provider can move forward with the procedure and if not so the healthcare provider would not be able to provide the specific types of treatment.

In a state of emergency, the health care provider may look for the patient's closest blood relatives for consent, if such relatives are not available, or if there is a life-threatening situation, a healthcare provider can perform the necessary life-saving procedures without consent. In some cases, another person can sign a consent form on behalf of the patient. This is appropriate in the following conditions:

(I) If the patient has not reached the legal age of consent, a parent or guardian must consent on the patient's behalf.

(ii) If a patient wants someone else to make health and medical decisions for him in the future, he can fill out an advance directive form.

(iii) If the patient is unable to consent, another person can make medical decisions on their behalf. If the patient is in a coma or has advanced Alzheimer's disease, this is a possibility.

Informed Consent applicable in Different Jurisdiction

In most of the legal systems in the world, even a slight interference with the human body without consent is prohibited. As the medical procedures involve interference with the patient's body it demands the prior consent of the patient to initiate a medical procedure. In the medical setting, the process is known as informed consent and is applicable in most of the countries of the world. Following are some examples of countries where the practice of informed consent is applicable:

(I) United States of America: The concept of informed consent implies an objective test of a health care provider's duty to advise the patient of the risk involved, advantages and disadvantages of undergoing the treatment proposed. This process was recognised in the USA and is a condition precedent in medical procedures.[5] If a surgeon who operates without the patient's consent commits an act of battery for which he will be liable.

(ii) United Kingdom: The English law does not recognise the doctrine of informed consent. According to the House of Lords decision in Siddaway v. Board of Governors of Bethlem Royal Hospital, The test of liability for a health care provider's duty to warn a patient about the risk of a proposed treatment is the same as for diagnosis and treatment, the doctor must act in accordance with a practise recognised as proper by a responsible body.[6]

(iii) India: In India, a health care provider is required to explain what he intends to do with the patient. If there is a real risk of misfortune inherent in the procedure, he must warn of the risk of such misfortune. This is part of his duty of care to his patient. In the case of *Samira Kohli* v. *Dr Prabha Manchanda*[7], the Supreme Court held the Gynaecologist negligent for conducting hysterectomy (removal of the uterus) and bilateral salpingo-oophorectomy (removal of ovaries and fallopian tubes) without obtaining consent during laparoscopy test under general anaesthesia for affirmative diagnosis.

The law laid down by the Supreme Court in this case for obtaining consent before a surgical operation is as follows:

(I) A doctor must seek and secure real and valid consent (a valid consent is that which is obtained without fraud, misrepresentation. Consent also vitiated by undue influence or threat of violence. A consent obtained when a patient is under sedition may be held invalid on the ground that the consent given by the patient is not voluntary) of the patient before commencing treatment including surgery.

(ii) Adequate information furnished by the doctor or any member of his team (adequate information includes, the doctor must disclose nature and procedure of treatment and its purpose, benefits and effects and substantial risks), should enable the patient to decide whether he should submit himself to the particular treatment or not.

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[5] R.K Bag, Law of Medical Negligence and Compensation p.100 (Eastern Law House Pvt. Ltd. Kolkata, 2014).
[6] Ibid.
[7] (2008) 2 SCC 1.

(iii) Consent given solely for diagnostic purposes cannot be construed as treatment consent. The unapproved additional surgery is only required to save the patient's life or preserve his or her health, and it would be unreasonable to postpone such an unapproved procedure until the patient regains consciousness and makes a decision.

(iv) There may be a common consent where diagnostic and surgical procedures are involved. A common consent for a specific surgical procedure as well as an additional procedure that may be required during surgery may also exist.

(v) The nature and extent of information provided by the doctor to the patient in order to acquire consent do not need to be severe or broad, but should be to the level that a group of medical professionals with competence in the subject considers normal and proper.

Informed Consent in Time of Pandemic

In *M.K. Varghese* v. *San Joc Hospital, Perumbavoor*,[8] the patient claimed compensation against the doctor and hospital for conducting sterilization during caesarean operation without consent. The State Commission, Kerala held that the doctor was not negligent; because the doctor performed the sterilization operation during caesarean section without consent for the best interest of the patient whose subsequent pregnancy could have been dangerous for her life. But in *Samira Kohli case*[9], the Supreme Court held the Gynaecologist negligent for conducting hysterectomy and bilateral salpingo-oophorectomy without obtaining consent during laparoscopy test under general anaesthesia for affirmative diagnosis.

The studies reveal about 60-66 percent of the cases relating to medical negligence are filed before the consumer courts because of hospitals taking improper consent before performing certain procedures or switching hospitals, or improper documentation throughout diagnosis and treatment.[10]

At present, the deadly infectious disease Covid-19 has pushed the entire world into a state of a health emergency.

[8] 1992 (2) CPR 495 (Ker).
[9] Samira Kohli v. Dr. Prabha Manchanda &Anr(2008) 2 SCC 1.
[10] Times of India, Sunday November 20, 2016.
[11] Available at: https://www.who.int/emergencies/diseases/novel-coronavirus 2019?gclid=CjwKCAjwrPCGBhALEiwAUl9X04v0YcDUXAk503uTbDnyW8d7_sdiKulwvMp9DKqimxxK3S_6kv2oPBoCW3UQAvD_BwE (last visited on June 30, 2021).

Prison Reforms and Socio Legal Changes in India

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ABSTRACT

Punishing the offenders is the primary function of all civil societies1. Prisons are known to have existed throughout the history. Existence of prisons can be traced back to the ancient period. It was believed that rigorous isolation and custodial measures would reform the offenders. Experience, however, belied this expectation and often imprisonment had the opposite effect. With the development of behavioural sciences, it began to federalize that reformation of offenders was not possible by detention alone.

Prisons are not normal places. The prisoners are deprived of freedom and personal contacts with family and friends. Prison reform is the attempt to improve conditions inside prisons, improve the effectiveness of a penal system, or implement alternatives to incarceration. It also focuses on ensuring the reinstatement of those whose lives are impacted by crimes.

In modern times the idea of making living spaces safe and clean has spread from the civilian population to include prisons, on ethical grounds which honor that unsafe and unsanitary prisons violate constitutional (law) prohibitions against cruel and unusual punishment. In recent times prison reform ideas include greater access to legal counsel and family, conjugal visits, proactive security against violence, and implementing house arrest with assistive technology

The real purpose of sending criminals to prison is to transform them into honest and law abiding citizens by inculcating in them distaste for crime and criminality. But in actual practice, the prison authorities try to bring out reformation of inmates by use of force and compulsive methods. Consequently, the change in the inmates is temporary and lasts only till they are in the prison and as soon as they are released they again get attracted towards criminality.

It is for this reason that the modern trend is to lay down greater emphasis on the prisoners so that they can be rehabilitated to normal life in the community. This objective can be achieved through probation and parole. They repeatedly launched protests with the prison authorities and made all possible efforts to see that the rigours of prison life are mitigated and prisoners are humanly treated.[1]

Introduction

Donald Taft commented that prisons are deliberately so planned as to provide unpleasant compulsory isolation from society. A prison according to him characterizes rigid discipline, provision of bare necessities, strict security arrangements and monotonous routine life. Life inside the prison necessarily pre-supposes certain restrictions on the liberty of inmates against their free will. The British colonial rule in India marked the beginning of penal reforms in this country. The British prison authorities made strenuous efforts to improve the condition of Indian prisons and prisoners. The second Jail Enquiry Committee in 1862 expressed concern for the insanitary conditions of Indian Prisoners which resulted into death of several prisoners due to illness and disease. It emphasized the need for proper food and clothing for the prison inmates and medical treatment. A sentence of life imprisonment deprives a person from his right to liberty. Imprisonment affects the prisoner and also his family living in poverty. When a income generating member of the family is imprisoned the whole family has to suffer and adjust to the loss of income. The family has to suffer financial loss because they have to engage a lawyer, arrange food for the prisoner, transport to prison to visit the prison etc.

Prisons have very serious health implications. There are some prisoners who are suffering from various diseases before entering to the prison or they get affected after coming in the prison. Hence there is no healthy atmosphere in the prison. It is overcrowded; there is no fresh air, absence of proper and nutritious food etc. It is a known fact that prisons in India are overcrowded. As a result of this there is no separation of offenders of serious offences and minor offences. Hence hardened criminals may spread their influence over minor criminals. Persons who have committed offences for the first time come into contact with hardened criminals and hence are likely to

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[1] Prison reforms in India by Harpreet Kaur.

become professional criminals. The methods to reduce the burden of overcrowding of jail are release on bail, impose fine, release on probation or parole. The system of remission, leave and premature release may also be useful in tackling the problem of overcrowding in the prison. Custody, Care and Treatment are the three main functions of a modern prison organization[2]. The notion of prison discipline was to make imprisonment deterrent. Gradually, the objective of imprisonment changed from mere deterrence to deterrence and reformation. This led to the abandonment of some of the barbaric punishments and introduction of the system of awards for good work and conduct in the form of remission, review of sentences, wages for prison labour, treatment in open conditions, parole, furlough, canteen facilities etc. Revision has now been made to meet adequately the basic needs of food, clothing, medical care etc. Educational and vocational training programmes along with training in scouting etc, have been introduced in jails.

Prison Reforms before Independence of India

The modern prison system in India was originated by TB Macaulay in 1835. A committee namely Prison Discipline Committee, 1836 was appointed, which submitted its report on1838.

In 1864, the Second Commission of Inquiry into Jail Management and Discipline made similar recommendations as the 1836 Committee. In addition, this Commission made some specific suggestions regarding accommodation for prisoners, improvement in diet, clothing, bedding and medical care. Accordingly, the Government of India appointed the All India Jail Manual Committee In1957 to prepare a model prison manual. The committee submitted its report in 1960. The Indian Jail Reforms Committee 1919-20 which was appointed to suggest measures for prison reforms was headed by Sir Alexender Cardio. It visited many prisons and came to the conclusion that prisons should have not only deterring influence but they should have a reforming effect on inmates. As a measure of prison reform, the Jail Committee further recommended that the maximum intake capacity of each jail should be fixed, depending on its shape and size.[3]

A Jail Reform Committee, 1946 was constituted in the year 1946 for the formation of the jails.

This committee gave the suggestions as:

a) The child offenders should be treated differently

b) Modern jails should be constructed

c) The classification of offenders should be scientific such as; Women offenders, Habitual offenders, Handicapped offenders.

Prison Reforms after Independence of India

After independence of India, the work on the reformation of jails speeded up. It was accepted that prisoners are also human beings and have right of humanitarian. So in 1956 the punishment of transportation (Kala-pani) was substituted by the imprisonment for life.

In 1949 Pakawasha Committe gave the permission to take work from the prisoners in making the roads and for that wages shall be paid.

The All India Jails Manual Committee 1957-59 was appointed by the government to prepare a model prison manual. The committee was asked to examine the problems of prison administration and to make suggestions for improvements to be adopted uniformly throughout the India. The report was presented in 1960.they not only enunciated principles for an efficient management of prisons, but also lay down scientific guidelines for corrective treatment of prisoners.

Recommendations of Mulla Committee

All India Committee on Jail Reforms 1980-83 was constituted by the government of India under the chairmanship of Justice Anand Narain Mulla. The committee suggested setting up of a National Prison Commission as a continuing body to bring about modernisation of prisons in India. The Mulla Committee submitted its reportin1983. Some other recommendations of Mulla Jail Committee were as follows:

1. The conditions of prison should be improved by making adequate arrangements for food, clothing, sanitation and ventilation etc.
2. The prison staff should be properly trained and organized into different cadres.
3. The media and public men should be allowed to visit prison so that they may have first hand information about the conditions inside prison and be willing to co-operate with prison officials in rehabilitation work.
4. Lodging of under trial in jails should be reduced to bare minimum and they should be kept separate from the convicted prisoners.
5. The Government should make an endeavour to provide adequate resources and funds for prison reforms.

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[2] Prison reforms in India by Harpreet Kaur.
[3] Criminology and Penology book of Dr. N. V. Paranjape. P-281

Role of Juvenile Justice Act, 1986 in Prison Reforms

In the year 1986, a Juvenile Justice Act was enacted and observation homes, special homes, and juvenile homes were constituted, where the neglected children and juvenile delinquent can be admitted and the juvenile delinquent cannot be tried with the non juvenile delinquent offenders and cannot be kept within the prison. Many provisions were made regarding the orders that could be passed against the juvenile offenders and what cannot be passed against the juvenile offenders. Under this Act juvenile means a boy below the age of 16 years and a girl below the age of 18 years.

Modern aspects of Prison Reforms

Nowadays imprisonment does not mean to break the stones or grind the chakkies but the sense has changed. Undoubtedly, the condition of modern prison system is far better than that in the past but still much remains to be done in the direction of prison reforms for humane treatment of prisoners. The following modification in prison administration can be suggested for improving the efficiency of these institutions:

1) The maintenance of prison establishment is an expensive affair. It is in fact a burden on the public. Therefore the offender should be confined to the prison for only a minimum period which is absolutely necessary for their custody. The elimination of long term sentences would reduce undue burden on prison expenditure

2) The women prisoners should be treated more generously and allowed to meet their children frequently. This will keep them mentally fit and respond favourably to the treatment methods. The woman who fall prey to sex offence should be treated with sympathy and their illegitimate children should be assured an upright life in the society. Women prisoners should also be allowed to meet their sons and daughters more frequently, particularly the attitude in this regard should be more liberal in case of under-trial prisoners.[4]

3) Though the prisoners are allowed to meet their close relatives at a fixed time yet there is further need to allow them certain privacy during such meeting. The meeting under supervision of prison guards is really embarrassing for inmates as well as the visitors and many thoughts on the both sides remain unexpressed for want of privacy.

4) The present system of limiting the scope of festivals and other ceremonial occasions merely to delicious dishes for inmates need to be changed. These auspicious days and festivals should be celebrated through rejoicings and other meaningful programmes so that the prisoners can at least momentarily forget that they are leading a fettered life.

5) The existing rules to the restrictions and scrutiny of postal mail of inmates should be liberalized. This shall infuse trust and faith among inmates for the prison officials.

6) The prison legislation should make provision for remedy of compensation to prisoner who are wrongfully detained or suffer injuries to callous or negligent acts of the prison personnel. It is gratifying to note that in recent decades the Supreme Court has shown deep concern for prisoners right to justice and fair treatment and requires prison officials to initiate measures so that prisoners basic right are not violated and they are not subjected to harassment and inhuman conditions of living.[5]

7) The education in prisons should be beyond three R's and there should be greater emphasis on vocational training of inmates. This will provide them honourable means to earn their livelihood after release from jail. The prisoners who are well educated should not be subjected to rigorous imprisonment, instead they should be engaged in some mental cum manual work.[6]

8) There is dire need to bring about a change in the public attitude towards the prison institutions and their management. This is possible through an intensive publicity programmes using the media of press, platform and propaganda will. In Prabhu Dutta v. Union of India[7], the petitioner a newspaper correspondent filed a petition to interview two condemned prisoners Ranga and Billa for which permission was refused to herby Tihar Jail authorities. The Supreme Court allowed the interview upholding right of the press to have access to prison inmates.

9) On completion of term of sentence, the inmates should be placed under an intensive 'After Care'. The process of After Care will offer them adequate opportunities to overcome their inferior complex and save them from being ridiculed as convicts. Many non penal institutions such as Seva Sadans, Nari Niketans and Reformation Houses are at work in different

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[4] Francis Coralie Mullin V. Union Territory Delhi, AIR 2981 SC 746.
[5] Sanjay Suri V. Delhi Administration, (1988) Cr. LJ 705.
[6] Mohd. Gaisuddin V. State of Andhra Pradesh, AIR 1977 SC 1925.
[7] AIR 1982

places in India to take up the arduous task of After Care and rehabilitation of criminals.

10) There is dire need to bring about a change in the public attitude towards the prison institutions and their management. This is possible through an intensive publicity programmes using the media of press, platform and propaganda will. It will certainly create a right climate in society to accept the released prisoners with sympathy and benevolence without any hatred or distrust for them. The media men should be allowed to enter into prison so that their misunderstanding about prison administration may be cleared. In Prabhu Dutta v. Union of India, the petitioner a newspaper correspondent filed a petition to interview two condemned prisoners Ranga and Billa for which permission was refused to herby Tihar Jail authorities. The Supreme Court allowed the interview upholding right of the press to have access to prison inmates.

Last but not the least, the existing Prison Act, 1894 which is more than a century old, needs to be thoroughly revised and even re-stated in view of the changed socio-economic and political conditions of India over the years. Many of the provisions of this Act have become obsolete and redundant. The Supreme Court, in its landmark decision in Ramamurthy v. State of Karnataka[8], has identified nine major problems which need immediate attention for implementing prison reforms.

The court observed that the present prison system is affected with major problems of;

a) Overcrowding
b) Delay in trial
c) Torture and ill treatment
d) Neglect of health and hygiene
e) Insufficient food and inadequate clothing
f) Prison vices
g) Deficiency in communication
h) Streamlining of jail visits and
i) Management of open air prisons.

Reform in Prison Labour Scheme

The objectives of 'prison labour' have varied from time to time. The Indian Jail Reforms Committee of 1919-20 recommended that the main objective of prison labour should be the prevention of further crime by the reformation of criminals, for which they were to be given instruction in up-to-date methods of work enabling them to earn a living wage on release. The Apex Court in State of Gujarat & another v. Hon'ble High Court of Gujarat[9] observed, "Reformation and rehabilitation is basic policy of criminal law hence compulsory manual labour from the prisoner is protected under Article 23 of the Constitution. Minimum wages must be paid to prisoners for their labour after deducting the expenses incurred on them".

Reformation of Women Prisoners

The women prisoners should be treated more generously and allowed to meet their children frequently. This will keep them mentally fit and respond favourably to the treatment methods. A liberal correctional and educational programme seems necessary in case of women delinquents. Particularly, the women, who fall prey to sex offences, should be treated with sympathy and their illegitimate children should be assured an upright life in the society. The idea of setting up separate jails for women provides the free environment for providing special treatment to them. The first women jail was established in Maharashtra at Yarwada. Conformity with strict prison discipline is no guarantee that the prisoner has really transformed into a law abiding citizen.[10]

Probation as a Tool of Prison Reform

The term "Probation" is derived from the latin word 'probare' which means 'to test' or 'to prove'. Probation offers an opportunity for the probationer to adjust himself to normal society thus avoiding an isolation and dull life in prison. Probation is a conditional release of an offender under supervision. The system of probation involves conditional suspension of punishment.

Probation of Offenders Act, 1958 contains elaborate provisions relating to probation of offenders which are made applicable throughout the country. The Act provides four different modes of dealing with youthful and other offenders in lieu of sentence subject to certain conditions. This includes;

1. Release after admonition.[11]
2. Release on entering a bond on probation of good conduct[12] with or without supervision, and on payment by the offender the compensation and costs to the victim if so ordered, the courts being empowered to vary the conditions of the bond and to sentence and impose a fine if he failed to observe the conditions of the bond.

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[8] (1997) 2 SCC 642
[9] (AIR 1998SC 3164)
[10] Jyotsna Shah: Studies in Criminology & Probation Services in India.
[11] Section 3 of Probation of Offender Act, 1958
[12] Section 4 of The Probation of Offenders Act, 1958

3. Persons under 21 years of age are not to be sentenced imprisonment unless the court calls for a report from the probation officer or records reasons to the contrary in writing.[13]

4. The person released on probation does not suffer a disqualification attached to a conviction under any other law.[14]

Parole an Aspect of Prison Reform

One of the most important but controversial devices for reducing pressure on prison institutions is the selective release of prisoners on parole. Parole has a dual purpose, namely protecting society and at the same tome bringing about the rehabilitation of the offenders. The parole system is an excellent way to allow prisoners to rehabilitate and get in touch with the outside world. Parole is a legal sanction that lets a prisoner leave the prison for a short duration, on the condition that she/he behaves appropriately after release and reports back to the prison on termination of the parole period. The main object of the parole as stated in the Model Prison Manual are:

a) To enable the inmate to maintain continuity with his family life and deal with family matters

b) To save the inmate from the evil effects of continuous prison life.

c) To enable the inmate to retain self confidence and active interest in life.[15]

Open Prisons-A Modern Way of Prison Reform

Taking inspiration from Anglo-American developments in the correctional field of penology, the Indian penologists were convinced that India also cannot tackle its crime problem by putting criminals in prison cells. The institution of open prisons seems to be viable alternative to harsh imprisonment system. The whole thrust in these open-prison institutions is to make sure that after release the prisoners may not relapse into crimes and for this purpose they are given incentives to live a normal life, work on fields or carry on occupation of their choice and participate in games, sports or other recreational facilities. These are the minimum-security prisons. In this liberal remissions are given to extent of 15 days in a month. The State of Uttar Pradesh was first to set up an open air camp attached to Model Prison at Lucknow in 1949. Other States, like Andhra Pradesh, Assam, Gujarat, Punjab, Kerala etc. are also set up open-air camps.

Overcrowding of Prisons- A Big Problem

There has been a continuous record of overcrowding in jails. The position is further complicated by frequent agitations resulting in confinement of a large number of political prisoners, who claim special treatment. Overcrowding results in restlessness, tension, inefficiency and general breakdown in the normal administration.

Recently, the Supreme Court of India took exception to the unduly long detention of a large number of under trial prisoners and the Central and State governments have now started taking vigorous steps to remedy this situation

Rehabilitation as a Weapon of Prison Reform

The assumption of rehabilitation is that people are not permanently criminal and that it is possible to restore a criminal to a useful life, to a life in which they contribute to themselves and to society. A goal of rehabilitation is to prevent habitual offending, also known as criminal recidivism. Rather than punishing the harm out of a criminal, rehabilitation would seek, by means of education or therapy, to bring a criminal into a more peaceful state of mind, or into an attitude which would be helpful to society, rather than be harmful to society. The assumption of rehabilitation is that people are not permanently criminal and that it is possible to restore a criminal to a useful life, to a life in which they contribute to themselves and to society. A goal of rehabilitation is to prevent habitual offending, also known as criminal recidivism. Rather than punishing the harm out of a criminal, rehabilitation would seek, by means of education or therapy, to bring a criminal into a more peaceful state of mind, or into an attitude which would be helpful to society, rather than be harmful to society.

Conclusion and Suggestions

To ensure good discipline and administration, an initial classification must be made to separate male from females, the young from the adults, convicted from the unconvinced prisoners, civil from criminal prisoners and from casual from habitual prisoners. The main object of prison labour is prevention of crime and reformation of the offenders. And the other main object was to engage them so as to prevent mental damage and to enable them to contribute to the cost of their maintenance. The under trail prisoners constitute a majority of population in prison than convicted prisoners. The under trial prisoners are presumed to be innocent and most of them are discharged or acquitted after immeasurable physical and mental loss

[13] Section 6 of The Probation of Offenders Act,
[14] Section 12 of The Probation of Offenders Act, 1958
[15] Bhikhabhai Devshi V. State of Gujarat, AIR 1987 Guj. 136.

caused to them by detention due to delay in investigation and trial. The courts have in recent years been giving serious thought to the of human rights of prisoners and have, on that ground, interfered with the exercise of powers of superintendents of jails in respect of measures for safe custody, good order and discipline.

Research into crime and the criminal is still in its infancy. The immediate need of research is to evaluate the existing methods of treatment and to suggest new approaches to the prevention of crime. The value of probation, open prisons, parole and home leave as reformatory measures need to be established.

Prisoners constitute important institutions which protects the society from criminals. The obstacles in prison reforms are resource allocation, the deterrent functions of punishment, the notion of rehabilitation, and internal control.

The researcher would like to suggest certain measures to improve life of jail inmates-:

1) Many inmates usually complain about inadequate quality and quantity of food, which is required to be improved. The food is required to be prepared in better hygienic conditions.

2) Rehabilitation of inmates will be meaningful only if they are employed after release and for that purpose educational facilities should be introduced or upgraded.

3) Central Government along with NGO's and prison administration should take adequate steps for effective centralization of prisons and a uniform jail manual should be drafted throughout the country.

4) There should be a minimum fixed tenure for the investigating officers to ensure timely completion of investigation and trial.

5) As per the existing provision, the duties, rights and privileges of Prisoners should be printed in bold letters in vernacular language and pasted at several prominent places inside the Prison to make the prisoner aware of the same.

6) Allowing NGOs and Philanthropists who are really interested in the welfare of Prisoners liberally in all the treatment programs in Prisons like Classification, Education, Vocational training, Medical and Health care, Sanitation and Hygiene, Recreation Activities etc.

7) Amending the existing Section 53 of the Indian Penal Code to include the Community services as one of the punishments prescribed under this Section.

8) The prison administration should be brought under the ambit of the Right to Information, Act 2005.

9) Inspection shall be carried by the advisory body at regular intervals without interference from the prison authorities.

10) Prisoners Welfare Fund with Government contribution shall be created in all the States to undertake various welfare measures for Discharged Prisoners and their families.

11) A mobile complaint box should be installed outside the prisoner's cell to ensure the problems of the prisoners are taken into consideration.

12) The transparency in the judicial system should be increased to understand the actual scenario in the prisons.

Study of Insider Trading in India and its Types

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ABSTRACT

In today's day, company is growing in the worldwide marketplaces and with it there is significant amount of growth in the financial markets- Bond market, share market, derivative market and other sectors. "And with the rise in such trading, there has been a development in one specific type of trading- Insider Trading. Insider trading is trading in stock market while having a possible access to confidential, non-public information of a business. Insider trading or Insider Dealing is the unlawful activity of trading on the stock market to one's personal benefit by having access to private information. Insider trading is the purchasing or selling of a securities by someone who has access to substantial non -public information about the security. Insider trading may be unlawful or legal depending on when the insider makes the transaction. It is unlawful when the relevant information is still not public. Illegal insider trading involves tipping others when you know any kind of non- public information. Legal insider trading occurs when directors of the business buy or sell shares, but they report their activities lawfully.

Keywords: Legal, Insider, Trading, Securities, India etc.

Introduction

Insider trading is described as a malpractice whereby trade of a company's shares is conducted by individuals who by virtue of their employment have access to the otherwise non- public information which may be important for making investment choices. When insiders, e.g. key employees or executives who have access to the strategic information about the company, use the same for trading in the company's stocks or securities, it is called insider trading and is highly discouraged by the Securities and Exchange Board of India to promote fair trading in the market for the benefit of the common investor. Insider trading is an unfair activity, whereby the other stock holders are at a significant disadvantage owing to lack of crucial insider non-public knowledge.

However, in some instances if the information has been made public, in a manner that all interested investors have access to it, that will not be a case of unlawful insider trading. Because insider knowledge provides an investor an advantage over others, it is unlawful and punished by law. Mechanisms in place to discourage insider trading include quiet periods, during which company insiders are banned from selectively disclosing information to certain investors before it is made public, and blackout periods, which restrict trading by insiders at comparable times and for similar reasons. Insider trading happens when someone who has a fiduciary responsibility to another person, institution, company, partnership, business, or organisation makes an investment choice based upon knowledge relevant to that fiduciary duty that is not accessible to the general public. This insider knowledge enables them to benefit in certain instances and prevent loss in others. Insider trading may also occur in situations when no fiduciary responsibility is present but another crime has been committed, such as corporate espionage. Insider trading per se is obtaining information from non-public sources—private acquaintances, friends, colleagues—and using it for purposes of enhancing one's financial advantage. Sometimes such a practice can be conducted fraudulently, as when one who has obtained the information has a fiduciary duty to share it with clients but fails to exercises.[1]

Insider trading as defined by the Black's Law Dictionary is - The use of material non-public information in trading the shares of the company by a corporate insider or any other person who owes a fiduciary duty to the company. Insider trading has been defined generally to mean trading in the shares of a company for making a gain or for avoiding a loss by manipulation of prices by persons who are in the management of the company or are close to them, on the basis of undisclosed price sensitive information regarding the working of the company which they possess but which is not available to others.[2] Every country in the world with a

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[1] Machan, Tibor R., 'What is Morally Right with Insider Trading', Public Affairs Quarterly, Vol. 10 (April 1996), available at http://mises.org/etexts/insidertrading.pdf (accessed on 28 September, 2009).
[2] Sharma, L. M., Amalgamations Mergers Takeovers Acquisitions: Principles, Practices and Regulatory Framework (1st Edn., Company Law Journal, Taj Press, 1997) 299.

major stock exchange had made this practice illegal because of its potential to destroy public confidence in the stock exchange.[3] However the definition and sanction vary from state to state.

Insider trading is one of the most violent crimes on the faith of fair dealing in a capital market. The scope and stringency of the violation and penalties differ wildly from country to country. Trading by an insider of a company in the shares of a company is not per se a violation of law. For instance a person (an investigative journalist for example may interview an insider and thus become one) may come across insider information by his perseverance in uncovering a corporate fraud and disclose the fraud. A person can create inside information by his future actions, for instance a future tender offer bidder knows that the price of the target company will go up by his actions. In fact trading by insiders, including directors, officers and employees of the company in the shares of their own company is a positive feature which companies should encourage because it aligns its interests with those of the insiders. What is prohibited is the trading by an insider in breach of a duty of trust or confidence in the stock of a company on the basis of non-public information to the exclusion of others. Insider trading violations may also include tipping such information and securities trading by the person tipped.

Definition Of Insider Trading As Per 'SEBI (Prohibition Of Insider Trading) Regulation, 2015'

Insider: Insider means any person who is the holder of unpublished price sensitive information eg. Manager, company secretary, chief financial officer, chief executive officer, auditors etc. It also include persons who are connected with any insider by the way of frequent communication, relation with employees/ manager/ director etc.[4]

Trading: Trading simply means trading or dealing in the securities by the way of sales, agree to sale, purchase, agree to purchase etc.[5]

Insider Trading Laws in India

Insider trading denotes dealing in a company's securities on the basis of confidential information relating to the company which is not published or not known to the public used to make profit or loss. It is fairly a breach of fiduciary duties of officers of a company or connected persons towards the shareholders.

The prevention of insider trading is widely treated as an important function of securities regulation.

Section11(2)E of companies act,1956 prohibits the insider trading but does not define it.

Prohibition of insider trading is necessary to make securities market-

- Fair and transparent.
- To have level playing field for all the participants in the market.
- For free flow of information and avid information asymmetry.

India is not new to insider trading concept. The history of insider trading relates back to 1940s. India was quick to realize the need for efficient and transparent market. Therefore, various committees were constituted from time to time by the government realizing the need to regulate the securities/trading and to curb the insider trading and these committees have played a crucial role to lay down legal regulations for insider trading. The recommendations made by the several committees and the needs of rapidly advancing securities market needed a more comprehensive legislation to regulate the practice of Insider Trading, thus resulting in the formulation of the SEBI (Insider Trading) Regulations in the year 1992. These regulations were the first major step forward in controlling the insider trading and making the securities market more transparent and more powers given to the SEBI to regulate the market in effective and efficient manner. In India, the Securities and Exchange Board of India (SEBI) is the sole market regulator to keep the market transparent and tackle the insider trading menace or any other market fraud.

Rational Behind Prohibition of Insider Trading

The smooth operation of the securities market and its healthy growth and development depends on a large extend on the quality and integrity of the market .Such a market can alone inspire confidence in investors Insider trading leads to loose of confidence of investors in securities market as they feel that market is rigged and only the few, who have inside information get benefit and make profits from their investments. Thus, process of insider trading corrupts the 'level playing field. Hence the practice of insider trading is intended to be prohibited in order to sustain the investor's confidence in the integrity of the security market.

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[3] Dignam, Alan and Lowry, John, Company Law (4th Edn., Oxford University Press, 2006) 74.

[4] SEBI (Prohibition of Insider Trading) Regulations, 2015,Regulation 2(g)

[5] SEBI (Prohibition of Insider Trading) Regulations, 2015, Regulation 2(l)

Types of Insider Trading

- Illegal Insider trading

This generally involves buying or selling a security in breach of a fiduciary duty or other relationship of trust and confidence, while possessing material non-public information about the security. The biggest perpetrators in India are the promoters and close associates, who trade through benami/front names. Investigating or even detecting such trades is difficult, as the holdings aren't shown as belonging to the insiders, but are disguised as public shareholding. Some violators also use information that they've misappropriated or have received as a 'tip' to trade in the market. The practice is rampant. For instance, takeover announcements are often preceded by a massive run up in the stock prices of the companies.

The insider trading definition that we are concerned about is the buying or selling of a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, non-public information about the security. Over the last 10 years, the SEC and the courts have greatly expanded this definition, to include trading by individuals whose relationship of trust is so remote as to be non-existent, but that discussion is left for another day. While myself and most other securities attorneys believe that the concepts of insider trading have been expanded beyond all permissible bounds, the law today is that if material information about a company, or about the company's stock, is obtained in violation of any duty to any person and used to trade, the trader is guilty of insider trading.

Insider trading violations may also include tipping such information, securities trading by the person tipped, and securities trading by those who misappropriate such information. Examples of insider trading cases that have been brought by the SEC are cases against:

1. Corporate officers, directors, and employees who traded the corporation's securities after learning of significant, confidential corporate developments;
2. Friends, business associates, family members, and other tippees of such officers, directors, and employees, who traded the securities after receiving such information;
3. Employees of law, banking, brokerage and printing firms who were given such information to provide services to the corporation whose securities they traded;
4. Government employees who learned of such information because of their employment by the government;
5. Employees of financial printers who learned of the information during the course of their employment; and
6. Other persons who misappropriated, and took advantage of, confidential information from their employers.

Legal Insider Tading

Legal trades by insiders are common, as employees of publicly traded corporations often have stock or stock options. These trades are made public in the United States through Securities and Exchange Commission filings, mainly Form. Prior to 2001, U.S. law restricted trading such that insiders mainly traded during windows when their inside information was public, such as soon after earnings releases.

Insider trading is a familiar term for all investors and it is generally associated with an illegal conduct. But the term actually includes both legal and illegal conduct. Simply stated, insider trading means trading in a company's stocks or other securities by a corporate insider[6]. This can also be stated as legal insider trading. A corporate insider, also referred to as classical insider, is typically a director or an official of a company. The category of insiders in a company also includes the constructive insiders who become privy to the corporate information legitimately by virtue of their relationship with the company. For instance, an underwriter, accountant, lawyer or consultant working for a company and exposed to the company's inside information are regarded as the constructive insiders. This implies that if any corporate or constructive insider of a Majority of the academicians who have conducted studies on insider trading laws have classified insiders into a. classical insiders, and b. the constructive insiders. Classical insiders are typically the directors and officials of the company whereas the constructive insiders are those to whom corporate information is revealed legitimately by virtue of their relationship with the company/issuer, i.e., an underwriter, accountant, lawyer or consultant working for the Corporation who has a fiduciary relationship with the shareholders.

- Punishable Insider Trading and Non-Punishable Insider Trading

Defining all the activities that constitute criminal insider trading is much trickier than it might seem on the surface.

[6] Majority of the academicians who have conducted studies on insider trading laws have classified insiders into a. classical insiders, and b. the constructive insiders. Classical insiders are typically the directors and officials of the company whereas the constructive insiders are those to whom corporate information is revealed legitimately by virtue of their relationship with the company/issuer, i.e., an underwriter, accountant, lawyer or consultant working for the Corporation who has a fiduciary relationship with the shareholders.

There are many factors that must be considered in order for the Securities and Exchange Commission (SEC) to prosecute someone for insider trading, but the main things they must prove is that the defendant had a fiduciary duty to the company and/or they intended to personally gain from buying or selling shares based upon the insider information".

Review of Literature

" Should the Government Regulate Insider trading? Insider Trading And its Legal Mechanism Studied Securities and Exchange Board of India and the Regulation of the Indian Securities Market Studied Insider trading laws in India – Status before and after the enactment of Indian Companies Act, 2013 Studied Indian Update – New Insider Trading Laws In India: How Much were Too Much Studied Laws relating to the menace of Insider Trading in India Studied Anticipative And Statistical Analysis Of Insider Trading (Studied The Know-All of Insider Trading – Decades of Corruptive Prevention Studied Insider Trading – A Comparative Perspective Role of SEBI in curbing Insider Trading in India – An Analysis Studied Regulatory Management and Reform in India" Studied Insider Trading: a Comparative Study"

Impact of Insider Trading in Securities Market

The securities market in many countries is very young and poorly regulated as compared to other securities market in wealthy nations. As a part of globalisation where commercial operations have spread the whole globe, the demand for properly regulated market has also grown to many folds. The impact, scope and consequences of insider trading may differ in any nation but any level of insider trading has a huge influence on the reputation of the country.

Every shareholder spends his money in the market with the previous trust of transparent and efficient market. An investor when making his choice regarding investment (to Sell, buy or retain shares) depends on the available price sensitive information given by the listed business. When an investor relies upon the accessible price sensitive information, he has the previous confidence and faith in the accuracy of the value of the securities he is trading. Even after making the price sensitive information public , one sect of the business possesses the knowledge which ultimately determines the value of the security. When such individuals invest in the market they are known as insiders. In simple words, Insider trading means trading of securities by persons who have access to non published price sensitive information by reason of position they hold in a company or during their course of work they get acquainted with such information and take decision accordingly; either to buy or sell their securities based on such unpublished price sensitive information.

In Indian context, corporate insiders are allowed to trade in their own company's stock but are required to disclose these transactions to avoid the misuse of any non-public price sensitive information. SEBI has framed numerous disclosure regulations on insiders to build investor confidence and increase the transparency in securities trading. The aim of these disclosures is to create a level playing field to all the participants in the market.

Companies Act, 2013, passed by the Indian parliament also devised the code of conduct for the administration of insider trading regulations. The listed companies in India are guided by Clause- 36 of the Listing Agreement of the stock exchanges, which states that, the issuer will have to inform the stock exchange where the company is listed immediately about events such as closure on account of power cuts, lockouts, strikes, etc. All events which may have a posture on the operations or performance of the firm, as well as price sensitive information have to be reported at the beginning of the event as well as after the end of the event.

This is intended to facilitate the shareholders and the public to assess the information and act accordingly. Over the years, to improve the fairness and transparency of the capital markets, SEBI has made several amendments to its SEBI (Prohibition of Insider Trading) Regulations, 1992.

India's First Insider Trading Case: Hindustan Lever Limited (HLL)

The first case where SEBI had initiated action against the violators of insider trading laws was the Hindustan Lever Case.[7]

In this case, Hindustan Lever Limited (HLL) and Brooke Bond Lipton India Ltd (BBLIL) were subsidiaries of the common parent company, Unilever. A merger announcement between BBLIL and HLL was intimated to the stock exchanges on 19 April, 1996. SEBI was notified about the leakage of the merger information and insider trading by the market as well as the media. Therefore, the SEBI had initiated investigations into the matter. SEBI found that HLL as an insider had purchased the securities of BBLIL from the Unit Trust of India (UTI) on the basis of the UPSI about the impending merger, thereby violating the provisions of the Insider Trading Regulations and the SEBI Act. As a result, UTI incurred losses. SEBI, in exercise of its power under Section 11B of the SEBI Act read with Regulation 11 of the Insider Regulations had directed the

[7] Order passed by SEBI dated March 11, 1998

HLL to compensate the UTI to the extent the UTI had suffered losses. SEBI estimated the loss caused to the UTI on account of the insider trading at Rs.3.04 crores. The basis for this calculation was the difference between the market price of the shares of BBLIL at which the shares were sold by UTI to HLL after the announcement of the merger and the price of the shares prior to the announcement of the merger, excluding premiums. SEBI justified its action as corrective steps.

UTI and HLL filed separate appeals against the SEBI's order before the appellate authority, the central government.[8]

The interpretation of the term 'insider' under regulation 2(e) was one of the key issues under consideration before the appellate authority in this case. In this regard, the appellate authority observed that the definition of insider should have three ingredients:

(i) the person should be a natural person or legal entity;

(ii) the person should be a connected person or a deemed connected person; and

(iii) acquisition of the UPSI should be by virtue of the connection.

The SEBI had also interpreted in its order, the third requirement of 'acquisition of UPSI' by the insider by virtue of the connection with the company by envisaging two alternate situations:

(i) where the insider is reasonably expected to have access to UPSI by virtue of the connection with the company; or

(ii) where the insider has actually received or had access to such UPSI.

SEBI had concluded that if a connected person actually gains or receives such information independently, notwithstanding his position in the company, such person will fall within the definition of 'insider' and therefore, SEBI regarded HLL as an insider. This was upheld by the appellate authority.

However, the appellate authority overruled the SEBI's order, inter alia, on the following grounds:

(i) the news about the merger was not a UPSI as it was generally known and acknowledged by the market;

(ii) the information relating to merger could not have significant impact on the price at which the transaction was concluded;

(iii) the SEBI's decision to award compensation to UTI suffers from procedural deficiencies;

(iv) SEBI's direction to HLL to compensate UTI lacks jurisdiction; and

(v) SEBI's direction for prosecution under Section 24 of the SEBI Act was bad in law as the order did not state the reasons for prosecution and also SEBI did not invoke its specific powers for adjudication under Section 15G of the SEBI Act. Therefore, the SEBI's decision to prosecute HLL was set aside by the appellate authority.

Conclusion

"In India, the greatest issue is the absence of effective enforcement of insider trading laws. The ideal securities market is concerned with the distribution of capital in the economy. This function is enabled by market efficiency, the circumstance where the market price of each asset correctly represents the risk and return in its future. Thus, the main purpose of regulation and policy is to promote market efficiency; thus we must assess the effect of Insider trading upon market efficiency. Insider trading seems to be skewed particularly to the speculators who engage in the market anticipating there would be an increase in the value of shares. The rationale behind the prohibition of insider trading is the obvious need and understandable concern about the damage to public confidence which insider dealing is likely to cause and the clear intention to prevent so far as possible what amounts to cheating when those with inside knowledge use that knowledge to make a profit in their dealings with others. It is a recognised truth that the smooth functioning of the securities market and its healthy growth and development relies to a great degree on the quality and integrity of the participants in the market. Such a market may alone inspire the confidence of the investors".

In this backdrop, a critical approach to the effectiveness of the Indian regulatory regime reveals certain issues that require careful consideration and modifications.

1. At the outset, India does not have one specific statute governing insider trading. Section 12A of the SEBI Act prohibits insider trading, without defining the term "insider trading". Detailed provisions under the SEBI Act and the various regulations under the SEBI Act, including the Insider Regulations either prohibit insider trading or provide for the enforcement mechanism in respect of the offence of insider trading. As these are covered under

[8] Initially, the orders of SEBI were appealable before the central government by the aggrieved party. Section 20 of the SEBI Act, 1992 provides that any order of the Board passed before the Securities Law Amendment, 1999 shall be appealable to the Central Government. It was in the year 1995, with the insertion of chapter VI A of SEBI Act, 1992 that the Securities Appellate Tribunal (SAT) was set up. Initially only the orders of A.O. were appealed before the SAT. However, with the amendment of 1999, SAT was conferred with the powers to decide the appeals preferred against orders of SEBI as well as that passed by A.O.

multiple laws, the provisions under different legislations have to be reviewed and compared and the lack uniformity in various statutes in their approach to insider trading creates significant interpretational difficulties. For instance, there are redundant provisions under the Buy-Back Regulations which should have been removed, but they still exist. Further, the provisions under the Merchant Banker Regulations must be aligned with Section 12A of the SEBI Act.

References

1. Allavaru, K. A. (1997). Nishith Desai Associates . 1(Insider Trading a Comparative Study), 1–13.
2. Anticipative And Statistical Analysis Of Insider Trading author: Javish Valecha. (2017). 2017.
3. Gourav, K. (2018). Role of SEBI in curbing Insider Trading in India – An Analysis.
4. INDIAN UPDATE – NEW INSIDER TRADING LAWS IN INDIA: HOW MUCH IS TOO MUCH? Authors: Cyril Shroff. (2015). 2015.
5. Insider Trading And its Legal Mechanism Author:Sudershani Ray & Kartik Dawar Student of Jamia Millia Islamia , Faculty of law. (n.d.).
6. Laws relating to the menace of Insider Trading in India, UK and US . It also attempts to analyse the effectiveness of such regulations . Author Name: Kirthana Singh. (2012).
7. Mitra, S. (2010). and Reform in India Background Paper for OECD. 1–40.
8. Nguyen, H. O. A., Faff, R., & Hodgson, A. (2010). C Orporate U Sage of F Inancial D Erivatives, I Nformation a Symmetry , and I Nsider T RadingHoa Nguyen. 30(1), 25–47. https://doi.org/10.1002/fut
9. Securities and Exchange Board of India and the Regulation of the Indian Securities Market by G. Sabarinathan Indian Institute of Management Bangalore. (n.d.). June 2010, 1–54.
10. Steinberg, M. I. (2002). Insider Trading – A Comparative Perspective. 222(1980), 1–32.
11. Studies, L. J. (2013). International Journal of Law and Legal Jurisprudence Studies: ISSN: 2348-8212: Volume 2 Issue 5 “ Insider trading ” laws in India – Status before and after the enactment of Indian Companies Act , 2013 Author: -: ISSN: 2348-8212: Volume 2 Issue 5. 2(5), 257–263.
12. The Know-All of Insider Trading – Decades of Corruptive Prevention Author: Sonakshi Das & Sanjana Sahu a. (2015). 2015.

An Analysis of The Evolution of Right to Privacy: A National & International Perspective

Ms. Vineeta Kalla*

ABSTRACT

Throughout ages, privacy has been a universally well recognized concept. Absence of neither a specific nor a common definition hasn't hindered its development in different civilizations, be it ancient, medieval or modern. We can trace the evolution of privacy to development of society and social order. Nevertheless,the growth of various constituents to the privacy thus maturing into a separate legal right is a result of modern jurisprudence. The importance to privacy, though, has been recognized way earlier but its need for fundamental human existence is acknowledged due to the dynamic growth of technology and multimedia.

In the present times, the international recognition of the privacy has seen its growth under the auspices of the United Nations and various international conventions like Universal Declaration of Human Rights, 1948, International Convention on Civil & Political Rights, 1976,etc.. These conventions have played a pivotal role in establishing privacy as a universal, inviolable and inherent human right. Since independence, the Indian Supreme court by its various judicial pronouncements has identified and asserted different dimensions to privacy. In 2017, however, the Puttuswamy judgment marked a new chapter in the development of jurisprudence relating to privacy and was recognized as a fundamental right under Article 21 of the Indian Constitution. This article investigates the evolution and scope of right to privacy developed through various judgments, international & regional conventions works of jurists and scholars.

Keywords: Privacy, Right to Privacy, International Human Rights, Indian judiciary.

Introduction

Since the dawn of a civilized society, the value of privacy was realized as an essential to social construction of human civilization. It was understood as a sine qua non to the development and preservation of one's physical, spatial and informational boundaries. It, basically, is right of individual human beings to enjoy freedom from unauthorised interference into one's private life.

The term privacy is derived from the Latin word "privatus" means separated from the rest. Oxford English dictionary defines it as "the state of being alone and not watched or disturbed by other people".[1] Black's Law Dictionary defines Privacy as *"The condition or state of being free from public attention to intrusion into or interference with one's acts or decisions"* which means there is certain information regarding any individual which he or she would not like to disclose with anyone.[2] Thus, privacy means the right to be let alone, the right of a person to be free from unwarranted publicity; and right to live without unwarranted interference by the public in the matters with which the public is not necessarily concerned. 'Privacy' in its broad sense, covers a number of aspects, like, non-disclosure of information about oneself, his sexual affairs, privacy of business secrets and non-observance by others, etc."[3]

Jurists like Aristotle, William Blackstone, John Stuart Mill, etc. have emphasized that the need to distinct the 'private' from the 'public' to preserve a liberty of the citizen independent from the authority of the state. Austin in his Lectures on Jurisprudence (1869) spoke of the distinction between the public and the private realms: jus publicum and jus privatum. He states, "If the reason for protecting privacy is the dignity of the individual, the rationale for its existence does not cease merely because the individual has to interact with others in the public arena."

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[1] Oxford Learner's Dictionary of Academic English available at http://www.oxfordlearnersdictionaries.com/ definition/american_english/privacy (Last visited on 22/08/2021).

[2] Bryan Garner, ed.) 3783 (2004) assessed from Vaishnavi Sabhapathi, "Right to Privacy – The Indian Perspective" available at https://www.legalbites.in/right-to-privacy-the-indian-perspective/ (Last visited on 27/09/2021)

[3] Kiran Deshta, Right to Privacy under Indian Law, Deep & Deep Publications Pvt. Ltd., New Delhi, 2011.

According to Edward Bloustein, privacy is an interest of the human personality. It protects the inviolate personality, the individual's independence, dignity and integrity.[4] Privacy is thus considered as a basic human right, without the guarantee of which the right to live with human dignity would become incomplete.

Right to privacy was firstly defined by Justice Cooley in 1880 as the individual's "right of complete immunity, right to be let alone". Samuel D. Warren and Louis Brandeis in their Seminal Article published in Harvard Law Review in 1890 advocated Thomas Cooley's concept of Right to Privacy. According to them the genus of the right to privacy lies in the right to property enjoyed by men. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life- the right to be let alone."[5]

In 1960, William L. Prosser attempted to define 'Privacy' as a composite of torts. Alan Westin in his book "Privacy and Freedom," defined privacy as 'the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitude and their behavior to others.'[6]

Privacy is also characterized as a variable concept, i.e., its scope differs from political, cultural or societal variance and also a specific period of time. It varies with the times, the historical context, the state of culture and the prevailing judicial philosophy.[7] This makes the concept of privacy, fundamentally dynamic.

'Privacy' is a multi-faceted concept including a bundle of right, Itcovers a number of aspects, like, non-disclosure of information about oneself, his sexual affairs, privacy of business secrets and non-observance by others, etc."[8]

Bloustein referred privacy as a composite interest rather than a right which protects essential conditions of an individual's personality and life as well. On the other hand, Ruth Gavison stated that there are three elements of privacy: secrecy, anonymity and solitude. It is a state which can be lost, whether through the choice of the person in that state or through the action of another person.[9]

Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.[10]

The term "Right to Privacy", thus, is a term encompassing various rights inherent in the concept of liberty and such a right prevents governmental interference in intimate personal relationships or activities.

The Right to Privacy, simply put, is merely the right to live as one chooses[11], provides individual autonomy and is granted as a personal liberty in a number of written constitutions of the world in the present social scenario.

Development of Right to Privacy

The concept of privacy can be evidenced from various ancient texts of eastern as well as the western civilization. The texts of Bible, specially the story of Sons of Noah in Genesis, prove the existence of privacy in the western society. Sir Edward Coke decision in the Semayne's Case where he stated that "For a man's house is his castle" is an obvious example of privacy of property and family.

Similarly, as its Indian counterpart, Naradsmriti recognizes the claim to privacy against the sovereign and society at large. For instance, an individual caught trespassing on someone else's property was liable to be fined. Arthashastra, Yajnawalkya Samhita and the Manusmriti supplement these religious precepts and condemn usage of another person's property without his or her permission. If one look at the Hitopadesh it says that certain matter (worship, sex and family matters) should be protected from disclosure. Manusmriti, which is a source of classical Hindu law, prohibits bathing in tanks that belong to other men. Additionally it prohibits the use of wells, gardens, carriages, beds, seats and houses without the owner's permission.[13]

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[4] Privacy as an Aspect of Human Dignity, (1964). 39 New York U.L.R. 962 at 971 cited in Privacy and Human Rights - An International Survey of Privacy Law and Practice available at http://gilc.org/privacy/survey/intro.html (Last visited on 27/09/2021)

[5] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," Harvard Law Review, Vol. IV (5), 1890, pp.193-220 at p.193

[6] Alan F. Westin, Privacy and Freedom, Atheneum Publication, New York, 1970

[7] Hyman Gross, Privacy – Its Legal Protection, 1976; Alan F. Westin, Privacy & Freedom, 1970, p.7; William L. Prosser, "Privacy", California Law Review, Vol.48, 1960, pp.383-423; Chandra Pal,"Right to Privacy-Emerging As a Constitutional Right,"Civil and Military Law Journal, Vol.18,1982,p.42.

[8] Kiran Deshta, Right to Privacy under Indian Law, Deep & Deep Publications Pvt. Ltd., New Delhi, 2011.

[9] Supra note 4

[10] Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

[11] Pravin Anand & Gitanjali Duggal , "Privacy", in Michael Henry (ed.), International Privacy, Publicity and Personality Laws, 2001, p.233.

[12] All Answers ltd, 'Right To Privacy The Indian Perspective' (Lawteacher.net, October 2018), available at https://www.lawteacher.net/free-law-essays/constitutional-law/right-to-privacy-the-indian-perspective-constitutional-law-essay.php?vref=1, (Last visited at 21/08/2021)

[13] White Paper on "Locating Constructs of Privacy within Classical Hindu Law" available at https://cis-india.org/internet-governance/blog/loading-constructs-of-privacy-within-classical-hindu-law (Last visited at 27/09/2021)

To sum up, under the classical Hindu jurisprudence, the different aspects of the privacy in the ancient Hindu law can be understood in the following five categories[14]: a. Privacy of physical Space/ property, b. Privacy of Thought, c. Privacy with respect to bodily integrity, d. Privacy of Information e. Privacy of Identity.

Islamic law explicitly protects privacy of home as a fundamental human right. In this context Quran states[15], "This is for your own good, so that you might bear in mind, if you find no one in the house do not enter it until you are given leave; and if you are told "turn back" then turn back. The Prophet Mohammad also accentuated the right of the people to be protected against umreasonable intrusions in to their privacy. In Christianity, there are several references of privacy. The Bible, the Holy text of Christian's states: that in a marriage relationship sexual union is to be done in private. Jesus taught his followers to keep their generosity private."[16]

The above examples help us to conclude that protection of privacy is not an isolated event nor is a limited, local or regional right; but is of universal significance. Though the idea of Privacy varies in the societal and cultural contexts, but existence of Privacy is found in every society- past, present or future. The present status of right to privacy as an essential requisite to human life and dignity is the outcome of a continuous process of development all over the world.

Under the modern jurisprudence, the foundation of right to privacy as a protective right necessary for civilized human society can be traced back in 1361 in the Justices of Peace Act in England. The Justices of Peace Act was related to matters of tort, injuries to personal property and personal injuries such as slander, libel, false imprisonment, and malicious prosecution, etc. Moreover, the Act provided for the arrest of peeping and eavesdroppers.

In 1763, parliamentarian William Pitt's remarked, the course of a debate in the House of Common against the Excise Bill, 1763 that "the poorest man may in his cottage bid defiance to all the force of the crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter-but the King of England cannot enter; all his force dare not cross the threshold of the ruined tenement". The Act empowered the agents of the Crown to search and inspect any suspected business premises including private homes of a farmer or a cider merchant for untaxed cider. He remarked acted as an alarming call in contemporary countries for the protection rights of privacy.

The Swedish Parliament's Access to Public Records Act, 1776 was the first legislation in Sweden that enables the public to obtain information from government records. But the Act has made the condition that government-held information should be used for legitimate purposes.

In the USA, 1890 Warren and Brandeis had added a new chapter to the law and asserted the right to privacy as an important human right to be preserved. Their article called upon the courts to recognize a specific legal right to privacy – a right independent of property and liberty.[17]

Through various judicial decisions e.g. *Boyd* v. *United States*[18], *Grosjean* v. *American Press Co.*[19], *Breardv. City of Alexandria*[20], *Griswold v. Connecticut*[21], *Katz* v. *United States*[22] *Rowan* v. *Post Office Department*[23] and *Cox Broadcasting Corporation* v. *Mortin Cohn*[24], the law relating to the protection of Right to Privacy have been developed under different provisions of the U.S. Constitution, like the First Amendment, the Fourth and Fifth Amendments, the penumbras of the Bill of Rights, the Ninth Amendment and the concept of liberty guaranteed by the first section of the Fourteenth Amendment. The above cases discussed & developed different dimensions to right to privacy and the US Supreme Court recognised privacy as a constitutional right having its roots in the First Amendment.[25]

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[14] Szabó M. D.: Kísérlet a privacy fogalmánakmeghatározására a magyarjogrendszerfogalmaival. InformációsTársadalom 2, 2005. p. 45 cited by AdriennLukács, "What is Privacy? The History and the Definition of Privacy", available at http://publicatio.bibl.u-szeged.hu/10794/7/3188699.pdf (Last visited at 27/09/2021)

[15] Mashood A. Baderin "International Human Rights and Islamic Law", Oxford University Press (2003) pp.115-116.

[16] Matt6:3-4

[17] Richard A Glenn. The Right to Privacy- Rights and Liberties under the Law. 1st Edition. California: ABC-CLIO, 2003, p 47

[18] 116 U.S. 616(1886)- The Supreme Court recognised Privacy as the underlying principle of the Fourth Amendment prohibition against unlawful searches and seizures.

[19] 297 U.S. 233(1935)- It was held that licence law of Loiusiana under question was curtailing the freedom of press enshrined under the First Amendment and was violative of Fourteenth Amendment.

[20] 341 U.S. 622(1951)

[21] 381 U.S. 479(1965) – The court ruled that any law which is violative of right to marital privacy is against the principle of the Constitution of the United States which protects the liberty of married couples to buy and use contraceptives without government restriction.

[22] 389 U.S. 347 (1967)

[23] 397 U.S. 728(1970)- US Supreme Court recognized absolute right of the individual to restrict the entry of unwanted material into one's home and has created an exception to the free speech.

[24] 420 U.S. 469 (1975)- In an unanimous decision, Justice White held that the interests of privacy "fade" in cases where controversial "information already appears on the public record dealt with the issues of privacy and press freedom."

[25] Katz v. U.S., 389 U.S. 347(1967)

In this sense, countries globally realized the importance of protection of privacy interests on every occasion and such necessity has been grown up with much technological advancement and the increasing tendency of governmental intrusion. In the present times, privacy therefore is an indispensable structural feature of liberal democratic political systems.[26]

Right to Privacy: An International Human Right Perspective

Internationalization of Privacy Rights has developed the auspices of the United Nations all over the world. Presently, all international, national and regional laws are the reflection of a universal agreements signed under the UN Charter.

Since its inception, reaffirmation of faith in human rights and dignity in the post-world wars eras has been the one of the principle objectives of the United Nations Organization. Art. 1 of the U.N. Charter proclaims that one of the purposes of the *U.N. is to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedom for people without distinction as to race, sex, language or religion.*

As steered by principle and purposes of the UN Charter, in 1948, the Universal Declaration of Human Rights, a milestone instrument in the history of human rights, effectively recognized the right to privacy among every individual and every organ of the society as an inalienable right to man. Art. 12 of the Universal Declaration of Human Rights states,

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference and attacks."

Art. 19 of the Universal Declaration of Human Rights ensures the right to privacy against unreasonable interference by media while exercising their freedom of speech and expression. Art. 19 of the said Declaration states as,

"Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinion without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers."

Subsequently in 1950, the European Convention on Human Rights was adopted in 1950 as a reaction to a large number of violations of human rights in the Second World War. This Convention was drafted on the basis of the United Nation's Declaration on Human Rights to protect human rights and fundamental freedoms. Art. 8 of the Convention ensures the right to privacy in the following words,

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedom of others."

In 1966, the International Covenant on Civil and Political Rights (ICCPR) adopted by General Assembly imposed an obligation upon all the states to promote recognition of the inherent dignity and of the equal and inalienable rights of all humans. The Civil and Political Liberties enumerated under ICCPR were regarded as the First Generation of Human Rights and privacy was recognized as one under Art. 17 of the ICCPR, simliar to Art. 12 of the UDHR 1948.

Based on the above provisions, it is pertinent to note that right to Life remains incomplete without the guarantee of Right to Privacy, which is a civil and political guaranteed under the Bill of Rights. The International Covenant on Economic, Social and Cultural Rights, 1966, the Convention on the Elimination of All Forms of Discrimination against Women, 1979, the Convention on the Rights of the Child, 1989 & the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 are also significant in order to understand the different facets to privacy.

The Convention on the Rights of the Child, 1989 recognized that children are not possessions, but people who have human rights. Article 16 of the said convention affirms the protection of privacy of children in the manner similar under Art.12 of UDHR. Correspondingly under Art. 14 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, the right to privacy of migrant workers and member of their families are protected.

It is apparent that a prominent position of privacy in the human rights jurisprudence hence formulated the necessity to understand the importance of the right to privacy and to establish a protective regime for privacy.

In 2015, the Human Rights Council appointed the UN Special Rapporteurs on the Right to Privacy through its Resolution 28/16 mandated to promote and protect the

[26] Julie E. Cohen, WHAT PRIVACY IS FOR, Harward law review, Vol. 126, pp 1904-33 at p 1905

right to privacy.[27] The Special Rapporteur is mandated to seek credible and reliable information from Governments, non-governmental organisations and any other parties who have knowledge of situations and cases relating to privacy by:

- Reviewing government policies and laws on the interception of digital communications and collection of personal data
- Identifying actions that intrude on privacy without compelling justification
- Assisting governments in developing best practices to bring global surveillance under the rule of law
- Articulating private sector responsibilities to respect human rights
- Helping ensure national procedures and laws are consistent with international human rights obligations.[28]

Likewise, many Regional Human Rights Convention also have been emphasized the importance of privacy as a human right and its need for legal protection. One such notable conference is the American Convention on Human Rights, 1969 wherein right to privacy incorporated under Art. 11.[29]

It is worth mentioning that the scope and ambit of the international legal scenario of human right is very vast and ever evolving. However, the interrelation between privacy and human right is such that one cannot separated from each other. Privacy is an existential condition of human life and United Nations has played a very important role for the protection of right to privacy in the international arena.

Right to Privacy in India: An Analysis of Judicial Pronouncements

Under the Indian Constitution, a general right of privacy can be read under the Article 19, 21, 22, 25 and 300A. Under Article 19(1) (a), the Indian Constitution provides a right to freedom of speech and expression, which implies that the person is free to express his will about certain things. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Additionally, Article 22 states that a person is secured from unreasonable arrests and under Article 25, the person is entitled to propagate and profess any religion. Article 300A provides that the privacy of property is also secured unless the law so authorizes i.e. a person cannot be deprived of his property unlawfully.

The judicial evaluation of the right to privacy can be traced from Kharak Singh v. State of U.P.[30] where a six-Judge Bench held that the right to life to mean right to dignified life. In the minority opinion of Subba Rao, J., it was stated that the word 'liberty' in Article 21 was comprehensive enough to include privacy also. He said that although it is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the right is an essential ingredient of personal liberty.

Subsequently, Mathew J. in Gobind v. State of Madhya Pradesh[31], upheld if the right of a person to be let alone or the right to privacy was considered as a fundamental right under Article 19, but it cannot be absolute and subject to some reasonable restrictions.

The Supreme Court in subsequent decisions of Malak Singh v State of Punjab and Haryana[32], State of Maharashtra v Madhukar Narayan Mardikar[33] held the right to privacy to be part of the civil right but was never perceived as a fundamental right under the Part III of the Indian Constitution.

In case of R. Rajagopal v. State of Tamil Nadu[34], the Supreme Court has tried to harmonize the conflicting interests of Privacy, Defamation and Freedom of Expression for the establishment of an egalitarian social order and held that acitizen has a right to safeguard the privacy of his own, his family, marriage, etc. No one can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical barring few exceptions.

In People's Union for Civil Liberties v. Union of India[35], also known as the telephone-tapping case, Justice Kuldip Singh held that telephone-tapping has been and would always be the serious invasion of the Privacy of individual citizens. Mr. "X" v. Hospital "Z"[36] and Vijay Prakash v. Union of

[27] https://www.giplatform.org/actors/united-nations-human-rights-council visited at 23/09/2021
[18] Ibid.
[29] Article 11 reads Right to Privacy: "1. Everyone has the right to have his honour respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attack on his honour and reputation. 3. Everyone has the right to protection of the law against such interference or attacks."
[30] AIR 1963 SC 1295
[31] AIR 1975 SC 1378
[32] (1981) 1 SCC 420
[33] (1991) 1 SCC 57
[34] (1994) 6 SCC 632
[35] AIR 1997 SC 568
[36] AIR 1999 SC 495

India[37] are also notable judgment on the right to privacy.

It wasn't until the unanimous 9- bench decision in case of the Justice K.S. Puttaswamy v. Union of India[38] that the privacy was recognized as a fundamental right guaranteed within Article 21 in particular and Part III on the whole. The court noted that life and personal liberty are inalienable and inseparable for a dignified human existence. They are inherent, intrinsic and inseparable part of the human element subject to permissible restrictions on fundamental rights.

Legislative Overview of the Privacy in India

Currently in India, there is no specific legislation dealing with privacy and data protection. The protection of privacy and data can be derived from the Indian Constitution and various laws pertaining to information technology, intellectual property, crimes and contractual relations.

The right to privacy under the tort law can be understood from the principles of nuisance, trespass, harassment, defamation, malicious falsehood and breach of confidence. The tort of defamation involves the right of every person to have his reputation preserved inviolate. The provisions of Indian Penal Code can also be read to provide for the protection for the privacy and imposes criminal liability in case of violations[39]. Specific inter-personal relationships the Evidence Act, 1872 are given legal recognition wherein one party is obligated to maintain a certain measure of confidentiality.[40] Parties to a contract, governed by Indian Contract Act, 1872, may agree to regulate the collating and use of personal information gathered, viz.by means of a "privacy clause" or through a "confidentiality clause". Similarly, the Information Technology Act, 2000 also contains specific provisions intended to protect electronic data[41] and individual's privacy and punishment for violating the same in any electronic form.[42]

Based on the recommendations of the Sri Krishna Committee Report The first ever attempt to protect privacy of an individual in the digital sphere was made by the introduction of Personal Data Protection Bill, 2019 in Lok Sabha and seek to provide for protection of personal data of individuals, and establishes a Data Protection Authority for the same. The Bill governs the processing of personal data by: (i) government, (ii) companies incorporated in India, and (iii) foreign companies dealing with personal data of individuals in India. The Personal Data Protection Bill, 2019, being deliberated by the Joint Parliamentary Committee, is expected to provide comprehensive requirements for authorized collection and management of personal data. The proposed Bill, despite several shortcomings, does offer significantly more protection than the current framework consisting of S. 43A of Information Technology Act, 2000 and the concerned Information Technology (Reasonable Security practices and procedures and sensitive personal data or Information) Rules, 2011.

The failure of the legislation to enact this bill has put the privacy of all the citizens of India in the greedy hands of the multinational giants. The lack of a national privacy policy has exposed the interests of individual to be exploited freely and inhibited by the practices of commercial enterprises. Issues related to the updated privacy policy of WhatsApp and commercial exploitation out by the absence of a national legislation on the matters of privacy.

Conclusion

To summarize, privacy has both material and philosophical aspects. At its core, the nature of privacy is characterized by freedom of individual human beings from any outside interference, safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life.

Privacy as inherent and inalienable human right is a well recognized concept under the international as well as national area. United Nations, other international & regional agencies along with judiciary have developed a complete idea on the protection of privacy interests of individuals.

Being a developing country, privacy is a complex issue for India. As much as, it is a necessary measure to protect personal data as an essential part of informational privacy, the growth of the digital economy is also essential to open new horizons of socio-economic growth of the country. Recognition of privacy as a fundamental right after a landmark judgment by a nine-judge constitutional bench of the Supreme Court on August 24, 2017, India needs to find practical ways of ensuring its implementation, specially in the digital sphere. It will take a great time and effort on the part of the Indian government to protect and educate the Indian citizens to the penetration as well as exposure caused by the continuously growing digital technology. The government policy also should be an balancing act between the growing digital economy and the privacy of the citizens.

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[37] AIR 2010 Delhi 7
[38] (2017) 10 SCC 1
[39] Ss. 403, 354 A to D
[40] Ss. 123-126
[41] Ss.43 & 43A
[42] S. 66E

Rehabilitation Policy in India: Victim and Witness

Dr. Bhupesh Rathore*

ABSTRACT

"Nowhere did the Indian legislature and judiciary define a 'victim of crime'. In this regard, we can rely on the Declaration of the Joint National Council on the Principles of Justice and the Abuse of Power, adopted in November 1985, which provides a full definition of this expression in Articles 1 and 2". "On the other hand, rehabilitation means restoration of useful life or restoration of good health, function or strength through treatment and education".The concept of rehabilitation is that people do not commit permanent crimes and that it is possible to return an offender to a useful life, the life to which he or she has committed, and to society. The term "rehabilitation" refers to the process of restoring a person's productive life through therapy and education, as well as the process of restoring excellent health, operation, or capacity. Criminal recidivism, often known as re-offending, is the goal of rehabilitation. The rights of the accused or convicted are well protected by the Constitution and other laws of the land, which is often discussed and debated in various forums, but in all this, there has never been any reference to the "rights" of the victims of the crime regarding rehabilitation.[1]

The Concept and Position of Victims

Criminal rehabilitation is a method of assisting inmates in growing and changing by removing them from the natural forces that drove them to commit crimes in the first place. The goal is to treat each of the key consequences to help an offender lead a crime free life after he or she is released from jail. One of the most difficult issues for convicts is that they have been in prison for so long that they are unable to work outside of the country. This motivated some of them to conduct crimes to return to prison and avoid being caught. So, what rehabilitation programmes are in place to help inmates become more socially responsible while also removing them from all environmental risks? Some fundamental rights are reimbursement, right to be an advocate of his choice, right to heard, attend, informed and participation in criminal justice proceedings, right to protection from intimidation and harassment, right to speedy trial, right to restitution from the offender, right to prompt return of personal property seized as evidence and the victim shall also have the right to choose appeal of any order issued by the court which acquits the defendant or is convicted of a minor offense or grants less partial compensation, and that appeal to a court will be granted.[2]

In addition to strengthening reimbursement for victims, the new law should address other needs of victims, including medical and psychological care, economic care, immediate safety and security, and long-term rehabilitation.[3]

"Rehabilitation for Victims of Crime - Special Cases"

Rehabilitation of Victims of Custodial Offenses- The constitutional right of a victim of a custodial offense to receive compensation was reiterated by the Supreme Court in *Nilabati Behera* v *State of Orissa*.[4] The Court recognized that imputing the heirs of victims of custodial violence was not sufficient for standard treatment of trial. The right to seek relief publicly from the courts exercising their writ jurisdiction was clearly recognized. Further in *D.K.Basu* v. *State of West Bengal*, the Court explained that the award of compensation is within the jurisdiction of law without prejudice to further action like suit for damages which is legally binding on the victim or the heirs of the deceased victim."[5] In respect of an equivalent case for an atrocious act committed by State functionaries ... "Relief for wrongful redress from the established infringement of the fundamental rights of a citizen under the jurisdiction of common public law, thus, in addition to the general is in the treatment and not in their humiliation."[6]

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1 Article1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. Article 2- A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

2 (1993) 2 SCC 746.

3 Section 374 (20 and (3) of the Code of Criminal Procedure, 1973

4 (Manupatra)

5 (Manupatra)

6 (1993) 2 SCC 746.

"Rehabilitation of Torture Victims"

"The National Human Rights Commission of India provides appropriate incentives for the rehabilitation of torture survivors. Headed by a former Supreme Court judge, the National Human Rights Commission reviews human rights violations such as torture and recommends measures of relief and justice through local state governments."[7] It is sometimes recommended to impose fines to supply the necessary funds for rehabilitation and other compensation for injuries to police officers and therefore the responsible police headquarters. While this technology ultimately funds some rehabilitation, it leads to long delays in decision making and compensation recovery.[8]

The name 'victimology' was coined in 1947 by the French ambassador Benjamin Mendelssohn by combining the Latin word "victima" with the Greek word "logos"[9]. To provide a general understanding of abuse, "a crime study from the perspective of the victim who creates people who are hurt or destroyed by the action of another person/group of people. A New Dictionary in the Hebrew Language Victims"[10] defines a 'self-sacrificing person', a person who died in an accident or civilian injury, a victim of war, a victim of the liberation movement, a 'victim of an assault, a victim of a brave and dangerous act', victim patient. In a broader sense, a victim is a person who 'suffers from the fault of another or from his own fault'.The word victim generally means, any person who has suffered or has been grievously injured by injustice at the hands of any other person including the State or nature

The 1985 Declaration of the Basic Principles of Justice for Victims of Crime and Abuse, defines victims of crime as:

1. 'Victims' means, individually or collectively, those who have been injured, including physical or mental injury, emotional trauma, pecuniary harm or serious violation of their basic rights, which is subject to the criminal laws operating within the Member State Violates or violates the laws of prohibition, including abuse of power by offenses.
2. A person may be deemed to be a victim under this declaration, regardless of whether the perpetrators have been identified, arrested, prosecuted or convicted and regardless of the family relationship between the offender and the victim. . The term "victim" includes, where appropriate, the victim's immediate family or dependent and victims of intervention to aid victims of trauma or prevent abuse.[11]

The two most important characteristics of a "victim" are suffering and injustice. Being victimized should be unfair but not illegal. In fact, the word "victim" should not exclude a person who is suffering as a result of a legal proceeding. The USSR Penal Code defines a victim as a person who is indebted to an unlawful, injured, moral, operational or physical offense. It is now clear that the victim is a person who passes through four stages -

1. Experience of injury, injury or suffering,
2. To see the threat as unreasonable,
3. Application for recognition by a public controlling agency (police),
4. Apply for public recognition (witnesses, the criminal justice system, etc.) and become a real victim.

Privileges of Sufferers and Eyewitnesses [12]-

1. "It shall be the duty and responsibility of the Government to make arrangements to protect the victims, dependents and witnesses from any form of threat or coercion or coercion or violence or threat of violence."[13]
2. The victim shall be treated fairly, respectfully and with respect and care for any special needs arising out of the victim's age or gender or educational or poverty.
3. The victim or dependent shall be entitled to proper, accurate and timely notice of the proceedings of any court relating to the execution of bail and the Chief Public Prosecutor or the State Government shall inform the victim of any proceeding under this Act.
4. The aggrieved or dependent shall have the right to apply to the Special Court or the Special Court, as the case may be, the parties shall have the right to produce any document or material, call upon the persons present to see or inspect it.
5. "The victim or his dependent shall be entitled to be heard in any proceeding under this Act in respect of the defendant's bail, release, release, parole,

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[7] (1997) 1 SCC 416.
[8] Human Rights & Human Rights Instruments in India'
[9] Ibid.
[10] Right to compensation of victim crime, victimization & victimology in Bangladesh perspective, available at: http://www.iosrjournals.org/iosr-jhss/papers/Vol.%2022%20Issue7/Version9/J2207098188.pdf (last visited on June 23, 2012).
[11] Ibid.
[12] Ins. by s. 11, ibid. (w.e.f. 26-1-2016).
[13] (Act, 2019)

conviction or sentence or any other related proceeding or disputes and shall make a written presentation of his conviction, conviction. or punishment."[14]

6. "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a Special Court trying a case under this Act shall provide to the victim, dependent, informer or witness"[15]—

   (a) full security for the purposes of justice;

   (b) the cost of travel and maintenance during the investigation, inquiry and testing;

   (c) social and economic rehabilitation during investigation, investigation and trial; and

   (d) Transfer.

(7) "The State shall inform the concerned High Court or the Special Court of the protection granted to any victim or person of maintenance, knowledge or witness and that Court shall from time to time review the security granted and issue appropriate orders."[16]

(8) Without prejudice to the provisions of sub-section (6) at the request of an aggrieved or dependent person, the concerned High Court or the Special Court which has knowledge or testimony of any proceeding before him or his or the Special Public Prosecutor. Respect for that victim, informed or witness, to take such steps which may include-

   (a) conceal the names and addresses of witnesses in his orders or judgments or in any other record of public record;

   (b) issuing signs of non-disclosure of the ownership and address of witnesses;

   (c) "take immediate action in respect of any complaint relating to harassment of an abusive, informed or witness person and on the same day, if necessary, issue an appropriate protection order:"[17]

"Provided that the inquiry or inquiry into a complaint received under sub-section (c) shall be heard by the Court separately from the main case and shall be completed within two months from the date of receipt of the appeal:"[18]

Provided that in the event that the appeal under sub-section (c) conflicts with any public service, the Court shall prevent that public service from harassing the victim, informer or witness, as the case may be, in any matter related or unrelated trial without the concurrence of the court pending in.

(9) "It shall be the duty of the Inquiry Officer and the Presiding Officer to register the complaint of the victim, who has knowledge or witnesses of any kind of intimidation, coercion or incitement or violence or threat of violence, whether orally or in writing. , and a copy of the First Information Report shall be made available immediately."[19]

(10) "All proceedings relating to offences under this Act shall be recorded on video."[20]

(11) It shall be the duty of the State concerned to lay down proper procedure for ensuring the exercise of the following rights and entitlements of the victims and witnesses in the administration of justice—

   (a) provide a copy of the pre-recorded preliminary information report free of charge;

   (b) to provide immediate cash or cash assistance to the victims of cruelty or dependents;

   (c) provide necessary protection to the victims or their dependents and witnesses;

   (d) to render assistance in the event of death or injury or damage to property;

   (e) to provide food or water or clothing or shelter or medical aid or transport or daily allowance for the victims;

   (f) providing maintenance costs for the victims and their dependents;

   (g) to provide information about the rights of victims of cruelty during the filing of complaints and registration of First Information Reports;

   (h) to protect the victims or dependents and witnesses from intimidation and harassment;

   (i) to provide information by way of inquiry and bill of lading to victims or dependents or related organizations or individuals and to provide a copy of the billing sheet free of charge;

   (j) take necessary precautions during a medical examination;

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[14] (Act, 2019)
[15] (Act, 2019)
[16] (Act, 2019)
[17] (Act, 2019)
[18] (Act, 2019)
[19] (Act, 2019)
[20] (Act, 2019)

(k) to provide information to the victims or dependents or organizations or individuals regarding the amount of assistance;

(l) to provide advance information about the dates and places of investigation and trial to victims or dependents or organizations or individuals;

(m) to provide adequate information on the matter and to arrange for the trial of the victims or dependents or related organizations or persons and for that purpose to render legal aid;

(n) to exercise the rights of victims of violence or their dependents or related organizations or persons at all stages of the process under this Act and to provide necessary assistance for the realization of the rights.

(12) Victims of cruelty or dependents shall have the right to seek the help of NGOs, social workers or lawyers.

The Concept and Position of Witness

Witness "has been a key player in the fight for justice over the years. The foundation of justice requires that truth and fairness be the end of justice. This brings the role of the observer or third party as the witness to confirm or report the ingredients"[21]of the incident to criminal justice agencies. The sanctity of the statements made by the witness is believed to be as accurate and true as those made under oath. Therefore, the role of witnesses was crucial in helping the judiciary. The word 'witness' is not defined in any Indian law.

"Calling a witness to give evidence in a trial is not a new thing. It was also present in ancient India. Kautilya in his famous work 'Arthashastra'[22] "states that "the parties themselves shall present witnesses who are not distant or time or place. Witnesses who are distant or who will not go shall be made to present themselves on the orders of the judge."[23] However, the official understanding of the term is clear. A witness can be described as giving evidence in a trial; A person who doesn't care about every group, who has sworn to tell the truth, the whole truth, and nothing but the truth.

Halsbury's Law of India has divided witnesses into different categories such as;

- Eyewitness account,
- Natural witnesses,
- Witness the witness of the occasion,
- Witness legal witness,
- Lone witness,
- Witnesses Wounded Witnesses,
- Witnesses of independent witnesses,
- Witnesses relating to participants
- Witnesses of identical witnesses,
- Be a witness,
- Witnesses of key witnesses,
- Witness child witness,
- Witnesses of hostile witnesses,
- Approvers, collaborators etc.

Legal Provisions for Witness Protection

Like many other countries in India, there is no specific law that provides protection only for testifying. "However, there are some provisions in the Indian Evidence Act, 1872. Section 151 and 152 protect witnesses from insulting", embarrassing, objectionable questions and questions that offend or insult them. Apart from these provisions, there is no provision for the protection of witnesses in India. This fact was accepted by the High Court in the case 'NHRC v. State of Gujarat' (Bajpai)[24],[25] where it said 'no commandment has been passed, there is no scheme for the protection of witnesses by the National Govt. The Supreme Court observed that 'there is a need for protection of witnesses as the time has come for serious and irreverent considerations to protect the witnesses so that the full truth may be presented before the court and justice may prevail and not dilute the case'. The Highest Court in its several decisions on all types of cases has agreed some indications of the need to protect witnesses. The Delhi High Court has issued guidelines for protection of witnesses in *Ms. Neelam Katara* v. *Union of India. Supreme Court in cases like NHRC* v. *State of Gujarat*[26] *PUCL* v. *Union of India";*[27] *Zahira Habibullah H. Sheikh Nabane* v. *State of Gujarat*'[28] *and Sakshi* v. *Union of India*'[29] have highlighted the necessity for lawmaking on this issue. In *Kartar Singh* v. *State of Punjab*'[30] the Highest Court sustained the legitimacy of sections 16(2) and (3) of the

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[21] (Bajpai)
[22] (Bajpai)
[23] Kautilya, Arthasastra, Book J, Chapter 11, Verse 50; Kangle, Kautilya Arthasastra (University of Bombay) (1970), Part IInd, Page 230
[24] (Bajpai)
[25] NHRC v. State of Gujarat: (Best Bakery Case) (2003)
[26] 2003(9) SCALE 329
[27] 2003(10) SCALE 967
[28] 2004(4) SCC 158
[29] 2004(6)
[30] 1994 Cri LJ 3139 (SC)

TADAAct, 1987, which provided the court the power to recognize and in certain circumstances the address of confidential witnesses; To proceed at a place fixed by the Court and to keep the names and addresses of witnesses of its order. The Supreme Court in Delhi Domestic Working Women's Forum v. Union of India' [31] has emphasized on the care of anonymity of sexually abused victims who will be eyewitnesses in matters connected with the rape case. In *Zahira Habibulla H. Sheikh and Another* v. *State of Gujarat and Others*[32] the Supreme Court reminded the state that it is their constitutional duty and duty to protect the health and liberty of citizens.

A brief review of the existing legal framework and judicial contribution for the right to rehabilitate victims reveals that, apart from the area of compensation, little has been done legally or with plans to address the full range of issues facing victims. . The development of the victim's right to compensation is at an early stage. We can learn and improve in various endeavors, first of all to rehabilitate victims. While there will always be debate about what can and cannot be given, it is time for the legislature to introduce a variety of promising programs to rehabilitate the most vulnerable victims to forget their plight".

There is a need to revise the current status of India Rehabilitation Schemes in India. The provisions under CrPC may not meet the growing needs of the victims. In order to provide fair, social and legal justice and facilitate renewal, the new special legislation needs to align with those of the US and UK such as:

1. "Fair, considerate and sympathetic treatment by police, hospitals, social organizations, prosecutors and courts";
2. "Immediate reimbursement/compensation to the victim for injuries or damages caused through existing arrangements; and"
3. Protecting Victims and Potential Victims of Future Violence

The struggle for victims to gain legal rights within the criminal justice system still continues in many areas.

[31] (1995) 1 SCC 14
[32] Supra at p 63

Book Review

"Supreme Whispers" Conversations with Judges of the Supreme Court of India 1980-89

Ms. Sarita*

Having the advantage of being unbiased and impartial is a confusion. At the point when you place the greatest possible level of dependence on the explainer of law sitting on the most elevated court of this country, you expect equity to be to be sure served without bias. In any case, there is no ideal man, for he would some way or another be called God. "Supreme Whispers "composed by Abhinav Chandrachud is a convincing genuine novel which astoundingly highlights the secretive shut entryways of the Supreme Court of India during the 1980s. A look into the existences of the then Supreme Court judges whose changed conviction frameworks have affected legal understanding. The creator draws together series of impacts and examples recognized from a progression of meetings directed by a researcher Prof. George H. Gadbois Jr., with different adjudicators of the Supreme Court of India, legislators, proficient senior legal advisors and relatives during 1980 – 1989.

The book is incorporated under six heads featuring the noticeable parts of the legal residency of a Supreme Court judge in this way noteworthy, surprising realities of the legal outlook winning around then. Under the primary part named "Judicial Rivalries", the peruser is presented to intense contentions between the appointed authorities who battle battles concerning political goals, proficient feelings of disdain, closely held individual beliefs with each other particularly calling attention to the tussle between the central equity and the most senior adjudicator of the Supreme Court.

As the book advances further, under the subsequent section named "Disagreement without Dissent" the writer draws out the differentiating idea of the recently recognized individual skirmishes of the adjudicators between one another which doesn't express on paper.

Which means, notwithstanding judges having shifted contrasts among themselves, in spite of there being conflict on legal translation, at last, the court presents an assembled front without contradicting assessments. There is a trace of concealment of voice of the referee of law now and again by restriction practiced because of specialized parts of rank.

Under the third section named "Special Leave, a Special Burden", one reason for absence of contradiction among the appointed not really settled. The well-known idea of Special Leave Petitions and the weight that it forces upon passes judgment on passing on them with less or no an ideal opportunity to proliferate a disagreeing assessment is clarified. At the point when a huge part of an adjudicator's useful time is put resources into hearing the occasionally unnecessary uncommon leave petitions, an appointed authority neglects to dedicate his idea towards communicating dispute when required just in light of the fact that it is an extra assignment for an adjudicator to repeat a disagreeing judgment. The section features the liberal uniqueness brought out by the Supreme Court judges of Independent India when contrasted with the past rigid technique took on by the Privy Council in hearing exceptional leave applications leaving unnecessary burden on the adjudicators.

In the fourth section named "Decliners", an intriguing field of legal arrangements is portrayed. This section manages the individuals who rejected the colourable lofty proposal of height to the Supreme Court. Numerous legal counselors have turned down the alluring judgeship giving different reasons, for the most part featuring the helpless view held by the vast majority in the legitimate brotherhood about the legal position. However much one would consider it an honor to be elevated to the Supreme Court as an appointed authority, the position is shown as a cover uncovering poor monetary status of the adjudicators inferable from the compensations and absence of chance of free reasoning.

Under the fifth part named "The Fictional Concurrence of the Chief Justice", the steadily growing leader effect on legal declarations and arrangements is exposed. What ought to be a region where the Chief Justice be given a chance to select adjudicators to the court contingent on lawful type, colossal obstruction by the Executive with stowed away political plan

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prompts subverting the freedom of legal executive. A view into the disgusting strategies of moves, super sessions and non-affirmation of arrangements utilized by the Executive to threaten the Chief Justice and different adjudicators into tolerating arrangements goes to feature that an autonomous legal executive is a fantasy. The part further clarifies the weapons brought out by the legal executive in handling leader impact as the collegium framework.

In the last section named "Criteria for Selecting Judges", different implicit rules are embraced by the adjudicators just as the chief government in naming appointed authorities to the Supreme Court with an end goal to find some kind of harmony, a few reasons being beneficial while some being outlandish. A plenty of components like territorial foundations, minority status, political beliefs and leanings, uprightness, individual propensities and so forth, are found in dynamic play while making legal arrangements. Of course, the value of an appointed authority is thought about as well.

This book endeavors to introduce before it peruses the endless biases and reasonings that are depicted at this point skillfully veiled by the Supreme Court. Everything isn't well in the engine. Notwithstanding this being a record from the 1980s, most wonders got from these meetings keep on being valid, pertinent and in presence even right up 'til the present time. The book urges the peruser to hold an unbiased view and respect towards the 'preeminent' legal executive while truth be told showing that nobody is liberated from predisposition. What one can realize is that the 'legal attitude' is essentially an impression of 'customary human idea'. An exceptionally grasping book prescribed for the peruser to test inquiries against the colossal regard and esteem set upon the legal executive.

Book Review

“Not Enough: Human Rights in an Unequal World" by Samuel Moyn Cambridge: Harvard University Press, 2018

Mr. Harsh Kumar*

“Samuel Moyn breaks new ground in examining the relationship between human rights and economic fairness. If we don't address the growing global phenomenon of economic inequality, the human rights movement as we know it cannot survive or ?ourish.”

—George Soros, Hungarian-born American investor, and philanthropist

From the very inception the regime of human rights has been always favorable to the richest class of people. Indeed, even as state infringement of political rights accumulated uncommon consideration because of common freedoms crusades, a guarantee to material fairness vanished. In its place, market fundamentalism has arisen as the predominant power in public and worldwide economies. In this thought provocative book, Samuel Moyn examines how and why we decided to make common liberties our most elevated standards while at the same time dismissing the requests of a more extensive social and financial equity.

In his book Not Enough: Human Rights in an Unequal World Samuel Moyn contends not that the human rights development has caused this blast in imbalance, but instead that basic human rights and the basic human rights development (as of now established) never really prevented this pattern from arising and speeding up and isn't capable of switching it. Moyn's primary case is that for the contemporary human rights development, social and economic rights have been conceptualized as giving an essential least (or adequate) measure of what he terms "the beneficial things throughout everyday life” and keeping in mind that this has electrifies thoughtfulness regarding issues of worldwide destitution it has never really stemmed the blast of disparity inside or across countries.

Truth be told, Moyn contends that the worldwide human rights development and neoliberalism have had the option to exist together for quite a long time absent a lot of dread of the last superseding the previous: "To a frightening degree, common liberties have become detainees of the contemporary period of imbalance". This is the finish of Moyn's book, yet to arrive he takes the peruser on an exceptionally intriguing and genuinely necessary history of social and economic rights, showing that there has been a longstanding discussion with respect to whether social and monetary privileges ought to incorporate just adequacy or additionally be extended to incorporate material equity too.

In a spearheading history of rights extending back to the Bible, Not Enough graphs how 20th century government assistance states, worried about both extreme poverty and growing abundance of wealth, made plans to satisfy their citizens' most fundamental requirements without neglecting to contain how much the rich could overshadow the rest. In the wake of two world wars and the breakdown of empires, new states attempted to take government assistance past its original European and American countries and ventured to such an extreme as to challenge disparity on a worldwide scale. In any case, their plans were failed as a neoliberal faith in business sectors won all things considered.

Moyn places the vocation of the Human rights development comparable to this upsetting movement from the egalitarian politics of yesterday to the neoliberal globalization of today. Investigating why the ascent of human rights has happened close by suffering and detonating disparity, and why activists came to look for solutions for neediness without challenging the disparities of wealth, Not Enough demands for more yearning standards and developments to accomplish a sympathetic and fair world.

Moyn then, at that point, shows how the discussion about advancement moved from the ideal of a libertarian world to a dream of putting basic essentials first. The World Bank official Mahbub ul Haq accepted that the need ought to lighten the enduring of poor people, an idea that informed the creation regarding the Human Rights Development Index. The 'essential need' approach at first had a stressed relationship with basic liberties, however progressively the two began to cover each

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other. Moyn then, at that point, follows how worldwide equity hypotheses developed during the 1970s when Peter Singer expounded on famines in East Bengal. Moyn contends that Charles Beitz's more libertarian vision of worldwide equity was the 'road not taken', and, all things considered, Henry Shue's idea of privileges, which upheld for a base norm of security for everybody, came to rule the arising philosophical talk. In the last section of the book, Moyn exhibits that common liberties overall turned out to be considerably more famous exactly when neo-radical monetary strategies were being carried out in Chile, the USA, Great Britain and later in Eastern Europe. Moyn claims that despite the fact that basic liberties didn't support neo-progressivism, as its 'doppelgänger' and 'sidekick' they don't do anything to limit its unfortunate results. With the ascent of neo-radicalism, the ambition of distributive equity was lost.

Moyn's original account of the development of various thoughts regarding worldwide equity is rousing. It is a specific strength of Moyn's methodology that he arranges the historical backdrop of monetary and social privileges in the bigger political and philosophical discussions about uniformity and adequacy. In his doing, we get an insight of the other options and possibly botched chances of other worldwide equity projects that were sidelined by basic human rights. Notwithstanding, the wide setting here and there prompts an underestimation of the legal documents that involve monetary and social privileges and the acts of the establishments liable for maintaining them. For example, despite the fact that Moyn portrays the adoption of the ICESCR as an 'epoch making event' throughout the entire history of monetary and social rights, he examines its advancement and effect in just three pages. Additionally, Moyn might have dug further into the advancement of social privileges law in some public courts since the 1990s and might have investigated the General Comments of the Committee on Economic, Social and Cultural Rights or the report of the UN Human Rights chief on severity gauges all the more completely. Moreover, when Moyn presents the NIEO as the prevalent option 'road not taken', he fairly makes light of that redistributive cases with regards to the NIEO were likewise part of the way outlined in basic freedoms language. For example, Moyn doesn't make reference to the 1973 report on The Widening Gap by the Iranian Manouchehr Ganji as unique rapporteur of the United Nations (UN) Commission on Human Rights and doesn't investigate how the Senegalese attorney KéboM'Baye connected the NIEO conversations with the right to development. Obviously, it is additionally a fact that the strength of Moyn's narrow review is that it comes at discernible length and is open to legal counselors, political researchers, and history specialists the same. Regardless, future examination ought not avoid diving further into the historical backdrop of economic & social rights practices of human rights bodies and courts in light of the fact that Moyn's scholarly history lets part of the institutional history unexplored.

Case Comment

Laxmibai Chandaragi v State of Karnataka
(Writ Petition [Criminal] NO.359/2020)

Dr. Arti Sharma*

The learned court in this case has validated inter -marriage of young couple who belonged to different community, though both were highly educated and decided to settle their life .It has been affirmed that that the right to marry is a part of Article 21 which emphasize upon the right to live a dignified life as per the choice and free will of young generation who may apprehend or face threat from their parents and relatives upon the basis of caste or community.

The complaint was filed at the police station of Murgod, situated at Savadatti Taluk, Belagavi District by one Basappa Chandaragi (complainant) whereby he mentioned that his daughter Laxmibai Chandaragi (petitioner No.1) went missing missing on andfrom the date 14.10.2020. FIR waslodged by the parents and relatives of the girl.

Both the parties to marriage had travelled by flight from Hubli to Bangalore and further from Bangalore to Delhi and thereafter got married. The girl then, sent her marriage certificate to her parents through whatsapp on 15.10.2020 and declared to the them about the factum of marriage. The investigation officer asked the petitioner No.1 to appear before the Murgod police station to

Learned Court stated that the young generation is ready to choose their own companion for life being devoid of the early norms of the society whereby caste or community were considered as a matter of paramount importance. Such inter marriages may result into reducing the caste or communal tensions because the young generation nowadays are much interested and capable of selecting their own companion due to which they face threats from the elders.

Thus, Courts have been coming to the aid of these youngster because with the passage of time there occurs a great change in the temperaments of new blood and they must be allowed to live a dignified life without any threat from any side as right to marriage has been considered as part ofArticle21 of the Constitution. The consent of young couple must be considered as prime basis and should not be evaded on the rash basis of group thinking. Inter marriage has been considered as valid concept to be given importance in consonance with the development of time. Article21 of the Constitution of India has been emphasized that a person shall not be deprived of life or liberty rather than in accordance with the law .It has been affirmed that two adults have right to do marriage and live as per their wishes .Thus, right to life includes right to live with free will and without any sort of interference. The writ petition has been filed under Article 32 of Constitution of India because the girl (petitioner) in the present case alleged that she has been threatened by her parents. However, parents took a plea that if girl return to parents home ;then they may better accept the marriage. FIR was quashed. Honorable court stated that to allow and accept inter-marriage may serve as the only remedy to curb the menace of caste system. However honorable court failed to appreciate the moral values inculcated in the family. What about the family of girl who had lost the rights over their girl all of sudden. If their rights have been lost due to their girl attaining majority and due to completion of her studies. Marriage has been considered as crucial part of life and it is the need of time that young people be allowed to choose partner with their free will ; but it is a part whereby parents may have to play a crucial role. It is not only about choice of partner but here court have failed to underline the concept of balance between family ties and children choice.

Honorable court failed to appreciate the rights of parents in helping children to decide their life partner's choice or duty of children to consult parents before deciding regarding their marriage. Isn't it vanishing of moral values of children and destructing the structure of family by disallowing parent's to conduct children's marriage.

Is it all about inter-marriage? Is it all about caste ?Whether the only remedy to curb the menace of caste is inter-marriage?

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The answer to this question is No.

The learned court quoted that the inter-marriage may be better step to reduce anxieties, tensions and grudges among the communities and castes and thus, consent of community or caste is not much necessary. This viewpoint may not be much acceptable in our country where litigation is very much imbibed into the minds of people and they want to settle their scores through the institutionalized mechanism of dispute resolution. They do not hesitate to file cases on one pretext or the other. Thus, inter -marriage may create a root cause of the dispute for people may take it as egoistic concept.

Thus, when there occurs a clash of interest, reconciliation of conflicting interest needs to be made. Judiciary must have to come forward to balance the conflicting sections of society. Its not only about one couple who eloped to get married and its to remembered that family is the basic unit of society. How far it is relevant to allow one family to be disrupted to allow other family to rejuvenate (family of girl and her husband) in this case. Its not much acceptable solution that permission should be granted only to the girl to settle in her life rather her welfare, protection and interest needs to be considered for which it is required that parents should not be deprived of their right over children. Marriage is crucial part of life for youth generation and their parents as well; for parents are supreme well-wisher of their own children. Thus, reconciliation should be made in the mediation centers situated in the courts as the primary duty and objective of mediation is to reduce anxiety, tension, curtail litigation and strengthen the family ties .Thus, it is much required need of time that familial ties, girl' s interest (even though major) and wishes of parents must be balanced and reconciled; for the institution of marriage is a sacrament.

In the present context courts are overburdened and bears a burden of heavy litigation due to which people get delayed justice. Most of litigation filed in the courts may be due to egoistic nature or sentimental issues. Courts are inclined to settle matters through the concept of ADR (alternative dispute resolution) so that a balance may be achieved between overburdened courts and delayed justice. Thus, at this stage it become much imperative need of time to settle the matters through mediation centers at a very early stage. So, matters pertaining to the present case may be carried to the mediation centers whereby anxiety, tension and grudges of families may be reduced in order to save the familial ties.

Case Comment

Mohammad Salimullah v. Union of India, Writ Petition (Civil) no.793 of 2017

Mr. Hardik Daga*

"Right not to be deported' is concomitant to Article 19 and available only to Indian Citizens"Mohd. Salimullah is a public interest litigation filed before the Supreme Court of India seeking to prevent the deportation of 40,000 Rohingya refugees in India. Whilst the principal plea remains pending, on *April 8, 2021, the Supreme Court through a 6-page order in Mohammad Salimullah v. Union of India, rejected Rohingya refugees' constitutional right to remain in India and allowed their deportation by the Government of India, following the legal procedure. The Supreme Court, in its decision held that while fundamental rights under Articles 14 and 21 are available to all persons whether citizens or not, the 'right not to be deported' is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e) and is available only to citizens.*

On 8th August, 2017, the Ministry of Home Affairs issued a letter to the Chief Secretaries of all the State Governments and Union Territory Administrators advising them to take prompt steps to deport the refugees illegally staying in India. News reports originating from various media houses claimed that around 150-170 Rohingya refugees detained in a sub-jail in Jammu face deportation back to Myanmar. Petitioners were one of the said refugees and they claim to have fled Myanmar in December2011 when ethnic violence broke out. Through the petition, the petitioners have sought;

(i) the release of the detained Rohingya refugees; and

(ii) a direction to the Union of India not to deport the Rohingya refugees who have been detained in the sub jail in Jammu.

Petitioners claims were based on ;

(i) that the principle of non refoulement is part of the right guaranteed under Article 21 of the Constitution; the rights guaranteed under Articles 14 and 21 are available even to non citizens; and

(ii) that though India is not a signatory to the United Nations Convention on the Status of Refugees 1951, it is a party to the Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights, 1966 and the Convention on the Rights of the Child 1992 and that therefore non refoulement is a binding obligation. The petitioners also contend that India is a signatory to the Protection of All Persons against Enforced Disappearances, Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment.

The state sought to defend its decision on three grounds:

(i) the subject matter of the petition lying primarily in the executive domain,

(ii) the state possessing intelligence suggesting links between several Rohingya immigrants and terror or extremist organizations, and

(iii) India not being a signatory to the Refugee Convention, 1951 or Refugee Protocol, 1967.

The Court has taken an appropriate step as it is based on sound legal reasoning and not meddling with the government's discretion on matters of national and border security. The claims of the petitioners can very well be refuted by;

1) On the Issue of Refoulement-. The principle of non-refoulement constitutes the cornerstone of international refugee protection, enshrined under Article 33(1) of the Refugee Convention. "Refouler" means to expel or return. The essence of the principle is that a State may not oblige a person to return to a territory where he may be exposed to persecution. However, it is quite important to take into consideration the exceptions to the principle under Article 33(2) of the Convention i.e. when there are reasonable grounds to consider that the person concerned is either convicted of any serious crime or is a danger to the security of the host country. Such reasonable grounds must

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depend on the discretion of the government as gathered by intel sources and people on the ground. Article 51 (C) of the Constitution cannot be evoked in the present circumstances as it is only applicable when India is a party to a convention. India being a non-party to the Refugee Convention, the principle is inapplicable. Petitioners cited Gambia v. Myanmar, a recent decision where the International Court of Justice had taken a note of Genocide of Rohingyas in Myanmar and the lives of these refugees are in danger, if they are deported. There is no doubt that the National Courts can draw inspiration from International Conventions/Treaties, so long as they are not in conflict with the municipal law and national policies. Regarding the contention raised on behalf of the petitioners about the present situation in Myanmar, the Court would not have been correct to comment upon something happening in another country.

2) On the issue of Fundamental Rights- As per Section 2 (a) of Foreigners Act, 1946, the present petitioners are not the citizens of India and fundamental rights as enshrined under the constitution are not available to them (barring Article 14 & 21). But the right not to be deported, is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e) and therefore, the petitioners cannot claim to be subject/beneficiary of this right. Two serious allegations have been made in reply of the Union of India relate to

   (i) the threat to internal security of the country; and

   (ii) the agents and touts providing a safe passage into India for illegal immigrants, due to the porous nature of the landed borders.

Section 3 of the Foreigners Act empowers the Central Government to issue orders for prohibiting, regulating, and restricting the entries of foreigners into India or their departure. The idea of allowing illegal entry into the borders and letting business of agents and touts to provide a safe passage will set a wrongful precedent and will further pave way for such activities, and consequently it will prove to be perilous and detrimental for the security of the nation. The current policy of the government is based on a legitimate concern and the Apex Court was right in not meddling and upholding the sanctity of separation of power.

Case Comment

S. Khushboo vs Kanniammal & Anr (Criminal Appeal No. 913 of 2010)

Ms. Punam Kumari Bhagat*

The landmark judgement is given by the apex court of the country in case of S. Khushboo v. Kanniammal recognizing for the first time that living relationship comes within the ambit of right to life under Art.21 of the constitution. The court held that live-in relationship is permissible, and it cannot be considered as illegal and unlawful when two adults are living together. The court also gave legal recognition to live-in relationships by categorizing them as "domestic relationships" protected under the Protection of Women from Domestic Violence Act, 2005 ("DV Act").

The case has originated when the appellant gave an interview to the India Today channel in which she said that pre-marital sex should be recognized and embraced by society. Later, Dhina Thanthi, a Tamil daily, had an interview with her in which the appellant allegedly defended her views. Several persons and organizations have lodged criminal charges against her under section 499, 500, 504, 505(1)(b) and 509 of the IPC and sections 4 and 6 of the Indecent Representation of women act, 1986. Under Sec 482 of CrPC, she appealed to the High Court to quash those criminal proceedings. The court said that only the trial court had to deal with whether her comments amounted to defamation and her complaint was dismissed. Through Special Leave Requests, she approached the Supreme Court.

There is a radical change in the mind set of the Indian society towards the live-in relationship between the two consenting adults. Earlier a live-in relationship between two people used to get the societal approval of the society when they were legally married else the relationship was morally or legally not acceptable. But today live-in relationship is categorically recognized by the various courts judgement where there is a continuous cohabitation for a longer period between two people who are not legally married to each other but share a common household.

Since there is no specific legislation dealing with live-in relationship in India, the apex court of the country time to time has elaborated the concept and issued the guidelines to deal with such relationships. In the case of *Lata Singh v. State of U.P* (2006)., the Court held that though live-in relationships are perceived as immoral it is not an offence under the law. In this case also the Supreme Court held that living together is a right to life covered under Article 21 of the Indian Constitution; thus, despite being considered immoral by society it is not an offence in the eye of law.

Obviously, the judgment given by the supreme court is a welcoming step in the contemporarily -social machinery, but it is not free from criticism as well.

In case of V.K.V. Samra (2013), the Supreme court classified, live-in relationships into two—domestic cohabitation between two unmarried individuals and domestic cohabitation between a married and unmarried individual or two married individuals. The Court has only recognized the former and not the latter. Even till the time situation is the same.

Again, the supreme court in its previous judgement of Badri Prasad v. Deputy Director Consolidation (1978), and another case of SPS Balasubramanian v. Suruttayan (1994) clarified that children born out of such a relationship would be entitled to inheritance in the property of the parents only. Therefore, such children do not have the coparcenary rights in the property of the Hindu undivided family and cannot claim their ancestral property as their parents were not legally wed to each other when they were born.

The right to a woman in live-in relationship is equally protected under Protection of women from Domestic violence Act, 2005.Live-in relationships are in many respects has the status of marriage, as the couples are living together for a long period and presenting themselves as husband and wife. Thus, they come under the ambit of the PDV Act, 2005, and the woman in a live-in relationship can take protection under this Act, 2005, and can also claim maintenance under sec 125 Cr.P.C. But unfortunately the High Courts of Bombay, Allahabad and Rajasthan have repeatedly refused to grant protection to such live-in couples, citing reasons that a live-in relationship between a married and an unmarried person is illegal. Domestic violence Act, 2005 no where mention that live-in-relationship which is in the nature of marriage will be

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considered as implicit marriage. The prime object of DV Act is to give protection to the wife/ female live in partner from violence committed by their male live in partner. In every case of domestic violence, the violation enquiry is focused on the physical harm caused to the woman and the consequent protection of the woman. Therefore, any denial of protection would be a serious injustice to the women who are suffering.

The key problem is that there is lack of uniformity in the order on live-in couples given by different courts of the country. Recently, on 12 May. 2021, the Punjab and Haryana High Court dismissed protection plea filed by young live-in couple where the girl is 18 years old, and the boy is 21 years old and were demanding protection of life and liberty from the relatives of the girl. The reason assigned by Justice Kshetarpal that if such a plea is allowed to the runaway couples, then the social fabric would be ruined.

In another case Justice Jaishree Thakur of Panjab and Haryana High Court observed that such a relationship may not be acceptable to all, but it will not constitute an offence.

However, in case of *Kamini Devi v. State of UP (2006)*, the Allahabad High Court granted protection to a live-in couple stating that when a major boy and a girl decide to live together nobody, including their parents have the right to interfere in their living conditions and such arrangement between them is not an offence and if anyone interferes with their peaceful living then that will be a violation of their fundamental right to life and liberty under Article 21.

The Delhi High Court, taking a different stand, adopted a wider approach, upholding the rights of a female live-in partner, irrespective of the marital status of both individuals.

The differences in the opinion of the judges of different and the same High courts question the legality and acceptability of live-in relation in India. Though supreme court always protected the live-in couple through its judgement irrespective of the moral and social values. The situation shall continue to exit in Indian society unless and until a specific law in not made on live-in relation. In U.K living relationship is governed by Civil Partnership Act,2004; in the U.S.A, live-in relationships are governed by prenuptial agreements and common law; in Australia, Family law Act recognizes live-in relations; in Canada, such relations are termed as common-law marriages. But in India such a relationship is viewed from moral and ethical perspective. It is the high time to enact proper legislation covering such relationship. After getting legal status the live-in couples can live their life freely and without any threat irrespective of dissenting opinion of the society.

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EDITORIAL POLICY

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We seek contributions in the form of:

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3. Case Comment/Legislative Critique & Notes (Maximum 3,000 words inclusive of footnotes)
4. Book Review (Maximum 2,000 words inclusive of footnotes) besides other forms of scholarly writing

? Place tables/figures/images in text as close to the reference as possible. Table caption should be above the table. Figure caption should be below the figure. These captions should follow Times New Roman 11point.

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6. Citations:

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All Correspondence/manuscripts should be addressed to:

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Annexure I

PLAGIARISM DISCLAIMER

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CASES

IN MAIN TEXT:

Jassa Singh v. State of Haryana

IN FOOTNOTE:

Jassa Singh v. State of Haryana, (2002) 2 SCC 481

The full citation should be provided in the footnote even if the case name has been mentioned in full in the main body.

Government to be written in full.

Example: Kesavananda Bharati v. State of Kerala ; M.C. Mehta v. Union of India.

SHORTENED FORM

If the same case is going to be cited subsequently, the full citation used the first time should be followed by the shortened form by which the case will be referred to subsequently, in inverted commas, and in square brackets.

Example: M.C. Mehta v. Union of India, [1997] 2 SCC 353 [Taj Trapezium case] Subsequent references

Taj Trapezium case, [1997] 2 SCC 353

The shortened form should be used every time after the first time a case is cited.

QUOTES FROM CASES

Per Subba Rao J., "a construction which will introduce uncertainty into the law must be avoided. It is conceded by the petitioner that the power to amend the Constitution is a necessary attribute of every Constitution". (Footnote original citation of case or shortened form as per rules stated above)

Single Judge:

S.H. Kapadia J.

Chief Justice of India

Thakkur C.J.I.

More than one Judges

K.G. Balakrishnan C.J.I., S.H. Kapadia, R.V. Raveendran, B.S. Reddy and P. Sathasivam (JJ.)

UNPUBLISHED DECISIONS

Name of the parties, Filing No of Year, Decided on date (Name of Judges) (Name of Court) Example:

> BP Singhal v. Union of India, W.P. (Civil) No.296 of 2004, Decided on May7, 2010(K.G. Balakrishnan C.J.I., S.H. Kapadia, R.V. Raveendran, B.S. Reddy and P. Sathasivam (JJ.) (Supreme Court of India).

INTERNATIONAL DECISIONS

Case name, (Party names) Judgement, Year, Publisher, Page No (Court Name) Example:

Case Concerning Right of Passage over Indian Territory (India v. Portugal) Judgment, 1957, ICJ reports, 12 (International Court of Justice)

LEGISLATIVE MATERIALS

When citing Constitution, it should be in Capital letters while other Statutes it should be First letter of the word in Uppercase followed by lower cases.

CONSTITUTION

Art. 21, THE CONSTITUTION OF INDIA, 1950.

OTHER STATUTES

Sec. 124, Indian Contract Act, 1872.

BILLS

Cl. 2, The Companies (Amendment) Bill (introduced in Lok Sabha on March 16, 2016).

PARLIAMENTARY DEBATES

Question/Statement by Name, DEBATE NAME, page no (Date) Example:

? Question by N.G. Iyengar, CONSTITUENT ASSEMBLY DEBATES 116 (August 22, 1947).

? Statement of V. Narayanaswamy, LOK SABHA DEBATES 5 (March 10,2010).

BOOKS

TEXTBOOKS

Name of the Author, NAME OF THE BOOK, Volume (Issue), Page (Publisher, Edition, Year)

Example:

H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, Vol. 3, 121 (Universal Law Publishing Co. Pvt. Ltd.,4th Edn., 2015)

? In the case of a single author,
M.P.Jain, INDIAN CONSTITUTIONAL LAW, 98 (Kamal Law House, 5th Edn., 1998)

? If there is more than one author and up to two authors,
M.P.Jain and S.N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW, 38 (Wadhawa, 2001)

? If there are more than two authors,
D.J. Harris et al, LAW OF THE EUROPEAN COMMUNITY ON HUMAN RIGHTS, 69 (2nd Edn., 1999).

? If there is no author then the citation would begin from the Title of the Book.

? If the title of the book includes the author's name then the book should be cited as an author less book.

Example:

Chitty on Contracts, Vol. 2, 209 (H.G. Beale ed., 28th edn., 1999).

EDITED BOOKS

Name of Editor/s (Ed.) NAME OF BOOK, page no./s (Publisher Name, Year of Publication)

? In the case of a single editor,
Nilendra Kumar (ed.), NANA PALKHIVALA: A TRIBUTE, 24 (Universal Publishers, 2004).

? If there is more than one author and up to two editors,
S.K. Verma and Raman Mittal (eds.), INTELLECTUAL PROPERTY RIGHTS: A GLOBAL VISION, 38(2004).

? If there are more than two editors,
Chhatrapati Singh et.al. (eds.), TOWARDS ENERGY CONSERVATION LAW 78 (1989).

COLLECTION OF ESSAYS

Name of Author, Name of Article in Name of Collected Book Page No (Editor Name, Year of Publication)

M.S. Ramakumar, India's Nuclear Deterrence in NUCLEAR WEAPONS AND INDIA'S NATIONAL SECURITY 35 (M.L. Sondhi Edn., 2000).

REGILIGIOUS AND MYTHOLOGICAL TEXTS

TITLE, Chapter/ Surar Verse (if applicable)

Example:

THE BHAGAVAD GITA, Chapter 1 Verse46

ARTICLES

Name of Author, Name of Article, Volume (Issue) NAME WHERE ARTICLE IS PUBLISHED page no (Year of Publication)

LAW REVIEW ARTICLES

A.M. Danner, Constructing a Hierarchy of Crimes in International Criminal Law Sentencing, Vol. 87(3) VIRGINIA LAW REVIEW 415 (2001).

MAGAZINE ARTICLES

? Articles in print versions of magazines
Uttam Sengupta, Jack of Clubs and the Cardsharps, OUTLOOK 22 (June 11, 2016).

? Articles published in a magazine arranged by volume
A. Bagchi, Sri Lanka's Experiment in Controlled Decentralization: Learning from India, 23(1) ECONOMIC AND POLITICAL WEEKLY 25 (January 2, 1988).

? Articles in print versions of newspapers
Robert I. Freidman, India's Shame: Sexual Slavery and Political Corruption are Leading to an AIDS Catastrophe, THE NATION 61(New York Edn., April 8, 1996).

MAGAZINE ARTICLES ONLINE VERSIONS

Name of Author, Name of Article, NAME WHERE ARTICLE IS PUBLISHED (Date of issue)

available at link where it is published (date of last visit)

It is mandatory to use exact link where the article of published removing the hyperlink

? Articles in online versions of newspapers

Mehboob Jeelani, Politics stretches list of Smart Cities from 100 to 109, The Hindu (2 July 2016), available at http://www.thehindu.com/todays-paper/politics-stretches-list-of-smart-cities- from-100-to-109/article8799010.ece(Last visited on July 2,2016).

? Articles in online versions on magazines

Uttam Sengupta, Jack of Clubs and the Cardsharps, OUTLOOK (11 June 2016), available at

http://www.outlookindia.com/magazine/story/jack-of-clubs-and-the-cardsharps/297427(Last visited on July 2, 2016).

REPORTS

LAW COMMISSION REPORTS

243rd Report of the Law Commission of India (2012)

ONLINE REPORTS

World Trade Organization, Lamy outlines "cocktail approach" in moving Doha forward, (2010), available at http://www.wto.org/english/news_e/news10_e/tnc_chair_report_04may10_e.htm (Last visited on May 10, 2016).

INTERNATIONAL TREATIES

Art. 5, UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), July12, 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html (accessed July 2, 2016)

GENERAL RULES

FORMATTING

? Single numbers do not begin with a0

? Remove hyperlinks in all citations of URLs

? The format of dates should be – June 25,2016

? Capitalisation – The start of every sentence should be in capitals. In titles, do not capitalise articles, conjunctions or prepositions if they comprise of less than fourletters.

? Italics – Italics are to be used in the following instances:

  ? Case names when used in the main text

- Non-Englishwords
- Emphasis in the main text, but not forming part of aquote

- Short forms – The short forms of words which are not mentioned in this guide are not acceptable. Short forms which are acceptable are:
  - Art. for Article
  - Cl. for clause
  - No. for number
  - Reg. for regulation
  - Sec. for section
  - Vol. for volume
  - Edn. For edition
  - Ed. For editor
  - Ltd. for Limited
  - Co. for Company
  - Inc. for Incorporated
  - Add "s" to the short form for the plural form.

FOOTNOTES

- Multiple citations in the same footnote should be separated by asemicolon.
- Connectors–
  - Id. and supra are the only connectors which may be used for cross referencing
  - These connectors can only be used to refer to the original footnote and may not be used to refer to an earlier reference.
  - The format for referring to the immediately prior footnote shall be one of the following:
  - When the page number(s) being referred to are the same as in the previous footnote
  - Id.
  - When the page number(s) being referred to are different from the previous footnote
  - Id., at 77-78.
  - The last name of the author, when available, should be used before the supra. The format for referring to footnote earlier than the immediately prior footnote shall be: Seervai, supra note 6, at 10.
- Introductory Signals
  - No introductory signal to be used when the footnote directly provides the proposition.
  - The signal 'See' shall be used when the cited authority clearly supports the proposition.
- All footnotes must not end in a period (fullstop).

QUOTES

- For quotations below fifty words in length, the quote should be in double inverted commas and should beitalicized.
- For quotations above fifty words in length, separate the text from the main paragraph, indent it by an inch from either side, and provide only single line spacing. If the main text has only single line spacing, the font size of the quote shall be reduced by1.

Ethics Policy for Journal

1. Reporting Standards

Authors of research paper should present an accurate account of the work performed as well as an objective discussion of its significance. Underlying data should be represented accurately in the paper. A paper should contain sufficient detail and references to permit others to replicate the work. Fraudulent or knowingly inaccurate statements constitute unethical behaviour and are unacceptable. Review and professional publication articles should also be accurate and objective, and editorial 'opinion' works should be clearly identified as such.

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Authors may be asked to provide the research data supporting their paper for editorial review and/or to comply with the open data requirements of the journal. Authors should be prepared to provide public access to such data, if practicable, and should be prepared to retain such data for a reasonable number of years after publication. Authors may refer to their journal's Guide for Authors for further details.

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The authors should ensure that they have written entirely original work, and if the authors have used the work and/or words of others, that it has been appropriately acknowledged, cited, quoted and permission has been obtained where necessary. Authors should cite publications that have influenced the reported work and that give the work appropriate context within the larger scholarly record. Information obtained privately, as in conversation, correspondence, or discussion with third parties, must not be used or reported without explicit, written permission from the source.

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An author should not in general publish manuscripts describing essentially the same research in more than one journal of primary publication. Submitting the same manuscript to more than one journal concurrently constitutes unethical behaviour and is unacceptable.

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Information obtained in the course of confidential services, such as refereeing manuscripts or grant applications, must not be used without the explicit written permission of the author of the work involved in these services.

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Authorship should be limited to those who have made a significant contribution to the conception, design, execution, or interpretation of the reported study. All those who have made substantial contributions should be listed as co-authors.

Where there are others who have participated in certain substantive aspects of the paper (e.g. language editing or medical writing), they should be recognised in the acknowledgements section.

The corresponding author should ensure that all appropriate co-authors and no inappropriate co-authors are included on the paper, and that all co-authors have seen and approved the final version of the paper and have agreed to its submission for publication.

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PRAGYAAN: JOURNAL OF LAW

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The practice of peer review is to ensure that only good research papers are published. It is an objective process at the heart of good scholarly publishing and is carried out by all reputable scientific journals. Our referees play a vital role in maintaining the high standards and all manuscripts are peer reviewed following the procedure outlined below.

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Language correction is not part of the peer review process, but referees may, if so wish, suggest corrections to the manuscript.

How long does the review process take? The time required for the review process is dependent on the response of the referees. In rare cases for which it is extremely difficult to find a second referee to review the manuscript, or when the one referee's report has thoroughly convinced the Editor. Decisions at this stage to accept, reject or ask the author for a revision are made on the basis of only one referee's report. The Editor's decision will be sent to the author with recommendations made by the referees, which usually includes verbatim comments by the referees. This process takes one month. Revised manuscripts may be returned to the initial referees who may then request another revision of a manuscript or in case second referee the entire process takes 2-3 months.

Final report: A final decision to accept or reject the manuscript will be sent to the author along with any recommendations made by the referees, and may include verbatim comments by the referees.

Editor's Decision will be final. Referees are to advise the editor, who is responsible for the final decision to accept or reject the research paper for publication.

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