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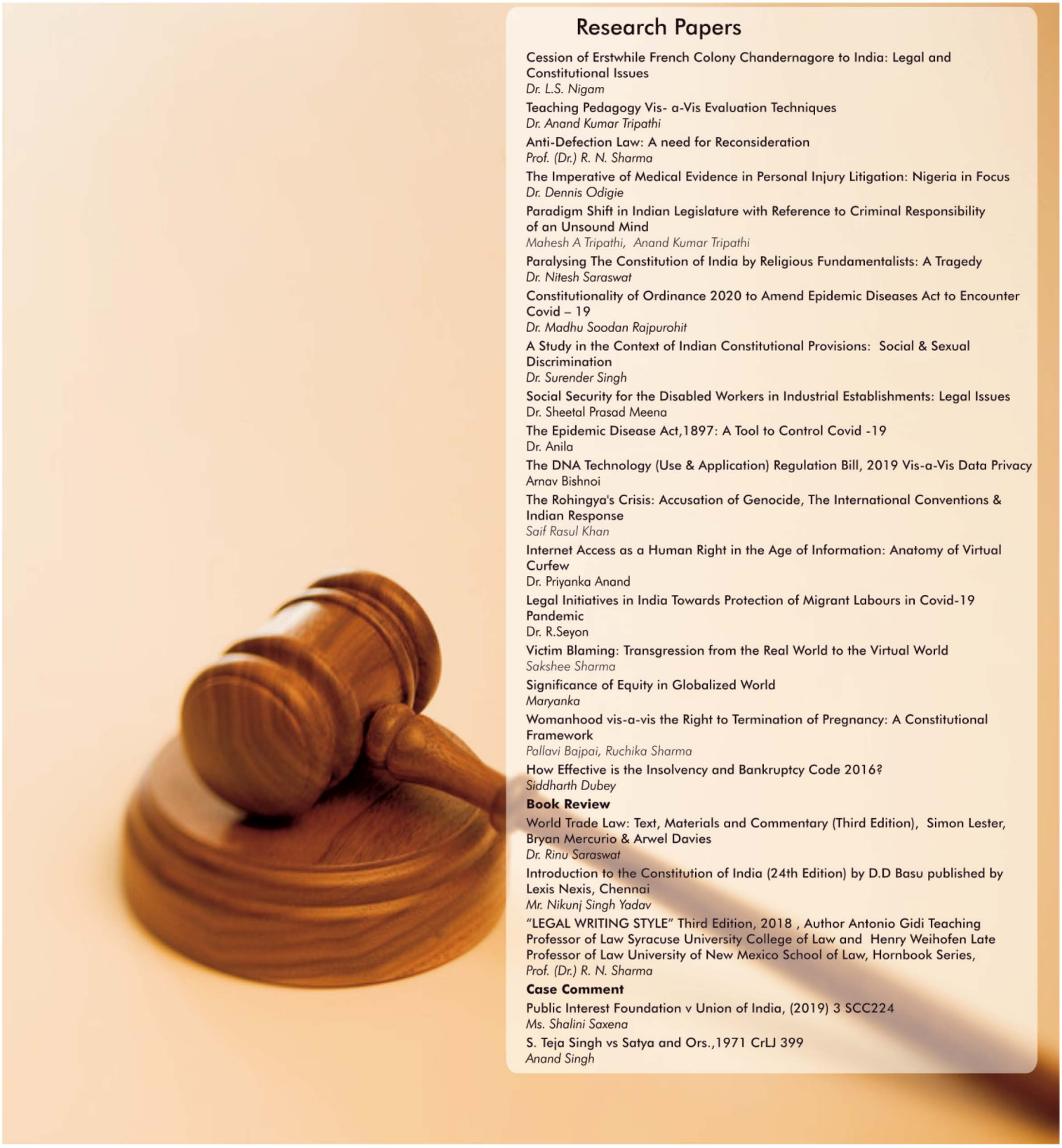

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Pragyaan: Journal of Law

From the Editor

It gives us great pleasure to present to readers, the Volume 10, Issue 1 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 topic undertaken by Indian legal fraternity. We are pleased to present eleven articles which in themselves are putting forth better understanding of a range 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 insightful reviews. As such, the journal aspires to be vibrant, engaging, accessible, and at the same time makes it integrative and challenging.

We offer scholars to contribute their 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 year after year with each volume . I express my 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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Cession of Erstwhile French Colony Chandernagore to India: Legal and Constitutional Issues

Dr. L.S. Nigam*

ABSTRACT

Indian became free and independent from British Paramount on 15th of August, 1947 but there were several pockets, within the Indian Territory, under the control of French and Portuguese Governments. Goa, Daman and Diu along with Dadra and Nagar Haveli were Portuguese settlements, whereas Pondicherry, Karaikal, Yaman and Mahe as well as Chandernagore (also known as Chandannagar) were French colonies. All these enclaves, later on, became part of the Union of India. French Government transferred their territories through the treaties but positions of the Portuguese colonies were different. Dadra and Nagar Haveli were first liberated by the people and declared the areas as "Free Dadra and Nagar Haveli". Later on the areas were integrated in India on request of the people. Territories of Goa, Daman and Diu were acquired by the Government of India. All these non-British European colonies were added into Territory of India in due course of time by amending THE CONSTITUTION OF INDIA as provided in Article 368 of the Constitution, except the territory of Chandernagore.

The case of Chandernagore was different as no Constitution amendment was observed for the inclusion of the territory into Union of India and after sometimes, it was directly merged into State of West Bengal by simple Parliamentary legislation, The Chandernagore (Merger) Act, 1954.

The present study included inter-alia, Treaty of cession of Chandernagore, Article 1 (3) (c) and Article 368 of THE CONSTITUTION OF INDIA, in the light of verdicts of the Supreme Court of India.

Keywords: Chandernagore, French Colony, Cession of Territories, Constitution Amendments.

1. Introduction

The Parliament of United Kingdom passed Indian Independence Act, 1947 (1947 Cchapter 30). The date for the enforcement of the Act was fixed, the 15th August 1947. On and from that day India became free and independent Nation. The Act, 1947 also provided partition of India into two dominions- India and Pakistan[1]. It further provided termination of Crown's Paramount and Suzerainty over India and Indian States (also known as Princely or Feudatory or Native States)[2]. These Indian States were integrated to Indian Dominions[3] before the commencement of Indian Constitution, Territory of Indian Dominion and Indian State became part of territory of Union of India with commencement of Constitution, that is 26th Day of January, 1950. Even though, some pockets of India were still ruled by the French and Portuguese Governments. Goa, Daman and Diu along with Dadra and Nagar Haveli were Portuguese colonies, whereas Pondicherry, Karaikal, Yaman and Mahe as well as Chandernagore (also known as Chandannagar) were French establishments. It is worth mentioning that among the above referred to French and Portuguese enclaves; Chandernagore has distinct positions as it is first non-British, European territory ceded to India.

It appears appropriate to discuss the brief historical background of Chandernagore before discourse of its legal and Constitution issues.

The origin of the name of Chandernagore or Chandannagar is not perfectly known. It is believed that Chandernagore denotes city of moon. Another view is that the name is related with Chandan (Sandal wood). This place is situated on the bank of river Hooghly in about 33 km from Kolkata. In the development of Chandernagore, role of French East India Company was very significant. It is to be recalled that India had business relation with Western world from ancient times but trade was controlled by Arab – traders because of there were no sea link. Vasco-de-Gama, a Portuguese explorer, first reached India by sea-route. His voyage to India was first link of between Europe and India by ocean route. He reached Calicut on 20th of May 1498. This sea-route led to English, Portuguese, Dutch, Danes and French to reach India and establish their trading posts in India. In May 1664, the French East India Company was formed by the Government of France. A

*Former Vice-Chancellor, The ICFAI University Raipur, C.G., India

1 Section 1 of the Indian Independence Act, 1947.

2 Section 7 (1) (b) of the Indian Independence Act, 1947.

3 Before the commencement of the Constitution, 'India' was known as independent Dominion.

representative of French East India Company, Francois Martin, established a trade Centre at Pondicherry in 1673. He visited Chandernagore in 1688 with a Farman of Emperor Aurangzeb and purchased three villages named Borokishanpur, Khalisani and Godapara and established a business outpost. Gradually French East India Company started construction of buildings besides Fort of Orleans. In 1730 Joseph Francois Duplixis was appointed Administrator of Chandernagore. He was transferred to Pondicherry as Governor in 1741. During the reign of Duplexis development of Chandernagore was in culmination. The fate of Chandernagore was depending upon the Franco-British relation. During the period of 1757 to 1816 many times Chandernagore was occupied by the Britishers and returned back to the French after treaties held between them. Thereafter Chandernagore continued as a part of the French India under the control of the Governor General of Pondicherry till it was transferred to India.

Chandernagore is associated with some significant events and personalities Duplexis married to Jeannne Albert (locally known as Jona Begum) on April 17, 1741. Sri AurobindoGhos reached here in 1910 and stayed for a month before leaving for Pondicherry. Rash Behari Bose was resident of Chandernagore. In 1943, he handed over the commend of Azad Hind Fauz to Subhas Chandra Bose in Japan.

With departure of Britishers from India several Administrative and legal changes came up at Chandernagore, which are described as under:-

Effect of Independence of India on Chandernagore- The French Government had formed Chandernagore Administrative Council on 15th August 1947 and handed over economic freedom and more administrative responsibilities to the Council. Indian National Flag was also hoisted at Administrator's House[4].

Declaration of *Ville-Libre* – Governor of French India visited Chandernagore and declared it as Ville-Libre (Free Town) on 2nd May 1947. Now the Municipality cum Administrative Council had been assigned more power of Administration[5].

Referendum – A referendum was held on 19th of June, 1949 to ascertain the desire of people regarding their consent or refuse to stay with French Union. Total 7608 persons participated in referendum, out of them 7473 persons voted for joining India, only 114 were wanted to stay with France and 22 ballots were invalid. Thus people of Chandernagore were in favour to join with India[6].

De-facto Transfer of Chandernagore – Chandernagore was de-facto transferred to India on 2nd May 1950. Monsieur G.H. Tailleur, who was the Administrator of Chandernagore, as a Delegate of Commissioner of the Republic of French India transferred his power to Mr. B.K. Banerjee, Administrator appointed by Government of India[7].

De-Jure Transfer- A treaty was executed between the Republic of India and the Republic of France to confirm the cession of the territory of Free town of Chandernagore to India held in Paris on 2nd February 1951[8] .

The treaty was signed by Wing Commander Sardar Hardit Singh Malik, Ambassador Extra-ordinary and Plenipotentiary of India in France and Mr. Guy De La Tournelle, Director General for Political Affairs at Ministry of Foreign Affair of France.

According to Article I of the treaty France transferred to India, in full sovereignty, the territory of free town Chandernagore. In the Article XII, there was a provision that this treaty shall come into force on ratification by Governments concerned.

Ratification of treaty by the France - As per provision of Article XII of the Franco-Indian treaty, the French National Assembly ratified the treaty on 11th April 1952 in which referred that the small French possession of Chandernagore handed over the Government of India.

Merger of Chandernagore into West Bengal - Chandernagore was merged into the Sstate of West Bengal by an enactment, The Chandernagore (Merger) Act, 1954 (No. 36 of 1954), published in the official Gazette on 29th September, 1954. In Section 2 (c) of this Act defines 'Chandernagore' means the whole territory which immediate before the 9th day of June 1952 was comprised in the Free Town of Chandernagore. The Act 1954 also amended First Schedule of Constitution in Part - A by adding, "and in case of state of West Bengal shall comprise the territory as defined in Cclause (c) of Ssection 2 of the Chandernagore (Merger) Act, 1954".

2. Legal and Constitutional issues

It has been observed that several administrative and legal steps had been taken related to Chandernagore; but some questions are unanswered till now, therefore an endeavor

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4 SailendraNathSen, CHANDERNAGORE FROM BONDAGE TO FREEDOM 1900-1955, (Primus Books, Delhi, 1st Edition, 2020, P. 350;.

5 Id.

6 Id.

7 AjitMukhopadhyay and KalyanChakrabortty, Discover Chandannager, (Chandannagar Heritage, Chandannagar, 1st Edition, 2003, p. 40).

8 Devadatta Day and Shophie Villain Onraet, Chandernagore (English version, pp. 63-67, French version pp 46-49)

is made to frame the issues as under:

1. Whether Chandernagore was part of the Territory of India (Before its merger into a State to West Bengal)
2. A Territory which was neither a State or a Union Territory could be admitted to the Union of India under provision of Article 2 of the CONSTITUTION OF INDIA.
3. *Raison d'être* for not following the provision of Act. 368 of the CONSITUTION OF INDIA in relation to Chandernagore.

Whether Chandernagore was a part of Territory of India (Before its merger to State of West Bengal)

After the National Assembly of France ratified, this Treaty on 11 April 1952 Government of India had decided that Chandernagore would be ruled by the President of India through an Administrator under Department of Foreign Affairs.

In 1954, Chandernagore was merged to the State of West Bengal vide Chandernagore (Merger) Act 1954. As the Constitution of India was enforced from 26th January 1950, it would be suitable to discuss the issue in the light of the Constitution. At the commencement of the Constitution, the Union of India comprised of the States, which were classified as Part A, B, and C, besides these, there were certain territories in Part D of the First Schedule. This classification was abolished by the State Reorganisation Act, 1956 (No. 37 of 1956), and reduced these into three categories; Part - A, Consisted of 13 States, Jammu and Kashmir was placed in Part - B and under Part - C, the States listed were Union Territory. The Constitution (Seventh Amendment) Act, 1956 made numerous amendment in the Constitution in order to implement State Reorganisation. After the amendment Article 1 reads as under:-

1. Name and Territory of the Union:

(1) India, that is Bharat, shall be a Union of States.

(2) The States and the territories thereof shall be as specified in the first schedule.

(3) The territory of India shall comprise of:-

(a) The territory of States;

(b) The Union territories specified in the first schedule and

(c) Such other territories as may be acquired.

In reference to above referred to provision, some points may be taken into consideration.First point is concerned with Clause (2) of the Article 1 of the Constitution, which refers to States and Territories as specified in First Schedule. So far as Chandernagore is concerned, it did not place in the First Schedule, before the Chandernagore (Merger) Act, 1954.

Second point is in reference to Sub Clause (a) and (b) of Clause (3) of the Article 1, which prescribed the territories of States and Union territories specified in First Schedule; Chandernagore was neither a State nor placed as Union Territory in First Schedule. In these circumstances only provision of Article (3) (c) may be applicable in case of Chandernagore, which provide, such other territories as may be acquired.

In this connection, it is worth to refer the case of N. MasthanSahibv. Chief Commissioner of Pondicherry[9]. Pondicherry was also a French colony situated in India. The case was decided by bench of five Judges of Supreme Court of India on 8th December 1961. Questions before the Apex Court were (1) Whether Pondicherry is part of territory of India; (2) If not, what was the extent of the Jurisdiction exercised by the Union Government and French Government over the territory? The case was decided by majority judgment. Author of the majority Judgment was anRajagopalaAyyangar, J. After analyzing the issue the court decided that Pondicherry is not comprised within the territory of India as specified in Clause (3) of Article 1 of the Constitution. The Court further observed that, by an agreement signed between the Government of France and the Government of India took over the administration of the French establishment in India which included the territory of Pondicherry. A treaty was signed but not ratified according to French Law; therefore Government of India had been administering the territory of Pondicherry under Foreign Jurisdiction Act, 1947, which is based on the fact that it is outside of India and not a part of territory of India. On the second issue, it has been observed by the Apex Court that Government of India exercised full jurisdiction over Pondicherry in executive, legislature and judicial matters according to the Foreign Jurisdiction Act, 1947. Article 260 of the Constitution also refers the Jurisdiction of the Union in relation to territories outside of India by an agreement.

In context to judgment of the Supreme Court in case of N. MasthanSahib[10], analysis regarding the position of Chandernagore would be quite necessary. The treaty of cession of Chandernagore was ratified by the French National Assembly according to French law. But so far as Indian side was concerned, formality for inclusion of territory according to Indian Constitution was not complied and it was administered under the Foreign

[9] N. Masthan Sahib V. Chief Commission of Pondicherry, AIR 1960 SC 845

[10] Id

Jurisdiction Act, 1947. Thus, it suffices to say that Chandernagore was not a part of territory of India, as it was neither considered as a State or a Union Territory. However the provision of Clause (30) ofArticle 366 of the Constitution could be taken in to consideration regarding Chandernagore. The relevant Clause (30) defines, 'Union Territory' means any Union Territory specified in First Schedule and included any other territory comprised within the territory of Indian but not specified in that Schedule (emphasized supplied). It is noteworthy to state that Clause (30) of Article 366 was substituted by the Constitution (Seventh Amendment) Act, 1956 therefore it is not applicable in case of Chandernagore as it was merged into State of West Bengal in 1954.[11]

The merger of Chandernagore to the State of West Bengal by Chandernagore (Merger) Act, 1954 is also required to be discussed in the light of Article - 2 of the Constitution of India, which reads as under:-

2. Admission or Establishment of new States - "Parliament may by law admit in to the Union or establish, new States on such term and condition as it think fit."

Thus, the Constitution confers power to 'admit' and to 'establish' new States. It is noted that free town of Chandernagore neither admitted as a new State nor established a new State, therefore provision of Article - 2 does not seems applicable.

It would be further needed to analysis Article 3 of the Constitution in relation to Free Town of Chandernagore. Article - 3 is reproduced for reference:-

3. Formation of new State and alteration of Boundaries or name of existing State - Parliament may by law -

(a) form a new State by separation of territory from any State or by uniting two or more states or part of States or uniting any territory to a part of any State;

(b) increase of area of any State;

(c) diminish the area of any State;

(d) alter the boundaries of any State;

(e) alter the name of any State

The area of the State of West Bengal had been increased by the Parliament, exercising the power conferred under Clause (b) of Article 3 by adding Chandernagore through enactment of Chandernagore (Merger) Act, 1954. But this action of the Parliament had been tenable, if Free Town of Chandernagore would have been correct provided it had been admitted or established as a State or Union territory in context of the Article - 2 of the Constitution.

The perusal of Article 3 of the Constitution clearly elucidate that the Parliament is empowered to create a new State as well alter the area, boundaries and name of existing States (emphasis added). As the Free Town of Chandernagore was not a State as discussed in supra paragraphs, its merger to the State of West Bengal seems to be indefensible.

Raison d'être for not amending the Constitution for admission of Chandernagore in Territory of India

After the commencement of the Constitution on 26th January 1950, first change in the territory of India was, due to cession a strip of territory comprising 32.81 square miles to the Government of Bhutan in 1951, by an enactment, The Assam (Alternation of Boundaries) Act, 1951 (47 of 1951) w.e.f. 1st September, 1951 and this was considered as alteration of boundaries of the State of Assam but inter alia diminishing the territory of India. Next case of alteration of territory was due to cession of erstwhile French colony Chandernagore to India. As has been already discussed on this issue but for ready reference it should be recalled, accordingly it was de-factotransferr on 2nd May 1950, dejure transfer through treaty of cession signed by Government of France and India on 2nd February 1951 and ratification of treaty by French National Assembly on 11th April 1952. Thus territory of Indian increased. This territory of directly merged in to the State of West Bengal without including it into territory of India, by an enactment in 1954[12].

In reference to boundary dispute between the India and Pakistan, both Governments entered into an agreement known as Indo-Pakistan Agreement. Under this agreement a part of territory of India was to be ceded by Pakistan. This subject was referred to the Supreme Court of India by the President under provision of Clause (1) of Article 143 of the Constitution. This case is referred to asIn Re: Berubari Union and Exchange of Enclaves[13].

The Supreme Court decided the case on March 14, 1960 and held that transfer Agreement involved cession of the territory included in the First Schedule and therefore, the implementation of Agreement was outside of the scope of Parliamentary legislation underArticle - 3. The Apex Court further determined that said Agreement could be implemented by legislative action by way of amendment of the Constitution in accordance with provision of Article 368 providing for alteration of content of Article 1. Therefore, to give effect to the transfer of certain territories to Pakistan in pursuance of the agreement entered

[11] The Chandernagore (Merger) Act, 1954

[12] The Chandernagore (Merger) Act 1954 (36 of 1954).

[13] Re: Berubari Union and Exchange of Enclaves, AIR 1960 SC 845

between the Governments of India and Pakistan, the Constitution of India, was amended by the Constitution (Ninth Amendment) Act, 1960. Section 2 (a) of this amendment provided that changes in the territories contained in it were to be given effect from the "appointed day" to be fixed by notification in the official Gazette[14].

Another Constitution amendment was due to integration of Dadra and Nagar Haveli. Dadra and Nagar Haveli were a Portuguese enclave in Western India[15]. The area was taken over by Pro - Indian Forces and being administered as a de- factoState of Free Dadra and Nagar Haveli. In defense of the desire and request of the people of Free Dadra and Nagar Haveli, embodies in a formal Resolution adopted by their Varistha Panchayat on June 12, 1961 for integration of their territories with Union of India, the Government of India decided that these territories will form part of India, as specific Union Territory with effect from August 11, 1961[16]. Therefore, the Constitution (Tenth Amendment) Act, 1961 enacted. Later on Portuguese colony Goa, Daman and Diu had been become part of territory of India, as the territories were acquired on December 20, 1961. The Constitution (Twelfth Amendment) Act, 1962 was enacted to include as Union Territory of Goa, Daman and Diu[17] .

As discussed earlier in case of N. Masthan Sahib[18], the Supreme Court had decided that Pondicherry is not a part of territory of India as it was administered by Government of India by a treaty of cession. It is to be noted that de-facto transfer of Pondicherry was held through an agreement dated 28th October 1854 and de-jure cession treaty was held on 28th May of 1956[19]. The Judgment of SupremeCourt in N. Masthan Sahib Case[20] and certain other administrative difficulties led the Constitution Amendment for legitimation inclusion on Pondicherry to the territory of India, Hence the Constitution (Fourteenth Amended) Act, 1962 was enacted[21].

3. Conclusion

At the last, it would be worthy to mention that the inclusion of an independent Himalayan Nation, Sikkim as a full-fledged State. Brief information regarding the background seems to be appropriate. On May 08, 1974, there was a historical agreement between Chogyal (King) of Sikkim, leaders of political parties representing the people of Sikkim and Government of India for progressive representation of people and close relationship with India. Accordingly, Government of Sikkim Act, 1974 was passed.Interestingly, this Act provided a post of the Chief Executive, in Section 28, which says, "At the head of administration in Sikkim, there shall be a Chief Executive, who shall be nominated by the Government of India and appointed to that post by Chogyal". The Chief Minister of Sikkim made a formal request through Chief Executive to given representation of people of Sikkim in the Parliament of India. Therefore, to give the effect of people of Sikkim to strengthen the relationship with India the Constitution (Thirty first Amendment) Act, 1974 enacted. A new Article - 2A was inserted in the Constitution, Sikkim to be associated with the Union. Later on Assembly of Sikkim decided to be Constituent Unit of India. The Assembly also obtained the concurrence of the people of Sikkim through special poll held on 14th April 1975. Accordingly Sikkim was included as full fledge State of India by the Constitution (Thirty-Sixth Amendment) Act, 1975[22]. Before concluding the issues regarding the Constitution Amendment, it is justified to refer the Constitution (Hundredth Amendment) Act, 2015 which settled the land boundary between India and Bangladesh[23].

From above deliberation, it is clear that cession of Chandernagore was legitimately required an amendment in the Constitution but it could not be executed. Raison d'être for not amending the Constitution, seems to blame, the legal and Constitutional scenario prevailing at that time. India became independent on 15th of August 1947 and Constitution of India commenced on 26th Day January 1950. Between the independence and enforcement of Constitution, several changes at Chandernagore occurred, which may be recalled briefly, such as formation of Chandernagore Administrative Council (15th August, 1947); declaration of Chandernagore as Ville Libre (27th November, 1947)

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[14] The Constitution (Ninth Amendment) Act, 1960 did not come into effect as "appointed day" was never notified in official Gazette.

[15] See."Case concerning Right of Passage over Indian Territory (merit)."

[16] Dadra Nagar Haveli are now merged into Union territory of Daman and Diu, vide the Dadra and Nagar Haveli and Daman and Diu (Merger of Union territories) Act, 2019, (No. 44 of 2019)

[17] Goa had been assigned full statehood by the Goa, Daman and Diu Reorganisation Act, 1987

[18] N. Masthan Sahib V. Chief Commission of Pondicherry, AIR 1960 SC 845

[19] Treaty Between the Republic of France and India Establishing cession by French Republic of Indian Union of French Establishment of India, on 28th May 1956

[20] N. Masthan Sahib V. Chief Commission of Pondicherry, AIR 1960 SC 845.

[21] Union Territory Pondicherry means, the territories which immediately before the sixteenth day of August, 1962 were comprised the French establishment in India, known as Pondicherry, Karikal, Mahe and Yaman, see section 3 of the Act, 1962

[22] Section 2 of the Act provided, I shall be deemed to have come into force on the date on which the Bill for this Act is passed. Therefore the Act enforced on April 26, 1975

[23] Ramkishor V. Union of India. AIR 1966 SC 644 also see Union of India V. SukumarSengupta, AIR 1990 SC 1692

Referendum (19th June 1949) and just after the commencement of the Constitutionde-facto transfer of Chandernagore to India (24th May 1950). Thus, when India was framing its Constitution, juxta-position, many administrative and legal changes occurred. Thereafter, Treaty of Cession was executed on 2nd February 1951. Till this time, no Constitutional formalities were required. Meanwhile the Assam (Alteration of Boundary), Act, 1951 was passed by legislative law. The French National Assembly ratified the treaty of cession on 11th April 1952. After this no legislative action was taken by the Government of India and following the practice in Assam (Alteration of Boundaries) Act, 1951, Chandernagore was merged to the State of West Bengal. Probably it was the reason to believe that no Constitutional amendment is required for this purpose.

Chandernagore is first non-British, European colony in India which was liberated from French control, step by step. This led to further removal of European pockets from India, which was situated in Indian Territory. Ultimately Dadra and Nagar Haveli first liberated and later on integrated to Indian Union, whereas Pondicherry along with Karikal, Mahe and Yamancession by treaty and included in territory of India. Last acquisition was Goa, Daman and Diu[24].

These all European enclaves were included in Union of India, first as Union Territory and later on by legislative enactment Goa became a full-fledged State. Meanwhile some judicial verdicts by the SupremeCourt of Indian came across as well as some international laws were also followed. Therefore several amendments in the Constitution were done. Even after the adding the territories of Dadra, Nagar Haveli, Goa, Dam and Diu, Government of India and Portugal entered in a treaty, to recognize the sovereignty of India in these areas, Thus, it is suffice to say that Constitutional requirement of respective countries must be followed but in case of Chandernagore inclusion could not be observed.

[24] www.1iiofindia.org/in/other/treaties/INTser/1974/53.html

Teaching Pedagogy Vis- a-Vis Evaluation Techniques

Dr. Anand Kumar Tripathi*
Professor Dr. Kaushik C.Raval**

ABSTRACT

Knowledge, honour and self confidence can be obtained through well and equipped education system. This is true that all the lofty ideals can be achieved only through education but how it can be achieved or translated into reality? Whether by imposing stringent rules on the teaching fraternity or by providing training or showing strictness against teacher will yield desirable outcome? No,according to researcher teaching is a passion which cannot be forcibly entrusted in the mind-set of a teacher. To go everyday in classroom with new ideas and smile needs certain commitments and passion towards this profession.

Generally, it has been observed that students feel bore in the classroom, if a teacher does not involve themselves with innovative ideas, vision and complete devotion in the class. Engaging lectures in the classroom is not only way out to get success of teaching. UGC from time to time has been suggesting to the universities/Colleges/Institutions through itscircular, rules and regulations for the betterment of education system. It is worthwhile to discuss the pivotal role of UGC actively involved with sole objective of quality education. On 31st January'2008 UGC has drawn their attention to the pressing needs of academic and administrative staff. In the said circular various parameters are highlighted i.e. curriculum development, admission process and examination reform is a few.

In this research paper scholars have attempted to discuss upon two very core issues of the education systemi.e. Teaching methods andevaluation techniques. Undoubtedly, feedback of the teacherson student's performance will help to the teachers in various aspects of their knowledge domain thereby to attain the high pinnacles of the academics.

Keywords: Education, curriculum, feedback, techniques and students.

Introduction

Teaching is a noble profession with a major responsibility on its shoulders to cater to the needs of students. In the era of globalisation every field requires skilled and professional manpower to be remain present in the fierce competitive era. Due to this the trends of teaching methods have been rapidly changing its pace and face. In practice there are various teaching methods being adopted in higher education. Teaching becomes effective when its effect positively affects the teaching methods. It is submitted that teaching and learning both are important aspects of effectiveness of teaching as Thomas Angelo rightly said that "Teaching in the absence of learning is just talking." Can use of anonymous students' feedback on the quality of classroom teaching and students' interaction improve the teaching pattern? Indicators used in the performance sheet of the teachers reveal that a teacher has to be literally involved in all walks of academics be it direct teaching or other co curricular activities.

A teacher holds its complete domain in the classroom but no one can suggest the way of teaching methods to the teacher. There is no rule book on teaching methods. It varies from faculty to faculty and person to person. Research indicates that students are the most qualified sources to report on the extent to which the learning experience was productive, informative, satisfying, or worthwhile. While opinions on these matters are not direct measures of instructor or course effectiveness, they are legitimate indicators of student satisfaction, and there is substantial research linking student satisfaction to effective teaching.[1] Student's feedback may be helpful in improving the quality of teaching but this would not be considered a sole criteria to assess the performance of a teacher. For administrators, the information derived from ratings aids them in making both summative and formative judgments dealing with faculty retention, tenure, and promotion, hiring, selecting faculty for teaching awards and honors, and in assigning teachers to courses[2].

Research Methodology

Tutors should observe the performance of students from time to time, for instance in the form of 'Test Your Knowledge,'[3] which Dr.Tripathi created while teaching at

*Dean, School of Security Law, policy & Governance, Raksha Shakti University, Lavad, Gandhinagar, Gujarat.

** Director, University School of Law, Gujarat University, Ahmedabad

1 Theall and Franklin, 2001

2 Franklin, 2001; Kulik, 2001

3 Test Your Knowledge is a comprehensive feedback report of the students in the respective subject based on a periodical test.

one of the main law schools of India. Tutors should focus on making students confident in their domain of knowledge. In this competitive world, new generations have to bridge the gap between conservative thinking and innovative ideas. To merely read lines of a book in the classroom is not the job of tutors. As a student of law researcher feels that pedagogy never gets its highest bonus until it is supported by certain success story of teaching. To ignite the minds of students thereby to set norms in academia should be the very purpose of teaching pedagogy.

Earlier Dr.Tripati was a faculty memberat Gujarat National law University, Gandhinagar, conducted a test among the students named 'Test Your Knowledge' to observe the performance of students in the classroom. Total 150-160 students were examined based on the course contents taught. In the said examination students were evaluated in five scales i.e. excellent, Very Good, Good, Average and Below Average based on their performance.

Objective of the Research

- To find out best and effective teaching methods
- To explore the opinion of the students about teaching methods
- To highlight the issues and problem in the path of teaching
- To provide suggestions for improving teaching methods.

Findings

As a researcher it is submitted that classroom teaching should be practical oriented. Feedback on student performance reveals that a special emphasis must be taken by teacher to understand the student's genuine problem being faced while learning. In a research undertaken through 'test your knowledge' during teaching 20% students were graded excellent,30% students were graded very good,20% were graded good,10% were graded an average. In a class where there is variety of students is very challenging task to maintain balance at par with teachings objective. This situation somehow affects the teaching quality in the classroom. Teacher behaviour in classrooms is positively related to student achievement. Therefore, teaching pedagogy needs different pace in the classroom to make the class balance in respect of justification of teaching.

In an excellent summary of direct teaching, Killen (1996, 9) has written: '…to be an effective teacher you need the knowledge and skill to present information clearly, using a variety of strategies that allow you to remain task oriented and that engage the students in learning processes in which they can experience reasonably high levels of success'.[4]

In modern age institutions/Colleges/Universities are duly established with technology and no doubt it brought dynamic changes in teaching methods.ICT based teaching has been become the dire need of every Institutions. Can we think that behind this veil certain lofty ideals of teaching are struggling for its identity? Teaching methods are not sufficient to make a class more effective until favourable environment is created in the class. Ultimately, students who spare their valuable time from their life span join the institution to learn the practical nuances of course curricula.Effective teachers blend their instructional skills with a more personalised and responsive approach to their students. Effective teaching combines human relations, skills, judgment, intuition, knowledge of subject matter, and an understanding of learning into one unified act, resulting in improved learning for all students[5]. The foundation of education depends upon the tutors. Tutors do not merely teach students; they must also be able to reach students. So, it is said that a teacher is always a student. Indeed, the 'transformation in learning from within the four walls of a room to the four corners of the world, and the explosion in knowledge, urges one to re-think the development of higher education.'

According to the researcher following teaching methods are suggested for the effective teaching:

1- Lecture Methods: It is unanimously accepted that lecture method is not only old and also popular andeffective to students get new ideas and innovation. In this method they develop their rapport with teachers which makes students easy while learning in the class. This method also opens the avenue to learn through listening and interaction in the class. It is also pertinent to point out that the process approach is not necessarily perceived as helpful by some students who are mature enough to know when their needs and expectations are not being met. Recently Vaughn, Schumm, Klingner and Saumell (1995) have reported that most students in their study wanted more direction from the teacher, especially when dealing with difficult text material. On a similar issue, Delpit (1988, 287) quotes one student as saying: 'I didn't feel she was teaching us anything. She wanted us to correct each other's papers and we were there to learn from her. She didn't teach us anything, absolutely nothing'.

A study conducted by Benson, L., Schroeder, P., Lantz, C., and Bird, M (n.d.). provides evidence that students may place greater emphasis on lecture material than on

[4] Reducing classroom failure by improving the quality of instruction © Peter Westwood, Flinders University of South Australia, 1997 p.8

[5] Kauchak & Eggen: 1989

textbooks. Lecturing is not simply a matter of standing in front of a class and reciting what you know. The classroom lecture is a special form of communication in which voice, gesture, movement, facial expression, and eye contact can either complement or detract from the content. (Davis.1993).

2- Presentation Methods: According to Hamm (2008) quoted Rafe; "A presentation involves motivating listeners to accept a new idea, alter an existing opinion, or act on a given premise."[6] Motivation plays very significant role in learning process. Earlier it was through poster, play card and through Over Head Projector. Through Presentation mode of teaching increases confidence among students. Not only this but the topic become interesting. Spoon feeding concept becomes frustrates by this method as students directly performs in the supervision of teachers, collects material by its own and good way to learn alone etc.

3- Homework Assignment Methods: Assignment is one kind of active learning. In this method students are given chance to search the solution through website, text or book. Enhancing the confidence among students even beyond the class is also worth for this method. Giving more time in the class as a teacher is not more effective unless and until constructivist approach is adopted. Student-centred, process-based approaches to learning, often involving individual assignments and group work, are extremely difficult to implement effectively with large classes. Individual students and small groups require frequent attention from the teacher, and while waiting for such attention students may spend large amounts of time off task.

4- Seminar/Conference Methods: Generally, students are very much acquainted with their colleagues' behaviour, knowledge and style in terms of their academic life. When they go another institution, they come to know certain new ideas what they barely learnt in their parent institute. It is must to give them chance to meet other people of the same profession. This will definitely make student understand the subject through participatory learning methods. Networking with other institutions matters a lot and through conference and seminar methods the same objective can be achieved.

5- Group Discussion Methods: Students should directly involve in teaching-learning system. This can be possible by conducting group discussion during course of teaching curriculum. It is a free verbal exchange of ideas between group members or teacherand students. For effective discussion the students should have prior knowledge andinformation about the topic to be discussed. McCarthy, P. (1992) stated strengths of class discussion as; pools ideas and experiences from group and allows everyone to participate in an active process. In this pedagogy it reduces the difference of opinion among the group members. We should bear in our mind that every student is given proper time and opportunity during discussion. In this affair it is the duty of a teacher to create conducive environment and should act a facilitator. It is expected from a teacher to introduce the topic before group discussion begins. One of the important tips is to Encourage students listen other's point of view and then evaluate their own. Teacher should give value to all students' opinions and try not to allow his/her own difference of opinion, prevent communication and debate.(During examination of witness or cross examination in the court, it is most important to remain silent and to speak, whatever is in the interest of justice. This method helps to develop the skill and passion)

In legal education system students can be given a case or some burning issues being faced by the society or world at large, so all may supposed to remain updated with current situation of the society.

6- Course Design: A hallmark of vibrant educational institutions and disciplines is their curriculum content which evolves continuously. In designing a course, faculty must consider what material they have to teach, how best to teach it, and how to ensure that students are learning what is being taught. Many of the decisions affecting the success of a course take place well before the first day of class. Careful planning at the design stage not only makes teaching easier and more enjoyable, it also facilitates a student's learning. Once a course is planned, teaching involves implementing the course design on a day-to-day basis. To attract prospective students, there must be a well-tested syllabus to meet the purpose of education.

Teaching pedagogy is just an experience which a teacher experienced during the teaching. The notable task of a teacher is also to observe the performance of the students in a routine manner. During my one decade of teaching I have observed that we must adopt following measures in attaining the best of our efforts in modern education system.

1- Test your Knowledge:

This is an evaluation technique been undertaken at GNLU, Gandhinagar to know the performance of each and every student of the class. In our opinion it is well known that we are very much crazy on engaging lectures within the four walls. But without proper vision in its efficacy no fruitful outcome is expected. It is submitted that professors devote too much time teaching a given body of material and too little time developing their students' ability to think. Ideally,

[6] Effective teaching methods at higher Education level: Dr Shahida Sajjad,p.7

what we teach our students should serve as a floor on which they stand to reach greater heights rather than as a ceiling that limits what they are able to achieve. The classroom reality is often quite different, likely because the need to test our students in the end dictates what we teach them. As a result, we tend to emphasize mastery of material that is more amenable to objective evaluation. Creative thinking is the resultant collateral damage.[7]

The available evidence indicates that high grades do not guarantee high teaching evaluations.[8] But even if it were possible to "buy" high teaching evaluations with high grades, the real question is why would you want to? I half-jokingly tell my students on the first day of class that I probably receive a $1.50 more in compensation at the end of the year if I receive high teaching evaluations rather than average or low teaching evaluations, so the cost to adhering to my principles is negligible. My practice is to distribute the teaching evaluations from the last time I[9] taught the course so that the students can read first-hand what former students had to say. These practices give rise to two desired effects. First, those students that may be less serious about learning can find some other class in which to enrol.[10] Second, it is important for students to have full information about the course so that they can make an informed decision as to whether it is appropriate for them. In light of the high (and increasing) cost of a college education, every effort should be made to help students allocate their tuition dollars in the most efficient manner possible.

Finally, a word or two about teaching awards is in order. Whereas many gifted (and no so gifted)professors will receive a teaching award or two in the course of their careers, there are professors most deserving of such honors that will never receive them.[11] Some of the most influential and able professors that we encountered in college never even came close to winning a teaching award.

2- Lecture Summary:

Aiming to assess values, skills and knowledge imbibed by student's routine assessment in a class to be done. It goes without saying that by applying this method student will make their presence in the class not only physically but also mentally. They will be morally fascinated with this kind of evaluation pattern. During my orientation Programme at Lucknow University in 2012 we were told as a teacher to implement lecture summary evaluation method in the class which I implemented at Raksha Shakti University, Ahmedabad. I have observed this technique at best evaluation pattern ever applied in my academic career over one decade.

3- News Diary:

Let all noble thoughts come from all sides. (Aano Bhadrah Kratwo Yantu Vishwatah) which also applies with teaching. As a part of continuous evaluation, I instructed students to keep maintain study diary for making updates of certain things relating to the subjects and beyond. Keeping in mind that students are before me for knowledge and skill and therefore, it becomes more important on the part of teacher to give complete devotion towards the welfare of the students by enhancing their personality. Overall development of the students is possible when we seek different methods of teaching otherwise it would be merely a formality.

Recommendations:

- Teacher should be students friendly and should possess good moral.
- Teacher should enter in the classroom with well equipped with latest development of the subject
- To evaluate teaching effectiveness different methods can be used including peer review, self-evaluation, teaching portfolios, student achievement and students' ratings of teaching methods used by their teachers.
- To observe the performance of the students on regular basis.
- Teacher has to encourage students to raise the questions/doubts at the end of the lecture.
- To grant leave to students for making their presence in other Institution.
- Teachers have to play a role like a sparking plug, not hosepipe.
- Teachers have to provide appetizer, not the foodstuff.

Anti-Defection Law: A need for Reconsideration

Prof. (Dr.) R. N. Sharma*

ABSTRACT

Indian Constitution envisages adult franchise based on multiparty representative form of democracy. The basic premise on which representative democracy is based is to give due protection and weight age to the wishes of the people. The leader of the political party which enjoys the majority support of the Legislators is chosen as the head of the government. But because of multiparty system we face a situation where the members of fragmented political parties try to defect to ruling side to get position/power/money for their safe future. This shifting of loyalty by members from one party to other results in political instability.

For the survival of democracy political stability is essential for the steady progress of the country. Since 1967 the Indian political scene was besmirched by political defections by members of the legislature. This situation brought about instability in the political system. The infamous "Aaya Ram, Gaya Ram" slogan was coined against the background of continuous defections by the legislators resulting in unstable governments. This instability has caused serious concerns in the mind of right thinking political leaders of the country. These leaders started thinking of measures including enactment of law to curb/minimize this menace. Finally culminated in passing of 'anti-defection law' in the form of the 10th Schedule of the Constitution.

In this research paper an effort has been made to analyse the provisions of Indian Constitution and Anti Defection law with a view to arrive at a conclusion whether the law has been successful in eliminating the defections or not. Latest Supreme Court judgments have also been referred to adjudge the suitability of the present law. Efforts have also been made by putting forth suggestions to make the law more effective and fruitful for eliminating the menace of defection.

Keywords : Anti Defection, Democracy, Whip, Speaker of the House, Instability.

Introduction

Indian Constitution envisages adult franchise based on multiparty representative form of democracy. The basic premise on which representative democracy is based is to give due protection and weightage to the wishes of the people. The leader of the political party which enjoys the majority support of the Legislators is chosen as the head of the government. But because of multiparty system we are facing lot many problems. One of them is that most of the times the ruling party though commands the majority in terms of seats in the Parliament/legislature but the ground reality is that the party in power has secured even less than 35% of votes poled and opposition political parties who cumulatively secure more votes in terms of percentage then the ruling party. If we calculate the percentage of votes secured by ruling party in terms of total votersit may come down to 20%. In such a situation the members of fragmented political parties try to defect to ruling side to get position/power/money for their safe future. Thus, the shifting of loyalty by members from one party to other results in political instability.

For the survival of democracy political stability is essential for the steady progress of the country. In democracy every citizen has to feel its responsibility towards Nation, which can be said to be the *sine qua non* for the development and progress of the Nation. As we have chosen the parliamentary form of government where the public elects their representatives to the parliament /legislature to govern ourselves. Therefore, the loyalty of the legislators should be to the nation and electorate of the constituency that elected them. Edmund Burke[1] is also of the view that the representative should think of what is good for the country and not just for his constituents. Similarly, Winston Churchill in his famous speech said that, for him, first came the nation, then the constituents, and then the party. But the fact remains that the legislators are more loyal to the party that fielded them over the electorates. The shifting of loyalty from time to time by members of legislatures to serve their own interest has become a common feature in the seventies of nineteenth century.

Since 1967 the Indian political scene was besmirched by political defections by members of the legislature. This situation brought about instability in the political system. The infamous "Aaya Ram, Gaya Ram" slogan was coined against the background of continuous defections by the legislators. Legislators used to change their loyalty to

*Dean, School of Law, IMS Unison University, Dehradun

[1] famous speech on representation in 1774

political parties frequently, bringing about chaos in the legislatures resulting in unstable governments. This instability has caused serious concerns in the mind of right thinking political leaders of the country. These leaders started thinking of measures including enactment of law to curb/minimize this menace. Several efforts were made to enact law to curb such political defections. Many Bills were brought by members of parliament as private members' bill, and by the government but these could not become law because of one reason or the other, like lack of consensus on the basic provisions of an anti-defection bill. For the first time *Constitution Amendment Bill*[2] was introduced for disqualifying defected legislators from holding ministerial births. This Amendment Bill lapsed with the dissolution of Lok Sabha. This attempt was followed by another *Constitution Amendment Bill*[3] which also lapsed. Members of Parliament were more concerned about their freedom of speech in Parliament and other legislatures over the political instability as they had a fear that too stringent a law on defection would amount to an attempt to curb the freedom of speech- a constitutional right of the legislators. At last in 1985, when Rajiv Gandhi became Prime Minister with a big majority, the 'anti-defection law' was passed as the 52nd Constitution Amendment Act in 1985[4]. This amendment added the Anti-Defection Law in the form of the 10th Schedule of the Constitution. It came into effect from 1st March 1985.

The objectives of the Act are to deal sternly the evil of political defections which has become a matter of national concern, and if it is not combated, it is likely to undermine the very foundation of our democracy and the principles which sustain it. Thus we can say that restoration and reinstatement of democratic values seem to be the object behind enacting anti defection law.[5] Indian Constitution also deals with defections under Article 102 (2)[6] and 191 (2)[7] . The intention of these provisions is also to check the corruption/horse trading in parliament/legislatures to check the popular phenomenon "Aaya Ram Gaya Ram" in the Indian polity.

Though the anti-defection law seeks to provide a stable government by ensuring the legislators do not switch sides but it also restricts a legislator from voting in line with his conscience, judgement and interests of his electorate. It impedes the oversight function of the legislature over the government. It ensures that members cast their vote based on the decisions taken by the party leadership, and not what their constituents would like them to vote for. Generally political parties issue direction/whip to legislators of their party on most of the issues, irrespective of their nature to serve their party's interest and force the legislators to ignore their voters interest.[8]

Salient features of Anti Defection Law:

(I) Paragraph 2 of the 10th Schedule[9] provides for the grounds for defection. It states that members of legislatures who do the following will lose their membership of House if they: (I) voluntary resign from their political party from which they have been elected, (II)vote against the direction/whip of their political party, (III)does not vote/abstain from voting in legislature despite having a direction to vote from their party. Points II and III do not apply if the member has prior permission from his/her party or the party condones the member's action within 15 days of the voting.[10] It further provides that members elected as independent of any political party will lose their membership if they join any political party after their election to legislature. Nominated members will also lose their membership if they join a party within 6 months of their nomination to legislature.[11] The Speaker or the Chairman of the concerned House has been authorized

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2 32nd Constitution Amendment Bill

3 48th Constitution Amendment Bill

4 52nd Constitution Amendment Act,1985

5 Objective statement appended to the Constitution 52nd Amendment Bill

6 Article 102 (2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.

7 Article 191 (2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule

8 Report of the National Commission to review the working of the Constitution, 2002, http://lawmin.nic.in/ncrwc/ncrwcreport.htm, Report of the Committee on electoral reforms, 990, http://lawmin.nic.in/ld/erreports/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf and Law Commission (170th report), 1999, http://www.lawcommissionofindia.nic.in/lc170.htm.

9 Paragraph 2 of the 10thSchedule:Disqualification on grounds of defection. This section deals with the crux of the legislation. This lays out factors on which a member could be disqualified from the Parliament or the State assembly. Provisions in para 2.2(a) provides disqualification of a member if he or she "voluntarily gives up the membership of such political party" whereas para 2.1(b) provisions, when a member votes or abstains from any crucial voting contrary to the directive circulated by his/her respective political party. provision of Para 2.2 states, any member after being elected, representing a political party shall be disqualified if he/she joins any other political party after such election. Para 2.3 states, a nominated member shall be disqualified, if he/she joins any political party after six months from the date he/she takes his seat

10 Ibid

11 Ibid

decide the cases on defection matters. If the Chairman or the Speaker defects, the decisions shall be made by a member elected by the House.[12]

2. The 10th Schedule also provides following exceptions when members will not be disqualified as a member of legislature:

(II) When political parties merge with each other entirely,

(III) When a political party splits into other parties, subject to not less than a third of the members splitting.

(IV) When two-thirds (or more) of members belonging to a party join another party without both their parties explicitly merging.[13]

(V) A split in a political party will not be considered a defection (a) if a complete political party merges with another political party,(b) if a new political party is created by the elected members of one party,(c) if he or she or alternative members of the party haven't accepted the merger between the two parties and opted to perform as a separate group from the time of such a merger.

The question whether a legislator can be disqualified for defecting from a party by voluntarily giving up the membership or has resigned from a party has been answered by the Supreme Court when it has clarified that in the absence of a formal resignation by the member, the giving up of membership can be inferred by his conduct. The members who have publicly expressed opposition to their party or support for another party were deemed to have resigned. The Court further stated that the presiding officer has to draw a reasonable inference from the conduct of the legislator.[14]

The provisions of anti-defection law do not apply to Presidential Elections. "The voting or not voting as per his/her own free will at the Presidential election will not come within the ambit of disqualification under the Tenth Schedule to the Constitution of India and the electors are at liberty to vote or not to vote at the Presidential election as per their own free will and choice.[15] " Therefore, no whip can be issued by the parties to their members to vote in a particular manner and if such a direction is made, it would amount to the exertion of undue influence within the meaning of Section 171C of the Indian Penal Code.[16]

Anti-Defection Law in other Countries

Among the Commonwealth countries, anti- defection law is not only practiced in India but is prevalent in various other countries like Bangladesh, Kenya, South Africa and Singapore who disqualifies a legislator on his ceasing to be member of the party or when he is expelled.

In the United Kingdom Parliament, a member is free to cross over to the other side, without being daunted by any disqualification law. In the US, Canada, and Australia, there is no restraint on legislators switching sides.

In Bangladesh, a member shall vacate his seat if he resigns from or votes against the directions given by his party. The dispute is referred by the Speaker to the Election Commission.[17]

The Kenyan Constitution stipulates that a member who resigns from his party has to vacate his seat. The decision is by the Speaker, and the member may appeal to the High Court.[18]

In Singapore stipulates that a member has to vacate his seat if he resigns, or is expelled from his party. Article 48 states that Parliament decides on any question relating to the disqualification of a member.[19]

The South African Constitution provides that a member loses membership of the Parliament if he ceases to be a member of the party that nominated him.[20]

After going through laws of various countries we can say that the perceptible presence of anti-defection laws in countries where democracy is in a growing stage the legislators are less informed on the principles of democracy, but are more rapacious on gaining more political and monetary ascendancy.[21]

On the other hand in the developed democracies legislators are sufficiently informed of democratic values and their right to freedom of speech and have balancing approach towards both. In these countries the freedom to dissent with the policy of the political party to which a legislator owes allegiance is ensured by the "collective conscience" of the electorate, to which alone the legislators are primarily responsible.

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12 PRS Legislativehttps://www.boomlive.in/what-is-the-anti-defection-law-in-india-and-is-it-working-as-it-should/

13 Added by 93rdAmendment to the Constitution.Paragraph 4 of the 10th Schedule

14 Ravi Nayak vs Union of India, 1994(Supp(2)SCC641

15 Election Commission of India clarification relied on the judgement of KuldipNayar v. UOI, AIR 2006 SC 3127

16 Ibid

17 Article 70 of the Bangladesh Constitution

18 Section 40 of the Kenyan Constitution

19 Article 46 of the Singapore Constitution

20 Section 47 of the South African Constitution

21 The Wire Analysis,13 Nov.2019

Though the Anti Defection law has been able to curb the evil of defection(unholy change of allegiance on the part of the legislators) to a great extent and has served the interest of the society. But, the legislators in search of greener pastures started defecting in bigger groups to another party both in state Assemblies and in Parliament. This only shows that the law needs a relook in order to plug the loopholes.

Role of Presiding Officer in the matters of Disqualifications

The presiding officer(speaker) of the legislature has been authorized to decide the cases of disqualification of the members of the house on the complaint being made by party/ individual concerned. Paragraph 6 of the tenth schedule of the Constitution provides that questions relating to disqualification of member of the house shall be referred to the Speaker whose decision on the same will be final.

Though the expert committee appointed by Election Commission has recommended that the Presiding Officer's power to decide the matter of disqualifying a member should be taken away and the same may be given to the President (in case of MPs) or the Governor (in case of MLAs) on the advice of the Election Commission. This process should also be followed for disqualification in case the person holding an office of profit.[22] This recommendation was not accepted by the Government.

The law initially stated that the decision of the Presiding Officer is not subject to judicial review. This condition was struck down by the Supreme Court in 1992, thereby allowing appeals against the Presiding Officer's decision in the High Court and Supreme Court.[23] However, there may not be any judicial intervention until the Presiding Officer gives his order.

The law does not specify a time-period for the Presiding Officer to decide on a disqualification plea. Therefore, there have been several cases where the Courts have expressed concern about the unnecessary delay in deciding such petitions.[24] In some cases this delay in decision making has resulted in members, who have defected from their parties, continuing to be members of the House. There have also been instances where opposition members have been appointed ministers in the government while still retaining the membership of their original parties in the legislature.[25]

In a case where MLAs were subject to disqualification while defecting to the ruling party in smaller groups, the Presiding Officer gave decision after more than 2/3rd of the opposition has defected to the ruling party in smaller groups. (The Telangana Speaker in March 2016 allowed the merger of the TDP Legislature Party in Telangana with the ruling TRS, citing that in total, 80% of the TDP MLAs (12 out of 15) had joined the TRS at the time of taking the decision.)[26]

In Andhra Pradesh, legislators of the main opposition party boycotted the entire 12-day assembly session in protest against the delay of over 18 months in action being taken against legislators of their party who have allegedly defected to the ruling party.[27]

The Vice President of India as Chairman of Rajya Sabha, disqualified two JD(U) members and gave ruling that all such petitions should be decided by the Presiding Officers within a period of around three months.

The power of the Speaker to disqualify a sitting member is different from disqualifying a candidate from contesting in the election. Therefore, this power of Speaker cannot travel beyond the tenure of the Assembly of which he was the Speaker.[28]

The Supreme Court in *Kihoto Hollohan v. Zachillhu and Others*[29] while interpreting the provisions of Anti-Defection Law observed that a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its members in furtherance of those commonly held principles. Any freedom of its members to vote as they please independently of the political party's declared policies will not only embarrass its public image and

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22 Report of the Committee on Electoral Reforms, 1990, http://lawmin.nic.in/ld/erreports/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms. pdfand the National Commission to review the working of the Constitution (NCRWC), 2002, http://lawmin.nic.in/ncrwc/ncrwcreport.htm.

23 KihotoHollohon vs. Zachilhu and Others, 1992Supp(2)SCC 651

24 Speaker, Haryana Vidhan Sabha Vs KuldeepBishnoi&Ors., 2012, https://indiankanoon.org/doc/45034065/ and Mayawati Vs Markandeya Chand &Ors., 1998, https://indiankanoon.org/doc/1801522/

25 Anti-Defecton Law Ignored, November 30, 2017, http://www.news18.com/news/politics/anti-defection-law-ignored-as-mlas-defect-to-tdp-trs-in-andhra-pradesh-and-telangana-1591319.htmland It's official Minister Talasani is still a TDP Member, March 27,2015, http://www.thehansindia.com/posts/index/Telangana/2015-03-27/Its-Official-Minister-Talasani-is-still-a-TDP-member/140135.

26 Telangana Legislative AssemblyBulletin ,March,10, 2016

27 The line TD leaders dare not cross, December 4, http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/the-line-td-leaders-dare-not-cross/article21257521.ece

28 A.R Antulay vs. R.S NayakAnd Another 1984 (2)SCC 183

29 1992 Supp(2) SCC 651

popularity but also undermine public confidence in its which, in the ultimate analysis, is its source of sustenance nay indeed, its very survival. Public image of disparate stands by members of the same political party is not looked upon, in political tradition, as a desirable state of things.The very purpose of the anti-defection law is to ensure that the voters of the constituency, which the elected member represents, shall not be duped by him. They cannot be taken for a ride, particularly when elections are fought on party lines.[30] The Tenth Schedule has laid down certain norms for keeping the flock of legislators of each party together, and the 'whips' in the hands of legislative party leaders reducing the hon'ble leaders and people's representatives into shepherds and sheep.

The whip authorizes the leader of the party to issue directive to its members to present/ abstain from the house or to exercise his right to vote as per directives issued by the leader. Though issuing if whip adversely affects the right of member to vote according to his conscience and can be said to be against the very basic principles of democracy, but the unhealthy trends of politics ofwithout principle has necessitated for the issue of whip by the leader of the party.Through whip it is expected that the conduct of the political leaders should not only be legally correct but in lines of the whip.

The Supreme Court in Shrimanth Patil[31] case observed that when the party issues a whip, it must be for a very important legislative measure or a trust vote on which the government's survival is at stake. Whips should be used only for crucial issues, for this we certainly need well-thought-out laws. To my mind the question of defections and other acts, society at large and particularly the electorate, needs to act to wipe out this kind of political culture. Legislators who act in unscrupulous ways should be voted out in subsequent elections. The legislators should be made to understand that if they will do certain things that they should not do, then they will lose elections. That is how democracy is supposed to work.

When an independent member is alleged to have joined a political party the test to be applied is whether the member has given up his independent character on which he was elected. This has to be determined on appreciation of material on record and conduct of the member by the Speaker. No hard and fast rule can be laid down in this regard it all dependends on facts of each case. The substance and spirit of anti-defection provisions are the guiding factors. Disqualification of these members by speaker was upheld, despite the allegation of procedural defect in enquiry.[32]

The fact remains that the Speakers have not acted as impartial umpires generally on issues related to defection. Thebasic assumption in the Tenth schedule that the Speaker will decide things on merit and will act impartially has proved wrong as they invariably come from ruling parties and take sides with it.

The Supreme Court in Karnataka case[33] urged Parliament to set up an independent tribunal to decide disqualification petitions within reasonable time to give teeth to the anti-defection law instead of leaving it to Speakers who continue to remain political party members either de jure or de facto. The Court further urged that "It is time Parliament should rethink on whether disqualification petitions ought to be entrusted to Speaker as a quasi-judicial authority when such Speaker continues to belong to a particular political party.[34]

Does anti-defection law curtail the right of free speech of legislators?

The people were having fear in their mind that their representatives will not be able to raise their issues in right perspective because of anti-defection law which intends to put curbs on freedom of expression and speech of them. In spite of such fear in the wake of "Aya Ram Gaya Ram" business which was shaking up the entire party system the need of anti-defection law was felt very much. This issue was also addressed by the five-judge Constitution Bench of the Supreme Court in 1992 K*ihoto Hollohan v. Zachilhu and others*[35] wherein it held that the law does not violate any rights or freedoms and conscience, or the basic structure of parliamentary democracy."The provisions do not violate any right or freedom under Articles 105[36] and 194[37] of the Constitution." The politicians found new loop hole in the

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30 Public Interest Foundation And Others v. Union Of India And Another 07-02 2014 and (2019)SCC 3 SC 224

31 ShrimanthBalasahebPatil v. Hon'ble Speaker Karnataka and Others, 2019SCC Online SC1505

32 Supra Note, 23

33 Supra Note 31

34 Supra Note 31

35 Supra Note 23

36 Article105. Powers, privileges, etc. of the Houses of Parliament and of the members and committees thereof.-(1) Subject to the provisions of this constitution and the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

37 Article 194.Powers, privileges, etc., of the House of Legislatures and of the members and committees thereof.-(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

Act. If he legislators wish to defect need not dread the Tenth Schedule to the Constitution, dealing with the disqualification of elected representatives on the grounds of defection. Before indulging in any anti-party activity which could invite disqualification under the schedule, they need to simply send in their resignation letters to the presiding officers of the house to which they have been elected as members. If their resignation letters precede the cause of action of their disqualification proceedings, the speakers will not inquire into their motivation for resigning their seats. The speakers need to satisfy themselves by ensuring that the resignation letters were not forged by others, and that the members who resigned did not do so out of coercion. If the members who resign do so because of some allurement from other parties, the speaker need not cite that as a ground for rejecting their resignations.[38]

The Supreme Court refused to pronounce on the validity of the rejection of resignations of MLA's by the speaker of the Karnataka assembly, because it found that their acts of disqualification arose prior to their submission of resignation letters.[39] The Court further observed that since the court found their disqualification by the speaker constitutional, it did not have to adjudicate the question of whether the speaker's rejection of their resignation letters was valid or not. At the same time court asserted that we can lay down the principles to guide the speaker's decision in future.[40]

The author is of the view that to give strength to the anti defection law and to expose the misdeeds of corrupt MLA's in terms of defection the court should have lifted the veil behind their resignation from the assembly.

Article 190(3) of the Constitution confers discretion on the speaker of the house to decide on the resignations of dissident MLAs as and when he considers appropriate, the Speaker has to satisfy himself that the resignations are voluntary and genuine and can reject them if he feels they are not. In this regard the inquiry should be restricted to the ascertainment of whether said member is resigning out of his free will or not.[41] Though the speaker has absolute discretion in this matter he has to follow certain set of rules as there is an assumption that he is a neutral person and acts in good faith.[42]

To decide whether the resignations were "voluntary" or "genuine" cannot be based on the ipse dixit of the speaker, instead, it has to be based on his "satisfaction" which should be based on objective material showing that resignation is not voluntary or genuine.[43] The satisfaction of the speaker is subject to judicial review, when Court observed that."On a consideration of the totality of the facts brought on record before us, it cannot be held that the findings of the Speaker are so unreasonable or unconscionable that no tribunal could have arrived at the same findings".[44] The Court cannot review the facts and evaluate the decision of the Speaker on the matter whether the members have voluntarily given up their membership of the party.[45]

The governor of Madhya Pradesh excising his powers conferred under Article 175(2) of the Constitution sent message to the Chief Minister in the wake of submission of resignation of 22 MLAs of congress party you should prove your majority in the house and asked to call meeting of the house over the upcoming week end to prove that your government still enjoys confidence of the house. The speaker passed the agenda for floor test after 10 to 12 days away from the day directed by the governor. The opposition party filed writ petition to Supreme Court to seek direction to advance the floor test. They argued that allowing more time for floor test would be the anti thesis of constitutional morality and would lead to horse trading. The speaker argued that I have to inquire whether the resignations submitted by 22 MLAs is voluntary or not , therefore I convened the meeting of house after 12 days. The Supreme Court held that governor has power to direct the speaker to call upon the meeting of house at the earliest and in this case directed the speaker to call upon the meeting of the house in three days as floor test is the only way to prove the majority.[46] The speaker than accepted resignation of all the 22 MLAs hurriedly and called the meeting of the house, but before the meeting of Assembly Chief Minister resigned, creating uncertainty in the State. It is submitted that in such cases speaker is not expected to act as neutral person and certainly will take sides with the party on whose ticket he has been elected. In this case the speaker could not inquire the voluntary or genuineness of the resignations. The fact that the members who resigned were taken to guest house in another state en block. The mystery still shrouds around the money and muscle power and horse trading .

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38 The Wire Analysis,13/NOV/2019

39 Shrimanth Balasaheb Patil v Hon'ble Speaker, Karnataka Legislative Assembly and others,2019 SCC Online SC 1454

40 Ibid

41 Article 190(3) If a member of a House of the Legislature of a State-
(a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of Article 191; or
(b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be, and his resignation is accepted by the Speaker or the Chairman, as the case may be, his seat shall thereupon becomes vacant:
Provided that in the case of any resignation referred to in sub-clause (b), if from information received or otherwise and after making such inquiry as he thinks fit, the Speaker or the Chairman, as the case may be, is satisfied that such resignation is not voluntary or genuine, he shall not accept such resignation.

Disqualification commensurate with the end of the assembly's term?

Article 191(2)[47] of the Constitution stipulates that a person who is no longer a member due to disqualification under Tenth Schedule will not suffer from the additional infirmity of not being allowed to become a member subsequently. Therefore, this provision does not debar a person from contesting elections. Articles 164(1B)[48] and 361B[49] also stipulate that disqualification does not bar a person from contesting elections. The outer period of disqualification is either till the end of the term or till the disqualified member is re-elected, whichever is earlier.

The speaker does not have any explicit power to specify the period of disqualification or bar a member from contesting elections after disqualification until the end of the term of the legislative assembly. If we take stand otherwise it could have a chilling effect on legitimate dissent; such a change in the policy cannot be looked into by this court, as the same squarely falls within the legislative forte.[50]

The court while striking down the part of the impugned order passed by the Speaker which specifies that the disqualification would last from the date of the order to the expiry of the term of legislative assembly as ultra vires, pointed out that the constitutional morality should never be replaced by political morality, in deciding what the constitution mandates. As this does not go to the root of the order, it does not affect the aspect of legality of the disqualification orders, the court pointed out while justifying its decision to sever the two aspects of the Speaker's order.[51]

The Supreme Court, while declaring the provisions of law which exclude the jurisdiction of courts from reviewing the decision of speakers unconstitutional unanimously observed that paragraph 7 of tenth schedule[52] completely excluded jurisdiction of all courts including the Supreme Court under Article 136 and High Courts under Articles 226 and 227 in respect of any matter connected with the disqualification of the member of a House. The Constitution does not allow the legislature to limit the powers of judiciary. 'The Speakers/Chairmen while exercising powers and discharging functions under the Tenth Schedule act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are amenable to judicial review'. Accordingly the Supreme Court reviewed and struck down the order passed by Speaker of Goa Assembly for disqualifying two members in violation of constitutional mandate contained in paragraph 3 of Tenth Schedule[53] to the Constitution.[54]

The political parties, instead of maintaining standards within the party with effective leadership, are resorting to litigation, begging the courts to decide the political issues with in the frame work of Constitution. Both Governors and Speakers desperately try to use Constitutional power to settle political scores and wreck political vengeance. In the process they just do not care the people's will in electing a party to power.

The issue that whether a member can be said to voluntarily give up his membership of a party, if he joins another party after being expelled by his old political party came up before the Supreme Court in[55] where in the Court observed that "Once a member is expelled, he is treated as an

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42 Election Comm.of India v. Telangana RastraSamithi& Another,(2010)14 (Addl.) SCR 468 and ShrimanthBalasahebPatil v Hon'ble Speaker, Karnataka Legislative Assembly and others,2019 SCC Online SC 1454

43 Ibid

44 Ibid

45 Ibid

46 Shivraj Singh Chauhan v. Speaker , M.P. Legislative Assembly, wp (c) no 439 of 2020

47 Article 191 (2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule.

48 Article 164(1B) A member of Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council belonging to any political party who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister under clause (1 …

49 Article 361B A member of a House belonging to any political party who is disqualified for being a member of the House under paragraph 2 of the Tenth Schedule shall also be disqualified to hold any remunerative political post for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or till the date on which he contests an election to a House and is declared elected, whichever is earlier.

50 Supra note 38

51 Supra note 38

52 paragraph 7 of tenth schedule: This provision bars any Court jurisdiction in case of disqualification of a member under this schedule. But, this schedule does not bar court intervention under article 32, 226 and 137 of the Constitution of India.

53 paragraph 3 of Tenth Schedule: Omitted after amending the schedule by the ninety-first amendment act - 2003, which exempted disqualifications arising out of splits with one-third of the members defecting from a Political party

54 Supra note 38

55 Bal Chandra L Jarkiholi and Others v. B.S. Yeddiyurappa and Others, 2011 (7)SCC 01

'unattached' member in the house. However, he continues to be a member of the old party as per the Tenth Schedule. So if he joins a new party after being expelled, he can be said to have voluntarily given up membership of his old party."

In another case[56] the court was asked whether a Speaker can review his own decision to disqualify a member under the Tenth Schedule, it was held that The Speaker of a House does not have the power to review his own decisions to disqualify a candidate. Such power is not provided for under the Schedule, and is not implicit in the provisions either.

A very important issue regarding the point that when can a court review the Speaker's decision making process under the Tenth Schedule was answered by the Supreme Court[57] when it observed that if the Speaker fails to act on a complaint, or accepts claims of splits or mergers without making a finding, he fails to act as per the Tenth Schedule. The Court further said that ignoring a petition for disqualification is not merely an irregularity but a violation of constitutional duties.[58]

The question of Speaker's powers to disqualify members and the extent to which courts can interfere with it have been a legal minefield, with contrasting judgements delivered in High Courts and Supreme Court. This culminated in a reference to a larger bench in SA Sampath Kumar vs Kale Yadaiah and Others,[59] to settle principles once and for all.

The three-judge bench of Supreme Court led by RF Nariman observed that the questions raised in the 2016 reference had already been answered by a five-judge bench in 2007. Justice Nariman while speaking on behalf of Court[60] pointed out that this court in Rajendra Singh Rana vs Swamy Prasad Maurya,[61] and Kilhoto Hollohan vs Zachillhu and others,[62] held that the Constitution prohibits judicial intervention to protect the legislator from the Speaker's action before the petition is decided by him. This means that the court cannot issue an interim order protecting the MLA or the MP from disqualification proceedings. It makes the position of law clear that "what was meant to be outside the pale of judicial review in Kihoto Hollohan are quiatimet actions in the sense of injunctions to prevent the Speaker from making a decision on the ground of imminent apprehended danger and does not interdict judicial review in aid of the Speaker arriving at a prompt decision as to disqualification under the provisions of the Tenth Schedule.

Applicability of principles of natural justice:

The principles of natural justice are sine a qua non for the transparency and for imparting justice . It was argued that the principles of natural justice are required to be followed in cases of disqualification matters. The answer to this question whether to follow the principles of natural justice in case of disqualification proceedings is mandatory or not was given by the Supreme Court in Ravi Nayak case[63] when it held that the Speaker can rely on newspaper clippings during the disqualification proceeding. Again in Mahachandra Prasad Singh[64] case the Supreme Court held, that when facts are admitted and not disputed, non supply of documents will not cause prejudice and thereby will not result in violation of principles of natural justice.

Again in Jagjit Singh case[65] the Supreme Court laid down the law regarding principles of natural justice qua Speaker's order, it held that natural justice is not a straight jacket formula and will depend on facts and circumstances of each case. The test to decide whether opportunity was given by Speaker is not to be measured based on time, but on whether it was sufficient.

To my mind the wisdom of the legislature in entrusting Speakers with the responsibility of ruling on the disqualification of lawmakers who defect needs to be revisited. The powers conferred on speaker by paragraph 6 of the tenth schedule[66] of the Constitution in the matters relating to disqualification of member of the house requires to be re construed by substituting speaker with a permanent tribunal headed by a retired Judge of the Supreme Court or a retired Chief Justice of a High Court or some other independent mechanism as the arbiter of such disputes. While endorsing this measure, the Court held, that it will ensure that such disputes are decided both swiftly and impartially, thus giving real teeth to the provisions contained in the tenth schedule, which the court said is vital

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56 Dr.Kashinath G Jalmi and Another v. Speaker and Others, AIR 1993 SC 1823

57 Rajendra Singh Rana and Ors.vs. Swami Prasad Maurya and Ors.[(2007) 4 SCC 270]

58 Ibid

59 2018 SCC online 2054

60 2020 SCC Online SC 55

61 Supra note 39

62 Supra note 32

63 Ravi S, Nayak v. Union of IndiaAIR19941558

64 Dr. Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council, [(2004) 8 SCC 747]

65 Jagjit Singh v. State of Haryana (2006) 11 SCC 1

66 Paragraph 6 of the tenth schedule:This paragraph details the Chairman or the Speaker of the respective legislative house shall be the ultimate decision making authority in case of any disqualification arises.

to the proper functioning of the democracy.[67] The Court further observed that "It is time that Parliament has to rethink on whether disqualification petitions ought to be entrusted to a Speaker as a quasi-judicial authority when such Speaker continues to belong to a particular political party either de jure or de facto".

In Manipur after 2017 Assembly elections the Congress was the single-largest party with 28 seats, was three seats short of the majority mark in the 60-seat assembly, the BJP, with 21 seats, moved to stake claim along with other smaller parties. Congress MLA ShyamKumar extended support to the BJP, helping Singh form a coalition government. ShyamKumar was made a minister of town planning, forest and environment in the BJP government. Congress leaders filed petition before the Speaker of Manipur legislative assembly, seeking ShyamKumar's disqualification but the Speaker did not act on the complaints. Congress then approached the Manipur High Court. The high court noted the seriousness of the issue but declined to grant any relief on the ground that the issue regarding powers of high court to interfere with the Speaker's discretion is pending before Supreme Court.

Keisham Meghachandra Singh then moved the Supreme Court in appeal[68]. The Manipur Speaker argued before the SC that the issue regarding whether high courts can direct Speakers to decide a disqualification petitions within a particular time frame was referred to a constitution bench of the Supreme Court in 2015 in the case of SASampath Kumar v. Kale Yadaiah.[69] Hence, the petitioner submitted that the decision in the Manipur case should be deferred till the constitution bench decides the issue.

However, the Supreme Court turned down this argument holding that the issue was conclusively settled by the top court in a 2007 judgment of Rajendra Singh Rana v. Swami Prasad Maurya[70] in which the court ruled that the High Court can direct Speakers to rule on disqualification petitions if they do not do this within a reasonable time and directed the Speaker of the Manipur assembly to rule on the disqualification pleas pending before him within four weeks. The court also made it clear that if the Speaker does not take a decision within four weeks, it will be open to any party to apply to the Supreme Court for further relief.

To my mind, the Supreme Court in Karnataka case did the right thing by allowing the Speaker the discretion to rule on the resignations with the direction that after exercising his discretion in the matter he has to convey the same to the Supreme Court.

Defection, Ethics and Democracy

The legislators are lured for money and power which forms the playing field for many of the defection cases. The acceptance of money by a legislator for doing any act on the floor of the House cannot be said to be ethical. The Cash for Query incident which happened in 2005 reminds us the influence of money and the extent to which the legislators go to satiate their avarice. Members of Parliament accepted money from stakeholders and raised questions in Parliament apparently to the benefit of money givers.[71]

To ensure that the members of legislatures should act and behave and vote as per their conscience and not lured for the individual/family benefits an ethical committee has been constituted in all legislatures.

In a sting operation upon the report of the Ethics Committee members were expelled the delinquent MPs who accepted money from stake holders for raising their questions in house. The author is of the view that theactive involvement of the Ethics Committee can be useful to prevent/minimize the incidents of horse trading of legislators. If every incident of defection tainted with monetary factors is enquired into and dealt with by Ethics Committee, the shameful floor crossing by legislators can be contained to a great extent.

Conclusion and Suggestions

The whole problem, the author feels, arises in the anti-defection law itself, which goes against the principles of representative democracy. The anti-defection law has made every MP or a MLA a slave of the party leadership. Invariably, It has converted our parliamentary system in to a de-facto presidential system as the Prime Minister or Chief Minister, who are executive heads controls the majority party in the Parliament or legislature. In essence, the executive and the legislature seem to have merged in to each other for this purpose. Apart from this it has following ramifications:

- It affects the independence of MPs/ MLAs.
- Framers of the Constitution didn't intend to give the control of members of legislatures to political parties. Against this philosophy in 1985 by incorporating 10thschedule in the Constitution, for the first time word "political parties" was incorporated in the Constitution.

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67 Ibid

68 Case decided on 21 January, 2020

69 https://www.lawyerservices.in/SA-Sampath-Kumar-Versus-Kale-Yadaiah-and-Others-2016-11-08

70 Supra note 27

71 S.SanalKumar,Advocate,"Anti defection law in India: Its flaws and its falls; Bar &Bench, August,I,2019

- A new term chief whip was also coined to empower leader of the party to ensure among legislatures to abide by his dictates.
- Anti-defection law prevents the members to speak up their mind and conviction necessary for fruitful discussion and thus undermines better debates and solutions in Parliament. In a diverse country like India, members also represent their constituencies, every member needs to be given voice to give voice to all regions and sections of the population.
- The anti-defection law has made mockery of parliamentary democracy by marginalizing debates, as the legislators are not allowed to dissent, without being disqualified by the House. Thus Parliamentary debate has become largely redundant.
- Not only this the freedom of a legislator to express his dissent against the policy decision of his political party is also necessary for the survival of a robust democracy but this freedom has been curtailed by the Act. It is undemocratic to tie a legislator to the whims and fancies of a political leadership
- Anti-defection law was passed to bring down the political defections but due to ever increasing political dishonesty and corruption this law never evolved properly. Politicians found loopholes in this law and use it for their own benefit.
- Now a days, no real democratic discussions happen inside political parties on major issues affecting the country. Individual MPs and MLAs should be left free to think independently and act accordingly.
- Even if we think that Anti-defection law has been successful in controlling defection the power to whip should be restricted to such cases where stability of the government is at stake like passage of the annual budget or no-confidence motions and to policy matters only.
- Even if we admit that the rationale behind conferring power to issue whip to the political party is that a legislator has been elected on the basis of the party's program it can also be made applicable to pre-poll alliances also.
- The powers conferred on Speaker to decide the cases of disqualification has proved wrong. This power was conferred on them under the presumption that they after election as Speaker will act independently, but this power has been exercised with ulterior motives. It is therefore, suggested that this decision making power be given to the President of India or the Governor of the State on the basis of an enquiry conducted by the Election Commissioner.[72] This would make the process similar to the disqualification procedure as provided in the Representation of Peoples Act.
- A new provision should be incorporated in the Representation of Peoples Act that the expenditure incurred in the election and the expenditure likely to be incurred in by election along with heavy penalty from defectors be made.
- As suggested by the Supreme Court if India an independent tribunal can also be constituted to decide the matters of disqualification of members of legislatures. The Tribunal should be headed by Retired Chief Justice if India.
- A time limit should be prescribed with in which the tribunal have to decide the matter, say one month.
- At present there is no provision in the present legal system for ensuring intra-party democracy in a political party. Representation of People Act is required to be amended to make political parties more democratic in the selection of their leadership. Those political parties who do not ensure intra party democracy should be deprived the power to issue whip.
- The amendment of the Representation of Peoples Act relating to recognition of a political party is also a need of the hour. A provision in the Act that parties which follow intra-party democracy in the selection of leadership would only be recognised may perhaps propel democratisation in the party hierarchy.
- There is a need to revisit our constitutional provisions to combat the menace of corruption and defection which has eroded the values of democracy.
- Provisions of law permitting exemption in case of splits and mergers of political parties from disqualification should be deleted as it has a tendency to defect at mass level .
- Pre pole alliance with various political parties should be given the status of political party under anti-defection law. It will also be helpful in controlling defection
- Another provision should also requires to be incorporated in the Representation of Peoples Act to the effect that the defectors should be barred from holding any public office or any remunerative political post for the duration of the remaining term.

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[72] Report of the 170th Law Commission

- The vote cast by a defector to topple a government should be treated as invalid.[73]
- Lok Sabha Speaker Om Birla while addressing the meeting of presiding officers of Indian Parliament and assemblies at Dehradun saidthat "the way people are losing faith in democratic institutions and the way fingers are pointed at presiding officers of legislative bodies, it is a matter of great concern. There is a need to amend the law to uphold the prestige of the institution of speaker."[74]

[73] Constitution Review Commission (2002)

[74] Meeting of Presiding officers held at Dehradun

The Imperative of Medical Evidence in Personal Injury Litigation: Nigeria in Focus

Dr. Dennis Odigie*

ABSTRACT

An appreciable number of personal injury cases are lost in litigationprocess on grounds of failure by some legal practitioners to tender relevant medical evidence (oral and documentary) owing to the misconception that physical observation of the victim's injury by the trial judge would take the place of the required medical evidence. Other reasons include reliance on the doctrine of res ipsa loquitur by the claimant upon such physical observation without more. Indigent personal injury victims are often unable to seek quality medical treatment or secure the attendance of qualified medical expert to testify and tender the required medical evidence onheir behalf. This paper highlights the fact that trial courts may continue to be helpless in the award of adequate compensation to personal injury claimants, in the absence of the required medical evidence. The paper offers suggestions on how identified pitfalls could be avoided, and concludes that despite the aforementioned challenges, medical evidence remains the cornerstone of personal injury litigation.

Keywords: medical evidence, personal injury, litigation, compensation, proof

1. Introduction

The predominance of illiteracy and poverty in the Nigerian society, coupled with unequal access to qualitative and affordable medical services by majority of the Nigerian populace negatively impact the quality of life of the unskilled and low income bracket workers in the event that they become victims of personal injury. The scenario is more noticeable in the construction and manufacturing industrial sectors of the economy. The aforementioned challenges negatively impact the victims' ability to afford the services of qualified medical personnel for treatment or to give expert evidence as to the cause, nature, extent and effect of injury suffered. Other challenges in this context include the fact that, some legal practitioners prefer to simply present the claimant before the court so that the victim's physical deformity could be observed by the trial judge, thereafter, rely on the doctrine of res ipsa loquitur. The primary focus of this paper is to emphasize that medical evidence remains indispensable in personal injury litigation.

The place of medical evidence in personal injury litigation is unique and indispensable, to the extent that evidence of scientists and other professionals cannot be substituted for it. In Nightingale *vBiffen, Hewitt vBiffen*[1], a narrower view of admissibility of evidence on a medical point was taken by the Court of Appeal. The issue was whether the arsenic poisoning from which two workmen were suffering had been contracted from bodily contact with arsenic in sheep dip. Medical evidence was given on behalf of the workmen by two qualified physicians who attributed the illness to arsenical poisoning which could have been contracted by contact with sheep dip. This medical opinion was controverted by a witness called by the employer, who described himself as research student in toxicology with proficiency in the knowledge of symptoms of arsenical poisoning, associated with many industries in which arsenical compounds were used; he held a B.Sc degree. The Court of Appeal held that such evidence was inadmissible against the evidence of a medical expert. The situation in Nigeria is not different from the aforementioned.

Medical evidence remains the barometer by which the judge is reasonably guided on assessment and award of damages for personal injury. In *Oke v Kaja*[2],the appellant who was plaintiff at the High Court went to respondent's eye hospital for treatment. While being conveyed in a lift at the eye surgery, his legs were trapped in a lift and he sustained injuries. Plaintiff's counsel failed to tender medical certificate in proof of the injury sustained. At the conclusion of evidence, the trial court awarded N2 million damages on the basis of defendant's admission. On appeal, the Supreme Court set aside the judgment of the trial court on grounds that the plaintiff failed to call medical evidence to contradict the fact that he (plaintiff) already had 81-85% disability before the accident which resulted in the action. The court cannot award damages on the basis of the patent and observable deformity in the claimant, but on theoral and documentary evidence from the medical expert who treated the victim. In *Ediagbonya v*

*Associate Professor of Law, University of Benin, Benin City, Nigeria.

1 (1925) 18 B.W.C.C.358(C.A),as cited by Dorothy Knight Dix and Alan H. Todd, in Medical Evidence in Personal Injury Cases, (London R2,Whitefriars Press Ltd, , 1961),

2 (2014) 3 NWLR (Pt.1394) 374

Dumez(Nig)Ltd[3], Karibi-Whyte, J.S.C emphasized the importance of medical evidence in proof of personal injury cases in the following words;

In personal injury cases, damages should be full and adequate. However, it must be recognized and conceded that the fullness and the adequacy of damages awarded as compensation will in each case depend on proved solid facts of the case and a just and fair assessment of the effect of the injury complained of.

Proof of specific injury and its impact on the victim's ability to do the work he used to do, loss of expectation of life and percentage disability as a result of injury suffered can best be proved by medical evidence. The judge cannot conjecture, speculate or assume anything about the severity or otherwise, of claimant's injury. There is no substitute for this requirement due to the specialized nature of evidence required. In *Omigie v Omoregie*[4], the plaintiff, an infant sued through her father (as "next friend"), against the defendants jointly and severally for N50,000 special and general, for severe and multiple injuries sustained by the plaintiff in a road traffic accident when the 1st defendant negligently drove 2nd defendant's car, hit the plaintiff(a teenage pedestrian) from behind and dragged her on the road until she was stuck against a stationary car. The plaintiff was treated as an in-patient at the Specialist Hospital, Benin City. The plaintiff's father paid the medical bills and cost of drugs. At the trial, plaintiff's counsel failed to tender medical certificate to show the severity and nature of injuries suffered by plaintiff. He also failed to call the medical doctor who treated the victim as witness. The court awarded nominal damages for pain and suffering and held that substantial damages could not be awarded in the absence of medical evidence to prove the severity, nature and effect of injury suffered. Upholding the trial court's findings, Omo JCA said;

Whist no medical evidence may be necessary to justify an award under this heading, an award under this head will be considerably enhanced where there is concrete evidence as to "fear of future incapacity, either as to health, sanity or ability to make a living…Sadness and embarrassment caused by disfigurement". No such evidence was adduced here either by the appellant or her father or P.W.1. Only the bare facts of the accident injuries sustained, and treatment were testified to.I must observe in passing that such evidence must have been available but was rather carelessly not adduced…To justify the award of a high sum such as N45,000 as damages for pain and suffering it is necessary to establish the specific nature and degree of seriousness of the injuries alleged to have been sustained; and to do so successfully there is an obvious need for some medical evidence. In the absence of such evidence only the award of a smaller amount can be justified.

It is obvious that the plaintiff would have been better for it in terms of damages awarded if her counsel had tendered medical records in support of the observable injuries in her and called the doctor who treated her for injuries suffered. If plaintiff's counsel had appreciated the foregoing, the plaintiff would have been awarded substantial damages.

It is axiomatic that no other class of evidence can take the place of oral and documentary medical evidence. Other documentary evidence such as patient's card, medical laboratory tests, receipts for purchase of drugs etcetera, would at best establish items of special damage. Only medical evidence can prove the degree of percentage disability and provide a clear guide for plaintiff's loss of earning capacity. Failure to call the doctor as witness or tender medical report on claimant's condition would constrain the court to award an infinitesimal sum as general damages to claimant. In J*ulius Berger Nigeria Plc v Godfrey Nwagwu*[5], where a piece of bone flew into plaintiff's eye and blinded same while working as butcher for the defendant company, there was overwhelming oral evidence of medical treatment of the plaintiff/respondent at hospital. Paragraph 14 of the statement of claim read;

That the plaintiff's right eye was medically attested to be dead by the authorities of Ahmadu Bello University Teaching Hospital Kaduna as a result of the injury he sustained during his course of employment by the defendant on the 27th of May 1997. which injury he would not have sustained if the defendant had provided him with safety device(s) to protect his eyes. Plaintiff shall at the trial rely on the report on his right eye from ABUTH Kaduna and same is hereby pleaded in evidence.

The respondent tendered several exhibits to show he received treatment in a few hospitals including Ahmadu Bello University Teaching Hospital, Kaduna, but failed to tender medical certificate from the hospital to show that his eye was dead as pleaded. Despite this omission, judgment was given in favour of the plaintiff by the trial court. On appeal, the judgment was set aside on grounds of absence of medical evidence. In his judgment, Rhodes -Vivour JCA said;

… as I have said earlier there is no evidence before me that the plaintiff cannot see or has totally lost his right eye. I therefore award a general damage (sic) of N135.000.00K only to be paid by the defendant to the plaintiff.

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[3] (1986) 3NWLR (Pt.31)753

[4] (1990)2 NWLR (Pt.130) 29

[5] (2006) 12 NWLR (Pt 995) 518

In cases of surgery occasioning personal injury, the defendants are usually medical doctors. The tendency is for such defendants to adduce fool proof evidence about how careful they were in carrying out the surgical procedure that resulted in the injury.For this reason, it is imperative for the claimant to go the extra mile by calling specialists in the field relevant to his condition as witnesses in proof of his case in the absence of which the claimant may be taking a flutter.

2. Res ipsa loquitur and surgical cases.

Res ipsa loquitur is a latin maxim which translates to 'the thing speaks for itself'. The court has resonated unequivocally in a retinue of cases, the inapplicability of the doctrine of res ipsa loquitur to surgical cases occasioning personal injury. In *Ojo v Gharoro*[6], the appellant who was plaintiff at the High Court of Edo State had a surgical operation for the removal of a growth that was observed in her fallopian tube at the University of Benin Teaching Hospital on 17/12/93. The 1st and 3rd respondents in the course of surgery negligently left a broken needle in plaintiff's womb, as a result of which she experienced great pains. In an effort to remove the broken needle, the plaintiff had another unsuccessful operation in a private hospital, and was finally referred to the University College Hospital, Ibadan, for exploratory laparotomy under fluoroscopy.

The plaintiff/appellant gave evidence that other gynaecologists she consulted confirmed to her that the way the surgeries were carried out would prevent her from bearing a child. She did not call any of the gynecologists as witnesses. She also did not tender any medical report or evidence in support of her claim but chose to rely on the doctrine of res ipsa loquitur. The court held inter alia that the case could not succeed in the absence of medical evidence. The decision in *Ojo v Gharoro* would have been decided differently if the plaintiff had called the private medical practitioner who treated her after the initial surgery, and the doctors who carried out the laparotomy at the University of Ibadan Teaching Hospital as witnesses. The Supreme Court held that claimant's evidence (not being expert evidence) could not discredit the expert evidence given by the defendants in their defence. In his judgment, Tobi JSC said;

It is on record that only the appellant gave evidence in an apparent proof of negligence on the part of the respondents. In a complicated and highly professional case such as this, where she relies on the doctrine of res ipsa loquitur, arising from an abdominal operation, I expected her to call expert evidence and here I have in mind surgeon or surgeons. I had earlier said such expert evidence should have been taken along with the evidence of the 1st respondent and DW1, all medical practitioners for purposes of determining where the pendulum tilts in the imaginary scale. As it is, the lay evidence of the appellant, if I may say so, for lack of better expression, in an essentially professional matter, and in the' professional areas, cannot match side by side with the evidence of 1st respondent, DWI and DW2. In the circumstances, I have no difficulty in coming to the conclusion that the presumption of negligence on the part of the respondents was clearly rebutted by the evidence of the three witnesses, and 1 so hold.

In *Mahan v Osborne*[7], the defendant performed an emergency abdominal operation on the plaintiff. During the operation, swabs were used to pack off adjacent organs from the area of operation. About three months after the operation the patient became seriously ill and when operated on, it was found that a swab had been left in his abdomen at the first operation. The patient died, and action was brought under the relevant English Statutes claiming damages against the defendant for negligence in the conduct of the first operation. The plaintiff obtained a verdict and judgment at the trial before Atkinson, J with a jury. On appeal, the judgment was set aside by Scott. L.J. An excerpt of the judgment read;

…it is difficult to see how the principle of res ipsa loquitur can apply generally to actions of negligence against a surgeon for leaving a swab in a patient, even if in certain circumstances the presumption may arise. If it applied generally, plaintiff's counsel, having by a couple of answers to interrogatories proved that the defendant performed the operation and that a swab was left in, would be entitled to ask for judgment, unless evidence describing the operation will disclose facts sufficiently indicative of want of skill or care to entitle a jury to find neglect of duty to the patient. It may be that expert evidence in addition will be requisite. But to treat the maxim as applying in every case where a swab is left in the patient seems to me an error of law.

In *Morris v Winsbury-Whyte*[7], the defendant had operated on the plaintiff. The post-operative treatment involved the insertion into his body of tubes and their frequent replacement. The tubes were originally inserted by the defendant during the operation, but replacements were made subsequently by resident doctors and nurses. Sometime after plaintiff's discharge from the hospital, a portion of a tube was found in his bladder. In an action for negligence against defendant, Tucker, J held that res ipsa loquitur did not apply because, while at the hospital ,he

6 (2006)10 NWLR(987)173

7 (1939) 2 KB 14, (1939) 1 ALL ER 535

8 (1937)4 ALL ER 494

was treated by numerous doctors and nurses, and was not in control or charge of the defendant for the whole period.

In *Roe v. Ministry of Health*[9], plaintiff was operated on in defendant's hospital where a spinal anesthetist of Nupercaine was administered by defendant, Dr. Graham, an anesthetist. After the operation, plaintiff developed spastic paraplegia resulting in paralysis from the waist down. Plaintiff brought an action against the hospital and/or Dr. Graham contending that res ipsa loquitur applied since the paralysis ordinarily did not follow a properly administered anesthetic. The court held that the doctrine did not apply. In *Hughston v Jost*[10], sodium pentathlon that was injected into the plaintiff intravenously leaked into surrounding tissues. The court held that res ipsa loquitur did not apply. Similarly, in Fish v Kapur(1948) 2 ALL ER 176, a dentist extracted a wisdom tooth, leaving part of root in plaintiff's jaw and fracturing it, the court held that res ipsa loquitur did not apply.

It is submitted that a foreign object should ordinarily not be left in a patient after surgery. It is submitted further that regardless of the decisions in other jurisdictions on the non-application of the doctrine of res ipsa loquitur to clear cases of medical negligence aforementioned, the argument about the distinction between a full needle and half-broken needle as contended in Ojo v Gharorois unnecessary. This is a proper situation where the doctrine of res ipsa loquitur ought to apply.

3. The gains of Medical Proof

The courts have stated in unequivocal terms that medical evidence remains the plank on which personal injury litigation rests. This principle of law also applies in Nigeria as in other jurisdictions as exemplified by foreign judicial authorities. In *Nigerian Bottling Co. Ltd v Constance Ngonadi,*[11] Oputa JSC in his decision referred copiously to the testimony by plaintiff's first witness (a medical doctor) where he said;

I medically examined her and found as follows: 1st and 2nd degree burns of the right side of the face extending to the right side of the ear and neck. 2nd and 3rd degree burns of the breast muscle, right axilla (armpit) extending to the right chest and the right lower quadrant of the abdomen. 2nd and 3rd degree burns of the right shoulder and the whole of the right arm up to 2/3 of the dorsum of the right hand (upper skin coner of the finger). Continuing his evidence, the witness added: 3rd degree burn is where the whole structure of the skin is burnt...It leaves back de-pigmented scar i.e., the scare cannot get back the original colour of the skin." Testifying as to the resulting effect of the plaintiffs/respondent's injuries, the medical witness.The witness concluded: "There was incomplete restoration of muscular flexibility and power. Therefore, the plaintiff/respondent cannot lift heavy loads with the right hand; nor withstand muscular assault: She cannot properly wash clothes, grind pepper or pound yam...She will easily get tired in discharging domestic duties.

The medical expert proceeded to analyse the medical and psychological effects of the injury suffered by plaintiff in the following words;

Breast Affectation.....This would affect the breast feeding of her children.....Cosmetic Affectation…As a young lady the pigmented colour can never be restored. She cannot use normal female's cosmetics otherwise she mayhave cancer of the skin. Social Affectation…she cannot take part in cultural dances where the breast and hands are exposed. She has to wear long sleeves to avoid exposure of the ugly scar left there after the burns. Remote Affectation…quick ageing of the hand and skin, some minor or major mental disturbances….On the above medical evidence, I wonder how it can be seriously contended that the award of N30,000.00 general damages was fantastic or excessive." What would be the cost in Naira and Kobo of pain and suffering, of loss of muscular flexibility, of inability to breast feed one's children, of permanent disfigurement of one part of the body, of possible major mental disturbance.

Evaluating the above medical evidence, Oputa JSC said;

On the above medical evidence, in wonder how it can be seriously contended that the award of N30,000 general damages was fantastic or excessive. What would be the cost in Naira and Kobo of pain and suffering, of loss of muscular flexibility, of inability to breast feed one's children, of permanent disfigurement of one part of the body, of major mental disturbances?...The court of first instance took account of all these and arrived at the figure of N30,000.00(to my mind a very conservative assessment).

In *Smith vLeech Brain & Co. Ltd*[12], the medical testimony showed that "the burn was the promoting agency of cancer in tissues which already had a pre-malignant condition. In these circumstances, it is clear that the plaintiff, but for the burn, would not have developed cancer. On the other hand, having regards to the number of matters which can be promoting agencies, there was a strong likelihood that

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9 (1954) 2 QB 66, (1954)2 ALL ER 131

10 (1943) 1 DLR 4026

11 supra

12 (1962)2 Q.B 405 at 413

at some stage in his life he would develop cancer..." In *Warren v. Scruttons Ltd*[13], the medical testimony was that "any febrile condition, could have brought about the very condition to which the plaintiff is reduced today...."In the latter case, the plaintiff had lived with his vulnerable eye for nearly 15 years without any difficulties, he even had boxed considerably and in fact was a reserve on the Olympic team. In consequence, it does not seem fair to reduce his damages by £400 on account of his condition; since the past 15 years indicated there was a good chance that his disease would never have caused any harm.

In *International Institute of Tropical Agriculture v Amrani*[14], the respondent as plaintiff at the High Court sued and claimed from the defendant/appellant the sum of US $750,000 being general damages for injuries and loss of amenities of life suffered by the respondent as a result of appellant's negligence in causing the accident of 30/4/84 in which the respondent was injured when he ran into a deposit of sand on the tarmac while riding the defendant's moped within the premises of the Institute. In 1988, the plaintiff was diagnosed of Meniere's disease which had progressed to 18% permanent disability and had become absolutely deaf in his left ear and could no longer practice his profession at the time of filing the action. Unfortunately, the medical expert who testified as plaintiff's witness told the court that the respondent's Meniere's disease was not connected to the accident. In his judgment, Mukhtar JCA said;

The plaintiff sought to prove that he suffered Meniere's disease vide the evidence of P.W. 4, a Professor of Ear, Nose and Throat who testified that he diagnosed that the plaintiff was suffering from meniere's disease when he was transferred to him in April, 1987. When he was cross examined on that, he testified that he did not write it down that he diagnosed meniere's disease. The witness in examination in chief was shown Exh. P. 4 for which he said, "At the end of the diagnosis he asserted that 'meniere's disease" is in fact hereditary. A person can go through a full medical test without disclosing of the signs depending on the time he was subjected to the test. I did not know that he had an accident because he did not tell me."Exhibit 'P. 12' did also confirm that the plaintiff suffered from the said disease, but the cause was not disclosed…it cannot be said that …he became inflicted with the disease as a result of the accident. There is no evidence linking the two.

It has been judicially noticed in *Hanseatic Int'l v Usang*[15], that no amount of monetary award can adequately compensate for physical injury resulting in disability.This underscores the need to ensure that no personal injury claim is allowed to fail on account of technical flaw in litigation process. This makes imperative the need to ensure that nothing is left to chance on the issue of medical evidence at the trial. It is important that the medical reports are in consonant with plaintiff's case. Providing more than one consistent report(each being consistent with the other) would lend credence to claimant's evidence, and in fact give clearer insight to the sufferer's condition. In *Ediagbonya v. Dumez*[16], two medical doctors testified for the plaintiff. The first testified as follows;

I am a Consultant Psychiatrist attached to Psychiatric Hospital, Uselu. I know the plaintiff. I knew him as a patient. He was brought to me for treatment in 1976. He was complaining of severe headache, severe heat in the brain, sleep disturbance and dizziness. He suffered a severe head injury while at work in May 1976. There was scalp laceration on the head and was unconscious at the Specialist Hospital for about three weeks at the Specialist Hospital, Benin City. After giving me his medical history, I started him on treatment. At the time of his report my observations were the complaints. He was of stable '"character and well-adjusted before the accident. He had been under continued care since 1976 and he still needs to beunder care as he still suffers from the complaints. His head injury, responsible for the complaints…since the accident, the plaintiff has not been able to revert to his previous level of functioning as he is always full of complaints about his head. This is preventing him from being gainfully employed. He is still under treatment and this may continue for months and years.

The second plaintiff's witness said;

I am a Medical Doctor in general practice. I retired as a Senior Consultant in Orthopaedic Surgery Specialist Hospital, Benin in 1979. I know the plaintiff very well. He was brought into our surgical ward as a stretcher patient on 27'" May. 1976. He had a road traffic accident. I examined him and found multiple injuries. My salient findings were as follows (1) Scalp laceration and on the left side of the face was a bruise (2) He had multiple contusions on the left shoulder area and the left side of his chest. (3) He also had a multiple fracture of his right femur,(4) A swelling on the right side of his neck. He was admitted and treated for these injuries…A radiological assessment showed that his leg was two inches shorter. We tried all we could for him. From my total assessment of him at the age of 26 years he was two inches of shortening disability and that such shortening was a severe one. His

[13] (1962)1 Lioyd's L.R 497 at 502
[14] (1994) 3 NWLR (Pt. 332) 296 at 318-319
[15] (2003)18 NWLR (Pt.851)79
[16] (1986) 3 NWLR (Pt. 31) 758 - 759

permanent disability could be about 50 to 60 per cent. He now has to wear a permanent shoe raise on the affected leg.

The trial court relied substantially on the medical evidence in reaching its decision and commented;

The medical evidence in this case is quite full. The age of the plaintiff was put at 26 years and he was earning up to N280 per month. He was a young man with stable character, but he now suffers mental and physical handicap. He is unable to obtain any job and has become unemployed.

On a similar note, the Supreme Court in *Eseigbe v Agholor* [17], reviewed the N10,000.00 general damages awarded by the lower court upward and substituted same with an award of N50,000.00 general damages on the basis of available copious medical evidence from the medical doctor who treated the plaintiff. In his oral evidence, he stated;

On 3/2/86 I was on duty at the General Hospital, Iruekpen, when the plaintiff was brought to the hospital…She had severe burns on her right hand. She was in a state of shock, she was in pains and in a confused state….i observed that apart from the general effect of the accident the right hand of the plaintiff was severely scarred from the mid-arm to the tip of the fingers and had an impression of second degree burns…I am still treating her for keloids which she later developed. The plaintiff can undergo plastic surgery for keloids…the right hand has lost some functions in that she cannot pick things or write with that hand.

The foregoing evidence was not discredited under cross examination. Using the aforementioned piece of evidence as a guide, the Supreme Court observed;

Having regard to the findings of the court below of the massive keloids which are stubborn and likely to respond to surgery, the inability of the appellant to write or lift anything with the right arm, the fact that the appellant was dragged out of the car after the accident in a state of shock, the fact that she was hospitalized for ten days and had been on out-patient treatment coupled with the evidence of P.W.2 (Dr.Udegbe), I am satisfied that an award of N 10,000.00 is not a fair compensation for the injuries she sustained.

The fact that no amount of reparation can compensate for a lost limb is unassailable, and compelling enough to make trial courts award substantial damages, much as it would constrain appellate courts from unjustifiable reduction of awards by trial courts.

4. Medical Evidence and Pain and Suffering.

The question of indispensability of medical evidence is not applicable to proof of pain and suffering. No medical evidence is required to prove pain and suffering. This is because pain or suffering from an injury can only be best explained by the sufferer and easily expressed by his agonizing or discomforting reactions to the pain. Pain threshold varies from one individual to another. While it is possible to prove percentage disability by medical evidence, it is impossible to prove pain and suffering which is internalized, invisible and can only be described by the sufferer.

The foregoing has been judicially noticed in a number of cases. In *C & C Construction Co. Ltd v Samuel Tunde Okhai*[18], the trial court and Court of Appeal declined to make award for pain and suffering on grounds that there was no medical evidence in support of the averment in the statement of claim for pain and suffering. In the lead judgment, Muntaka-Coomassie, JCA said;

It was also claimed and pleaded that due to the constant severe pains the appellant was forced to purchase pain relieving drugs. This (sic) pieces of evidence have been denied. I could have awarded damages for pain and suffering but for the fact that nowhere the appellant produced the medical evidence to support his pleadings. This is rather painful. Was it his fault? Or that of his counsel or was he telling lies? Be that as it may, I cannot award a kobo for that claim in the absence of medical evidence.

Reversing the judgment, Pats-Acholonu, JSC said;

I must confess that I am at a loss to understand what sort of medical evidence would demonstrably show proof of pain and suffering. Beyond seeing a sufferer wince by the contorted nature of his face in agony, I do not know the type of evidence being sought for. Anyone who suffering and had his crushed leg amputated has definitely suffered pain and suffering. Pain is an intangible agonizing traumatic experience deeply internalized in the suffering to the best of my knowledge there has not yet been devised, invented or developed a method of medically , or scientifically assessing the pain of a sufferer in such a way that the device can be tendered in evidence.

In his contribution, Uwaifo, JSC.said,

As far as I am aware, there is no known means of medically assessing the intensity or otherwise of the pain a person is going through. Wen related to injury; medical evidence can only describe the nature of the injury but not the pain that goes with it. The more severe the injury the more likely the severity of the pain., I think, that Sellers L. J. observed in

[17] (1990) 6 NWLR (Pt.156) 254

[18] (2008)18 NWLR (Pt.851)79

Wise v. Kaye, inter alia:.. There is, I think, no common denominator for pain which is a bodily hurt, such as toothache, which can be acute with some although subject to an injury which would inflict pain on others. In medicinepain, it must be recognized, can be subjectof control or modification by drugs. Painof that sort can often be described in evidence as to its extent and duration, and its intensity can, perhaps, be assessed and compared. Such evidence that will best describe the extentand duration of pain will necessarily come from the victim.

In the same judgment, Edozie JSC said;

In my view, there was overwhelming evidence from the testimony of the respondent to establish pain and suffering. A person whose leg is crushed by a heavy drum and was in consequence amputated below the knee is presumed to have been under severe pain and suffering.

The only relevant evidence the claimant needs in addition to the degree of pains being experienced is fear of future incapacity. In *Lagos City Council v Ogunbiyi*[19],there was evidence of likelihood that the claimant might be amputated in the second leg at a future date in addition to the leg already amputated. This piece of evidence attracted exemplary and aggravated damages to the plaintiff. On a similar note, in *S.C.C. (Nig.) Ltd v Elemadu*[20], Ogbuagu, JSC,said;

While no medical evidence may be necessary to justify a claim for damages for "pain and suffering " resulting from injuries sustained from an accident (such as in the instant case), an award under this head, it has been held, will be considerably enhanced, where, there is concrete evidence as to fear of the future incapacity, either as to embarrassment caused by disfigurement.

5. Observation

The foregoing cases show beyond doubt that medical evidence remains indispensable in personal injury litigation. A claimant in a personal injury case who desires to get appropriate reparation must give medical evidence its pride of place at the trial. Oral and documentary medical evidence constitute the means by which injuries are proved beyond the physical observation of the victim's deformity. It is submitted that personal injury cases are won or lost on the quality of medical evidence presented at the trial. This requirement is unassailable much as it is imperative. It behoves on claimant's counsel to do the needful by ensuring that credible oral and documentary medical evidence are presented at trial. This is the safer way to avoid the dismal consequences that may be attendant to failure to provide the required quality of evidence in personal injury litigation.

6. Concluding Remarks

The paper has given an overview of the nature and quality of medical evidence required in personal injury cases, with particular emphasis that strict adherence to its indispensability is critical to the successful proof of any personal injury claim where disability or loss of amenities of life is a head of damage. Emphasis was made on the fact that claimant's counsel must never rely on the court's physical viewing of claimant's disability or injury without more. The work revealed instances where obvious and fine cases were lost on grounds of absence of medical evidence at the trial. On the whole, the position of the writer is that continuing legal education is imperative for members of the bar and bench, to save personal injury victims avoidable dismal consequences of shoddy presentation of cases by counsel, and wrong application of legal principles by court. It is hoped that a pragmatic implementation of the foregoing suggestions would ensure a regime of quality presentation and result oriented prosecution of personal injury cases in litigation process, and victim claimants would be better for it.

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[19] (1969) 1 ALL NLR 297

[20] (2005) 7 NWLR (Pt. 923) 28

Paradigm Shift in Indian Legislature with Reference to Criminal Responsibility of an Unsound Mind

Mahesh A Tripathi*
Anand Kumar Tripathi**

ABSTRACT

Criminal responsibility can be determined on the basis of an intent, which may lack in an insane mind. The Indian legislature relatinged to criminal responsibility uses an undefined term 'unsoundness of mind' for legal insanity. The judgments in this regards suggest that only severe psychopathological conditions such as delusions, hallucinations and epilepsy have attracted the court's attention. This paper is an attempt to suggest the possibility for an inception of any other psychopathological condition in Indian legislature in this regards. For this purpose doctrinal research design was adopted and various research articles, blogs, criminal laws, judgments were collected by using online platforms such as Goggle Scholar, PubMed, Indiankanoon.com, Legalcrystal.com and Research Gate. All the relevant material was reviewed and analyzed. After in – depth analysis of the available material it was found that Indian judiciary is accepting the opinions of mental health professionals in determining the legal insanity and if satisfied provides benefit to the pleader exempting criminal responsibility by proving severe psychopathological conditions. However, in 2018, premenstrual syndrome condition was raised in the High Court of Jaipur and received acquittal. This milestone judgment has evolved a new dimension in the insanity defense under Sec-84, IPC that can be seen as a paradigm shift to determine legal insanity. In the conclusion researchers are able to opine that any psychological/physiological condition that can reduce or diminish the understanding of doer at the time of criminal act and if defendant can provide proper and sufficient documentary evidence along with the testimony of mental health professional justifying his/her deteriorated mental condition at the time of act may lead to exemption from criminal liability.

Keywords: Delusion & Hallucinations, Premenstrual syndrome, Criminal Responsibility, Unsoundness of Mind, Legal Insanity, and Legislature.

Introduction

The present study highlights an irrevocable need to amend, upgrade and update the exemption criterion which can help those who couldn't comprehend their actions while committing the crime while also protecting their Human rights. Law is framed in order to protect the citizens rather punishing them. The study thus thrusts on the need for introducing the new criterion of diminished capacity/responsibility, importance of inclusion of mental health professional while framing such laws and other crucial medical and legal factors pertinent to bring amendments in the Section 84, IPC.

In the criminal law it has been considered unjust to call a person criminally responsible unless the act was voluntary and done with guilty intention. Therefore, intention becomes core component to hold a person criminally responsible for his or her conducts. The Indian law related to criminal responsibility comes under Sec- 84, IPC, a direct descendent of the M'Naghten Rule[1], definedas "Nothing is an offence which is done by a person who, at the time of doing it, by the reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law" (IPC, 1860). 'Unsoundness of mind' is a purely legal term which has nothing to do with medical insanity. According to medical experts, every case of psychological disturbances is insanity. However, law says that all persons who are psychologically insane are not necessarily legally insane because amongst the former some are able to control their impulses. Only mental illnesses that can raise doubt in the mind of judiciary and can be proved as legal insanity may receive exemption from criminal responsibility.

Insanity is defined as repetition of the same mistakes over and over expecting a different result (Maria, 2012). Time to time various teststo determine criminal responsibility were evolved worldwide in criminal justice systemssuch as Wild Beast Test,Insane Delusion Test, and the Test of Capacity to Distinguish Right from Wrong. These three tests laid the foundation for the landmark M'Naghten

*Assistant Professor (Psychology), School of Forensic Science & Risk Management, Raksha Shakti University.
**Assistant Professor (Law) & amp; Dean, School of Security Law, Policy & amp; Governance, Raksha Shakti University, Gandhinagar, Gujarat.

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rule(Math, Kumar, &Moirangthem, 2015), that defines that at the time of the commission of the act a person is unable to comprehend the nature and the quality of the act due to a diseased mind, and that what he/she is doing is wrong, and contrary to the law of the land.

This M'Naghtenrule became a legendary precedent for the law pertaining to insanity defense in India,which was solely based on this rule of 1843. Since its existence in the Indian Criminal Law, IPC, 1860, no changes have been made in this test. However, in 1971, an unsuccessful attempt was made by the Law Commission of India to revisit the Section in their 42nd report but the idea of inclusion of new tests was abandoned due to medico legal complexities.

During these years India has developed in all aspects of social sciences especially in law and amended most of the Acts related to mental health, except general exceptions. Therefore, there is a strong need to revisit the general exception and evolve new dimensions in the insanity defense. This research article is an effort to explore new dimension and possibility which has emerged from a milestone judgment of Jaipur High Court.

Disclaimer

The Mental Health Care Act, 2017 (MHA, 2017) avoided use of the terms such as insanity or unsoundness of mind but due to the existence of such terms in the judiciary system researcher is unable to entirely avoid them. Therefore, if any person reading this article feels offended about the terms, researcher deeply regrets.

Methodology:

For the purpose of this research various research articles, blogs, criminal law, judgments were reviewed and studied. All the suited research material was collected from database such as Goggle Scholar, PubMed, Science Direct, Indiankanoon.com, and Research Gate. Initially terms like insanity defense, M'Naghten rule, criminal responsibilities, legal insanity, were searched. For more detailed inclusion other terms such as delusion, hallucinations, epilepsy, mental illness, and not guilty by reason of insanity, and guilty but insane/mentally ill were used. Cross-references of few articles, and reviews, were further reviewed to get more specific details. To conduct this research authors have utilized a combination of primary and secondary data. The author found variety of published articles and case laws. To arrive at a meaningful result and discussion, only relevant articles, blogs and judgments were selected for the review.

Mental Conditions that received attention from judiciary in India:

Criminal law is entirely based on the belief that humans are morally responsible for their conduct and are not harm causing agent. For a person to be held criminally responsible, two essential elements have to be proven beyond any reasonable doubt, (a) the person committed the act *(actus reus)*[2] (Ashworth, &Horder, 2013) (b) in doing so, the person acted with his or her own free will, intentionally and for rational reasons *(mens rea)*[3] (Gerber, 1984).

Mental Health professionals may be summoned by the courts for assistance in determining whether certain mental illness can altera person's cognitive ability to form intention necessary to make that person legally culpable. Here law is not looking for medical insanity and is not interested in the levelor category of a particular mental illness but asking for a particular psychopathology behind the act where intent is questionable and can raise doubt in the mind of judiciary.

There are several types of psychopathological conditions behind mental illnesses which have been pleaded as insanity defense and availed exemption from criminal responsibility in Indian Courts, summarized as below.

Hallucination or Delusion

The Bombay and the Madras High Courts have held that only on the basis of hallucinations this provision section cannot be invoked. Therefore, delusional symptoms become an important factor to claim for an insanity defense. In a judgment, Kerala high Courtdefined delusion as "A false or erroneous belief, in the face of contrary evidence, is held with conviction and is un-modifiable by appeals to reason or logic that would be acceptable to persons of the same religious or cultural background delusion is always a sign of psychosis, since it represents a defect in reality testing. It is merely an indication of deep seated mental disorder. Therefore, the person cannot be regarded as fully responsible for anti-social acts"[4] (High Court of Kerala, 2017).

Hallucinations defined as a false perception which is not a sensory distortion or a misinterpretation but which occurs at the same time as real perceptions (Jaspers,1997).In wider sense hallucinations are abnormal perception of something that is not present (Johanna, Hedwige, & Frank,2017)[5]. It can be in any sensory modality but auditory and visual hallucinations are more common than the others. 'Voices' are characteristic feature of schizophrenia and can occur at any stage of the illness(Casey& Kelly, 2007). Hallucinations and delusions both are among the most common symptoms of schizophrenia and approximately 70% of people with schizophrenia experience hallucinations (Smith, 2019). In a study of 102 total cases pleaded in Indian High Courts for insanity defense from 2007 to 2017, 42.16% of these cases were having schizophrenia or other[6] psychotic illness(Ramamurthy, Chathoth, & Thilakan 2019).

The Supreme Court in *Mohinder Singh v. State* has held that a person suffering from schizophrenia at the time of the incident is entitled to successfully claim the plea of insanity as has been ruled by the Bombay and Rajasthan High Courts (Gaur, 1985). Hence, we can say that the psychopathology of schizophrenia such as hallucinations and delusions are the most acceptable mental conditions if proved, one may receive exemption from criminal responsibility under Section – 84 of IPC

Bipolar/ Mood disorder

Bipolar/Mood disorder is the second largest psychopathological condition that has been raised in the Indian High Courts for Insanity defense (Ramamurthy, Chathoth, & Thilakan 2019).[7] In a case of *Javan Rana v. State of Himachal Pradesh,*[8] court referred to a publication of the National Institute of Mental Health (NIMH) to understand mood disorder. According to this publication bipolar disorder is a brain disorder that causes unusual shifts in a person's mood, energy, and ability to function and it is different from the normal fluctuations of mood. The symptoms of bipolar disorder are more severe and can results in damaged relationships, poor work or school performance, and even suicide. It is an episodic illness where mania and depression typically recur across the life span. Between these episodes, symptoms are usually absent. In few cases patient never develop severe mania but instead experience hypomania that alternate with depression; this is known as bipolar II disorder.

However, in this case court had dismissed the appeal on the ground ofunavailability of proper evidence to prove the disease at the time of the commission of the act and expert opinion was also not supporting the stand of insanity at the time of offence.

Inanother case of *Sarjerao Rambhau Machalev. State of Maharashtra*, court awarded acquittal on the ground of bipolar mood disorder. In another case of Hussain Vs State of Kerala, accused got exemption from criminal responsibility on the ground of insanity rendered by the mood disorder. This should be noted that in both the cases mentioned above courthad called the experts and verified the records of illness and treatment to reach the conclusion of acquittal.

Epilepsy

Epilepsy is a chronic disorder characterized by recurrent unprovoked seizures. The epileptic seizure may be characterized by sensory, motor or autonomic phenomena with or without loss of consciousness (Roy & Das, 2013).

In a case of *Baswantrao Bajirao v. Emperor,*[10] Bombay, High Court has quoted Sydney Smith (Forensic Expert) "The special interest of epilepsy lies in the fact that all epileptics are liable to have lapses of consciousness in which things are done without volition of the patient and about which he has no recollection whatsoever when consciousness returns. This is known as post-epileptic automatism, and as the acts performed may be criminal it is essential to have some idea as to which actions may be assumed to be automatic and which cannot be considered so. Automatism is, as a rule, more pronounced after an attack of petit mal than after a typical fit, but this may not always be the case". However in this case, defendant was unable to prove the epileptic condition at the time of offence and was convicted. In *Digendra Nath Roy v. State,*[11] (Calcutta High Court, 1970), ground of epileptic condition was accepted but not acquitted, though punishment was reduced from Sec-302 to Sec-307. In a case of Unniri Kannan Vs State (Kerala High Court,1960),and State of Rajasthan Vs. Shera Ram at Vishnu Dutta (Supreme Court of India, 2011), M. Jahir Hussain vs. State reported by The Inspector of Police (Chennai Madurai, 2016)The accused who had been suffering from periodic epilepsy since childhood attacked his mother and killed her. The prosecution pleaded and got benefit under Section – 84, IPC.

Depression

Depression is a type of mood disorder which is also known as affective disorder. Its prevalence is highest among all type of mental disorders. The term was raised several times in Indian courts to get insanity benefit but most of the time no benefit was awarded by courts (Madras High Court,2008; Bombay High Court,2019; Karnataka High Court,2018; Kerala High Court 2008; High court of Madhya Pradesh, 2002).

In few cases where depression was introduced as an episode of bipolar mood disorder got benefit from criminal responsibility, for example *X vs. state of NCT of Delhi* (2017), *Sarjerao Rambhau Machale Vs. The State of Maharashtra* (2015), *A. Steepen Vs. The State* represented by the Inspector of Police (2016) major depression received acquittal. In a case of *Patreswar Basumatary Vs State of Assam* (High Court of Assam,1989),accused did receive benefit of doubt and got exemption from criminal liability. On the basis of above facts we can say that one can avail exemption from criminal responsibility on the ground of severe depression but the same needs to be proven by proper evidence and expert testimony.

It is to highlight here that in all the above cases where people get benefit under section – 84, IPC had proved severe psychopathology that deteriorated their cognitive faculties and reduced their capacities to understand the right &wrong concept or inability to apprehend the consequences of their conduct. Therefore, court had accepted the M'Naghten test of criminal responsibility.

Sleep Walking or Somnambulism

Sleepwalking, also known as somnambulism, consists of a sequence of complex behaviors that are initiated in the first third of the night during deep NREM (stage III and IV) sleep and frequently, although not always, progress without any consciousness or later no memory of the episode of leaving bed or walking about (Kaplan, & Sadock,2007). Attempt to wake individuals usually fails and sometimes even elicit violent responses such as aggressive and spastic limb movements are observed (Billiard, 2003). The person will have no awareness and knowledge about what he had done in the night therefore prosecution cannot establish criminality act as it lacks intention or motive.

In Papthi Ammal Vs State of Madras, the accused that had given birth to a child jumped into a well at night along with the newborn baby. Charges of attempt to commit suicide and murder were framed and the insanity defense was raised on the ground of somnambulism but failed for the lack of proof and adequate evidence (Ratanlal, & Dhirajlal, 2006). However, in this case court accepted the deficiency of an expert examination or collection of evidence. Hence, we can say that if a sufferer of such mental conditions can produce proper record of evidence corroborated by expert opinion or court may avail such services by itself, it may help to reduce victimization.

Concept of criminal responsibility and diminished responsibility

On the basis of above discussion we can conclude that Indian courts are looking for criminal responsibility and this concept of defense is entirely based on initially introduced insanity tests that have been developed from 1724 to 1800.These tests made way to the introduction of popular M'Naghten rule in 1843. Indian courts are still adjudicating legal insanity on the basis of a two century old test. The insanity defense is usually used in charges of murder in order to escape capital punishment (Vyas & Ghimire, 2016). However the developer of these tests, Britain, has also moved forward and introduced several new tests to determine legal insanity.

Britain, Scotland, USA and other western world have introduced several new dimensions to determine legal insanity and accepted the new scientific knowledge and development in the field of psychology. English law has incorporated a new concept of diminished responsibility in Homicide Act, 1957. According to this Act "A person who kills or is a party to the killing of another is not to be convicted of murder if he was suffering from an abnormality of mental functioning which arose from a recognized medical condition that substantially impaired ability to understand the nature of the conduct and form a rational judgment to exercise self-control".

Insanity defense looks for criminal responsibility whereas diminished responsibility defense examines whether the defendant had the capacity to form the requisite intent for the crime(Ashokan, 2016). Therefore, the concept of diminished responsibility arose as a means of avoiding the death penalty.

Indian judiciary still seems to adhere on M'Naghten rule to determine criminal responsibility, ignoring the concept of diminished responsibility; in capacity of an accused to control actions, or lack of substantial capacity to appreciate wrongfulness/ conformity with existing law.

Till date there exists only one such case in Indian Judiciary where diminished responsibility was taken into consideration. A women suffering from Premenstrual Syndrome (PMS) ought to have legal defense that reflects culpability in Indian Penal Code. PMS is classified under the category of stress related disorder in ICD-10. In a milestone judgment Rajasthan High Court exempted a woman from criminal responsibility on the ground of PMS(Kumari Chandra Vs State of Rajasthan, 2018) by considering the expert opinion and treatment records produced by the defendant. Before this judgment, exemptions from criminal responsibility were only obtained in severe mental disorders such as Psychosis, epilepsy or schizophrenia in Indian Judiciary.

Conclusion

So far criminal responsibility has been established on the basis of whether the defendant was legally sane or not as per Section – 84, IPC. Various mental illnesses were taken into consideration and only those medical illnesses which satisfied the criteria of legal insanity as well were given acquittal from criminal responsibility. However, in few judgments diminished responsibility and victim perspective were also taken into consideration to account for the acquittal of an accused.

These changing dimensions in acquittal and milestone judgments definitely demand the attention of law advisory boards and judiciary to review the criteria that considers unsoundness of mind. Opinion of mental health professionals should also be taken into account as to what all biological and psychological conditions of a human body and mind can lead to diminished capacity in an individual which in turn could be proved pivotal in acquittal of the accused like in the judgment of Rajasthan High Court(Kumari Chandra Vs State of Rajasthan, 2018) which exempted a woman from criminal responsibility on the ground of PMS (Tripathi & Tiwari, 2020). Defense against criminal responsibility is the protection provided by Section – 84, IPC to save any innocent from getting falsely charged or convicted and thus reducing the chances of getting victimized by law itself. Hence, it is crucial rather irrevocable to take mental illnesses, diminished capacity, victim perspective and other such related factors into

account before establishing criminal responsibility in an offence.

References

1. Ashokan, T. VS (2016). The insanity defense: Related issues, Indian Journal of Psychiatry58,6 191-198.Retrieved from http://www.indianjpsychiatry.org on Wednesday, January 1, 2020, IP: 10.10.0.136]
2. Billiard, M. (2003). Sleep: Physiology, investigations, and medicine. Springer.
3. Bombay High Court,1949 CriLJ 181Retrieved from https://indiankanoon.org/doc/102527/
4. Casey, P., & Kelly, B. (2007). Fish's clinical psychopathology; Signs and symptoms in psychiatry (3rd ed.), Cambridge, medicine.
5. Culcutta High Court, 1970 CriLJ 529Retrieved from https://indiankanoon.org/doc/1292010/
6. Gaur, K. D, (1985). Criminal Law – Cases and materials,(2nd ed.) Bombay: N M Tripati Private Limited.
7. High Court of Assam, 1989 CriLJ 196Retrieved From https://indiankanoon.org/search/?formInput=High+Court+of+Assam%2C+1989+CriLJ+196
8. High Court of Kerala, Crl.A. No. 1358 of 2012 Air 18th Dec 2017. Retrieved from https://indiankanoon.org/doc/127352874/?type=print
9. Indian penal Code (1960) CrPC Chapter-IV general exception, Government of India, pp- 26
10. Jaspers, K. (1997). General psychopathology (Vol. 2). JHU Press.
11. Kaplan, J. B., & Sadock, A. VS (2007). Synopsis of Psychiatry: Behavioral sciences/clinical psychiatry, (10th ed.), Lippincott Williams & Wilkins, PP- 766.
12. Kerala High Court, 1960 Cr L J 73Retrieved from https://indiankanoon.org/search/?formInput=1960%20cri%20lj%20%20doctypes%3A%20kerala&pagenum=1
13. Kumari Chandra v/s State of Rajasthan, (2018) Retrieved on 5th Nov-2019https://indiankanoon.org on August 1, 2018
14. Maria, C. S. (2012). Insanity: The real definition, Retrieved from https://www.huffingtonpost.in/2011/12/20/insanity-definition_n_1159927.html?ri18n=true
15. Math, S. B., Kumar, C. N., &Moirangthem, S. (2015). Insanity Defense: Past, Present, and Future. Indian journal of psychological medicine, 37(4), 381–387. doi:10.4103/0253-7176.168559
16. Mrs.Sheela @ Mahalakshmi VsMr.D.Kirupakaran, Madras High Court, 4 November, 2008; Ramdas S/O Dashrath Kaiser Vs Shri Shivaji Education Society, Bombay High court, 4 March, 2019; Mackinnon Mackenzie and Co. Ltd. Vs Miss Velma Williams, AIR 1964 Cal 94, (1965) ILLJ 632 Cal; State Of Karnataka VsShameer Pasha, Karnatka High Court, on 2 July, 2018; Muhammed Koya @ KoyaVs State Of Kerala on 28 August, 2008; BalsaiVs State Of Madhya Pradesh 2002 (1) MPHT 12 CG.Retrieved from https://indiankanoon.org/
17. Ranchhoddas, R., Thakore, D. K., Venkatachaliah, M. N., & Manohar, VS R. (2013). The Indian Penal Code, Gurgaon, Lexis Nexis,
18. Ratanlal, & Dhirajlal, (2006). The Indian Penal Code, (30th ed.), Wadhwa & Company, Nagpur, India.
19. Roy, M., & Das, D. (2013). Indian Guidelines on Epilepsy,Neurology, Chapter 116, P-527Retrieved from http://www.apiindia.org/medicine_update_2013/chap116.pdf
20. The Mental Health Care Act,2017. Government of India,
21. Ashworth, A., Horder, J. (2013).Principles of Criminal law, Oxford, UK: Oxford University Press.
22. Gerber, R. J. (1984).The Insanity Defense, Port Washington, New York: Associated Faculty Press.
23. Johanna, C. Hedwige,D.,Frank,L.(2017). Hallucinations in Healthy Older Adults: An Overview of the Literature and Perspectives for Future Research, Frontiers in Psychology,https://doi.org/10.3389/fpsyg.2017.01134https://www.frontiersin.org/article/10.3389/fpsyg.2017.01134
24. Smith, K (July, 2019). Schizophrenia: Hallucinations and elusions, https://www.psycom.net/schizophrenia-hallucinations-delusions/ Retrieved on 19 April, 2020.
25. Ramamurthy, p., Chathoth, VS, &Thilakan, p. (2019). How does India decide insanity pleas? A review of High Court Judgments in the last decade, Indian J of Psychol Med, 41:150-4.
26. Sarjerao Rambhau Machale Vs The State Of Maharashtra, Bombay High Court on 29 July, 2015. Retrieved on 19 April 2020 fromhttps://indiankanoon.org/doc/33731897/

27. Hussain VsThe State Of Kerala, Kerala High Court, on 6 August, 2008. Retrieved on 19 April 2020 fromhttps://indiankanoon.org/doc/33731897/

28. National Institute of Mental Health publication No. 3679, Retrieved on 19 April, 2020, from https://www.nimh.nih.gov/health/publications/bipolar-disorder/index.shtml

29. Vyas, J. N., & Ghimire, S. R. (2016). Textbook of postgraduate psychiatry, Vol-2, pp. 2074; Jaypee brothers Medical Publishers (P) Ltd.

30. Section-2, The Homicide Act, 1957. Retrieved from-http://www.legislation.goVsuk/ukpga/Eliz2/5-6/11/section/2.

31. Tripathi, M. A., & Tiwari, S. S. (2020). Inception of new criteria under section-84 to determine criminal liability, 4th International Conference of South Asian Society of Criminology and Victimology) Conference proceedings, pp.35-36.

Paralysing The Constitution of India by Religious Fundamentalists: A Tragedy

Dr. Nitesh Saraswat*

ABSTRACT

Religion is the helping hand of human civilization in the time of pleasure and pain, sorrow and sufferings, as well as an affect to realize the ultimate truth i.e. God, in the ways and manner the religion of follower prescribe. Since the time immemorial, the human civilization has followed some sort of religion and religious practices for their well being. Revealing of idols of God, Goddesses, Temples etc. in excavation of Mohanjodro, Harappa, Koshombi, Ajanta, Allora etc. in India and abroad reveal this hard fact. Religion is a system of faith which the believer treat it as conducive to his/her soul's well-being. It is a cultural system of behaviours and practices, world views, sacred texts, holy places, ethics and social organisation that relates to humanity and hence "an order of existence". However, understanding the importance of religious freedom, the framer of constitution provided several rights. For example, the preamble of the Constitution, Articles 25, 25(1), 26, 27 and 28 are glaring examples in this regard. Thus, broad definition of religion was given by the Supreme Court in Commissioner, H.R.E. v. L.T. Swamiar, AIR 1954 SC 282, and S.P. Mittal v. Union of India, AIR 1983 SC 1, and treated it system of beliefs or doctrines which are regarded as conducive to their spiritual well being and includes rituals, observances, ceremonies and modes of worship too.

Keywords: Religious venom is not allowed to disturb the countries' of situation legal system.

1. Introduction:

Since the time immemorial, the human civilization has followed some sort of religion and religious practices for their well being. Revealing of idols of God, Goddesses, Temples etc. in excavation of Mohanjodro, Harappa, Koshombi, Ajanta, Allora etc. in India and abroad reveal this hard fact. Religion is a system of faith which the believertreats it as conducive to his/her soul's well-being.Religion acts as a vast budding ground for societies where various cultures related to behaviours and practices, views, texts that are considered to be sacred, places regarded as pious, and social organizations exist and thrive. Thus, it would not be wrong to call it "an order of existence". The Supreme Court of India has given a broad definition of religion in *Commissioner, H.R.E. v. L.T. Swamiar*[1]*, and S.P. Mittal v. Union of India*[2], and treated it system of beliefs or doctrines which are regarded as conducive to their spiritual well-being and includes rituals, observances, ceremonies and modes of worship too. So, it is essentially a matter of personal faith and belief.

It is relevant here to mention that though religion is life, blood and soul of human race and exists for its well-being but simultaneously it has a darker side too. It is treated as away from logic and like "opium" to mankind because under the stage of religious intoxication one commits such inhuman and unnatural activities which annihilate a reasonable as well as ordinary common man conscience too. One may find such practices are being followed in India even today, in every corner of the country by the rural as well as urban people. So, it is a very sensitive and emotional issue and hence to be dealt with cautiously by other individual, society, as well as by the State. It has led so many strikes and wars for the sake of it from the beginning of the civilization and still providing a breeding ground for wars and dividing the family, villages, cities, districts, states and nations,and world too.

In the recent past years, India has witnessed the upsurge of religious fundamentalism that has threatened the centuries old established social and cultural fabric of Indian civilization. The "entry row" to Meenakshi, Venkateswara and Tirupatietc. Temples, the Ram Janmabhoomi and Babri Mosque issue, the conversion issues, have practically paralysed the legal system. For example, the recent "MarkazIssue" March/April 2020, (Nizamuddin) of New Delhi has rocked the country's health, safety, peace, and harmony and it has developed as a Atom Bomb in the hands of religious fundamentalist and gaining more and more notoriety rather peace and solace to the citizens in the country.

*Assistant Professor of Law , Law Centre II, Faculty of Law, Delhi University, Delhi

[1] Commissioner, H.R.E. v. L.T. Swamiar AIR 1954 SC 282.

[2] S.P. Mittal v. Union of India, AIR 1983 SC 1.

However, apart from the above observations, the bitter truth and reality is that nobody now can live without any kind of religion and religious practices because religion is considered as those faith and practices which are conducive for his physical and emotional well-being and serve as a helping hand and solace in the time of distress. Realizing this hard fact, the framers of the Constitution made it as a fundamental right under part III of the Indian Constitution from Article 25 to 28 of the Constitution.

2. Constitutional Provisions

Thus, the right to freedom of religion is a fundamental right guaranteed under Article 25 of the Constitution of India. Article 25 reads as follows:

Article 25(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 (2), the 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.[3]

Article 26. Freedom to manage religious affairs.– Subject to public order, morality and health, every religious denomination or any section thereof shall have the right–

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.[4]

The object and purpose of enacting article 26 is to protect the right conferred therein on a 'religious denomination' or a section thereof. However, the rights conferred under article 26 are subject to public order, morality and health and not subject to any other provision of Part III of the Constitution as the limitation has been prescribed by the law makers by virtue of article 25 of the Constitution.[5]

Article 27- Freedom as to payment of taxes for promotion of any particular religion. - No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.[6]

Article 28- Freedom as to attendance at religious instruction or religious worship in certain educational institutions-

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.[7]

3. Judicial Attitude

The analysis of these Articles reveals that the freedom of religion is a fundamental right with certain limitations and restrictions because absolute freedom is not possible and desirable in the present scenario of the country and in the world. Thus, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion,[8] there shall be freedom as to payment

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[3] Article 25 of the Constitution of India

[4] Article 26 of the Constitution of India.

[5] Dr. Subramanian Swamy v. State of Tamil Nadu, AIR 2015 SC 460.

[6] Article 27 of the Constitution of India.

[7] Article 28 of the Constitution of India.

[8] Article 25(1) of the Indian Constitution.

of taxes for promotion of any particular religion by virtue of which no person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religious denomination,[9] no religious instruction is to be provided in the schools wholly maintained by State funding; and those attending any State-recognized or State-aided school cannot be required to take part in any religious instruction or services without their (or if they are minor their guardian's) consent[10], every person and citizen has to comply the guidelines of health, safety and morality laid down in these Articles. But what has been noticed that now-a-days for the purpose of getting power, position and popularity, spreading venom in the name of religion has become the trend of the day. It is not a good sign for the existence and development of the country. We should not forget that India is a secular country and the preamble of the Constitution provides it. So, the Indian Constitution is secular and it also guarantees the right to freedom of religion. State can have a say in secular activities of a religion. If an aspect is essentially or integrally connected with religion, such aspect is protected under Article 25, of course, subject to the other provisions of Part III of the Constitution. If something does not form integral part of a religion, it can be secularized by the State. There is a difference between secularism and secularization and it was pointed out by the Supreme Court in the case of *A.S. Narayana Deekshituluv. State of A.P.,*[11] the Supreme Court pointed out the distinction between secularism and secularization in the following words:

"There is a difference between Secularism and Secularization. Secularization essentially is a process of decline in religious activity. Though secularism is a political ideology as the basis with citizens, the Constitution of India seeks to synthesize religion, religious practice or matters of religion and secularism. In secularizing the matters of religion which are not essentially an integral parts of religion, secularism, therefore, consciously denounces all forms of supernaturalism or superstitious beliefs or action and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practices". And in *S.R. Bommaiv. Union of India,*[12] secularization was treated as a basic feature of the Constitution. So, in other words, *"non-religious or anti-religious practices are antithesis to secularism which seeks to contribute in some degree to the process of secularization of the matters of religion or religious practices. For Instance, untouchables were believed to be a part of Hindu religious belief. But human rights denounce it and Article 17 of the Constitution of India abolished it and its practice in any form is a constitutional crime punishable under Civil Rights Protection Act. Article 15(2) and other allied provisions achieve the purpose of Article 17".*[13]

The right to freedom of religion assured by Article 25 and 26 of the constitution has been expressly made subject to public order, morality and health. The view taken by the Supreme Court in the case of *S. Veerabardan Chettiarv. E.V. Ramaswami Naiker*[14] was to the effect that though section 295A was a law creating an offence relating to religion, it had been enacted in the interest of the public order. In Ram ji Lal Modi v. State of U.P.,[15] the Supreme Court has pointed out that *"the right to freedom of religion assured by those articles (Articles 25 & 26 of the constitution) is expressly made subject to public order, morality and health. Therefore, it cannot be predicted that he freedom of the religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interest of the public order".* Thus, public order is the supreme and is above religion because in absence of public order, there cannot exist the right to religion not in India, but in any country of the world too. The *Santosh Kumar v. Secretary, Ministry of Human Resources Development, Aruna Roy v. Union of India*[17], the court further held any religious practice should give way for the benefit of the people and the nation as a whole. These observations are eye-opener in this regard.

However, in *Ismail Faruquiv. Union of India*[18], the Supreme Court by a majority has held that the State has the sovereign power, if it is necessary for maintenance of law and order, to acquire any place of worship like mosques, churches, temples etc. which is independent of Article 300-A of the Constitution. Such acquisition per se does not violate Articles 25 and 26 of the Constitution. Article 25 and 26 bring under there protection, religious practices

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9 Article 27of the Indian Constitution.

10 Article 28 of the Indian Constitution.

11 A.S. Narayana Deekshitulu v. State of A.P., 1996, 9, SCC 548.

12 S.R. Bommai v. Union of India, AIR 1994 SC 1918.

13 Sri Adi Vishveshwara of Kashi Vishwanath Temple v. State of U.P. And Ors., 1997 (4) SCC 606.

14 S. Veerabardan Chettiar v. E.V. Ramaswami Naiker, AIR 1958, SC 1032.

15 Ram ji Lal Modi v. State of U.P., AIR 1957 SC 620.

16 Santosh Kumar v. Secretary, Ministry of Human Resources Development, AIR 1995 SC 293.

17 Aruna Roy v. Union of India, AIR 2002 SC 3176.

18 Ismail Faruqui v. Union of India, (1994) 6 SCC 360.

which forms an essential and integral part of religion. However, it needs to be kept in mind that every religious practice may not be an essential part of the religious practice.

In two of its landmark judgments on freedom of religion under Articles 25 and 26 of the Constitution in *A.S. Narayana Deekshituluv.* State of *Andhra Pradesh*[19], and *Vaishno Devi Shrine*[20] cases the Supreme Court has clearly defined the role of the State in the matter of religion.

So, what one find in reference to the right to *"religion is a terrible Satan in its decadent status when people plunge into spiritual illiteracy, miss the divine essence of the lessons of the sages, prophets and seers and kiss the holy nonsense of "my religion right or wrong"* and *"my religionists alone to me belong". In this vulgar barbarous degeneracy humanism dies and values of tolerance and compassion perish. In the perverse reversal of higher meanings the man on earth becomes the blind ammunition of divine rivals in the skies. Be that as it may, religions cannot be wished away or wiped out but surely must be humanized and weaned from cannibalistic habits. Comity of denominations, not a zoo of savage faiths, must be the governing code of religious pluralism in the human world"*[21]. Thus, what is being done now a days that blind faith and blind religious practices are being propagated by religious leaders of all the religions in India to reach the "Heaven" which no one knows whether it exists or non-exist. In this series the fire of conversion is further lit which once spread, become difficult to douse in spite of best efforts by the Government and government instrumentalities including the Courts.

Recently, in a case of *M. Siddiqu (D) Thr Lrsv. Mahant Suresh Das & Ors.*[22], the Ayodhya Babri Masque Judgement of 2019, though settled the issue permanently but people still keeping the fire to burn on this or that ground. The author personally feels that now-a-days the practices of the ruling and opposition parties, parties of the all the religions and the social thinkers are giving political and religious colours to exploit the emotional feeling of the God fearing Indian masses. They flout public order, morality and health yardsticks to gain false popularity, which has very short span of life but capable to burn the entire social and cultural fabric of the country immediately. Hence, what is desirable in the present critical circumstances that strict compliance of public order without any bias and stern action against the violators, is the urgent need of the day in the country if we want to exist otherwise we will disintegrate like Russia and will return to early 1950's position of the country. Thus, the fundamentalists should not be allowed to paralysed the well-established and well-linked legal system of India which is treated as an ideal legal system in the world.

4. Conclusion :

Thus, it can be said that right to religion is purely a personal matter of the citizens to observe and follow. The Courts of this country as well as of other countries strengthen and cemented the position of law relating to religion in India and abroad and side by side curbed and restricted the unreasonable manner of exercising it too. Thus, the courts have taken a balanced opinion in protecting individual interests as well as social interests because this is a undisputed fact that individual interest cannot always and in all circumstances may prevail over social and State interests because in absence of society and State, it will not remain in existence. Hence, this freedom cannot be treated as beyond control and should be exercised in a balanced manner only and subject to public order, health, safety and moral. It is the need of time and necessary for health of the country's legal system.

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[19] A.S. Narayana Deekshitulu v. State of Andhra Pradesh, AIR 1996 SC 1765.

[20] Bhuri Nath And Ors.v. State of J&K And Ors., AIR 1997 SC 1711.

[21] Abdul Hussain Mir v. Shamsul Huda & Anr., AIR 1975 SC 1612; 1975 SCR (3) 106.

[22] M. Siddiqu (D) ThrLrs v. Mahant Suresh Das & Ors., Civil Appeal Nos. 10866-10867 of 2010, decided on 09.11.2019, in the Supreme Court of India.

Constitutionality of Ordinance 2020 to Amend Epidemic Diseases Act to Encounter Covid – 19

Dr. Madhu Soodan Rajpurohit*

ABSTRACT

Pandemic of COVID-19 (i.e. Corona Virus Disease - 2019) compelled us to probe and poke deep into the relevant legislations of the concern to curb it out in responsible manner. In India, Epidemic Disease Act, 1897 is one to them, which was enacted by former British India Rulers. On 22 April 2020, the Government of India announced the promulgation of an ordinance, 'The Epidemic Diseases (Amendment) Ordinance 2020' (in short "Ordinance 2020"), to amend the ED Act, adding provisions to punish those attacking doctors or health workers. Union Minister Mr. Prakash Javadekar made an announcement during Cabinet briefing that Attacks on doctors and healthcare workers is now protected by introduction of an Ordinance to amend the Epidemic Diseases Act, 1897, as decided by the Central Government. The author tried to analyse the relevant law with the new Ordinance, its comparative impact and examined the constitutionality of this Ordinance.

A. Introduction

Pandemic of COVID-19 (i.e. Corona Virus Disease - 2019) compelled us to probe and poke deep into the relevant legislations of the concern to curb it out in responsible manner. In India, Epidemic Disease Act, 1897 is one to them.

The first epidemic — Bubonic Plague, spread in Mumbai (formerly known as Bombay), which was dealt through enactment of Epidemic Diseases Act, 1897 (in short 'ED Act') by former British India rulers.[3] This law was made for containment of epidemics and enacted through special powers and provisions that required for the implementation of containment measures to control the spread of the disease.[4]

Thereafter the ED Act was continuously used to combat the various diseases in India viz. Swine flu (in 2009 in Pune), Malaria and Dengue (in 2015 in Chandigarh), Cholera (in 2018 in Gujarat).[5] Latest now, since March 11, 2020, it has been enforced across the country in order to limit the spread of Coronavirus Disease- 2019 (in short 'COVID-19').[6]

* Principal, Government P.G. Law College, Pali (Raj.) JNV University, Jodhpur, Rajasthan,India.

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[2] Principal, Government P.G. Law College, Pali, Rajasthan, India [A? liated to JNV University, Jodhpur].
[Formerly – Principal, Government Law College, Dholpur, Rajasthan, India. [Affiliated to MSM Brij University, Bharatpur]. Ass. Director, Directorate of College Education, Rajasthan, Regional Office, Jodhpur, Rajasthan, India.
Principal, Government Law College, Nagore, Rajasthan, India.[Affiliated to MDS University, Ajmer]. Principal, Government Law College, Sirohi, Rajasthan, India.[Affiliated to MLS University, Udaipur]. Principal, Government Law College, Pali, Rajasthan, India [Affiliated to JNV University, Jodhpur].
Associate Professor (Law), National Law University, Jodhpur, India.;Member, IPR Chair, Ministry of HRD, Govt. of India;
Director, Clinical Legal Education, National Law University, Jodhpur, India.; Chairman, Moot Court Committee, National Law University, Jodhpur, India.; Senator, JNV University, Jodhpur, India.]
The author can be contacted via email at drmsrnlu@gmail.com.

[3] Tiwari, Manish (19 March 2020). "The legal hole in battling Covid-19", Hindustan Times. Visited on 02 May 2020.

[4] "The 123-year-old law that India may invoke to counter coronavirus"; .The Economic Times. 12-3-2020. Visited on 02 May 2020.
See also :—
Awasthi, Prashasti. "Centre invokes 'Epidemic Act' and 'Disaster Management Act' to prevent spread of coronavirus". @businessline.Visited on 15-03-2020.

[5] "A 123-yr-old Act to combat coronavirus in India; experts say nothing wrong"; Livemint. IANS. 14-03-2020. Visited on 02-05-2020.

[6] "A 123-yr-old Act to combat coronavirus in India; experts say nothing wrong"; Livemint. IANS. 14-03-2020. Visited on 02-05-2020.
"To combat coronavirus, India invokes provisions of colonial-era Epidemic Diseases Act: A look at what this means". Firstpost. 12 March 2020. Visited on02-05-2020.
Following the 2019–20 coronavirus pandemic the Cabinet Secretary of India on 11 March 2020 announced that all states and Union territories should invoke provisions of Section 2 of the Epidemic Diseases Act, 1897.

On 22 April 2020, the Government of India announced the promulgation of an ordinance, 'The Epidemic Diseases (Amendment) Ordinance 2020' (in short "Ordinance 2020"), to amend the ED Act, adding provisions to punish those attacking doctors or health workers.[7]

B. Why "Ordinance 2020" needed?

The Government of India, on 22 April, 2020, announced the promulgation of Ordinance viz. The Epidemic Diseases (Amendment) Ordinance 2020 (in short "Ordinance 2020") to amend the Act and to punish those attacking doctors, health workers etc. This extra ordinary-situation piled up on various attacks were made by the miscreants and an online petition along with a protest call by Indian doctors as White Alert to the nation to observe Black day on 23rd April, 2020.[8]

It has been said by the government that during the current COVID-19 pandemic, there have been instances of the most critical service providers i.e. members of healthcare services being targeted and attacked by miscreants, thereby obstructing them from doing their duties. Members of the Medical community, even as they continue to perform relentlessly round the clock and save human lives, have unfortunately become the most vulnerable victims as they have been perceived by some as carriers of the virus. This has led to cases of their stigmatisation and ostracisation and sometimes worse, acts of unwarranted violence and harassment. Such a situation tends to hamper the medical community from performing their duties to their optimum best and maintaining their morale, which is a critical need in this hour of national health crisis. While healthcare service personnel are duty bound to serve without discrimination, the cooperation and support from society is a fundamental need for them to perform their duties with confidence.[9]

Several States have enacted special laws to offer protection to doctors and other medical personnel in the past. However, COVID-19 outbreak has posed a unique situation where harassment of the healthcare workforce and others working to contain the spread of the disease has been taking place at all fronts, in various places including even cremation grounds. The existing state laws do not have such a wide sweep and ambit. They generally do not cover harassment at home and workplace and are focused more on physical violence only. The penal provisions contained in these laws are not stringent enough to deter mischief mongering.[10]

It has been said that the health workforce are our frontline soldiers in battling the spread of COVID-19. They put their own lives at risk in order to ensure safety of others. They deserve our highest respect and encouragement at this moment rather than being harassed or being subjected to violence. It is hoped that this Ordinance will have the impact of infusing confidence in the community of healthcare service personnel so that they can continue to contribute to serving mankind through their noble professions in the extremely difficult circumstances being witnessed during the current COVID-19 outbreak.[11]

In this context, the Union Cabinet in its meeting held on 22nd April 2020 has approved promulgation of an Ordinance to amend the Epidemic Diseases Act, 1897 to protect healthcare service personnel and property including their living/working premises against violence during epidemics. The President has given his assent for promulgation of the Ordinance. The Ordinance provides for making such acts of violence cognizable and non-bailable offences and for compensation for injury to healthcare service personnel or for causing damage or loss to the property in which healthcare service personnel may have a direct interest in relation to the epidemic.[12]

The current Ordinance is intended to ensure that during any situation akin to the current pandemic, there is zero tolerance to any form of violence against healthcare service personnel and damage to property. The general public fully cooperates with healthcare personnel and have expressed their gratitude in a very organised manner several times during the past month. Nevertheless, some

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[7] Ministry of Law and Justice (22 April 2020), The Epidemic Diseases (Amendment) Ordinance, 2020 (PDF), The Gazette of India, Government of India.
See also, "Coronavirus crisis: Govt brings in ordinance; up to 7-year jail for attacking health workers". Business Today. 22 April 2020. Visited on 22-04-2020.

[8] "India: A7acks on Doctors - Text of Indian Medical Association White alert to the nation to observe Black day 23 April 2020 - Stop abuse and violence against doctors and health workers", South Asia Citizen Web, 22 April, 2020.
See <http://www.sacw.net/article14264.html > visited on 02-05-2020.

[9] "Promulgation of an Ordinance to amend the Epidemic Diseases Act, 1897 in the light of the pandemic situation of COVID-19", Press Information Bureau, Government of India, Ministry of Health and Family Welfare, 22-April-2020 22:14 IST, (Visited on 02-05-2020.

[10] "Promulgation of an Ordinance to amend the Epidemic Diseases Act, 1897 in the light of the pandemic situation of COVID-19", Press Information Bureau, Government of India, Ministry of Health and Family Welfare, 22-April-2020 22:14 IST, (Visited on 02-05-2020.

[11] "Promulgation of an Ordinance to amend the Epidemic Diseases Act,1897 in the light of the pandemic situation of COVID-19", Press Information Bureau, Government of India, Ministry of Health and Family Welfare, 22-April-2020 22:14 IST, (Visited on 02-05-2020.

[12] "Promulgation of an Ordinance to amend the Epidemic Diseases Act, 1897 in the light of the pandemic situation of COVID-19", Press Information Bureau, Government of India, Ministry of Health and Family Welfare, 22-April-2020 22:14 IST, (Visited on 02-05-2020.

incidents of violence have taken place which has demoralised the medical fraternity. It is felt that separate and most stringent provisions for emergent times are needed to act as effective deterrents to any such incidents of violence.[13]

It has also been said that violence as defined in the Ordinance will include harassment and physical injury and damage to property. Healthcare service personnel include public and clinical healthcare service providers such as doctors, nurses, paramedical workers and community health workers; any other persons empowered under the Act to take measures to prevent the out break of the disease or spread thereof; and any persons declared as such by the State Government, by notification in the Official Gazette.[14]

The penal provisions can be invoked in instances of damage to property including a clinical establishment, any facility identified for quarantine and isolation of patients, mobile medical units and any other property in which the healthcare service personnel have direct interest in relation to the epidemic.[15]

C. Potted Provisions of Epidemic Diseases Act, 1897 (EDAct)

It's a very small Act bearing only 4 sections. Sec. 1 is regarding its title and extent; Sec. 2 speaks regarding power to take special measures and prescribe regulations as to dangerous epidemic disease and empowers the State Governments to take required measures necessary as per situations by public notice or by regulations etc.; Sec. 2-A is regarding powers of Central Government to take measure and prescribe regulations for the inspection for the inspection of any ship or vessel leaving or arriving at any port in [the territories to which this Act extends] and for such detention thereof, or of any person intending to sail therein, or arriving thereby, as may be necessary] in case of any threat or outbreak of any dangerous epidemic disease[16]; Sec. 3 is regarding penalty and Sec. 4 is regarding protection, from suit or other legal proceeding, to persons acting in good faith under Act.

C (a). Position Before "Ordinance 2020" :

(1) Nature, Procedure of Investigation, Inquiry and Trial of Offences and Penalty under ED Act—

(i) Nature & Procedure of Investigation, Inquiry and Trial of Offences

As per Section 3 [which was renumbered as Sec. 3(1) by Ordinance 2020][17] of ED Act, Section 188 of IPC read with first schedule of Code of Criminal Procedure,1973 (in short Cr. P.C.), the offence is Cognizable, Bailable , and triable any Magistrate.[18] The offence is Non - Compoundable and shall be tried as per the procedure laid down in Cr.P.C.[19]

(ii) Offence &Punishment

According to section 3 [which was renumbered as Sec. 3(1) by Ordinance 2020] [20] of ED Act — For disobeying any regulation or order made under the ED Act shall be deemed to have committed an offence punishable under section 188 of the Indian Penal Code, 1860 (in short "I.P.C.).[21]

As per Section 188 of IPC the punishment is as follows - Disobedience to an order lawfully promulgated by a public servant, if such dis-obedience causes obstruction, annoyance or injury to persons lawfully employed: — Imprisonment for 1 months or fine of Rs. 200, or both.

if such dis-obedience causes danger to human life, health or safety, etc. .

— Imprisonment for 6 months or fine of Rs. 1000 , or both.

C (b). Position After "Ordinance 2020" :

Through Ordinance 2020, certain new sections viz.

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[13] "Promulgation of an Ordinance to amend the Epidemic Diseases Act, 1897 in the light of the pandemic situation of COVID-19", Press Information Bureau, Government of India, Ministry of Health and Family Welfare, 22-April-2020 22:14 IST, (Visited on 02-05-2020.

[14] "Promulgation of an Ordinance to amend the Epidemic Diseases Act, 1897 in the light of the pandemic situation of COVID-19", Press Information Bureau, Government of India, Ministry of Health and Family Welfare, 22-April-2020 22:14 IST, (Visited on 02-05-2020.

[15] "Promulgation of an Ordinance to amend the Epidemic Diseases Act, 1897 in the light of the pandemic situation of COVID-19", Press Information Bureau, Government of India, Ministry of Health and Family Welfare, 22-April-2020 22:14 IST, (Visited on 02-05-2020.

[16] Ins. by Act 38 of 1920, s. 2 and the First Schedule.Earlier substituted by the A.O.1937.

[17] Section 3 — Renumbered as Section 3(1) by Section 6 of the 'The Epidemic Diseases (Amendment) Ordinance 2020 (Ordinance 2020)', which came in to force at once, i.e. w.e.f. 22 April, 2020.

[18] Section 2 read with First schedule of Code of Criminal Procedure, 1973 (in short Cr.P.C.).

[19] Section 320 of Code of Criminal Procedure, 1973 (in short Cr.P.C.).

[20] Section 3 — Renumbered as Section 3(1) by Section 6 of the 'The Epidemic Diseases (Amendment) Ordinance 2020 (Ordinance 2020)', which came in to force at once, i.e. w.e.f. 22 April, 2020.

[21] Section 3 of Epidemic Diseases Act, 1897 (in short 'ED Act').

Sections 1A, 2B, 3A, 3B, 3C, 3D, 3E are inserted[22] including definition clause and few words are omitted in the principal ED Act.

(i) New Provisions:

The Ordinance 2020 defines, under new Section 1A, certain terms as follows :— ' 1 A . Definitions :In this Act, unless the context otherwise requires,—

(a) "act of violence" includes any of the following acts committed by any person against a health care service personnel serving during an epidemic, which causes or may cause—

(i) harassment impacting the living or working condition of such healthcare service personnel and preventing him from discharging his duties;

Section 1 of the ED Act (the principal Act) in sub - section (2), the words "except the territories which, immediately before the 1st November, 1956, were comprised in Part B States" are omitted.

Section 2A before Ordinance 2020 : —

2A. Powers of Central Government.— When the Central Government is satisfied that India or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease and that the ordinary provisions of the law for the time being in force are insufficient to prevent the outbreak of such disease or the spread thereof, the Central Government may take measures and prescribe regulations for the inspection of any ship or vessel leaving or arriving at any port in the territories to which this Act extends and for such detention thereof, or of any person intending to sail therein, or arriving thereby, as may be necessary.

Section 2A after Ordinance , 2020 :— [See section 4 of Ordinance 2020] In section 2A of the principal Act, for the portion begging with words "the Central Government may take measures" and ending with the words "as may be necessary" the following is substituted, namely —

" … the Central Government may take measures, as it deems it and prescribe regulations for the inspection of any bus or train or goods vehicle or ship or vessel or air crap leaving or arriving at any land port or port aerodrome, as the case may be, in the territories to which this Act extends and for such detention there of, or of any person intending to travel therein, or arriving thereby, as may be necessary."

(ii) harm, injury, hurt, intimidation or danger to the life of such healthcare service personnel, either within the premise of a clinical establishment or otherwise;

(iii) obstruction or hindrance to such healthcare service personnel in the discharge of his duties, either within the premises of a clinical establishment or otherwise; or

(iv) loss or damage to any property or documents the custody of, or in relation to, such healthcare service personnel;

(b) "healthcare service personnel' means a person who while carrying out his duties in relation to epidemic related responsibilities, may come in direct contact with affected patients and thereby is at the risk of being impacted by such disease, and includes—

(i) any public and clinical healthcare provider such as doctor, nurse, paramedical worker and community health worker;

(ii) any other person empowered under the Act to take measures to prevent the outbreak of the disease or spread thereof; and

(iii) any person declared as such by the State Government, by notification in the Official Gazette;

(c) "property" includes—

(i) a clinical establishment as defined in the Clinical Establishment (Registration and Regulation) Act,2010;

[As per sub section (c) of Section 2 of Clinical Establishments (Registration and Regulation) Act, 2010. —

'(c) of Section 2 —"clinical establishment"[23] means—

(i) a hospital, maternity home, nursing home, dispensary, clinic, sanatorium or an institution by whatever name called that offers services, facilities requiring diagnosis, treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicine established and administered or maintained by any person or body of persons, whether incorporated or not; or

(ii) a place established as an independent entity or part of an establishment referred to in sub-clause (i), in connection with the diagnosis or treatment of diseases

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[22] Sections 1 (certain words are omitted); Section 2A is amended; Section 3 is renumbered as sub section (1) there of, and aper sub section (1) as so numbered sub sections (2), (3) are inserted; new Sections 1A, 2B, 3A, 3B, 3C, 3D, 3E are inserted; in 'Epidemic Diseases Act, 1897(ED Act)' by the 'The Epidemic Diseases (Amendment) Ordinance 2020 (Ordinance 2020)', which came in to force at once, i.e. w.e.f. 22 April, 2020.

[23] sub section (c) of Section 2 of Clinical Establishments (Registration and Regulation) Act, 2010.

where pathological, bacteriological, genetic, radiological, chemical, biological investigations or other diagnostic or investigative services with the aid of laboratory or other medical equipment, are usually carried on, established and administered or maintained by any person or body of persons, whether incorporated or not, and shall include a clinical establishment owned, controlled or managed by —

(a) the Government or a department of the Government;

(b) a trust, whether public or private;

(c) a corporation (including a society) registered under a Central, Provincial or State Act, whether or not owned by the Government;

(d) a local authority; and

(e) a single doctor, but does not include the clinical establishments owned, controlled or managed by the Armed Forces.[24]]

(ii) any facility identified for quarantine and isolation of patients during an epidemic;

(iii) a mobile medical unit, and

(iv) any other property in which a healthcare service personnel has direct interest in relation to the epidemic;

(d) the words and expressions used herein and not defined, but defined in Indian Ports Act, 1908 (15 of 1908), the Aircraft Act, 1934 (22 of 1934) or the Land Ports Authority of India Act, 2010 (31 of 2010), as the case may be, shall have the same meaning as assigned to them in that Act.'

"Section 2B : Prohibition of violence against health care service personnel and damage to property — No person shall indulge in any act of violence against a healthcare service personnel or cause any damage or loss to any property during an epidemic"[25]

(ii) Nature, Procedure of Investigation, Inquiry and Trial of Offences against Healthcare Service Personnel :

(a) Nature

Offences against healthcare service personnel and the property under section 3(2) & 3(3) are now made Cognizable and Non—bailable[26],

Offences against healthcare service personnel and the property under section 3(2) may, with the permission of the Court, be Compounded by the person against which such act of violence is committed.[27]

(b) Investigation:

The cases registered under sub section (2) or (3) of section 3 (i.e. an act of violence against healthcare service personnel) shall be investigated :

— by a police officer not below the rank ofInspector[28];

— investigation shall be completed within 30 days from the date of registration of First Information Report (FIR)[29].

(c) Inquiry &Trial:

(i) Procedure:

Every inquiry or trial of a case for the offences committed under sub section (2) or (3) of section 3 (i.e. an act of violence against healthcare service personnel) shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded, and an endeavour shall be made to ensure that the inquiry or trial is concluded within a period of one year; provided that where the trial is not concluded within the said period, the Judge shall record the reasons for not having done so; provided further that the said period may be extended by such further period , for reasons to be recorded in writing, but not exceeding six month at a time.[30] However, the rest

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[24] For the purpose of this clause "Armed Forces" means the forces constituted under the Army Act, 1950 (46 of 1950) , the Air Force Act, 1950 (45 of 1950) and the Navy Act, 1957 (62 of 1957) — Explanation of sub section (c) of Section 2 of Clinical Establishments (Registration and Regulation) Act, 2010.

[25] Inserted in ED Act by Ordinance 2020.

[26] Sub section (i) of Section 3A of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020' .

[27] Section 3B of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020' .

[28] Sub section (ii) of Section 3A of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020' .

[29] Sub section (iii) of Section 3A of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020' .

[30] Subsection(iv)ofSection3Aofthe 'Epidemic Diseases Act, 1897 'read with Section 7 of the' The Epidemic Diseases (Amendment) Ordinance 2020' .

of the procedure of inquiry and trial shall be as per the procedure laid down in Cr.P.C.

(ii) Presumption:

The Ordinance 2020 has enacted that where an person is prosecuted foe an offence punishable under section 3(3) of ED Act, the Court shall presume that such person has committed such offence, unless the contrary is proved.[31]

It has also been enacted that in any prosecution for an offence under section 3(3) of ED Act, which requires a 'culpable mental state' (which includes intention, motive, knowledge of factoid the belief in, or reason to believe, a fact) [32] on the part of the accused, the Court shall presume the existence of such mental state, but it shall be for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution;[33] meaning thereby the burden of proof is on accused to prove such non existence of culpable mental state. The fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by preponderance of probability.[34]

(d) Offences against Healthcare Service Personnel and punishment / remedy:

(i) Punishment :

Under section 3 (2) of the ED Act —

(i) A person(s) Commits or Abets the commission of an act of violence against a healthcare service personnel;[35]or

(ii) Abets or causes damage or loss to any property[36] —Punishment of Imprisonment shall be not less than 3 months , which may be extend to 5 years and with fine, which shall not be less than Rs. 50.000/- , but which may extend to 2 lakh Rupees.[37]

While committing enact of violence against a health care service personnel, causes grievous hurt as defined in Sec. 320 of Indian Penal Code — Punishment of Imprisonment shall be not less than 6 months , which may be extend to 7 years and with fine, which shall not be less than Rs. 1 lakh , but which may extend to Rs 5 lakh Rupees.[38]

(ii) Compensation :

In addition to the punishment provided as above for an offence, u/Sec. 3(2) and 3(3), against a healthcare service personnel, the person so convicted shall also be liable to pay Compensation, such amount, as determined by the Court for causing hurt or grievou shurt to any heal their service personnel.[39] Incase of damage to any property or loss caused, the compensation payable shall be twice the amount off air market values of the damaged property or the loss caused, as may be determined by the Court.[40] In case of failure to pay the compensation awarded discussed as above (i.e. under sub section (1) and (2) of section 3 E of the ED Act, such amount shall be recovered as an arrear of land revenue under the Revenue Recovery Act,1890.[41]

(e) Power of Inspection:

The Central Government has been given a concurrent role with the State Governments to take any measures that may be needed to prevent the outbreak of an epidemic or the spread thereof.[42] In addition, the scope of inspection of vessels arriving or leaving the country has been enlarged to include road, rail, sea and air vessels.[43]

Section 2A before Ordinance 2020 : —

2A. Powers of Central Government.—When the Central Government is satis?ed that India or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease and that the ordinary provisions of the law for the time being in force are insufficient to prevent the outbreak of such disease or the spread thereof, the Central Government may take measures and prescribe regulations for the inspection of

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31 Section 3C of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment)Ordinance 2020' .

32 Explanation of Section 3D of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020' .

33 Sub section (1) of Section 3D of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020'.

34 Sub section (2) of Section 3D of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020'.

35 Sub section (i) of Sub section (2) of Section 3 of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020' .

36 Sub section (ii) of Sub section (2) of Section 3 of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020' .

37 Sub section (2) of Section 3 of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020' .

38 Sub section (3) of Section 3 of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020'.

39 Sub section (1) of Section 3E of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020'.

40 Sub section (2) of Section 3E of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020'.

41 Sub section (3) of Section 3E of the 'Epidemic Diseases Act, 1897' read with Section 7 of the 'The Epidemic Diseases (Amendment) Ordinance 2020'.

42 Section 2 of the 'Epidemic Diseases Act, 1897'(in short "ED Act").

43 Section 2 A (amended by Ordinance 2020) of the 'Epidemic Diseases Act,1897' read with Section 4 of the 'The Epidemic Diseases (Amendment) Ordinance 2020' .

any ship or vessel leaving or arriving at any port in the territories to which this Act extends and for such detention there of, or of any person intending to sail therein, or arriving thereby, as may be necessary.

Section 2A after Ordinance , 2020 :—

[See section 4 of Ordinance 2020] In section 2A of the principal Act, for the portion begging with words "the Central Government may take measures" and ending with the words "as may be necessary" the following is substituted, namely —

" … the Central Government may take measures, as it deems fit and prescribe regulations for the inspection of any bus or train or goods vehicle or ship or vessel or aircrap leaving or arriving at any land port or port aerodrome,asthecasemaybe,intheterritoriestowhichthisAc textendsandforsuchdetentionthereof,orof any person intending to travel therein, or arriving thereby, as may be necessary."

Amended Section 2A. :—

"2A — Powers of Central Government.— When the Central Government is satisfied that India or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease and that the ordinary provisions of the law for the time being in force are insufficient to prevent the outbreak of such disease or the spread thereof, the Central Government may take measures, as it deems fit and prescribe regulations for the inspection of any bus or train or goods vehicle or ship or vessel or aircraf leaving or arriving at any land port or port aerodrome, as the case may be, in the territories to which this Act extends and for such detention thereof, or of any person intending to travel therein, or arriving thereby, as may be necessary."

D. Comparative study of Offences and Remedies under ED Act Before & After COVID-19:

The vast changes have been taken place through Ordinance 2020 in ED Act , and hence the situation before and after COVID — 19 changed, which can be understand by following comparative table :

Offences and Remedies under ED Act Before & After COVID-19

Section	Offence	Position **Before** "Ordinance 2020"		Position **After "Ordinance 2020"**	
		Punishment	**Bailable / Non Bailable / Trial**	**Punishment**	**Bailable / Non Bailable / Trial**
Sec. 3 / 3(1) [Renumbered as Sec. 3(1) by Ordinance 2020] **r/w Sec. 188 of IPC**	**Disobedience to an order lawfully promulgated by a public servant,** **if such dis-obedience causes obstruction, annoyance or injury to**	**Imprisonment for 1 months or fine of Rs. 200, or both.**	**Cognizable; Bailable;** and triable by **Any Magistrate**	**Imprisonment for 1 months or fine of Rs. 200, or both.**	**Cognizable; Bailable;** Non — Compoundable; and triable by **Any Magistrate**
	persons lawfully employed				
	if such dis-obedience	**Imprisonment**	**Cognizable;**	**Imprisonment**	**Cognizable;**
	causes danger to human life, health or safety, etc. .	for**6 months or fine of Rs. 1000 , or both**.	**Bailable;** and triable by **Any**	for**6 months or fine of Rs. 1000 , or both**.	**Bailable; Non — Compoundable;** and triable by **Any Magistrate**
			Magistrate		

Sec. 3(2)	**Commits or Abets the commission of an act of violence against a Healthcare Service Personnel;**	——	——	**Imprisonment** not less than **3 months , which may be extend to 5 years** and **with fine**, which shall not be less than **Rs.50.000/- , but which may extend to 2 lakh Rupees.** + **Compensation** as determined by the Court for causing hurt or grievous hurt	**Cognizable; Non— bailable; Compoundable with permission of Court;** triable by **Any Magistrate;**
					Investigation:
	or Abets or causes damage or loss to any property	——	——		**— by** a police officer **not below the rank ofInspector;** **—** shall be completed **within 30 days from the date ofFIR.**
					Inquiry or Trial:
					Examination of witnesses - shall be **day to day until all the witnesses examined,** in case of adjournment must be with reasons to be recorded, and
					Inquiry or trial is concluded within **one year**; provided that **where the trial is not concluded within the said period, the Judge shall record the reasons** for not having done so; provided further that the said **period may be extended by such further period , for reasons to be recorded in writing, but not exceeding six month at a time.**
Sec. 3(3)	**While committing an act of violence against a Healthcare Service**	——	——	Imprisonment not less than **6 months , which may be extend to 7 years** and **with fine**, which shall not be less than **Rs. 1 lakh , but which may extend to Rs 5 lakh Rupees.** + **Compensation** as determined by the Court for causing hurt or grievoushurt	offence is **cognizable** and **Non—bailable;** **Non — Compoundable;**
	Personnel, causes				triable by **Any Magistrate;**
	grievous hurt as defined in Sec. 320 of Indian Penal Code				**Investigation:** **— by** a police officer **not below the rank ofInspector;** **—** shall be completed **within 30 days from the date ofFIR.**
					Presumption :
					Court Shall Presume the existence of **'Culpable mental state'** and **Commission of Offence** .
					Inquiry or Trial:
					Examination of witnesses - shall be **day to day until all the witnesses examined,** in case of adjournment must be with reasons to be recorded, and
					Inquiry or trial is concluded within **one year**; provided that **where the trial is not concluded within the said period, the Judge shall record the reasons** for not having done so; provided further that the said **period may be extended by such further period , for reasons to be recorded in writing, but not exceeding six month at a time.**

E. State Actions and Ordinances to Combat the Pandemic:

The Cabinet Secretary of India, following the COVID—19 pandemic, on 11 March, 2020 announced that all States and union Territories should invoke provisions of Section 2 of the ED Act.[44]

The various State Governments, including Rajasthan, have made their State's Ordinance despite having its own State legislations.[45] However, the author has discussed here the provisions of latest Ordinance of the State of Rajasthan as illustrative.

(i) The Rajasthan's State Ordinance:

The State of Rajasthan introduced an Ordinance namely Rajasthan Epidemic Diseases Ordinance, 2020[46] (in short "State Ordinance") on 1st May, 2020, to consolidate the laws relating to the regulation and prevention of epidemic disease and for matters connected therewith or incidental thereto. The provisions of this Ordinance are made in addition to and not in derogation of the provisions of any other law for the time being in force.[47]

(ii) Powers of State Government to Notify and take special measures to counter Epidemic Disease:

Any disease, can be notified, as an epidemic disease, by the State Government by notification in the Official Gazette notify, for the purposes of this Ordinance, either throughout the State or in such part or parts thereof as may be specified in the notification.[48]

When at any time the Government is satisfied that the State or any part thereof is visited by or threatened with an outbreak of any epidemic disease, the Government may take such measures, as it deems necessary for the purpose, by notification in the Official Gazette, specify such temporary regulations or orders to be observed by the public or by any person or class of persons so as to prevent the outbreak of such disease or the spread thereof and require or empower District Collectors to exercise such powers and duties as may be specified in the said regulations ororders.[49]

The Government may, in particular and without prejudice to the generality of the foregoing provisions, take measures and specify regulations,[50]—

(a) to prohibit any usage or act which the Government considers sufficient to spread or transmit epidemic diseases from person to person in any gathering, celebration, worship or other such activities within the State;

(b) to inspect the persons arriving in the State by air, rail, road or any other means or in quarantine or in isolation, as the case may be, in hospital, temporary accommodation, home or otherwise of persons suspected of being infected with any such disease by the officer authorised in the regulation or orders;

(c) to seal State Borders for such period as may be deemed necessary;

(d) to impose restrictions on the operation of public and private transport;

(e) to prescribe social distancing norms or any other instructions for the public to observe that are considered necessary for public health and safety on account of the epidemic;

(f) to restrict or prohibit congregation of persons in public places and religious institutions or places of worship;

(g) to regulate or restrict the functioning of offices, Government and private, and educational institutions in the State;

(h) to impose prohibition or restrictions on the functioning of shops and commercial and other offices, establishments, factories, workshops and godowns;

(i) to restrict duration of services in essential or emergency services such as banks, media, health

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44 "To combat coronavirus, India invokes provisions of colonial-era Epidemic Diseases Act: A look at what this means". First post. 12 March 2020. Visited on 02-05-2020.

45 The Rajasthan Epidemic Disease Act, 1957 (Raj. Act No. 31 of 1957) effective from 17 November, 1957. See also, Rajasthan Epidemic Disease, COVID-19 Regulations, 2020 issued on 12-03-2020 (Regulation vide letter no. F9 (58) M&H / 2019 / Part dt.12-03-2020 by Medical, Health and Family Welfare Department, Government of Rajasthan.
See also, The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020), (Signed and promulgated by the Governor on the1st day of May, 2020), published in Rajasthan Gazette vide Rajasthan Gazette Extraordinary, Bhag 4 (Kha) [4 ([k)] dt. 01-05-2020, pp. 38 — 45; which made it enforceable at once i.e, w.e.f. 01-05-2020.

46 The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020), (Made and promulgated by the Governor onthe1st day of May, 2020), published in Rajasthan Gazette vide Rajasthan Gazette Extraordinary, Bhag 4 (Kha) [4 ([k)] dt. 01-05-2020, pp. 38 — 45; which made it enforceable at once i.e, w.e.f. 01-05-2020.

47 Section 12 of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

48 Section 3 of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

49 Section 4 (1) of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

50 Section 4 (2) of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

care, food supply, electricity, water, fuel, etc.;and

(j) such other measures as may be necessary for the regulation and prevention of epidemic diseases as decided by the Government.

(iii) Protection for the action taken in Good Faith:

Any act done, in good faith, by any person, under this Ordinance, is also protected and no suit, prosecution or other legal proceedings shall lie against him.[51]

Protection of action taken in good faith.- No suit, prosecution or other legal proceedings shall lie against any person for anything which is done in good faith or intended to be done by or under this Ordinance.

(iv) Offences and Punishment:

Offence: Any person/institution/company who is bound by regulations or orders contravenes or disobeys any such regulation or order made under this Ordinance, or obstructs any officer empowered under this Ordinance, shall be punished on conviction. [52]

Punishment under Rajasthan Epidemic Diseases Ordinance, 2020 is imprisonment for a term which may extend to two years or with fine which may extend to ten thousand rupees or with both.53Whoever abets an offence under this Ordinance shall be punished in the same manner as if he had himself committed the offence. [54]

(v) Offence committed by Company:

Offence by Company: In case of an offence under this Ordinance has been committed by a company[55], every person, who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly[56]; but if the person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence, in such case he shall not be held liable.[57] Where any offence under this Ordinance has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director[58], manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be liable to be proceeded against and punished accordingly.[59]

(vi) Nature of Offences:

All offences under this Ordinance are made cognizable and bail able.[60] The offences punishable under this Ordinance are compound able and may either before or after the institution of the prosecution, be compounded by such authorities or officers and for such amount as the State Government may, by notification in the Official Gazette, specify in this behalf.[61]

The State Government may, by notification in the Official Gazette, authorise one or more persons who shall be competent to act under this Ordinance. [62] The State Government may by notification in the Official Gazette direct that any power exercisable by it under this Ordinance may also be exercised by such officer as may be mentioned therein, subject to such conditions, if any, as may be specified therein.[63]

F. Constitutionality of the amendments through Ordinance in ED Act:

(i) Ordinance 2020:

Constitutionality of the Ordinance 2020, and the amendments made through it in ED Act, is required to be examined.

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51 Section 13 of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

52 Section 5 of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

53 Ibid

54 Section 6 of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020)—

55 "Company" means a body corporate and includes a ?rm or other association of individuals. See Explanation (a) of Section 7 of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

56 Section 7 (1) of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

57 Proviso of Section 7 (1) of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

58 "Director", in relation to a firm means a partner in the firm. See Explanation (b) of Section 7 of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

59 Section 7 (1) of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

60 Section 8 of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).
"8. Offences to be cognizable and bailable.-Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act No. 2 of 1974) all o?ences under this Ordinance shall be cognizable and bailable."

61 Section 11 of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

62 Section 9 of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

63 Section 10 of The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020).

At the out set of the issue, the questions come in the minds of students of constitutional law that:—

Firstly, the Epidemic Diseases Act, 1897 (Act No. 3 of 1897) (in short ED Act) is legislated on 4th February, 1897 and enacted by British Indian Government. How this Act is live after commencement of the Constitution of India ?

Secondly, as the 'Public health and sanitisation, hospitals and dispensaries' are subjects of State List under Schedule VII of the Constitution of India and only States are empowered to make laws on it.[64] And therefore, how the Central Government has right or power to make such law(s) [including present Epidemic Diseases (Amendment) Ordinance, 2020; in short "Ordinance-20"[65]] in this regard ? In this light it will be proper to mention here that certain State governments (e.g. - Rajasthan) have made separate laws to meet out the situations crept out from COVID - 19 or like.[66]

Before Reaching To The Conclusion, we must we must take into consideration the various facts and arguments about the present case matrix as follows :—

- *First*, the Epidemic Diseases Act, 1897 (Act No. 3 of 1897) (in short ED Act) is legislated and enacted by British Indian Government is a Central Act, which is protected under Article 372 of the Constitution of India after its commencement. This Article protects all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.
- *Second,* This Ordinance 2020 is being introduced for the amendment in the Central Act that is Epidemic Diseases Act, 1897. This ED Act itself is within the jurisdiction of the Central Government, so Central Government has power to amend it.
- *Third,* This central Act already contains penal provisions, which mentions about certain acts to offices and are punishable and the Central government enhanced the penal provisions of the ED Act.
- *Fourth,* Since the Ordinance -2020 is a step-gap arrangement as the Parliament was not in session and promulgated by the President invoked the powers u/Art. 123 of the Constitution after being satisfied that circumstances exists which render it necessary for him to take immediate action; and not the final, which will become permanent only after facing the parliamentary process as per constitutional mandate.
- *Fifth,* In situations piled up during the spread of pandemic must also be taken into consideration as expressed by the Government of India as I have discussed in detail under heading "Why Ordinance 2020 needed" et al. - according to which several States have enacted special laws to offer protection to doctors and other medical personnel in the past. However, COVID-19 outbreak has posed a unique situation where harassment of the healthcare workforce and others working to contain the spread of the disease has been taking place at all fronts, in various places including even cremation grounds. The existing state laws do not have such a wide sweep and ambit. They generally do not cover harassment at home and workplace and are focused more on physical violence only. The penal provisions contained in these laws are not stringent enough to deter mischief mongering.
- *Sixth*, The current Ordinance is intended to ensure that during any situation akin to the current pandemic, there is zero tolerance to any form of violence against healthcare service personnel and damage to property.
- *Seventh*, The general public fully cooperates with healthcare personnel and have expressed their gratitude in a very organised manner several times during the past month. Nevertheless, some incidents of violence have taken place which has demoralised the medical fraternity. It is felt that separate and most stringent provisions for emergent times are needed to act as effective deterrents to any such incidents of violence.
- *Eighth*, The health workforce are our frontline soldiers in battling the spread of COVID-19. They put their own lives at risk in order to ensure safety of others. They

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[64] Article 246 read with Entry no. 6 of List II - State List of Schedule VII of the Constitution of India.

[65] Epidemic Diseases (Amendment) Ordinance, 2020.(No. 5 of 2020).Made and promulgated by the President of India published in Gazette of India on April 22. 2020, published in Gazette vide Gazette of India Extraordinary, Part II, Section 1, No. 24, CG-DL-E-22042020-219108; which made it enforceable at once i.e, w.e.f.22-04-2020.

[66] The Rajasthan Epidemic Disease Act, 1957 (Raj. Act No. 31 of 1957) e?ective from 17 November, 1957.
See also, Rajasthan Epidemic Disease, COVID-19 Regulations, 2020 issued on 12-03-2020 (Regulation vide letter no. F9 (58) M&H / 2019 / Part dt.12-03-2020 by Medical, Health and Family Welfare Department, Government of Rajasthan.
See also, The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020), (Signed and promulgated by the Governor on the 1stday of May, 2020), published in Rajasthan Gazette vide Rajasthan Gazette Extraordinary, Bhag 4 (Kha) [4 ([k)] dt. 01-05-2020, pp. 38 — 45; which made it enforceable at oncei.e, w.e.f. 01-05-2020.

deserve our highest respect and encouragement at this moment rather than being harassed or being subjected to violence. It is hoped that this Ordinance will have the impact of infusing confidence in the community of healthcare service personnel so that they can continue to contribute to serving mankind through their noble professions in the extremely difficult circumstances being witnessed during the current COVID-19 out break.[67]"

- *Ninth*, however, following the 2019-20 corona virus pandemic the Cabinet Secretary of India on 11th March, 2020 announced that all States and Union Territories should invoke provisions of Section 2 of the Epidemic Disease Act, 1897 (ED Act)[68], but no State could make immediate Statute / Ordinance / legislation etc. to meet out the situations.

It shall be prudent for us, before reaching to the conclusion, the above discussed situations, facts and arguments must looked into intensely also for proper adjudication of the issue in hand.

So, after looking into the facts and arguments as discussed above, it can be concluded that the Ordinance 2020 is constitutional and is not beyond the ambit of powers of the Central Government as mooted in foregoing discussions.

(ii) Constitutionality of the State Ordinance in the light of COVID-19

The State of Rajasthan introduced an Ordinance namely Rajasthan Epidemic Diseases Ordinance, 2020[69] (in short "State Ordinance") on 1st May, 2020 is constitutional for the reasons discussed above as it is very much with in ambit of the powers of State Government as a law made on the subject mentioned in Entry no. 6 of State List under Schedule VII read with Article 246 of the Constitution of India.

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[67] "Promulgation of an Ordinance to amend the Epidemic Diseases Act, 1897 in the light of the pandemic situation of COVID-19", Press Information Bureau, Government of India, Ministry of Health and Family Welfare, 22-April-2020 22:14 IST, Visited on 02-05-2020.

[68] "To combat coronavirus, India invokes provisions of colonial-era Epidemic Diseases Act: A look at what this means". First post. 12 March 2020. Visited on 02-05-2020.

[69] The Rajasthan Epidemic Diseases Ordinance, 2020 (Ordinance No. 1 of 2020), (Made and promulgated by the Governor on the 1stday of May, 2020), published in Rajasthan Gazette vide Rajasthan Gazette Extraordinary, Bhag 4 (Kha) [4 ([k)] dt. 01-05-2020, pp. 38 — 45; which made it enforceable at once i.e, w.e.f. 01-05-2020.

A Study in the Context of Indian Constitutional Provisions: Social & Sexual Discrimination

Dr. Surender Singh*

ABSTRACT

India became independent on 15th August,1947 through centuries of tales. In such a situation, in order to run the administration smoothly and eliminate the remnants of slavery, With the advent of the Indian Constitution all citizens are to receive social, economic and political justice, freedom of thought, expression, belief, religion and worship, equality of dignity and opportunity and to maintain the dignity of the individual and the unity and integrity of the nation, Constitution was made.

In this research paper the author has discussed the provisions of Indian Constitution like Fundamental Rights and Directive Principles of State Policy, which speaks of equality among all and prohibits discrimination on the basis of religion, race, caste, sex or place of birth. The researcher has pointed out that in India, gender discrimination is not only present but has been going on since the later Vedic period, a word for this woman was used as "Asuryapasya" meaning that the woman could not see the sun. Since then, there has been an increase in the continuous pattern of this gender discrimination which can be seen on the social level in the present context of India. In this paper the researcher has also dealt with the prevalence of crime against nature, along with the provisions of law which deals with the crime of sexual relations against nature. The decision given by the Hon'ble Supreme Court on homosexuality gave to a specific class the right to live life and the above historic decision milestone to legalize gender discrimination with them which has been going on for centuries and honoured the right to live with dignity by maintaining their right to privacy

Key words: Discrimination, Dignity, Equality, Freedom, Human trafficking

Introduction

India became independent on 15th August, 1947 through centuries of tales. In such a situation, in order to run the administration smoothly and eliminate the remnants of slavery, Indian constitution was enacted, adopted, enacted and surrendered on 26 November 1949 and fully[1] implemented on 26 January 1950 to form a fully dominated socialist nation.[2]

In which all citizens are to receive social, economic and political justice, freedom of thought, expression, belief, religion and worship, equality of dignity and opportunity and to maintain the dignity of the individual and the unity and integrity of the nation, Constitution was made.

Even after 7 decades of this freedom and constitutional provisions, gender discrimination can still be seen at the social level in Indian society even today. Where the inequality is found in thousands of families due to the gender discrimination mentality, a particular gender is also being exploited, not only injustice, exploitation, mental torture even with the people of specific class, but they make their lives hellish, Are you forced to live an animal life, only because of gender discrimination, which our civil society does not accept, while discrimination on the basis of gender is prohibited under constitutional provisions.

Constitutional Provisions: -

Part 3 of the Constitution provides for the provisions of Fundamental Rights[3] and Part 4 contains the Directive Principles of State Policy,[4] which includes discrimination based on equality, religion, race, caste, sex or place of birth before law under the Right to Equality.[5] The Right of Equality of Opportunity[6] was given in the matter of prohibition[7] and public employment, that is, the right to equality is provided by the Constitution gives the person the Right to Equality, in which Article 14 gave the general

*Associate Professor, Govt. PG. Law College, Pali

1 Indian Constitution, Govt. of India, 1990, Ministry of Law & Justice, Legislative Department, Rajbhasha Block, New Delhi.
2 42nd Constitutional Amendment, 1976 Enacted.
3 Indian Constitution, Article 14-35
4 Indian Constitution, Article 36-51
5 Indian Constitution, Article 14
6 Indian Constitution, Article 16
7 Indian Constitution, Article 15

rule of equality which forbids unreasonable discrimination between individuals. This person includes both citizens and non-citizens.

In the Indian Penal Code, 1860, under the word "person"[8] - any company or association or individual body whether incorporated or not, is accepted under the word person.

Gender,[9] which is the term masculine, is applicable to every person, whether male or female. While the word male in "man", "woman"[10] signifies a human male of any age, the word female refers to a human woman of any age.But here third gender is not defined. Whereas in the Vedic period also, about the *Ardhanarishvara* picture of Lord *Bhole Nathand Mata Parvati, Shiva Purana, Narada Purana* and other Puranas also say that if Shiva and Mata Parvati did not wear this, then the creation would remain deserted even today, then the same in Mahabharata the important role of *Shikhandi* cannot be forgotten.

Protection of Life and Personal Freedom[11]

"In which a person will be deprived of his life and personal liberties according to the procedure established by law, otherwise not", that is, in the above provisions of the Constitution, the word person or person has been used in it, not using the word woman or man or citizen. Third gender is included.

The Right against Exploitation prohibits Trafficking and Forced Labour of human beings in which[12]

1. Human trafficking and forced labor and other similar forced labor are prohibited and any violation of this provision shall be an offense punishable in accordance with law.
2. Nothing in this article shall prevent the State from imposing compulsory service for public purposes. In imposing such service, the state will not make any distinction only on the basis of religion, race, caste or class or any of them.

In such a way, it specifically instructs the state to conduct its policy.[13]

(i). All citizens, male and female, should have the right to obtain adequate means of livelihood.

(ii). The ownership and control of the material wealth of the community should be divided in such a way that it becomes the best means of collective interest. The State may nationalize the means of production for the purposes of the purposes under this clause.[14]

The Hon'ble Supreme Court stated in *Central England Water Transport Corporation v/s Brajonath,*[15] that Articles 38 and 39 contained the principle of "dispensation-justice" of the law. Our constitution directs the state for the distribution of justice, the concept of "dispensation-justice" means to end the economic disparity among citizens.

If citizens are obstructed or denied their constitutional rights, then in such a situation they are given rights under constitutional remedies to obtain the rights conferred by the Constitution,[16] where they can get their legal rights directly from the Supreme Court.

Gender Discrimination

In India, gender discrimination is not only present but has been going on since the later Vedic period, a word for this woman was used as "Asuryapasya" meaning that the woman could not see the sun. Since then, there has been an increase in the continuous pattern of this gender discrimination which can be seen on the social level in the present context of India. In saying that, all the people of India prohibit gender discrimination because gender discrimination has been considered not only prohibited but also a punishable offense under the constitutional provision and the law made by the Constitution.

It is for this reason that provisions for equality have been provided for the attainment of constitutional remedies in women, men and third gender, but on the ground reality in Indian social system, in many classes and thousands of families, there is a spurt in the same between women and men. Gender discrimination is clearly visible in their arrangement, behavior and behavior in each family, whose In the present time, everyone knows, but no one comes forward and plays a leading role in the solution of this burning problem, but when the opportunity comes, people of all classes make a definite interpretation in accordance with the provisions of the constitutional provisions and law, but in the true form. This does not happen but is limited to the oral interpretation of those provisions and the same person on his way home violates those rules and provisions. While violating, he does not

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8 IPC, 1860, Section 11
9 IPC, 1860, Section 08
10 IPC, 1860, Section 10
11 Indian Constitution, Article 21
12 Indian Constitution, Article 23
13 India Constitution, Article 39
14 State of Tamilnadu v/s Abu Qabur Bai (1984) 1 A.C.C. 516
15 (1986) 3 S.C.C. 156
16 Indian Constitution, Article 32

think that the person being discriminated against is also a human being. He too has feelings, he also has dreams of the future, a desire to live a human dignified life and he also has a personal identity. Bypassing all of this, gender discrimination in the Indian social system is largely seen.

This type of arrangement was created by the Indian English writer Mahesh Dattani in the play "Tara",[17] in which the author very well captured the gender discrimination in the Indian society by playing a drama composed with fictional characters in a very good way. Has given the message in which both Chandan and Tara are twin siblings who are born with three legs physically connected from the time of birth. At the time of his birth, the doctor gave his opinion that the blood flow is normal in the body of the girl instead of the boy, so if these twin siblings are separated by surgery and the third leg is Tara (which is a woman), then that girl will be able to work more smoothly instead of Chandan.But Tara and Chandan's father, who is an influential person, told the doctor to give the third leg surgically to Chandan (who is a male) among these twins because Chandan is a boy and the lamp of their family who will lead their family's dynasty.

On this, the doctor did the surgery of the twins according to Patel and added the feet to Chandan's body and his body was separated. This led to the fact that due to the lack of proper flow of blood in the body of Chandan (boy), his leg could not function smoothly, on the other hand, Tara (girl) who had blood in his body smoothly. Was she deliberately not given a third leg by her father (Patel) because she was a girl?On this, Sangeeta Das of Indian English Literature analyzed the above drama and said that the sacrifice of a girl in Indian society can be accepted so that only a man with disabilities can be protected for dynasty operation.

Sangeeta Das,[18] who is an analyst, commented on the drama Tara, stating that "The drama called Tara is neither a mourning for Chandan nor Tara's life, Tara was sacrificed because she was a girl and she was Tara did not have the same right to win a good life as her brother. The main idea taken in this drama is that of a perfect girl and an imperfect boy who has a painful thought. It is here which shows that the sacrifice of a girl is acceptable by the society rather than this drama of a divyang boy depicts the sacrifice of Tara and in the present times we can see it in every family of daily life where Gender differences can be seen in the behavior of sons and daughters, in the system of behavior.

In Indian society, domestic activities are also divided into sexual order, such as man has to look outside the house to earn money, and the woman has to handle all the work inside the house, etc.[19] In this play, Mahesh Dattani in the drama called Tara Has introduced sarcasm to the Indian social system when Chandan and Tara's father Patel, on seeing Chandan help her mother knit sweaters made Patel to feel bad and he says to Chandan that let this work be done by Tara. Chandan tells his father what has happened in this? Then the father (Patel) shouts at Chandan's mother Bharti, "How dare you make a sweater with Chandan?" How dare you think of making Chandan a girl? While Chandan was only correcting the mistake made by her mother in weaving sweaters.

Indian Penal Code, 1860- Section 377

Regarding crime against nature, there is only one section 377 which deals with the crime of sexual relations against nature. In which it is said that "Whoever will voluntarily enjoy senses with any man, woman or animal against the system of nature, shall be sentenced to life imprisonment or from either of the two years' imprisonment for a term which may extend to two years, Shall be punished and shall also be punishable with fine.[20] Only insertion is sufficient to constitute the sense enjoyment required for the offense described in this section.[21]

Section 377 has three major parts:

1. Minor
2. Unnatural
3. Homosexual

The Hon'ble Supreme Court on 6th September 2018, while delivering its historic judgment in Navtej Singh Johar and others vs Union of India,[22] said that "fundamental rights cannot be taken away in the name of morality". The said case is related to Section 377 of the Indian Penal Code, 1860. In which the right to privacy and dignified life under Article 21 of the Indian Constitution and the right to equality under Article 14 is considered a violation.

First, the Delhi High Court quashed section 377 in a petition filed by the Naz Foundation in 2009 on the question of homosexuality. In 2013, Suresh Kaushal challenged this decision given by the Delhi High Court to the Hon'ble Supreme Court. On which the Supreme Court

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17 Tara, written by Mahesh Dattani, Publisher-Penguin Publishers, New Delhi, 1990

18 Identity Crisis of Women in Tara, The Plays of Mahesh Dattani : A Critical Response, Writer- R.K. Dhawan, Tanupat, New Delhi, Prestige Books, 2005, Page 115

19 Collected Plays, Written by Mahesh Dattani, Publisher- Penguin Books, New Delhi-2000, Page 351

20 Prof. T. Bhattacharya, IPC, Central Law Agency, 7th Edition, 2013, Page 620.

21 Clarification of the above

22 Criminal Writ No. 76/2016 Supreme Court, Date 06/09/2018

reinstated section 377. In such a situation, in the year 2018, Navtej Singh Johar challenged it in the Supreme Court. On which the Honorable Chief Justice Murthy Deepak Mishra, Justice Murthy R.F. Nariman, Justice A.M. Khanvilkar, Justice D.Y. The Constitution Bench of Chandrachud and Justice Indu Malhotra, having ruled by consensus, has abrogated the provisions of Section 377 on the basis of which a privately consensual homosexual relationship between 2 adults was considered an offense.[23]

The battle in 26 courts to remove section 377 in India - The fight in 26 courts to remove section 377 came into force 158 years ago in India, whose figures are as follows -

? In 1861, section 377 of the Indian Penal Code was implemented. In which provision was given for life imprisonment and financial penalty on unnatural sex.

? In 1992 A.B.V.A. (Anti-AIDS discrimination movement) challenged the Section 377 in the Delhi High Court but the High Court dismissed the said petition.

? In 2001, the Naz Foundation also moved the High Court, which was rejected by the High Court in 2003.

? In 2004, the Naz Foundation instituted review petitions in the High Court, which were also rejected.

? In 2006, a hearing was started again in the High Court on the order of the Supreme Court but in 2009 the High Court dropped it from the purview of the crime i.e. the Delhi High Court quashed Section 377.

? In 2013, Section 377 was reinstated after challenging the Hon'ble High Court in the suit of Suresh Kaushal.

? In 2014, the Supreme Court also dismissed the review petition.

? In 2016, five people submitted the petition by the Supreme Court.

? In 2017, the Supreme Court considered sexuality a "right to privacy".

? In 2018 Navtej Singh Johar challenged the Supreme Court in which the Hon'ble Supreme Court has not considered homosexuality a crime. In this, only the part declaring homosexuality a crime was canceled. Thus, Section 377 was partially repealed, but under this section, minor and unnatural sex was kept unchanged.

Terms imposed in respect of partial cancellation of section 377 by Supreme Court:

1. Homosexuality will only occur between adults.
2. Solitude is essential in such relationships.
3. Consent of both parties is required.

The basis of this decision of Hon'ble Supreme Court has been given under Article 21, privacy, dignified life and right to equality under Article 14.

Death penalty on homosexual relations in 8 countries of the world:

? There is 11 thousand years of old artwork showing the relationship between the Roman ruler Hadrian and his beloved Antions.

? Many thinkers of the Renaissance period, leaders called themselves "gay". The gods of Greece, Horace and Seth, were called "Gay".

? In 2000 the Netherlands approved gay marriage. So far gay marriage is legal in 27 countries and homosexuality is not a crime in 120 countries of the world.

? Presently homosexuality is a crime in 76 countries of the world, but Iran, Sudan, Saudi, Yemen, Somalia, Iraq, Nigeria, Syria etc. 8 countries have considered homosexuality a crime and the punishment for this crime is death.

Morality cannot be sacrificed in the name of social morality[24]

The Hon'ble Supreme Court on 6 September 2018 excluded homosexuality from the category of crime. Chief Justice Murthy Deepak Mishra, while passing judgment on homosexuality, gave examples of the statements of many thinkers, writers and playwrights in which he began with the dialogue of Shakespeare's play which states that "What is there in the Name." The Chief Justice said that even after calling the rose by another name, it does not give a sweet fragrance. That is, only identification is important. Identity will give freedom to a proud life.Small sections cannot be forced to live in majority ways. Hearing these statements as stated by the Chief Justice, LGBT was present in the court. Tears in the eyes of the community and spilled from the court room as soon as the LGBT. When the people of the community came out, they jumped in joy. Some of them started kissing and hugging each other publicly. IIT. Mumbai student Krishna said that I got an IIT, even after getting admission in I was not so happy as I am feeling today with this decision. Because now we will be able to live lives without any fear and stress.

The first "Gay" Pride Parade in 1970:

On June 28, 1970, the world's first "gay" pride parade was

[23] Rajasthan Patrika, Jodhpur Edition, Date 07th September, 2018, Patrika.com, pg. 01 & 23.

[24] Dainik Bhaskar, Jodhpur Edition, Friday, Date- 07 September, 2018, Page 19.

held in New York. Later this parade was held by LGBT. Gay Pride Parades has currently emerged as a global way for the community to express themselves. The Pride Parade has been formed.

Long fight against Section 377 - 6 people in India fought a long fight against it.

- NGO - In 1992, A.B.V.A (Anti-AIDS discrimination movement) took the above cases to the courts. The Naz Foundation then fought a long battle.
- Navtej - Sunil couple are Navtej dancers who have received the SangeetNatak Academy Award.
- Ritu Dalmia - Ritu from Kolkata is the celebrity chef and the restaurant is the mistress of Chaindiva.
- Amannath - He is the owner of Neemrana Hotel Chain. He has written 13 books on history and art.
- Aisha Kapoor - 23 years old and an actor and businesswoman. She has also worked in the movie "Black".
- IIT Students: - 20 students of IIT also petitioned in this case.

Manvendra, the first prince of the country to accept himself as "gay": -

In 2006, Manvendra Gohil, who belongs to the Rajshri family of Gujarat, described "gay" as LGBT. To fight for the rights of the community, "Lakshya" runs salt trusts and is also building hospitals for these people.

Similarly, in 2003-04, a young man named Somnath, underwent several operations and became a woman who later became known as Manabi Bandhopadhyay, who in 1995 edited a magazine called "AubManab - Subhuman", who, on the basis of her merit, took over as Principal of Krishi Nagar Mahila Mahavidyalaya in the state of West Bengal in 2015. Manabi Bandyopadhyay also faced the same conditions that the gender discrimination conditions are seen in almost all families at the social level. Due to the non-cooperation of the teachers and students of the college, even after being the principal of the women's college, the situation reached such that they had to resign from the post of principal in the year 2017.

Similarly, Ganga Kumari daughter Bhikharam, who hails from Raniwada tehsil of Jalore district of Rajasthan state, has passed the competitive examination in the police department of the Rajasthan government's police department after passing the written examination in the competitive examination and despite achieving success in the physical examination of the Rajasthan government. Even after being eligible, the police department did not get her to take over due to gender discrimination. Ganga Kumari then filed suit in the main bench of Rajasthan High Court, Jodhpur and demanded justice. On which the Hon'ble Rajasthan High Court gave directions to the Police Department to get Ganga Kumari to take charge as a constable with immediate effect.[25]

To what extent are the above circumstances justified? Whereas from the time of independence, constitutional provisions were fully implemented only on 26 January 1950 by creating the constitution in independent India. Not only this, new amendments have also been added to them from time to time so that not only at the social level but also at the government level, deserving persons should not be stripped of their rights only under the mind set of gender discrimination. Only then can the gender discrimination in the true sense be removed.

Apsara became the first transgender national general secretary of Congress Women's Wing:[26]

Congress President Rahul Gandhi on 8 January 2019, Congress MP and A.I.M.C. Appointed Apsara to be Congress General Secretary in the presence of President Sushmita Dev. Apsara, who voiced the rights of transgenders, was a member of the DMK party before coming to the Congress and before that she was associated with the BJP.

Apsara had changed gender: Apsara was born as a boy, who later changed his gender. Apsara has worked in many international level journals as a journalist, studying journalism in Australia and London.

Statement of the justices of the Constitution Bench, which decides on homosexuality

Chief Justice Mr. Deepak Mishra - while giving a decision on September 6, 2018, on behalf of the Constitution Bench on the subject of homosexuality, said that "what is kept in the name" from identity will get the freedom of glorious life.

Justice D.Y.Chandrachud, in his 181-page judgment, said that for 158 years, we were considering homosexuality as a crime, which is a long time and this law has made L.G.B.T. It also stripped the community of the simple right which gives them the freedom to live, love and choose a partner of choice. His desire for love was banned while love makes life meaningful. The role of morality made their relations a hate figure in the society.

Justice Indu Malhotra, in his 50-page judgment, referring to Kurt Hitler's speech at a 1928 seminar on sexual reform in Copenhagen, said that gay love is not a

[25] SBCW 14006/2016 Ganga Kumari v/s State of Rajasthan

[26] DainikBhaskar, 8th January, 2019

joke of nature, but rather a game of nature. Because of this law, L.G.B.T. The community has suffered a lot. British President Theresa has regretted the law of the British Government which remained intact till 68 years after independence in India. Justice Indu Malhotra told Samalankita the right to live without discrimination, saying that L.G.B.T. History should apologize to them for all the torture of the community. Homosexuals have the right to live without discrimination with respect.

Justice R.F. Nariman, referring to the lines of Lord Alfred Duglos, wrote that "love and courage do not tell their names." He said that the word homo in Greek means 'alike', the word lesbian came from the Greek island of Lesbos. It was rumored that women make relations with each other, in India at least 200 people have been sentenced to 10 years on homosexuality charges. They have the right to live with pride and honor.

Conclusion

The decision given by the Hon'ble Supreme Court on homosexuality gave a specific class the right to live life and the above historic decision milestone to legalize gender discrimination with them which has been going on for centuries, proved then When the general public of India respect this historic decision, by removing the gender discrimination mindset from the heart, these people Honoring dignified life and their privacy, let them live life with equality, because in the earlier centuries, they have been sentenced to life without imprisonment for centuries, even without crime, while living in the society. Now at least they should be treated completely with an open mindset so that the wounds of this class have emerged over the centuries.

In the same way, in every Indian family, there is a differentiation between sons and daughters on the basis of gender in the upbringing, conduct, behavior, education and independence, even if we say that both sons and daughters are equal for the parents. At many places, it is also heard that the daughters serve their duties towards their parents in old age in place of son. Such statements are only and only statements in our Indian society, whereas in reality the truth is that in almost all the different families, sons and daughters are differentiated on the basis of gender in their parenting.

The daughter has been tolerating the differences made by her parents on the basis of gender with her since childhood, in which her thoughts towards parents and brother develop in the opposite direction from childhood itself. Taxes can also be the form of a volcano. In such a time, it is now that before that volcano erupts, the gender discrimination in our families must be abolished in real terms and they will have to be given equal rights to develop and live a dignified life. Only then will justice be done to them in real sense and Indian constitutional provisions in our society will be able to establish gender equality in the social context.

Social Security for the Disabled Workers in Industrial Establishments: Legal Issues

Dr. Sheetal Prasad Meena*

Introduction

Human needs social security in the society. Disabled persons are also part of our society. Due to industrial development every person of society affected. Disability is neither a physical problem nor a health problem. It is the result of negative interactions that take place between a person with impairment and her or his social environment. There are many Acts which have been enacted by the government for the benefit of the disabled or the physical and mentally challenged. Still they seems ineffective to disabled persons. Society cannot be changed by merely by making laws there needs a enforcement mechanism. These persons are deprived of Right to employment , Right to work & livelihood, Right to social security , Right to life with dignity etc.

A first step toward a consistent explanation of the prior work requirement is to note its relation to the insurance aspect of Social Security. The requirement ensures that the claimant has paid the Social Security tax for a significant period. Thus benefits can be characterized not as public charity but as a return of insurance proceeds to the disability claimant who has paid tax "premiums" to purchase protection against the risk of disability. The insurance concept is not an entirely satisfactory explanation for the prior work requirement, however, for it could as easily justify coverage for all those now excluded by the requirement.

We could assume that all persons undertake to pay insurance premiums if and when they work, and that the promise to pay these premiums is consideration for an insurance contract by which society agrees to protect against the possibility that an individual will become disabled after working and paying taxes, or be disabled throughout his life and so never achieve a status of taxpaying productivity. That this societal insurance concept has not been adopted indicates that we may be unwilling to regard as insurance a scheme that does not require a connection between an individual's actual contributions and the benefits he will receive.[1]

Definition of Social Security:

The definition of social security includes Social insurance, Social Assistance, Family Benefits, Health Care and other Social services, related social welfare services etc. Right to an adequate standard of living for the health and well being of himself and his family, clothing, including food, and housing and medical care and sickness, disability, widowhood, old age and necessary social security in the event of unemployment or other lack of livelihood in circumstances beyond his control, is provided to every individual. At all times and in every society, at every stage of development, there have been sick people requiring medical aid and care, handicapped and old people are unable to work for a living.[2]

According to a definition given in the ILO publication- Approaches to Social Security (1949), *"Social security is the security that society furnishes through appropriate organization against creation risks to which its members are exposed. These risks are essentially contingencies of life which the individual of small means alone cannot effectively provide by his own ability or foresight or even in private combination with his fellows".*

United Nations Organizations and Disabled persons :

According to Universal Declaration of Human Rights, 1948, *"All human being are born free and equal in dignity and rights"*. Nevertheless, this is far from being a reality for more than 500 million disabled persons around the world. Disabled persons living conditions are worse than those of other citizens. They are very often isolated and socially marginalized. They face discrimination virtually in all aspects of life. To combat this situation, specific rights have been evolved to protect disabled persons.

According to definition contained in the Declaration of the Rights of Disabled Persons (1975), the term 'Disabled Persons' *"any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either*

*Associate Professor, Govt. PG. Law College, Pali

1 The definition of disability in social security and supplemental security income: drawing the bounds of social welfare estates, Lance Liebman, Harvard law review, Volume 89, No. 5, Columbia Law School, March 1976.

2 Srivastav, Suresh C., Treatise on Social Security and labour Law, Lucknow Eastern Book Company, 1985, P.1.

congenital or not, on his or her physical or mental capabilities".

The United Nations has been continuously concerned, since its establishment, with the situation of disabled persons. In 1976, the UN General Assembly proclaimed (resolution 31/123) the year 1981 to be the International Year of Disabled Persons; and in 1982 it adopted (resolution 37/52) the World Programme of Action concerning Disabled Person and proclaimed (resolution 37/53) the period 1983-1992 the United Nations Decade Disabled Persons.

The Universal Declaration of Human Rights, Article 22 of the Declaration: *"Every one as a member of the society has the right to social security and is entitled to realization though national efforts and international co-operation and in accordance with the organization and resources of each state of economic, social and cultural rights indispensable for his dignity and the free development of his personality"*[3]. Similarly, Article 25 *"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood, or circumstances beyond his control".*[4]

International Convention on Economic, Social and Cultural Rights, 1966:

There are several rights given in the International Convention on Economic, Social and Cultural Rights, 1966, they are as follows: Right to work[5], Right to enjoyment of just and favorable conditions of work[6], Right to have social security and social insurance[7], Right to an adequate standards of living[8], Adequate means of livelihood to men and women alike[9]; equitable distribution of resources[10], Equal pay for equal work for both men and women, Right to work, Right to have public assistance in the event of old age, sickness and disablement and in other cases of undeserved want, Right to have just and human conditions of work including maternity relief; and Right to have minimum wages in all sectors of economy.

Right to Social Security: Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally from securing the means for a dignified and decent existence. In the event of the death of a beneficiary social security benefits shall be applied to his dependents.[11]

Ratification by India of the UN Convention of the Rights for Persons with Disabilities:

The Union Cabinet gave its approval for signing and ratifying the United Nations Convention on the Rights of persons with disabilities excluding the optional protocol on 29.03.2007. By signing and ratifying the UN Convention, India will be re-affirming its commitment toward International Policy Framework in respect of the persons with disabilities. Also; it would enhance the prestige in the international community. The UN Convention is aimed to promote protection and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. As per the Convention the persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Social Security Concept in Constitution of India:

The concept of security and social assistance is inserted in the preamble of the constitution itself. The very term socio-economic justice enshrined in the preamble of the Constitution envisages the very idea of social security to the working class people of the Country. Furthermore, the term dignity of individual as used in the preamble is itself sufficient to denote that workers employed in organized and unorganized sectors should have sufficient means of livelihood so that they could maintain a dignified life. This concept requires that workers should not be misbehaved or ill-treated while they are at work places. The tender behavior with the workers by the managerial authorities has been discarded. Apart from the preamble part of the constitution, the study of the following directives provided

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3 Article 22 of the Universal Declaration of Human Rights, 1948.

4 Article 25, Ibid.

5 Article 6 of the International Convention on Economic, Social and Cultural Rights, 1966.

6 Article 7, ibid.

7 Article 9, ibid.

8 Article 11, ibid.

9 Article 39A, ibid.

10 Article 39B, ibid.

11 Article 9 Additional Protocol to the American Convention on "Human Rights in the Area of Economic, Social and Cultural Rights", Protocol of

in the part II of the Constitution is aptly relevant for maintaining the dignity of workers in the industry. Our economic security and the success of our efforts to abolish poverty, to generate and maintain employment and to improve the standard of living of our people will, therefore, depend on our ability to identify the conditions that can ensure cooperation between our workers and employers.

Constitutional Fundamental Rights :

We have already pointed out that the Constitution of India offers, protection and social security to all citizens of India. It is obvious that the workers in the Unorganized Sector are as much entitled to protection and welfare or social security as citizens in any other groups. Fundamental Rights include the right to equality (Article 14), the protection against discrimination (Article 15), the rights to freedom of speech and association (Article 19), the rights to life and personal liberty (Article 21), protection against traffic in human beings, protection from forced labour (Article 23), and the rights of the child (Article 24). The Directive Principles of State Policy (Part IV of Constitution Articles 36 to 51) spell out the concept of social security. Article 38 of the Constitution, requires the state to strive to promote the welfare of the people by 'securing justice– social, economic and political, and minimize inequalities in income and status between individuals, groups and regions'. Article 39 (a), (b) and (e) of the Constitution requires that the citizens have the right to adequate means of livelihood, that the material sources are so distributed as best to serve the common good, that the health and strength of workers and the tender age of children are not abused, and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength[12]. Article 39A obligates the state to secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes, or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Individual or co-operative basis Article 41 requires the state, within the limits of its economic capacity and development, to make effective provision for securing the right to work, to education and public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want. Article 42 requires the state to make provision for securing just and human condition of work and for maternity relief. Article 43 requires the state to endeavor to secure, by suitable legislation, or economic organization, or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent slandered of life full employment of leisure and social and cultural opportunities. In particular, the state is to promote cottage industries on in rural areas.

Social Security Legislations in India:

In Modern India there is a network of laws which provides for social security for the disable workers. They are as follows: The Workmen's Compensation Act, 1923, The Employees' State Insurance Act, 1948, The Maternity Benefit Act, 1961, The Employee's Provident Funds & Miscellaneous Provisions Act, 1952; and, The Payment of Gratuity Act, 1972, Unorganized Workers' Social Security Act, 2008, The Rights of Persons with Disabilities Act, 2016 etc.

(i) The Employees' State Insurance Act, 1948, which covers factories and establishments with 10 or more employees and provides for comprehensive medical care to the employees and their families as well as cash benefits during sickness and maternity, and monthly payments in case of death or disablement.

(ii) The Employees' Provident Funds & Miscellaneous Provisions Act, 1952, which applies to specific scheduled factories and establishments employing 20 or more employees and ensures terminal benefits to provident fund, superannuation pension, and family pension in case of death during service. Separate laws exist for similar benefits for the workers in the coal mines and tea plantations.

(iii) The Workmen's Compensation Act, 1923, ensures provisions of payment of compensation, in cases of employment related injuries resulting in death or disability, to the workman or his family. This act takes come of law contingencies namely disabled due to employment injury and death due to employment injury. A lump sum compensation amount is paid to the disable worker or dependants as the case may be during both the contingencies. The maximum amount of compensation mentioned in the Act for disablement is Rs.5.4 Lakh and for death Rs.4.56 Lakh in case of temporary disablement monthly payment made 50% of wages up to 5 year. The Workmen's Compensation Act is not applicable to those who are covered the ESI Act.

(iv) The Maternity Benefit Act, 1961, which provides for 12 weeks wages during maternity as well as paid leave in certain other related contingencies.

(v) The Payment of Gratuity Act, 1972, which provides 15 days wages for each year of service to employees who have worked for five years or more in establishments

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SAN Salvador, 1988.

having a minimum of 10 workers. Separate Provident fund legislation exists for workers employed in Coal Mines and Tea Plantations in the State of Assam and for seamen. This Act provides for payment of lumpsum gratuity to the employees under the scheme gratuity payable 15 days wages for each completed year of service subject to monetary ceiling of Rs 3.50 Lakh. In case of seasonal establishment gratuity is payable 97 day wage. The gratuity is payable in the contingency of superannuation, retirement, resignation, death or disablement due to accident or disease subject to completion of 5 year continue services. The condition is however, not applicable in case of death or disablement.

(vi) Unorganised Workers' Social Security Act, 2008: An important initiative to safeguard the interest of unorganized workers has been taken very recently. The Act provides for constitution of National Social Security Board which will recommend formulation of social security schemes for unorganised workers/categories of unorganised workers from time to time. Accordingly, the National Board was constituted in 2009, the Board recommended that social security schemes viz. Rashtriya Swasthya Bima Yojana (RSBY) providing health insurance, Janashree Bima Yojana (JBY) providing death and disability cover and Indira Gandhi National Old Age Pension Scheme (IGNOAPS) providing old age pension may be extended to Building and other Construction Workers, MGNERGA workers, Asha workers, Anganwadi workers & helpers, Porters/ Coolies/ Gangmen and Casual and Daily Wagers.

(vi) The Rights of Persons with Disabilities Act, 2016: The Rights of Persons with Disabilities Act, 2016 along with the Rules (for implementation) has made various amendment in the previous law applicable. The new law ensures to effectively protect the disabled persons in India from being subjected to various forms of discrimination and additionally ensures their access to equal employment opportunities, and enhances their societal participation.[13]

The Disabilities Act of 2016 is in accordance with the principles codified in the United Nations Convention on the Rights of Persons with Disabilities, and replaces the previous legislation– Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act of 1995.[14]

The appropriate Government shall within the limit of its economic capacity and development formulate necessary schemes and programmes to safeguard and promote the right of persons with disabilities for adequate standard of living to enable them to live independently or in the community: Provided that the quantum of assistance to the persons with disabilities under such schemes and programmes shall be at least twenty-five per cent higher than the similar schemes applicable to others..[15]

Social Security Schemes in India :

The social security strategies in India include social insurance, social assistance, national provident funds, and universal schemes for social security. Preventive schemes include preventive health care, vaccinations against diseases, etc. There are promotional social security schemes of the State and Central Governments such as food and nutritional security, education security, employment security, health security, women security, and assistance to the disabled. These are provided through programs such as Food for Work, Jawahar Rozgar Yojana, Integrated Rural Development Project, Sakshara, Public Distribution System, etc.

The Social Security Acts guarantee income maintenance for support only to persons who might have become disabled due to work injury or some other mishap while in service. But, a majority of the disabled people in the country is unemployed, or is involved in informal sector or dependent on their families, and requires social protection. In some of the development programs, there are a few disabled beneficiaries. But the coverage is minimal considering the statutory provision of 3 per cent reservation for disabled people in all poverty alleviation schemes. There is an urgent need to address these problems and design a policy of social security for them.

Recently, the Minister of State for Labour and Employment, Mr. Santosh Kumar Gangwar, on December 11, 2019 introduced in Lok Sabha, the Code on Social Security, 2019. It replaces nine laws related to social security, including the Employees' Provident Fund Act, 1952, the Maternity Benefit Act, 1961, and the Unorganised Workers' Social Security Act, 2008. Social security refers to measures to ensure access to health care and provision of income security to workers.[16]

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[12] Report on Second National Labour Commission, 2002

[13] Srinivas Raman, "The Disabilities Act in India: What Employers Need to Know", December 12, 2017P. At available in https://www.india-briefing.com/news/the-disabilities-act-india-what-employers-need-to-know-15755.html

[14] Ibid.

[15] Section 24(1) of the Rights of Persons with Disabilities (RPWD) Act, 2016.

Thus, the Congress President, Sonia Gandhi insist on Prime Minister, Shri Narendra Modi to provide emergency wages as part of a special welfare plan to unorganised sector workers, especially migrant and construction workers, in the wake of loss of work forced by the Covid-19 outbreak.[17]

Role of Indian judiciary in recurring Social Security :

There is hardly any infrastructure for the disable to enjoy various facilities .A disabled activist had to file public interest litigation in the Hon'ble Supreme Court in order to make air travel accessible and disabled-friendly. However our buses and trains continue to be inaccessible for an average PWD. Very insignificant number of our public buildings are accessible to disabled. A division bench of Delhi High Court in Social Jurist, A Lawyers Group v. Union of India[18], was forced to pass the following comments: *"It is the common experience of several persons with disabilities that they are unable to read a full life due to societal barriers and discrimination faced by them in employment, access to public space, transportation etc. person with disability are most neglected .lot not only in the society but also in the family. More often they are an object of pity. There are hardly any meaningful attempts to assimilate them in the mainstream of the nation's life. The apathy towards their problems is so pervasive that even the number of disabled persons existing in the country is not well documented"*. In Rupender Singh v. State of Haryana and Others[19], the Punjab and Haryana Court held that the Person with Disabilities, (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 under Section 47-A workman who became disabled during his service and was made unfit for work, neither be retired from service nor re-employed in a lower pay scale. He should be offered an alternative job with same pay- scale.

Recommendation of National Labour Commission, 2002 for Social Security :

In 2002 national labour commission recommended the following: The basic benefits may include (a) insurance against death or disability, (b) health insurance and (c) old age benefits. He coverage under death and disability (a) may be comprehensive; the sum assured for life being uniform irrespective of the cause of death since it is unrelated to the needs of the surviving family. In the case of disability, the compensatory payments may be made periodically. There are a number of pension schemes in our country i.e. Old age pension, Widow's Pension, Pension for Physically Handicapped, National pension scheme & Other Pension Schemes. Since the Ministry has itself recognized the deficiencies in the existing arrangements for social protection of the disabled, there is not much that we need say in the matter. We, however, feel that it is necessary to prepare a comprehensive plan of action covering, inter alia, the following aspects. Removal of the disabilities, whenever possible, should be the basic objective of any such plan. Where the disabilities cannot be removed, measures should be taken to bring the disabled persons into the mainstream by providing them appropriate education and skill training.

Conclusion :

Disabled persons have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment to engage in a useful, productive, and remunerative occupation and to join trade unions. The Right to legal capacity is one of the most invisible human rights issues world over today and also one of the most important .Too many people with disabilities are denied the right to make choices in their lives. Too few are provided access to seek redress through legal mechanisms.[20] Indian legislation provides for social security provisions for disabled labour to provide social security for disabled workers. State Governments too have many provisions for this; e.g. Disabled retirement pension, disabled pension, disabled education, medical facilities, railway air travel and income tax, maternity benefits, compensation during disability. So, we are marching ahead on the path of systematic and scientific progress toward social security and social assistance schemes in India. In this regard, the concluding observation and suggestion is that the Government of India and the State Governments should implement the recommendations of Second National Labour Commission. It will result in making long range social security scheme for disabled persons employed in organized and unorganized sectors where crores of workers are engaged for employment. More important thing is also required to emphasis to implement the existing laws properly to provide and ensure the social security for the disabled workers .Thus, strict implementations of enacted laws will be helpful in the society.

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16 The Code on Social Security, 2019, Ministry on Labour and Employment, December, 11, 2019, at https://www.prsindia.org/billtrack/code-social-security-2019

17 The Times of India, New Delhi on 6th April, 2020, "Unorganised Workers Social Security Act".

18 2002 6 AD(Delhi) 217.

19 (2007) 1LLJ61.

The Epidemic Disease Act,1897: A Tool to Control Covid -19

Dr. Anila*

ABSTRACT

Nowadays, the whole world is combating coronavirus disease (COVID-19). India is also adversely affected by this disease and which is spreading in India very quickly. W H O declared it an international health emergency. To prevent from spreading it in all over the country and to protect public health, the Indian Government announced to take essential measures under The Epidemic Disease Act, 1897 and empowerd the States to take essential measures to prevent and eradicate this dangerous outbreak. This Act was enacted in 1897 when Bombay was witnessing to the plague outbreak. It has only four Sections, which are about the extension, powers of the State and Central Government, penalties, and protection of persons acting under this Act. But after this, there were so many incidents that occurred at different places of the country of violence against medical personnel that forced the Government to think again. The Government amended this Epidemic Disease Act, 1897, by an Ordinance in April to protect health workers and warriors of COVID-19. This Ordinance increases the punishment and penalty for offenses under this Act, and the offense is also declared as cognizable and non-bailable. But despite this, the country has needed a comprehensive, integrated, actionable provision of law to deal with such problems, eg. COVID-19.

Key words: WHO, Epidemic, Disease, Outbreak, COVID-19, Emergency, Medical Personnel

Introduction

Today all human beings of this world are panic about Coronavirus Disease (COVID-19) the origin of this viral disease is in Wuhan City, which is situated in China. In the early December Municipal Help Commission, China reported a cluster of cases of pneumonia in Wuhan, Hubei Province. A novel coronavirus was eventually identified, WHO reported on social media on January 4, 2020[1] and after the recommendation of the Emergency Committee, WHO declared the novel coronavirus outbreak as a Public Health Emergency of International Concern- PHEIC on Jan. 30, 2020. This disease is spreading worldwide very quickly, and about 229 countries became grasp of COVID-19.[2] India is also one of the suffered countries. The very first case of the COVID-19 Pandemic in India was reported on January 30, 2020.[3] It was almost covering all the states of India on May 20. Pandemic COVID-19 adversely affected all the fields of economy, social, cultural, demographical political, and law and order also. However, this is not the first time that people of India face this kind of vulnerable disease. In the past decades, Indian citizens have also fought with many infectious diseases.

Some of the diseases will discuss many disease out breaks that are reported and responded during the past decades. For example, the plague was spread in Surat in 1994, Chikungunya and Dengue Fever also spread at large scale, and H5N1 and H1N1 are some of which caused widespread destruction.[4] The outbreaks caused by the Nipah and Japanese encephalitis virus and Crimean Congo Hemorrhagic fever are also a severe infectious disease, which created a danger for public health. Other countries with the potential for the international spread such as Ebola virus infection and Zinca virus also threatened the public health security of India. The burden and spectrum of infectious diseases are used in India, and they still contribute about 30% of disease burden in India.[5] An average of around 40-50 outbreaks is reported to CSU every week. A total 990 outbreak in 2010, which is increasing continuously in 2679 in 2016 and 1714,was reported in 2017.[6] The major cause of the risk of disease is globalization, increasing volume of air travels, industrialization, migration towards Urban and complex lifestyle has change behavior, and life falls in stress. In this series, COVID-19 is also an outbreak of viral infection with properties of rapid progression.

*Assistant Professor, Dr. AnushkaVidhiMahavidyalaya, Udaipur

1 https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19

2 COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)".

3 https://www.ncbi.nlm.nih.gov

4 Rakesh, P. S., The Epidemic Diseases Act of 1897: Public Health Relevance in the Current Scenario,https://www.ncbi.nlm.nih.gov.

5 https://www.who.int/ healthinfo/ global_burden_disease/ 2004_report

6 https://idsp.nic .in/index4.php?lang=1&level= 0&linkid=313&lid=1592

Minimizing the transmission of this type of dangerous and infectious disease government needs special legislation that protects public health and prevents the infection by spreading in the general public. Legislation can contribute not only to avoiding infection of disease but also in maintaining law and order. Regulatory options available in India are namely The Epidemic Disease Act, 1897[7] and international health regulations. These public health laws authorized to the State for interference with freedom of movement also because these laws based on the principle of Public Health Necessity. So following the COVID-19 Pandemic, the Cabinet Secretary of India, on March 11, 2020, announced that all States and Union Territories should invoke what provisions and Section 2 of The Epidemic Disease Act, 1897.[8]

Methodology :The article has been based on the epidemic disease act 1897 in context to the present period of COVID-19. This article is based on secondary data, and it included data published in newspapers, gazette notification, magazines, websites. The main objective of this article is to evaluate the Act in the present pandemic situation and evaluation of the impact of this Act. The problem of Healthcare personnel which they faced is also discussed here. The study also contains the comparison of the old Act of 1897 and the amendment Ordinance of 2020.

History of the Epidemic Disease Act, 1897

The epidemic word has come from the Greekword "epidemios" means epi (on) and demos(people). This word epidemic existed in ancient Greek around 430 BC (5th century BC)[9]. But generally, this epidemic term is used to describe something that has grown out of control when any infection or disease spreads rapidly to several people and affects so many persons at the same time. Epidemic disease is generally highly communicable and spreads throughout the population in a short period.

There was in Bombay, in 1897, the plague was spreading very fast. So Queen Victoria directed the Government to take essential measures to prevent and eradicate the disease and The Epidemic Disease Act, 1897 was passed on February 4, 1897 in the following the direction of Queen for stringent measures for the eradication of pestilence and better prevention of the spreading dangerous epidemic disease of plague. Fortunately, this Act confined played to Bombay by tough measures of this Act. At the same time, this is the shortest Act as ever enacted by Indian legislation comprising just four Sections.

The central provision of The Epidemic Disease Act, 1897, is discussed below:

1. Section – 2 : Power to take specific steps and prescribe regulations as to dangerous epidemic diseases- (1) When at any given time the State Government is contented that (the State) or any part of it is visited by, or threatened with, an outbreak of any dangerous epidemic disease, the State Government, if (State) thinks that the common provisions of the law for now in force are inadequate for the purpose, may take, or require or authorize any person to take, such steps and by public notice, prescribe such interim regulations to be noticed by the public or by any person or category of persons as (State) shall consider it necessary to prevent the eruption of such disease or the spread from it, and may decide in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed.

2. More precisely and without discrimination to the generality of the aforementioned provisions, the State Government may take steps and prescribe regulations for-

   (a) The inspection of persons travelling by railway or another way, and the isolation, in hospital, temporary accommodation or any other means, of persons suspected by the inspecting officer of being infected with any such disease.

3. Section-2A :Power of Central Government- When the Central Government is contented that India or any part of it, is visited by, or threatened with, an outbreak of any dangerous epidemic disease and that the common provisions of the law for the moment in force are not enough to prevent the outbreak of such disease or the spread from it, the Central Government may take action and prescribe standards for the inspection of any ship or vessel departing or arriving at any harbourin [the territories to which this Act extends] and for such detainment thereof, or of any person intending to sail therein, or arriving thereby, as may be necessary.

4. Section -3 : Penalty - Any person disregarding any regulation or order made under this Act shall be purported to have committed an crime punishable under Section 188 of the Indian Penal Code.

5. Section – 4: Protection to persons acting under Act.- No suitor other legal preceding shall lie against any person for anything done or in good faith meant to be done under this Act.

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7 Epidemic Diseases Act, 1897, Act No. 3 of 1897 [4th February, 1897.] http://www.bareactslive.com

8 https://indianexpress.com/article/explained/explained-what-is-the-epidemic-act-of-1897-govt-has-invoked-to-fight-coronavirus-6309925/.

9 Kumar, Ankit, Epidemic Disease Act,1897 An Overview http://legalserviceindia.com/legal/article-1971 -epidemic-diseases-act-1897-an-overview.html.

After implementing this Act, there were so many incidents that occured in the country, which was about violence against medical personnel and the team ,who was working for preventing, surveillance, and treating coronavirus disease, some of the cases discussed below:

? Case 1 - In Indore, police and medical officials were attacked on April 1 when they went to screen residents of locality tagged as one of the COVID-19 hotspots of the city, the medical team attacked by heavy brick batting.[10]

? Case 2- In Delhi patients of COVID-19 who were admitted in the COVID-19 isolation ward at Lok Nayak Jai Prakash Narayan Hospital abused on-duty doctors on 14th April evening the male patient allegedly sexist remark to a female doctor.[11]

? Case 3- In Bengaluru health worker (ASHA) witnessed and attacked by a local mob when she went to that area to sanitize people and screen the families for COVID-19.[12]

? Case 4- In Moradabad UP on April 15, the mob attacked police officers, health workers and those involved in the sanitization campaign, people attacked police officers and pelted stones at the ambulance and medical staff also.[13]

? Case 5-A medical team was subjected to the stone pelting in Bajariya, Kanpur, when they went to Quarantine, a suspected family.[14]

? Case 6 -In Ajmer, Rajasthan, seven people attacked a team of health workers during its visit to a locality in Ajmer district; they went for the screening of residents for coronavirus on April 7. The medical team had visited Khanpur Chisti Nagar to screen residents for coronavirus. Many people attacked the team and also pelted stones at them.

? Case 7- In Madhya Pradesh, on April 2, 2020, the health staff visited a locality to screen residents for coronavirus. During their duty, they were attacked by residents of thatlocality; in this incident, two women doctors injured. They rescued by police after.

? Case 8 - In Rajasthan, at least five police personnel were injured when they were deployed to enforce the curfew over the coronavirus pandemic in the Panch Batti area of Tonk district when they came under attack by a mob.

? Case 9 -In Hyderabad, two doctors attacked by a family of a person who died due to infection of coronavirus in Gandhi Medical Hospital in Hyderabad on April 1. The person who assault was himself is a COVID-19 patient. He was not only attacked the doctor on duty but also broke a window of the hospital.

? Case10- In Surat (Gujarat) the Healthcare professional who was working in Civil Hospital was threatened by her Apartment residents for traveling to work on March 23, when the doctor had returned from work on March 23 night, 8 to 10 residents of her apartment including their president warned her about going out.

These discussed cases are only a few examples of attacking police and medical teams, and we can say the warriors of COVID-19. This type of case is happening all over in India. The Indian Member of Healthcare Services being targeted and attacked by miscreants, thereby obstructing them from doing their duties. This was very unfortunate. So the Government passed an Ordinance of amendment in Epidemic Disease Act, 1897, and the penalty and punishment increased to protect health care service personnel and property, including their living and working from violence during the epidemic. The amendment in the"acts of violence"makes it cognizable and non-bailable offenses. Commission for abatement of such acts shall be punished with imprisonment for a term of 3 months to 5 years and with fine of rupees 50000 to 200000 in case of causing severe injury imprisonment shall be for a term 6 months to 7 years and with fine of rupees 100000 to 500000 besides the wrongdoer(offender) shall also be liable to pay compensation to the victim and two times of the fair market value of damage of property.

The Epidemic Disease (Amendment) Ordinance,2020[14]

The Epidemic Disease Act, 1897, amended on April 22, 2020. By the amendment, many new provisions inserted in the previous Act, eg. in Section- 1 inserted a Section name Section 1A. Section 1A -In this Section, many terms are defined -

(a) "Act of violence" includes any person of the following Act committed by any person against a health care service personnel who are serving during an epidemic which causes or may cause---

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10 https://timesofindia.indiatimes.com

11 Sahu, Kamal Kant and others, India Fights Back: COVID-19 Pandemic,://www.ncbi.nlm.nih.gov/pmc/articles.

12 https://www.deccanherald.com.

13 Rakesh, P. S., The Epidemic Diseases Act of 1897:https://www.ncbi.nlm.nih.gov

14 https://taxguru.in/corporate-law/epidemic-diseases-amendment-ordinance-2020.html

? Harassment impacting the living or working condition of such service personnel and preventing him from discharging his duty.

? Any harm, injury, intimidation, or danger to the life of such health care service personnel either within the premises of Clinical Establishment or otherwise.

? Obstruction or hindrance to such Health Care Service Personnel in the discharge of their duties is there within the premises of a Clinical Establishment or otherwise.

? Loss or damage to any documents or property in the custody of or in relation to such Health Care Service Personnel.

(b) The term Healthcare Service Personnel also defined in this ordinance, which is meant by a person who, while carrying out his duties concerning epidemic related responsibilities in direct contact with infected person and thereby is at the exposure of being impacted by such disease.It also includes

? Any public and clinical healthcare provider like the doctor, nurse, paramedical workforce, and community health workers

? Any other person authorised under the Act to take measures to prevent the outbreak of the disease and spread thereof.

? Any person declared as such by the State Govt. by official gazette notification.

(c) The term property also defined under the new ordinance which includes-

? Clinical Establishment as defined in the Clinical Establishment (Registration and Regulation) Act, 2010

? Any facility identified for and time and isolation of patients during an epidemic.

? Any other property in which health care service personnel has direct interest in relation to the epidemic.

Section- 2A : The Section 2A also amended, the principal Act, for the portion beginning with the words "Centre Government made take measures" and ending with the words "as may be necessary," is described as"theCentral Government may take such measures as it is deemed to fit and prescribe regulation for the inspection of any mean of transport vehicle or goods vehicle or ship or vessel or aircraft leaving or arriving at any land port or port for aerodrome as the case may be in the territories to which this act extend and for such detention thereof or of any person intending to travel there in arriving thereby as may be necessary."

A new Section is also inserted in Section 2 for prohibition of violence against health care service personnel and damage to their property that is Section 2B which has a provision that no person shall indulge in an"act of violence" against the healthcare service personnel or cause any damage to any property during an epidemic.

Section –3 : Section 3 also amended and inserted some provisions of penalty. In this Ssection, the term 'whoever' means commits or abets the commission of an atrocity against a health care service personnel or abate for causes damages or loss through any property shall be punishable with prison sentence for a term which should not be less than 3 months but which may extend to 5 years and with fine which shall not be less than 50000 but which may be extended to 200000 rupees. However, while committing an act of violence against healthcare service personnel causegrievous hurt as defined in Ssection 320 of Indian Penal Code (IPC) to such person shall be punished with detention for a term which shall be at the very least 6 months but which may lengthen to 7 years and with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

There are in Section 3 also inserted new Sections 3(A),3(B), 3(C), 3(D), and 3(E), which deal with the procedure for the offence.

Section – 3(A) :Section 3(A) that the offense is punishable under Sub-Section (2) or (3) or Section 3 shall be cognizable and non-bailable.

? any case registered under sub-section (2) or (3), and section 3 shall be investigated by inspector but not the below rank.

? Investigation of a case under sub-section (2) or (3) or section 3 shall be completed within 30 days from the date of registration of FIR.

? In every trial or inquiry of a case under sub-section (2) or (3) or section 3 the proceedings shall be held as expeditiously as possible, and in particular when the examination of witnesses has once begun the same shall be continued from day to day until all the witnesses in attendance have been examined unless the Court finds the arrangement of the same way on the following day to be necessary for reason to be recorded and an endeavor shall be made to ensure that the trial or inquiry is conducted within a period of one year.

? Provided that where the trial is not included within the said period, the judge shall record the reasons for not having done so.

? Provided further that the said period may be extended by such for the period for reasons to be recorded in writing but not exceeding 6 months at a time.

Section -3(B) :where a person is prosecuted for committing an offense punishable under sub-section (2) of section 3 such offense may with the permission of the Court be compounded by the person against whom such act of violence is committed.

Section - 3(C) : where a person is prosecuted for committing an offense punishable under sub-section (3) of section 3, the Court shall presume that such person has committed such offense unless the contrary is proved.

Section - 3(D): has a provision about the presumption of culpable mental state, the provision includes in any prosecution for an offense under sub-section 3 of section 3 which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state, but it shall be a defense for accused to prove the fact that he had no such mental state concerning the Act charged as an offense in that prosecution. For this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Section - 3 (E): in addition to the punishment provided for an offense under sub-section (2) of section 3 the person so convicted shall also be liable to pay by way of compensations such amount as may be determined by the Court for causing hurt or grievous hurt to any health care service personnel.

Not with standing the composition of an offense under section 3(B)in case of damage to any property or loss caused, the compensation payable shall be twice the amount of fair market value of the damaged property or the loss caused as may be determined by the Court. Upon failure to pay the compensation awarded under subsection (1) and (2), such amount shall be recovered as an arrear of land revenue under the Revenue Recovery Act, 1890.

Limitations of the Epidemic Disease Act, 1897

- This Act is silent on the scientific methods of outbreak prevention control and eradication, for example by medicine, vaccination, and surveillance.
- In this Act, provisions focus only on sea travel. However, in the context of modern aspects, the Act needs to include air travel also because, in the present time, increasing international travel by especially by air transport. It should also include the factors related to increased migration, a higher density of population, industrialization and urbanization. These factors have contributed over the decades to change in the transition and propagation of communicable diseases.
- It has no provision related to a speedily setup management system.
- There is a lack of coordination system in this Act and no provisions related to coordination between center and state Government, which is compulsorily required to tackle and prevent the epidemic disease.
- Many states have their oven epidemic disease act, so these laws vary in quality and content, and this difference between state and central law also creates a confusing state or mismanagement in the system.

Some states and union territories have also issued measures and regulations of emergency for their jurisdiction under the epidemic disease act to deal with coronavirus disease, for example

- The Delhi Epidemic Disease Covid-19 Regulation, 2020
- The Maharashtra Epidemic Disease Covid-19 Regulations, 2020
- Punjab Epidemic Disease Covid-19 Regulations, 2020
- The Himachal Pradesh Epidemic Disease (Covid-19) Regulations, 2020

These regulations contain duties and obligation of hospitals and laboratories and powers of the district administration to restriction measures like sealing borders of state and districts, closure of Institutions, banning public gathering, quarantine facilities and also combat with the rumors about COVID-19

- The legislation does not have provisions for the protection of Human Rights in a medical emergency. There are no legal concerns about the safety of fundamental human rights during the period of emergency for Quarantine and or isolation period.

Conclusion -

The whole world is facing the impact of COVID-19 not only on health concerns but also on the economic ground. All countries are trying to prevent and eradicate this viral disease, but till now, 229 countries have spread the COVID-19 infection. India has also spread COVID-19 almost in all the states. Indian Government takes many preventive measures, but till May 22, there are cases about more than one lakh of corona positive. Indian Government enforced The Epidemic Disease Act, 1897, to strengthen the legal framework to prevent and control the spread and existing communicable and infectious diseases in India. The central Government gave power to the states through The Epidemic Disease Act, 1897, despite this, the

coronavirus spreading very quickly in all regions of the country. In between many incidents also take place against health workers, in this situation, the Epidemic Disease Act amended to protect COVID-19 warriors or frontline officials, for example, medical staff, police etc.

Nevertheless, despite this, the Act has some limitations about public health issues and scientific response. All health workers, police personnel, and cleaners are faced so many abuses, violence, and attacks by the mob or local community. So The Epidemic Disease Act, 1897,whichis almost 123 years old, has some limitations because of changing all the aspects of health and society behavior. There are some States who formulated their public health laws, and some states have amended the old provisions of The Epidemic Disease Act, but these acts vary in quality and content.

Suggestions –

After all these facts and issues, there is a need for a comprehensive, integrated, actionable, and relevant provisions of law to control COVID-19 that should be formulated in public right based, public focused and public health-oriented based and most important, coordination must be in all States and Center. To stop the outbreak of communicable diseases all the effective measures should be inserted in The Epidemic Disease Act. There is a need to modify the Act according to the modern era and modern history of the health and security of the public. The process of conviction should be quick and fast for the offenders, so the example should be set up in front of the public. This will help the persons in serving the duty safely and help in preventing and treating the disease. The guarantee of human rights during the emergency period should be provided in the new legislation. The provision related to Quarantine and isolation should be more transparent and specified in the new legislation.

The DNA Technology (Use & Application) Regulation Bill, 2019 Vis-a-Vis Data Privacy

Arnav Bishnoi*

"It's the little details that are vital. Little things make big things happen."[1]
– JOHN WOODEN

Introduction

DNA is the acronym for Deoxyribonucleic Acid, it is the fundamental strand and the building block of our life and the identity which one receives from his forefathers (half of it from Father and the other half from Mother)…No two person can have the same DNA patterns for it is a kind of inimitable identity card given to us on our birth by the genetic nature itself, albeit for the only exception being if they're identical twins!

DNA, also called as genetic blueprint of life was at foremost defined by the Scientist Francis H.C. Crick and James Watson in 1953,[2] and both of them had won Nobel prize for the same in 1962, but the credence has to be given to the English Scientist, Alec Jeffreys, who founded and used to effect the first modern-day DNA analysis system in the Colin *Pitchfork*[3] case. This case showed the world, the future of criminal investigation and how imperative this forensic tool will be.

Prior to the introduction of this technology, the criminal investigation & justice system and the whole apparatus relied heavily on the conventional evidences like testimony from a witness, who would in a plethora of cases turn hostile and leave the investigative agencies in utter embarrassment. Later on, blood found at the crime scene was also put used by law enforcement agencies but blood samples didn't remain constant/usable over the longer period as compared to the DNA material which remains usable for an interminable stretch and also, it endorsed the principle of *"presumption of innocence"* whereby the guilt has to be established well beyond a reasonable doubt, that's the principle which almost every criminal justice system is based upon.[4]

DNA technology has had a scientific backing and has been considered more accurate than other crime scene evidence,[5] apart from the bright, sunny and positive side of DNA based technology, the grimy and soiled side too exists, whereby the DNAs are being misused for all the data (for example, determining genetic flaws which would belittle the personal in society, determining such medical ailments which one would like to conceal, familial relations, etc.) they have. Take for example the *infamous Aarushi Murder Case*, according to different outlets of Media the case was sabotaged by tempering the DNA traces.[6] CDFD, Hyderabad in its report to CBI explicitly mentioned that Aarushi's vaginal swabs were replaced with that of an unidentified woman.

Furthermore, DNA mapping/fingerprinting has been used conclusively not just to convict one person but also exonerate the person who has been wrongfully clenched because of a fake testimony, wrong assumption or a planted evidence.

One might wonder as to where all this DNA evidence is found at a crime scene or at what parts and articles one can find it, therefore a short table is formulated to better understand the probable samples can be collected from the crime scene and what samples can be adduced from the human body of the criminal/suspect/victim;

*Associate (Disputes Resolution), Singh & Associates, Gurugram

1 John Wooden, Quotes, Goodreads, https://www.goodreads.com/quotes/112020-it-s-the-little-details-that-are-vital-little-things-make (last visited: Nov 24, 2019).

2 Dr. Himanshu Pandey, Evidential Value of DNA: A Judicial Approach, Bharti Law Review 2017, www.manupatra.com(last visited Jan 21, 2020).

3 R v Pitchfork, Case No: 2008/04629/ AI, EWCA Crim 963.

4 Khaleda Parven, Forensic Use of DNA Information v Human Rights and Privacy Challenges, 17 U.W. Sydney L. Rev. 41 (2013).

5 Karen Norrgard, *Forensics, DNA Fingerprinting, and CODIS,* NATURE EDUC. (2008), https://www.nature.com/ scitable/topicpage/ forensics-dna-fingerprinting-and-codis-736(last visited Jan 21, 2020).

6 Praveen Swami, *Arushi murder case sabotaged by DNA tampering*, The Hindu, Dec 17 2016, https://www.thehindu.com/news/national/ Arushi-murder-case-sabotaged-by-DNA-tampering/article16879048.ece (last visited Jan 20, 2020).

EVIDENCE	PROBABLE POSITION OF THE DNA	FOUNTAINHEAD OF THE DNA
Clothes/ Laundry	Surface of the cloth	Blood stains, Semen Marks & Body sweat (skin cells)
Nails of the finger	Under the nails	Blood, Skin/Tissues
Marks of a bite	The Skin	Saliva (Buccal/cheek cells)
Toothpick/ Floss	The toothpick/ Floss	Saliva and/or Tissue
Gun bullet	Clothes & Skin	Tissue, Blood
Cap/Hat/Helmet	The area inside	Hair/ follicle, Sweat, Flakes/ Dandruff
Bedsheet, Blanket Pillow, etc.	Surface area	Saliva, Sweat, Dandruff, Hair, Fluids, etc.
Laptop, Mobile phone, Landline, PC, electric	The surface area like the keys, screen, etc.	Sweat, Flakes, etc.
Glass, Bottle, etc.	The lid and the side area	Saliva
Spectacles and Sunglasses	Lens, frame, nose and ears	Skin particles, Sweat, Saliva

The Constitution of India[7] strives to increase the scientific temper amongst all its citizens by emitting a duty so as 'to develop the scientific temper, humanism and the spirit of the inquiry and reform' and also, 'to strive towards excellence in all the spheres of individual and collective activity'.[8] In order to develop this temper, the Indian Governments over the period have had always tried to foster this habit by implementing a number of policies, guidelines and bringing in legislations in this area like that of the Drugs and Cosmetics Act,[9] Central Council for Medical Act[10] and the introduction of the most recent one i.e., the DNA Technology (use and application) Regulation Bill, 2019 for there is a major shortcoming and also a need has been felt in the existing framework circumscribing the use, regulation and also storage of DNA Data in criminal investigation for offences under the Indian Penal Code, 1860 and identifying the missing persons or the victims of severe disasters (man-made/natural) whose identification becomes difficult. Questions were raised as to why the present framework[11] was not amended, but the Law Commission in its report stated that simply amending the present structure wouldn't help and that there was 'a need to regulate the use of human DNA profiling through a standalone law'[12] so that its use is regulated within such whelms of law.

DNA TECHNOLOGY (USE & APPLICATION) REGULATION BILL, 2019

The DNA bill was introduced as recently as in July 2019[13] by Dr. Harshwardhan, the Minister of Science & Technology (Govt of India). This bill was opposed by the leader of opposition, Dr. Sudhir Ranjan Chowdhury as well as INC MP Dr. Shahi Tharoor. Both of the leaders had their own reservations against bill stating that it would;

1. Violate the Fundamental Right of Privacy of the Citizens,[14] and
2. That it would promote surveillance state because there exists no legislation which would protect DNA Data of the subjects and it will be like putting the cart before the Horse.[15]

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7 The Constitution of India 1950, Art 51A.

8 The Constitution of India, Art. 51A(h), Art. 51A(j).

9 Drugs and Cosmetics Act, 1940, No. 23 of 1992 (India).

10 The Indian Medicine Central Council Act, 1970, No. 48 of 1970 (India).

11 The Code of Criminal Procedure, 1973, No. 02 of 1974 (India).

12 Law Commission Report No. 271- Human DNA Profiling, Pg. 06.

13 The DNA Technology (Use and Application) Regulation Bill, 2019, PRS INDIA, https://www.prsindia.org/billtrack/dna-technology-use-and-application-regulation-bill-2019 (last visited: Jan 20, 2020).

14 Payel Majumdar Upreti, What the DNA Profiling Bill means for your data privacy, THE HINDU BUSINESSLINE, Aug 2, 2019 https://www.thehindubusinessline.com/blink/know/what-the-dna-profiling-bill-means-for-your-data-privacy/article28793951.ece# (last visited Jan 19, 2020).

15 Ibid, Dr. Shashi Tharoor in the Lok Sabha.

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Earlier the same bill was introduced in 2018 but lapsed due to the then 16th Lok Sabha getting dissolved for elections. It all started in 1985, the Indian Courts had for the very first time witnessed the usage of DNA evidence and in 1988, sent a person to jail on the basis of such an evidence.[16] Attempts have had been made in last 20 years to bring in a law which could regulate the usage and storage of DNA but every attempt of successive governments made in consonance to it faced strong opposition in the Parliament due to the controversial nature of this law. At first, in 2003 two episodes unfolded, firstly The Law Commission in its 185th report[17] recommended the inclusion of DNA testing subject to stringent circumstances u/s 112 of the Evidence Act, 1860 and secondly, the Department of Biotechnology established a committee, "DNA Profiling Advisory Committee" to advice for a bill, which actually became the Human DNA Profiling Bill, 2007[18] which was never introduced in either of the Houses of Parliament.[19] The build up to 2019's bill was preceded with the following events,

- In 2012, a new version of the bill was leaked[20]
- In 2013, Dept of Biotechnology formulated an expert committee on the formulation on it
- In 2015, the NDA Govt planned to table the bill so formulated in the Parliament, and,
- In 2016, The use and regulation of DNA Based technology in Civil and Criminal Proceedings, Identification of Missing persons and Human Remains Bill listed for introduction, consideration and passing.

• WHAT DOES THE BILL STATES?

The bill introduced in 2019 is identical to the one presented in 2018, the bill provides forth identifying and establishing the identity of certain persons (**Indices discussed in the table below**), use of the DNA Data (for the matters mentioned in the Schedule[21]) so collected in order to augment effectiveness of the criminal justice system.

While collecting such DNA data, the authorities will have to bear certain conditions/clauses/situations in mind. Firstly, if a person is convicted for an offence which is punishable for more than 7 years then no consent of the person has to be taken while collecting the data.[22] Secondly, if a person is arrested for a crime which carries punishment for less than 7 years then in that case consent of the person is required before DNA profiling can be done.[23] Thirdly, if the person/s is/are the victims and/or minor/disabled then a written consent would be required.[24] But, if consent is not given in the 2nd and the 3rdcase mentioned above, the authorities can approach the Magistrate who may give such orders[25] as he deem it fit to be.

A DNA Data Bank will also be established[26] at the National level as well as Regional/Zonal level (every state). These Data Banks will maintain certain indices (**Indices discussed in the table below**). As far as the Removal, Retention & Entry of DNA profiles is concerned, the same will be supervised by specified regulations passed as per the wisdom of the legislature. Nevertheless, the Bill states certain conditions for removal of DNA profiles of the following persons:

1. A Suspects, when a court orders to or the police on its own files such report,

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16 Law Commission of India, Report No. 185, Review of the Indian Evidence Act 1872, P. 43, http://lawcommissionofindia.nic.in/reports/185thReport-PartII.pdf. (last visited: Jan 21, 2020).

17 Ibid, P. 4

18 Department of Biotechnology. Ministry of Science & Technology GOI. Annual Report 2009 – 2010. pg. 189. http://dbtindia.nic.in/annualreports/DBT-An-Re-2009-10.pdf. (Last Accessed: Jan 19, 2020).

19 The Centre for Internet & Society, Rethinking DNA Profiling in India, 2012, https://cis-india.org/internet-governance/blog/epw-web-exclusives-oct-27-2012-elonnai-hickok-rethinking-dna-profiling-india (last visited: Jan22, 2020).

20 Human DNA Profiling Bill 2012, Working draft version- 29th April 2012, https://cis-india.org/internet-governance/blog/draft-dna-profiling-bill-2012.pdf (last visited: Jan 21, 2020).

21 Example; offences under the Indian Penal Code- 1860, Civil Matters so as to establish the paternity and also establishing identity in the case of missing persons and natural disasters.

22 Section 21(1), The DNA Technology (Use and Application) Regulation Bill, 2019.

23 Ibid, Section 21(1).

24 Ibid, Section 22(2).

25 Ibid, Section 21(3).

26 Ibid, Section 25.

2. An Undertrial person, when the court commands,
3. A person who had given his DNA under the Crime scene indexes or if it was present in the Missing persons' index, on his written request.[27]

The bill endeavours to formulate a DNA Regulatory Board[28], which will be at the helm of affairs administering and regulating the DNA Labs and Banks established pan India. The functions of the board will chiefly comprise *advising the Govt.* apropos the DNA Labs and Banks; *giving& revoking accreditation* to the Labs and also, the Board is to make sure that *confidentiality be maintained* as to all the DNA Profiles stored and submitted in the DNA Bank and Labs, if the aforementioned confidentiality is not maintained and DNA is used without any authority then in that instance the bill provides a penalty of such breach which amounts to Rs. 1 Lakh or imprisonment of up to three years.[29]

DNA PROFILE INDICES[30]/ CATEGORY - TABLE	
Offender Convicted	2019's bill provides for collection of DNAs with out consent if the offender is convicted for more than 7 year and with consent if the offence is under 7 years, no option for retrospective inclusion of DNAs.
Forensics from Crime Scene	Any objects (like cloth, mucus, tissues, etc) found at the crime scene bearing unidentified or unknown DNA profiles which can be of any suspect. Such samples can be found on the deceased/victim's body or clothes.
Accused and Suspects	DNAs of person accused and/or suspected, but for certain specific category of offences only
Volunteers and Victims	Rape or Sexual Assault victims (provided under Ss. 53(2) of CrPC and persons who have given the DNA voluntarily for '***n***' number of reasons.
Determination of Parenthood/ Kinship	In Civil matters where the dispute is that of determining the parenthood and kinship, mostly in inheritance and property suit.
Persons Missing/ Disaster victim identification	Unidentified persons and Missing persons due to kidnapping or natural/ man-made disasters.
Deceased- Identity Unknown	Unidentified Corpse or remains of a Human body.

[27] Ibid, Section 31(2).
[28] Ibid, Section 3.
[29] Ibid, Section 47.
[30] South African Criminal Law Forensic Procedures Amendment Act 37 of 2013.

The main area of disapproval amongst the masses has been the Catch-22 situation triggered due to the plans of formulating DNA databases. The data stored in these DNA Banks carriages an imminent threat to the privacy of every such person whose DNA Profile is being kept. As the DNA profiles contain a 'n' number of sensitive information it stirs/poses a situation where one's civil liberty is invaded by any wrongful and malafied usage of the data. An article suggested that DNAs, because they contain very personal information shouldn't be stored on the databases.[31]

LEGAL & CONSTITUTIONAL FAÇADES OF DNAS

The Constitution as discussed above in the Introduction part, casts an obligation to develop a Scientific temper. Here, the Parliament has the authority to formulate legislations in this regard which would encourage a catena of scientific and technological methods supplementing precision in crime detection in order to speed up the overall investigation.[32] In addition to developing laws on the matter, the Constitution also ensures that such an evidence is not used discriminately or illegally against the one who provided it, i.e. violating the *"right against self-incrimination"*[33] in any manner and also guaranteeing the *protection of life and personal liberty*[34] of every such person who gives his or her DNA Profile for any of the purposes enshrined under the 2019 DNA Bill.

1. CODE OF CRIMINAL PROCEDURE, 1970 & CRIMINAL ADMINISTRATIVE SYSTEM

The Criminal Amendment Act in the year 2005, substituted the explanation given under the then Ss. 53,54. The new explanation provided the DNAs a veracity and a legal backing, it is relation to the collection and examination of Accused persons' blood, semen, saliva and also collecting as well as processing DNA Profiles and/or samples as per Ss. 53(2)'s explanation. But in 2011, Apex Court pronounced that DNA profiling could have been done even without the amended S. 53A of Criminal Code, they held that the prosecution still had the recourse available to get the DNA tests done in order to make the case full proof.[35]

Correspondingly, through the same amendment act, Ss. 311-A was added, where the Magistrate was vested with the powers to order an individual to give his sample of the writing and/or his signatures.

Identification of Prisoners Act, 1920 is another legislation which empowers the I.O. (under CrPC) to collect finger as well as footprints' imprint. The Act also empowers the Magistrate so as to give such a direction for taking the measurement.[36]

2. INDIAN EVIDENCE ACT, 1872

Ss. 45 and 112 have been the epitome for the usage and acceptance of DNAs as evidence in the courtroom. It was the fingerprinting evidence which ensued the conviction of former CM of U.P. Shri Amarmani Tripathi for the cold-blooded murder of Madhumita Shukla who was pregnant and upon DNA examination so as to ascertain the paternity, it was adduced that Mr. Tripathi was the father of that foetus.[37] When and if Ss. 45 is applicable then along with its applicability, the ground on which this opinion so derived was based upon u/s 51 too becomes relevant. The Court while exercising the wisdom of Expert u/s 45 strives to reach a reliable conclusion and not just a probability, the Court has had agreed to the fact that in matters which include highly scientific methodology of understanding the issue then the rule of expert cannot be disputed.[38] With reference to accepting the Expert's Opinion in the Court, the same judgment laid down certain requirements:

i. That the expert must be within a recognized field of know-how

ii. That the evidence must be founded on reliable principles, and

iii. That the expert must competent of understanding and dealing the subject.[39]

S. 112 of the Act can be made to look tough upon a husband who has just learned by the DNA test that the child born is not his own but he will have to stand his/her fatherhood because as u/s 112, if the pair is staying together at the time of conception, the conclusiveness as per this law would remain irrebut table.[40]

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31 Mike Redmavne, The DNA Database: Civil Liberty and Evidentiary Issues, Cri. L.R. 437, 1998.

32 Constitution of India 1950, Art. 246, List I- Union List No. 65, Seventh Schedule.

33 Constitution of India 1950, Art. 20(3).

34 Constitution of India 1950, Art. 21.

35 Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130.

36 Identification of Prisoners Act 1920, Ss. 5.

37 State of Uttar Pradesh v. Amaramani Tripathi, AIR 2005 S.C. 3490.

38 Ramesh Chandra Aggarwala v. Regency Hospitals, AIR 2010 SC 806.

39 Ibid.

40 Kanti Devi v. Poshi Ram, AIR 2001 SC 2226.

Section 9, of the Act, which asserts about the 'facts necessary to explain or introduce a fact in issue or relevant fact' is another Ss. in the Evidence Act which can be used to furnish such DNAs as is required to demonstrate certain fact/s.

3. FAMILY& OTHER CIVIL LAWS (CPC, TPA).

Forensic Science and other related technological advances in criminal investigation have been extensively used in the matters pertaining to proving parenthood, ascertaining the legality/illegality of the child born out of wedlock and issues circumscribing the succession as property in India. The leading case which established the usage forensics in Divorce cases has to be *Sharda v. Dharampal,*[41] whereby the SC held that, it is intra vires for the Family Court to order a medical test for the person contesting the suit and inspite of such an order, the person refuses the test then in that case the court is entitled to draw interpretations which are contrary. It is worthwhile to note that its well within the inherent powers of a civil court[42] to order such a test for the sake of seeking justice, truth and maintaining transparency in the Judicial and Criminal administrative system.

4. RIGHT TO PRIVACY

India is party to numerous International treaties which promotes and protects Human Rights, the foremost amongst them is *(1) The International Covenant on Civil and Political Rights 1966, (2) Universal Declaration of Human Rights 1948,*

The Apex Court in *PUCL v. UOI,* corroborated with the *Art. 12* of the UDHR and laid down that the Right under Art. 21 cannot be curtailed, excluding the procedure laid down by the law of the land.[43] Likewise, ICCPR- 1966 asserts that, *"No one should be subjected to arbitrary or unlawful interference with his privacy"* and that everyone has a right against such interference and arbitrariness.[44]

A catena of cases stated that the right to privacy is not absolute in nature, the absolute nature of privacy developed through a case by case process. One of the cases observed that, the right to privacy is not a right which is explicitly pronounced by the Constitution[45] and the other observed that such a right must be subject to the restriction based on compelling public interest.[46] But with passage of time, the concept developed and the court stated that the right to privacy in itself means the *"right to let alone".*[47]

The Grundnorm, i.e. The Apex Court under Article 21 now endorses the Right to Privacy as an *absolute right*[48] of an individual, but before this famous Aadhar Card judgement, the Right to Privacy was *"not an absolute rightand surveillance* might well be *imposed* on such rights as per the statute."[49] and it took over six decades for the Supreme Court to reach a conclusion as to its absolute nature. Irrespective of privacy being that of an absolute nature, the present DNA Bill of 2019 caused commotion with reference to the usage of data stored by the authorities as well as other legislations and corresponding provisions in existence where under it is stated that unwarranted invasion of privacy shouldn't occur albeit it is necessary in the larger public interest[50] to do so and in the Puttaswamy judgement, a point contrary to all such legislations was deliberated, Justice Chandrachud in Para 181 of the judgement put forth his argument and also questioned *"How can you just use any individuals personal data in public interest"?*[51]

5. RIGHT AGAINST SELF INCRIMINATION

The latin maxim, Nemo Debet Proderese Ipsum, i.*e. no one can be required to be his own betrayer*[52] is laid down as a fundamental right in our Constitution. In our legal framework, an accused has a right so as to not produce any documents or give any testimony which is self-incriminating in nature.[53]

The right against self-incrimination protects a person from being a witness against himself. Although, it was decided that no personal can be compelled to provide his blood

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41 Sharda v. Dharampal, AIR 2003 S.C. 3450.

42 Civil Procedure Code, 1908, Ss. 151.

43 People's Union for Civil Liberties v. Union of India, AIR 1997 SC 568 (575); Article 12, UDHR 1948.

44 International Covenant on Civil and Political Rights 1966,Article 17.

45 Kharak Singh v. Union of India, AIR 1963 S.C. 1295.

46 Govind v. State of Madhya Pradesh, AIR 1975 S.C. 1378.

47 R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.

48 Justice K.S. Puttaswamy (Retd.) V. Union of India, Writ Petition (Civil) 494 of 2012.

49 MP Sharma v. Satish Chandra, AIR 1954 SC 300; State of Maharashtra v. Madhukar Narayan Mardikar, AIR 1991 SC 207; Anuj Garg v. Hotel Assn' of India, AIR 2008 SC 663.

50 Ss. 8(j), Right to Information Act, 2005.

51 Supra Note No. 51, Para 181.

52 Shiv Narayan Dhingra, "Right to Silence of the Accused Under Constitution of India", 41 JCPS 32 (2007).

53 State of Gujarat v. Shyamlal Mohanlal Choksi, AIR 1965 SC 1251.

sample for forensics against his will and also that no contrary presumption shall be made due to such conduct.[54] But, a Constitutional Bench, while addressing the Constitutionality of taking fingerprint observed that, "to be a witness" is not equivalent to that "furnishing evidence" in the broadest of the form.[55] Being a witness means providing some kind of knowledge in the form of a testimony which would convict him and not merely the mechanical process of producing any document in the court which contains any information pertaining to the controversy at hand, the only thing to be kept in mind is that it shouldn't comprise any statement founded on suspect's personal knowledge.

A three-judge bench of the Hon'ble Apex Court, in a landmark judgment,[56] made a well thought out decision that the *polygraph & BEAP tests, narco-analysis* and other scientific techniques when used on a person '*involuntarily*', then in that case the result derived will be equivalent to a *'testimony'* and, a breach of Article 20(3). But, later on the court in Ritesh Sinha v. State of U.P.,[57] refused to agree to the question which was raised as to whether the taking of voice test without one's consent would violate his right to self-incrimination. In this same matter, Hon'ble Justice Ranjana Desai observed that, "the taking and retention of DNA samples which are equal to a physical evidence shouldn't face any hurdles in the Indian legal scenario."

USAGE & REGULATION OF DNA IN VARIEDLEGAL STRUCTURES

Advancement in DNA technologies have reached to that level where no country can ignore its usefulness in augmenting the veracity deduced by the criminal investigation machinery. The advancement has reached to that level where a little genetic difference, as that in family members can be noticed and each person can be singled out.

It will be not be an exaggeration to cite the ostentatious remarks made in the case of The People v. George Wesley, Justice Joseph Harris, as he was then observed that, 'DNA Profiling is the utmost advance made in the "search for truth" …since the emergence of cross-examination'.[58]

Most of the nations have in one way or the other put DNA profiling to use in its criminal machinery. More than 64 countries around the world has an operational DNA database[59] qua legal structure to regulate it. Discussing some of the important ones around who have made a formidable use of this technology from the inception as well as important in relation to India would be apt here:

1. UNITED STATES OF AMERICA

The US started using DNAs to solve matters in the late 1980s, the first use done with the aid of a commercial test centre in 1986. One of the highlights in the US model is the induction of Innocence Project in 1992. The project has helped (to this date) in exonerating 367 people, including 130 of them who were wrongfully convicted of murder and other crimes they never committed.[60] The US, in 1994 enacted the DNA Identification Act[61] which furnished authority for FBI to establish a national DNA database called USA National (federal) DNA database which is managed through the Combined DNA Index System-CODIS Software (currently 2nd largest DNA Database in the World), which is being used by all the US states and it would connect all the 50 US states for swiftly resolving the crime by accessing the data centrally stored. In 2018, this database contained over 13.4 million profiles of offenders, 3.1 million profiles of persons arrested and 8.6 million other DNA profiles.[62]

US Police Dept was given a freehand by the Supreme Court in the case of *Maryland v. King* to collect randomly and in routine DNAs from person/s under arrest but not yet found guilty of the offence and also to put such data collected into the DNA database.[63] The data collected in this matter was later on put to use in a case where King was arrested for threatening a group of persons with a weapon,[64] in this matter the previous swab taken to process his DNA profile was used to nab of him.

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54 Goutam Kundu v. State of West Bengal, (1993) 3 S.C.C. 418.

55 State of Bombay v. KathiKaluOghad, AIR 1961 S.C. 1808.

56 Smt. Selvi & Ors. v. State of Karnataka, AIR 2010 S.C. 1974.

57 Ritesh Sinha v. State of Uttar Pradesh, (2013) 2 SCC 357.

58 Josesph Harris J., The People v. George Wesley, 198 3d 519 (Cal App, 1988).

59 Global Summary, DNA Policy Initiative, http://dnapolicyinitiative.org/wiki/index.php?title=Global_summary (last visited Jan 22, 2020).

60 DNA Exonerations in the United States, Innocence Project, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Jan 22, 2020).

61 42 U.S.C. § 14132.

62 CODIS - NDIS Statistics, Fed. Bureau of Investigation, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics (last visited Jan 22, 2020).

63 Maryland v. King, 569 U.S. 435, 465-66 (2013).

64 Ibid at 440.

One of the most important judgments after the Maryland's judgment has to be of *People of the State of New York v. Joseph Castro,*[65] where a three-fold projection test was settled by the Court to riposte the admissibility of DNA evidence in any matter listed before the court:

- Appreciated the rationale of Frye test, i.e. Scientific admissibility;
- If the technique is proficient enough in giving the desired consistency in results;
- Whether the recognized scientific techniques are being used.

Later on, the Court of Appeals in 1989 gave two additional prongs for admissibility of evidence.[66] And, what weight each evidence carries was characterized in *Daubert v. Merrell Dow Pharmaceuticals*.[67]

2. UNITED KINGDOM

The birth of DNA profiling/fingerprinting took place in the UK under the aegis of Dr. Alex Jeffreys from the University of Leicester. The first use aimed at proving family relation of Ghanaian boy with a person eligible to live in UK to the immigration authorities. The authorities accepted the result from the test which showed high probability of a Mother- Son relation.[68] The Colin Pitchfork case, where Dr. Alex Jeffreys performed the first DNA fingerprinting for a criminal matter was a remarkable occurrence for the development as well as veracity of DNA testing. Here the man was a suspect for double rape and murder in and around the same town, the man confessed to committing one of the crimes but not to the other, the investigative authorities were hell bent upon making him agree to the other one too and if it was not for the DNA tests exonerating him from the 2nd matter he would have found guilty for that in addition.[69]

UK launched its "UK National DNA Database" also called "UK National Criminal Intelligence DNA Database" in 1995.[70] The power to found such a database was given under the Criminal Justice and Public Order Act, 1994. The database is one of the largest databases in the world whereby more than 20,000 DNA tests being performed every year.[71] Before the passing of Protection of Freedoms Act in 2012, UK NDNAD had absolute powers to retain a DNA profile, and it consisted more than 0.45 million unknown DNA profiles accumulated from the crime scenes.[72]

3. OTHER NATIONS

- SINGAPORE: The Registration of Criminal Act, 1985[73] (ROCA) provides for the registration of criminals, further the first use of DNA was reported in 1990. An amendment via Bill No. 43 of 2002 established a DNA database of offenders.
- CHINA: China, in 1989 was amongst the foremost nations in our South Asian region to have used DNA in the criminal investigation and justice system as well as establishing a DNA bank in 2004, the bank was made as per the mandate provided under a law passed by the Ministry of Justice in 1999.
- China's databank is the largest in the World now with over 53 million profile and plans to put all its citizens on the database.[74]
- HONG KONG: A Special Administrative Region under the Chinese regime- (HKSAR) has been using DNAs and the profiling apparatus from 1992. The Dangerous Drugs, Independent Commission Against Corruption and Police Forces Act was amended by Act- No. 68 of 2000, the amendment provided authority to the establish a DNA profiling database, which was established in 2001.
- SOUTH AFRICA: Although SA has been using and conducting DNA tests in criminal investigation from 1991 and has a DNA data bank since 1997, it managed to get a legislature promulgated as late as in 2013, which is the South African Criminal Law Forensic Procedures Amendment Act No. 37. The act

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65 143 Misc. 2d 276 (1989).

66 US v. Matthew Sylvester TWO BULLS, 918 F2d 56.

67 Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)

68 Kelly K. F, J.J. Rankin & R.C. Wink, "Methods and applications of DNA fingerprinting: a guide for the non-scientist" 16 Crim. L. Rev. 211. (1987)

69 Supra Note No. 06, Colin Pitchfork.

70 Aaron Opoku Amankwaa, The effectiveness of the UK national DNA database, 1 Forensic Science International: Synergy 45-55 (2019).

71 Avi Lasarow, DNA Breaks Down Barriers in the Court Room, Elearn-university.org Testing <http://iww.elearn-universitv.org/MedicineiScience/48524.php>. (last visited: Nov24, 2019).

72 UK Home Office, National DNA Data bank Strategy Board Annual Report 2013-14, 7 https://www.gov.uk/government/uploads/system/uploads/attachmentdata/file/387581/NationalDNAdatabase201314.pdf (last visited Nov 21, 2019).

73 Cap. 268, 1985 Rev. Ed. Sing; Supra Note 05.

74 Wenxin Qianwei, China Snares Innocent and Guilty Alike to Build World's Biggest DNA Database, WSJ (2017), https://www.wsj.com/articles/china-snares-innocent-and-guilty-alike-to-build-worlds-biggest-dna-database-1514310353 (last visited Oct 22, 2019).

gave legality to the DNA database which was already in existence. The Legislation also gives the autonomous power to include a profile retrospectively for an action that took place in the past, i.e. before the inception of 2013's amendment.

THE PRIVACY ALARM

Taking India's perspective to the issue of privacy, lot of incidents took place all over the globe which made us (Indians) ponder, if our data protected? Incidents followed and the Govt. formulated "Sri Krishna Committee for drafting a data protection bill" which will be in consonance to GDPR regime in Europe. If and when implemented, the DNA profiling under the DNA Act will reveal one's and his family's sensitive information (for example, one's predilection to disease, ancestry or parenthood) which could potentially be misused if not handled and protected properly. The power as per the DNA Bill to collect DNA samples from individuals, either forcefully or non-consensually constitutes a possible threat to one's bodily integrity.[75]

People are in a better position now than before the Cambridge Analytica Scandal took place. People witnessed as to how their personal information was stored without the consent, being sold and treated by the data mining companies, and people are better equipped to comprehend and appreciate the fact that our DNA profiles too contain vital data and just how this data can be used in a detrimental manner by Data fiduciaries.

Recently, Govt. of Andhra tied up with a forensic company in order to collect and make a DNA registry consisting 50 lakh people.[76] Studying from the practices of making such a database from other nations around globe, one can deduce that the task is not laidback and one is like a socio-cultural landmine.

In India, as there is an absenteeism of law on this issue, without any regulating force private companies have been collecting DNA samples for making genealogy/ancestry tree.

In the USA, particular communities have been targeted and cordoned off to give their DNA samples, USA has been indifferent to the coloured people and the data from the Innocence Project in USA corroborates to this phenomenon, it revealed that the project has helped 225 African American in getting themselves exonerated of the crimes they didn't committed.[77] Even in the United Kingdom, before deleting close to 18 lakh profiles from UK's DNA database as per the requirement Protection of Freedoms Act, 2012. In a data from 2007, it was reported that almost 3/4th of young black citizens of the UK were on such a database.[78] Usage of DNA Profiles which is well off the mark than what it is supposed to can give rise to discrimination as witnessed in the US, UK. The biological profile can give birth to a 'substandard' class of people who are genetically marginal when compared to those who have healthy genes. This inferior class of people then will be discriminated in the case of giving employment, taking them for adoption as also in the case of getting married.

The police in certain cases have also followed the Data Subject and collected the data from a cup or bottle he was using at the café/restaurant. This "Abandoned DNA" has been challenged in lot of countries as being unlawful and unethical,[79] but to the utter disappointment of the aggrieved, no inroads have been made to enforce the civil liberty. In Australia, the police can legally gather a person's abandoned DNA data without his/her consent or any impending Court orders. They can do so by collecting all the items which such a data subject has touched like a glass, bottle, etc. as discussed earlier.[80]

RETENTION OF DNA: AN UNFETTERED POWER

In USA, as it happens in the Combined DNA Index System-CODIS, these samples are retained for solving subsequent cases, quality control as well as research purposes.[81] Nevertheless, the retention of information which is very delicate poses imminent threat to the privacy of an individual as well as the society and on top of that the unfettered power given to the police officials to collect the data from the person 'willingly/unwillingly' adds upon the miseries of an ordinary individual.

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[75] Robin Williams and Paul Johnson, 'Inclusiveness, Effectiveness and Intrusiveness: Issues in the Developing Uses of DNA Profiling in Support of Criminal Investigations',Journal of Law, Medicine and Ethics 545, 551, 33(3) (2005).

[76] Payel Majumdar Upreti, What the DNA Profiling Bill means for your Data privacy, The Hindu Business line, 2019, https://www.thehindubusinessline.com/blink/know/what-the-dna-profiling-bill-means-for-your-data-privacy/article28793951.ece# (last visited Jan 22, 2020).

[77] Supra Note No. 63, Innocence Project.

[78] Sujata Byravan, The Problems with a DNA Registry, The Hindu, 2018, https://www.thehindu.com/opinion/op-ed/the-problems-with-a-dna-registry/article23805145.ece (last visited Jan 22, 2020).

[79] Ibid

[80] Jeremy Gans, 'DNA Identification, Privacy and the Irrelevance of Australian Law', Privacy Law Bulletin 3(9), 110, 110 (2007).

[81] RE Gaensslen, 'Should Biological Evidence or DNA be Retained by Forensic Science Laboratories After Profiling? No, Except Under Narrow Legislatively Stipulated Conditions',Journal of Law, Medicine & Ethics 375, 377, 34 (2006).

In UK, questions were raised in S and Marper v. the UK,[82] as to the retention of DNA profile and whether it breached their right to privacy? The House of Lord through Lord Steyn pronounced that just the retention of such an information cannot be the breach of privacy. The matter was moved to the European Court of Human Rights (ECHR), where the ruling stated the DNA profiles of persons who are only suspects cannot be stored indefinitely, doing so would be indiscriminate & blanket usage of authority and in contravention to the principles which enshrine one's right to privacy.[83] The 2012's PoFA as discussed earlier and the Anti-Social Behaviour, Crime and Policing Act, 2014 was brought in so as to comply with the ECHR ruling, since then around 7.7 million profiles have been destroyed and 1.7 million of them are deleted.[84]

Prior to that the law in UK, after certain amendments to the S. 64(3A) of Police and Criminal Evidence Act, 1984 (PACE Act) and S. 57 of the Criminal Justice and Public Order Act, 1994 (CJPO Act) allowed the authorities to retain DNA samples for indefinite period even after the investigation is over & the person is convicted. Furthermore, the surveillance state got a shot in the arm to its powers when S. 82(2) of Criminal Justice & Police Act 2001 modified S. 57 of CJPO Act, permitting the samples to be reserved for usage in future cases. This data-banking practice of UK, if followed by other nations can give birth to an unprecedented surveillance state and a powerful instrument to intrude citizen's privacy. If we take a cursory look at the implications of these laws (PACE Act, CJPO & CJP Act) in the UK – the police are actually never required to destroy any legitimately collected sample!

- BALANCE BETWEEN NATIONAL INTEREST/SECURITY & HUMAN RIGHTS AND PRIVACY

Both the aspects, National Interest as well as Human Rights are quintessential for a country to progress. The society in toto is interested in endorsing both the aspects, as they being of mutually important significance but with the turn of century, new technological developments made society vary of its privacy and the resulting peaceful life.

The collection, storage and use of sensitive personal data always raises socio-ethical/ legal issues,[85] therefore in whatever way, any of the Governments around the globe plans to regulate the DNA regime, although it will be a strenuous task to balance both the books but it should take cognizance of the fact there are certain vital privacy apprehensions which are genuine and thoughts be deliberated upon these issues, especially issues vis-à-vis the withholding of DNAs for an indefinite period of time, collecting such data without any permission (without even the other person knowing that the data has been collected from an abandoned item), and also the extensive power and bashful use of info by law enforcing agencies in unfettered way in the name of National Interest and/or Security.

CONCLUDING OBSERVATIONS

There is no doubt that DNA profiling has been a boon to the criminal administrative system and justice delivery system, revolutionising the whole justice delivery system and making it more efficient, effective and accurate than ever[86] by enabling the options like automated comparisons of profiles with the help of technological advances in computerized storage, but India's social fabric and the peculiar social conditions assert this test in contradiction of the self- respect as well as the self-esteem of a child who if declared as a bastard will have to bear the brunt of it for the rest of his life and also his/her mother who will be public shamed and called as an unchaste woman,[87] therefore in our society before ordering such a test, careful examination has to be taken as the Court has endeavoured to not put the legitimacy of the child in peril.

For the controversy surrounding the bill pertains to the breach of privacy and the protection of data stored in such banks, It will be meaningful to note that back in 1890, Charles Warren&Louis Brandeis opined that, *"privacy, or the right to be let alone, was an interest that man should be able to avow unswervingly and not derivatively from his labors to guard other interests."*[88] There can be no dispute as to why not provide/give the right to privacy in its absolute term, but then if everyone started using the shield of privacy from going through DNA test then it will be impossible to get a conclusive evidence.

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82 S and Marper v United Kingdom, (European Court of Human Rights, Grand Chamber, Application Nos 30562/04 and 30566/04, 4 Dec 2008.

83 S (Eur Court HR, Grand Chamber, Application Nos 30562/04 and 30566/04, 4 Dec 2008) [125]-[126].

84 Ibid.

85 Mairi Levitt, 'Forensic Databases: Benefits and Ethical and Social Costs' 83 British Medical Bulletin 235, 236 (2007).

86 Leigh M Harlan, 'When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples' 54 Duke Law Journal 179, 179 (2004-05).

87 Goutam Kundu v. State of West Bengal, AIR 1993 SC 2295.

88 Charles Warren, The Right to Privacy, 4 Harvard L.R. 193 (1890).

The Indian Govt. has been arbitrary in applying the DNA to myriads of possible usage. For example, it has applied it for solving Murder, Rape cases as well as Paternity suits but has declined to use it in one of its major use, i.e. in resolving immigration cases. In the recent NRC drama, the government is not willing to accept DNA evidence from persons who have excluded from the citizenship list but whose family has been included.[89]

Dr. Arghya Sengupta, Founder of Vidhi Centre and member of the Sri Krishna Committee, while addressing students in NALSAR, Hyderabad put into view that, "*Individual is at the centre of data universe! But, that's not true. In today's time the company is at the centrifugal force who collects and stores all the data"*[90]. Since tons and tons of information is available to gather and process in one's DNAs it is of imminent importance that the Govt appreciates including greater protective measures in this DNA Bill so that the information is not misused and also Mr Shahi Tharoor rightly opined in Parliament during the tabling of bill that before this bill, a legislation to protect the data is the need of the hour and hopefully the Govt will make amends so that this doesn't turn into the next AADHAR!

There are two diverging interests existing as discussed earlier and to keep a check on both of them maybe it would be apt to have an International treaty/legislation and/or any such mechanism to keep a check on the new challenges, but meanwhile the 64 countries who have a DNA database form a consensus on this issue, our Govt should come up with relevant and necessary change to the present DNA TECHNOLOGY (USE & APPLICATION) REGULATION BILL, 2019 VIS-À-VIS THE DATA PROTECTION BILL. Apart from the privacy issues which surround this Bill. The Bill is in consonance with all the interpretations from the court in a catena of cases as well is in consonance with the CrPC Amendment of 2005 which allowed taking DNA samples in specific cases.

To rest my case, it will not be wrong to say that the conclusions once drawn by Sherlock Holmes in his series like that of one's appearance, Height etc. by looking at one's footprint[91] has almost become a reality after the onset of technological advances in forensic science, leading amongst all in the pack and making other techniques (like fingerprinting, blood splatter analysis, etc) look old fashioned[92] is DNA Technology.

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89 Arunabh Saikia, How DNA went missing from the NRC's blueprint for proving Indian citizenship, Scroll, 2019,https://scroll.in/article/931004/how-dna-went-missing-from-the-nrcs-blueprint-for-proving-indian-citizenship (last visited Feb02, 2020).

90 Dr. Arghya Sengupta- Vidhi Legal | NALSAR, Speech: On The Data Protection Report 2018, Youtube, https://www.youtube.com/watch?v=eie1V2HfMKc

91 Forensic Outreach, Five Ways Sherlock Holmes Inspired Forensic Investigation, (2014), https://forensicoutreach.com/library/5-ways-sherlock-holmes-inspired-forensic-investigation/. (last visited Feb02, 2020).

92 Samuel D. Jr. Hodge, Current Controversies in the Use of DNA in Forensic Investigations, 48 U. Balt. L. Rev. 39 (2018).

The Rohingya's Crisis: Accusation of Genocide, The International Conventions& Indian Response

Saif Rasul Khan*

ABSTRACT

The Rohingya refugee crisis is a global issue of pre-eminence. It has enveloped the whole world and is one of the most difficult and challenging human rights problem. The persecution has been documented by various sources even though the state outright rejects the notion that the Rohingyas are persecuted by the state military. Aung San Suk Ki, an internationally known figure and politician has defended the state and its actions in international forums. The state has been taken to the International Court of Justice (ICJ) by the state of The Gambia accusing it of state sponsored genocide. The matter has been presented in the ICJ and the process is undergoing to determine the validity of the arguments forwarded by The Gambia. On the socio-political side, in South-East Asia, the Rohingya crisis that has been brewing over the years has had a major impact in creating a large population of refugees. The persecution of Rohingya Muslims has resulted in a large-scale exodus of people to neighbouring nations and in particular to Bangladesh and India. What has been intriguing is the response of the governments to the entire situation. While Bangladesh has taken many of them and have taken support and aid from the UN to address the issue, the official position of India stands as that they are illegal migrants. This issue has created a situation wherein numerous human rights are being violated on a daily basis and the varied positions of the states have worsened the situation as there is no consistency in the international level. States selectively have adopted conventions and have forwarded reservations that dilute the very objective of drafting the convention. In light of the above, the paper shall be a doctrinal study on the concept of the genocide in relation to the Rohingya crisis. This paper will define the basic concepts in relation to the genocide convention and its varied facets that make international law ineffective. The paper shall dwell on the Rohingya crisis and its repercussions in the south-east region with emphasis on India. Further, the paper shall provide an analysis of the accusations forwarded in the ICJ in the preliminary stages of the matter in the court.

Keywords: Rohingya, Gambia, Myanmar, Genocide, ICJ.

1. INTRODUCTION

There are such different and critical conditions of human rights violations brewing in parts of the world. One such major problems which has been in existence since 2012 is the Rohingya persecution in Myanmar. This crisis in the state of Myanmar has been owing to the blatant discrimination, intolerance, violence and conflicts against the minority community in the Rakhine district of Myanmar. The large-scale violence, burning of houses, rape and murder of women and children has resulted in a large-scale exodus of Rohingyas from Myanmar to Bangladesh and India. The conditions and circumstances are brutal even though Myanmar officials continue to defend this as being a response against an armed rebellion in the state. The international community has responded to the situation and has condemned the actions of the military in the state. However, the most concrete action that has been taken is by the state of The Gambia which has filed a case in the International Court of Justice accusing the state of committing genocide on the Muslim minority population. The case is currently being discussed in the ICJ and both parties have been given a chance to defend their position.

This Rohingya crisis has interrelations with the concept of refugees as well as it has created a large number owing to the mass exodus. It also has ramifications for India as there are many Rohingyas in India taking refuge. At present there is no clear specific legislation for refugees in India and thus, cases are addressed on a subjective basis. This has resulted in chaos and uncertainty and a transfer of substantial power towards the central government to do as it may deem fit. Thus, the issue of Rohingya is not just restricted to enquiries of genocide or abuse of power by the military but one that has repercussions in the whole of South East Asia. It is one which has garnered the attention of an African nation that feels it is obligated to question the barefaced abuse of human rights law in the state of Myanmar and bring justice to people of the region.

2. KEY CONCEPTS

REFUGEE

The term, 'refugee' has been defined in many ways by different organizations and international covenants. The most authoritative definition is provided in the Convention relating to the Status of Refugee, 1951, the first focussed

*Assistant Professor, NERIM Law College, NERIM Group of Institutions,Guwahati, Assam

document on refugee protection. The convention in Article 1A(2) provides a detailed definition of the term focussing on key elements such as fear, persecution, and fleeing their own country with no scope for return[1].

In addition to the refugee definition in the 1951 Refugee Convention, Art. 1(2), 1969 Organization of African Unity (OAU) Convention defines a refugee as any person compelled to leave his or her country *"owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country or origin or nationality."*[2]

Similarly, the 1984 Cartagena Declaration states that refugees also include persons who flee their country *"because their lives, security or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order."*[3]

Thus, in essence it refers to a person who has been forced to flee his or her country because of persecution, war, or violence. There is a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. They are unable to return to their own homes or are afraid to do so. Some of the leading causes are war and ethnic, tribal and religious violence.

STATELESS PERSONS

A stateless person is a person who is not considered as a national by any State under the operation of its law.[4] The Universal Declaration of Human Rights provides that every human being has the right to nationality,[5] which also includes the right to change or alter one's nationality and also the right not to be deprived of it in an arbitrary manner. There are primarily two international documents which address the conditions of stateless persons. The former is the Convention relating to the Status of Stateless Persons, 1954 and the latter is the 1961 Convention on the Reduction of Statelessness. The United Nations High Commissioner for Refugees(UNHCR) is the nodal agency entrusted with the international coordination for reducing the number of stateless persons globally. At present, there are around 10 million stateless people.

The issue of statelessness arises from the national laws of a given state and how that alters the status quo of a given individual, i.e. a factual link between the individual and the state[6]. *De jure* and *de facto* are the two types of statelessness, the former being the most common. The latter is a problematic concept and is still developing consensus as to its nature, criterions and conditions[7]. Stateless persons are one of the most vulnerable class of persons, prone to blatant human rights violations. The condition means that they are incapable of obtaining a passport or have any form of access to the judicial system.

ASYLUM SEEKER

A person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status under relevant international and national instruments. In case of a negative decision, the person must leave the country and may be expelled, as may any non-national in an irregular or unlawful situation, unless permission to stay is provided on humanitarian or other related grounds.

MIGRANTS

International Organization for Migration(IOM) defines a

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1 Convention relating to the Status of Refugees, Art. 1A(2), 1951 as modified by the 1967 Protocol. A person who, "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

2 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis-Ababa, 10 September 1969. UNHCR, available at https://www.unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html

3 Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984, available at https://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html.

4 Art. 1, Convention relating to the Status of Stateless Persons, 1954.

5 Universal Declaration of Human Rights, Art. 15. (1) Everyone has the right to a nationality., (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

6 Nationality is generally acquired on the basis of an existing, factual link between the individual and the State – some kind of connection either with the territory (place of birth or residence) or with a national (descent, adoption or marriage) – the task at hand is to look at the domestic nationality legislation and practice of States with which an individual enjoys a relevant factual link, to see if nationality is indeed attributed to the individual under any State's law. If not, then he or she is stateless.

7 While the term de facto stateless persons has been used in a variety of contexts, there is a growing consensus that at a minimum this concept includes persons who possess a nationality but are outside their country of nationality and unable or, for valid reasons, unwilling to avail themselves of the protection of that country., Guidance Note of the Secretary-General, The United Nations and Statelessness, June 2011, available at https://www.un.org/ruleoflaw/files/FINAL%20Guidance%20Note%20of%20the%20Secretary-General%20on%20the%20United%20Nations%20and%20Statelessness.pdf

migrant as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is. IOM concerns itself with migrants and migration related issues and, in agreement with relevant States, with migrants who are in need of international migration services[8].

A migrant may leave his or her country for many reasons that are not related to persecution, such as for the purposes of employment, family reunification or study. A migrant continues to enjoy the protection of his or her own government, even when abroad.

3. ROHINGYA CRISIS IN MYANMAR: A BRIEF OVERVIEW

The Rohingyas are primarily Muslims living in the Rakhine district of Myanmar bordering Bangladesh. As of July 2019, an estimated 7,42,000 Rohingya children, women and men have fled to Bangladesh escaping violence in Myanmar since August 25, 2017.[9] As of 30 September, there were 9,15,000 Rohingya refugees in camps in Bangladesh.[10] The Rohingya crisis is a global issue which has its origin to the persecution of the Muslims by the majoritarian state and police forces in Myanmar. This Muslim dominant population has been subjected to brutal forms of violence, abuse, harassment and hatred in the last few years. The vast majority of Rohingya refugees are women and children, including new-born babies. Many others are elderly people requiring additional aid and protection. The Rohingyas are stateless persecuted beings and this crisis has resulted in a shift in the political and social relations between the states in the region. There is no end to the violence with new cases being reported every day.[11]

The cause as forwarded by the State officials is to curb military activities in the region. The state suggests that it is armed rebellion and thus, action had to be taken to address the wrongs.[12] What is intriguing is the nature and kind of brutality and force used by the military dominant state. Owing to the sheer brutality, many had to flee as their houses were burned down, women and children were raped, and people killed by the brute force. Many have died in the water bodies while trying to cross over to escape the violence and abuse.[13] The scale of human rights violations is unimaginable. Ground reports have documented the deplorable state and the fears that have been perpetuated owing to the military dominance in Myanmar. The lack of support for the Rohingyas is evident and the majority opinion is either in favour of their removal or is simply indifferent to the issue. Following this very opinion and outlook, the government has also deserted the Rohingya population considering the general elections which are due to be held in November 2020.

Many who fled Myanmar made their way to Bangladesh and have settled primarily in a refugee camp in Cox Bazar in Bangladesh. The Bangladesh government, with the help of the United Nations, has been providing them with basic amenities but their future hangs in the balance. The Rohingya crisis has created one of the biggest refugee population in recent years and this population is struggling to make sense of the situation, of their identity and the future. With time, many were repatriated back to Myanmar,[14] and many fled from Bangladesh to other neighbouring nations but the situation in Myanmar remains uncertain.

The crisis has resulted in questioning the state of affairs in Myanmar and one major development apart from the international condemnation is the case which has been brought into the International Court of Justice (ICJ)by the Gambia. The Gambia has accused the state of Myanmar of state sponsored genocide against the Muslim populations and has demanded action by the international court to immediately curb the violence and address the blatant violations of human rights in the state.

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8 International Organization for Migration, available at https://www.iom.int/who-is-a-migrant.

9 Rohingya Emergency, UNHCR, available at: https://www.unhcr.org/rohingya-emergency.html.

10 Myanmar Rohingya: Suu Kyi accused of 'silence' in genocide trial, BBC NEWS, (December 12, 2019), available athttps://www.bbc.com/news/world-asia-50763180.

11 Rohingya crisis: UN reports surge of deadly fighting in Myanmar, BBC NEWS, (April 17, 2020), available athttps://www.bbc.com/news/world-asia-52331129.

12 Rohingya crisis: The Gambian who took Aung San Suu Kyi to the world court, BBC NEWS, (January 23, 2020), available athttps://www.bbc.com/news/world-africa-51183521.

13 Hannah Beech, Hundreds of Rohingya Refugees Stuck at Sea With 'Zero Hope', THE NEW YORK TIMES, (May 1, 2020) available at https://www.nytimes.com/2020/05/01/world/asia/rohingya-muslim-refugee-crisis.html.

14 UNHCR, UNDP extend deal with Myanmar over return of Rohingyas, THE DAILY STAR, (May 11, 2020) available at https://www.thedailystar.net/rohingya-crisis-unhcr-undp-extend-deal-myanmar-over-return-rohingyas-1901584.
A tripartite agreement has been made between the State of Myanmar, the UNDP and UNHCR in relation to repatriation of Rohingya Refugees from Bangladesh. Originally signed in June 2018, it has been currently extended to June 2021.

4. THE GENOCIDE CONVENTION, 1948: MAIN PROVISIONS

The Convention on the Prevention and Punishment of the Crime of Genocide was the first comprehensive document prepared and adopted by the United Nations General Assembly on December 9, 1948.[15] The preamble to the Convention clearly stipulates that genocide is a crime under international law and is a practice that violates the fundamental principles, spirit and aims of the United Nations.[16] It also uses the word international cooperation to address concerns of genocide and liberate mankind.[17]

The Convention in its 19 Articles defines the concept, obliges State Parties to certain commitments and provides for the ratification and signature processes. The Convention in Article II clearly describes conditions that would qualify as genocide[18] and refers to the various acts and stages of genocide that are punishable under the Convention.[19] As in case of other international conventions, the onus is on the State Parties to create mechanisms, authorities that will punish such indiscretions.[20] The aspect of jurisdiction is also problematic in the sense that it states local jurisdiction and jurisdiction of international penal tribunal subject to acceptance of jurisdiction by the Contracting Parties.[21] The action to be taken by the United Nations or any of its organs attuned to the United Nations Charter is also limited subject to a request so made to it by the Contracting Party.[22] In Article IX, the International Court of Justice is cited as the authority who may be approached for questions of interpretation, application or fulfilment of the Convention.[23]

Myanmar signed the Convention on December 30, 1949 and ratified it on March 14, 1956.[24] However, it has made certain reservations to application. These are in relation to the jurisdiction limiting its applicability and ensuring that foreign courts cannot simply question the state on any matter of genocide.[25] The other major reservation is regarding Article VIII, which is in relation to the request of action by the United Nations; the reservation clearly states that it shall not apply to the state of Myanmar.[26]

This is a major issue and restriction in terms of the applicability and implementation of international law. The Conventions are made by the United Nations to forward certain goals as envisaged by the organisation; however, in most cases States forward such restrictions and reservations that dilute the importance and effect of the aims of a convention. The same is the case with the Genocide Convention and the state of Myanmar. It is forwarded such prominent reservations that limit the jurisdictionor the extent of action that may be taken in case of proven instance of genocide in the State. The question of jurisdiction is the first that shall be discussed in the ICJ in the case of *The Gambia v. Myanmar* and it will determine the future course of action. However, even if the charges are proven, the question of any concrete action being taken by the United Nations is unclear as Myanmar has clearly excluded the application of Article VIII within the state.

5. THE GAMBIA v. MYANMAR, ICJ

The ICJ was approached by The Gambia on the question of alleged acts of genocide in Myanmar.[27] The Gambia had on November 11, 2019 filed an Application on the said matter in the Registry of the ICJ accusing Myanmar of clear violations of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December

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15 The Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948.

16 Id.

17 Id.

18 Id, Art. II.

19 Id, Art. III.

20 Id. Art V.

21 Id. Art VI.

22 Id. Art VIII.

23 Id. Art IX. It includes interpretations of responsibilities of a State in respect of Genocide or any other matter enumerated in Article III.

24 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en#EndDec.

25 Id.

26 Id.

27 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar). The Gambia's intervention in the said matter came at a time when the international sanctions and condemnations yielded no concrete action on the part of Myanmar from refraining violence against the Rohingya population. The Organisation of Islamic Cooperation extended its support to the cause and sponsored The Gambia in the matter. The main representative from The Gambia is the Attorney General A. Tambadou who has a sufficient experience in such matters of genocide owing to his active involvement in the cases pertaining to Rwanda's 1994 genocide. Mr. Tambadou visited Cox Bazar as a part of the delegation of O.I.C. in 2018 and thereby decided to take the matter to the highest court against the state of Myanmar.

1948 (hereinafter called the Genocide Convention).[28] In pursuance of Articles 41, The Gambia has sought provisional measures to be extended by the Court to prevent aggravation of the situation in Myanmar pending a final hearing and judgement on the matter.[29] The Court having accepted the preliminary reports and the documents on January 23, 2020 gave an order extending specific preliminary orders to be followed by Myanmar to ensure that the situation and discrimination against the Rohingyas is ceases till the final hearing.[30] This decision of the Court is a major development as it not only acknowledges the existence of a problem in Myanmar but also because it has extended specific obligations to Myanmar to control the situation from spiralling further.[31]

The court covered many pertinent areas in the order, including the question of jurisdiction of the Court, the jurisdiction of The Gambia to bring the matter to the Court, the reservations of Myanmar in Article VIII of the Genocide Convention etc among others. What is interesting is that the Court has circumvented the question of jurisdiction of the ICJ challenged by Myanmar by bringing it within the fold of Article IX, to which Myanmar has no reservations.[32] Myanmar had forwarded the point that the ICJ does not have jurisdiction owing to the reservation forwarded by Myanmar in Article VIII, to which the Court replied that it does not apply to the Court. The Court stated that any formal submission of disputes under the Convention is a part of Article IX and thus held that The Gambia has full right to seize the opportunity and lodge an application on the matter. The Court also referred to two Fact finding Missions of the United Nations that had collected evidence of blatant human rights violations and of possible genocide acts in Myanmar. However, the Court remained clear that any formal question of and accusation of genocide will be dealt with at a later stage and need not be adjudicated at this preliminary level. Thus, on the question of jurisdiction, the Court was clear that it had the necessary jurisdiction and that any contention in that regard challenged by Myanmar does not stand true.

With regard to the question of The Gambia and whether it had jurisdiction to file an Application, the Court held that positively as well citing the case of Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). The Court stated that any State Party to the Genocide Convention has the right to invoke the responsibility of another state in case of violations of the provisions of the Convention.[33] Prima facie, the Court held that there is no issue on the relevance of the jurisdiction applied by The Gambia.

Referring to various past deliberations on the conditions in Myanmar and to specific discussions in the General Assembly, and the Fact-Finding Missions on Myanmar, the Court concluded that there has been a lack of action on the part of Myanmar to address the concerns and to curb the systematic violence that has been carried out for years now.

The Court affirmed the various provisional measures[34] requested and sought by The Gambia and held that

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[28] Morten B Pedersen, Gambia vs Myanmar: The Best Last Hope for The Rohingya?, THE AUSTRALIAN INSTITUTE OF INTERNATIONAL AFFAIRS, (December 28, 2019), available at http://www.internationalaffairs.org.au/australianoutlook/gambia-vs-myanmar-the-best-last-hope-for-the-rohingya/. Gambia – with the backing of the 57 members of the Organisation of Islamic Cooperation – has filed a case before the International Court of Justice (ICJ) alleging that Myanmar's atrocities against the Rohingya in Rakhine State violate various provisions of the Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention").

[29] Gambian Justice Minister Abubacarr Tambadou's actions brought Aung San Suu Kyi to The Hague to deny that her country's military was committing a genocide. Aung San Suu Kyi deposed before the court and denied every charge of genocide against her government. Her position in this matter has been under much scanner in light of the political interests and developments in Myanmar. Ms Suu Kyi asked the ICJ to drop the case, describing it as "incomplete and incorrect".

[30] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar, ICJ, (Jan 23, 2020), available athttps://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.

[31] Questions and Answers on Gambia's Genocide Case Against Myanmar before the International Court of Justice, HUMAN RIGHTS WATCH, (December 5, 2019) available at https://www.hrw.org/news/2019/12/05/questions-and-answers-gambias-genocide-case-against-myanmar-international-court.

[32] D West Rist, What Does the ICJ Decision on The Gambia v. Myanmar Mean?,AMERICAN SOCIETY OF INTERNATIONAL LAW, (February 27, 2020), available at https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean.

[33] Andrew Boyle, ICJ Orders Preliminary Relief in Myanmar Genocide Case, JUST SECURITY, (January 28, 2020), available athttps://www.justsecurity.org/68307/icj-orders-preliminary-relief-in-myanmar-genocide-case/.

Myanmar had obligations to other members of the convention to fulfill its requirements (so-called erga omnes partes obligations), including Gambia. The Court wrote, *"In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention."*

[34] Gambia requested six provisional measures which in summary were that: Myanmar do everything in its power to prevent genocide including preventing specific types of attacks on the Rohingya; Myanmar prevent the military or other groups or persons under its control from perpetrating acts of genocide, including particular acts; Myanmar not "render inaccessible", destroy, or alter evidence of the treatment of the Rohingya, including human remains; Myanmar and Gambia not do anything to aggravate the dispute; Myanmar and Gambia report on measures taken to affect the provisional orders in four months; and, Myanmar grant access to U.N. fact-finding bodies (Gambia did not include this last request in its initial filing with the ICJ, but raised it during oral arguments).

Myanmar should do everything within its power to address the concerns of the Rohingyas and take measures in fulfilment of preventing any of the acts as mentioned in Article II of the Genocide Convention.[35] Further, the Court stated that Myanmar must ensure that its military forces, and any other forms of armed forces must refrain from committing any acts of genocide in the region including conspiracy to commit genocide, public incitement, attempt or complicity in genocide. The Court further obliged Myanmar to ensure the preservation of evidence related to alleged acts of genocide in their country including the responsibility of preparing and submitting a report within four months to the ICJ of the concrete steps and measures taken by Myanmar in light of the Order of the Court and continuation of filing such reports every six months, thereby ensuring that Myanmar is accountable for its actions and the Court can keep track of the same.

This decision of the Court is a welcome one. Considering the lack of any concrete action in the International sphere, the move by The Gambia to file a formal application in the ICJ is commendable.[36] The order of the Court is also welcomed though ground level impact is questionable. The conditions have not really improved, and Myanmar is overly critical of the question of jurisdiction and of the order so passed. Unfortunately, there is no form of implementation mechanism in international law and thus, such orders may not make much of an impact for the average Rohingya.[37] The Security Council of the United Nations could pass a resolution in this regard, however, that has not been so because of the political relations between China and Myanmar which results in a veto for any concrete action against Myanmar. Nevertheless, there is movement and the fact that the Court will dwell into the issue and hopefully provide a judgement that will uphold the principles of human rights, equality, non-discrimination and humanity. The situation in Myanmar needs international attention and collaboration to ensure that some sense of humanity exists. The Court should keep track of the developments and Myanmar must do the needful to address the problems and issues of human rights violations at the earliest.

6. THE INDIAN RESPONSE TO THE ISSUE OF ROHINGYA REFUGEE CRISIS

India is in a unique position as far as refugee matters are concerned. India has not ratified either of the international refugee conventions but is the hub of many refugees who come to India with the hope of finding a safe and suitable life. Each case of such refugee protection is dealt with on a subjective case-by-case basis which makes it difficult to identify and harmonize the process of refugee protection. The pertinent question is why the state does not simply ratify the convention and thereby provide a uniform system for refugee protection.

The reluctance to ratify the international conventions raises some doubts regarding the dedication and seriousness of the state to address such issues. The protection regime provided in the international conventions can guarantee a simplified and uniform process which may be extremely fruitful for ensuring equality and non-discrimination and avoiding political interference in such matters.

Though India has not signed these twin conventions on refugee protection or the twin conventions for stateless persons; it is nevertheless bound to conform to some pertinent principles which are universal status of these fundamental rights, most of which are reflected in the Universal Declaration of Human Rights and the two Conventions. Additionally, some principles have reached the status of being a jus cogens. These are certain pertinent principles that are to be followed universally irrespective of the ratification status and without any derogation. One such principle is that of non-refoulment of refugees.

The Indian response to the Rohingya crisis has been one that is determined by the status of migration. India has not ratified the UN Convention on the Status of Refugees or the Protocol of 1967. Thus, there is no obligation on the part of India to recognise them as refugees within that terminology. The Government has approached the Supreme Court in the matter and have clearly stated that they are simply illegal migrants who will have to be deported back to their country.

Over 40,000 of those Rohingyas, who fled Myanmar, have entered India illegally, according to government's estimate. The number of Rohingyas registered with the UNHCR is at around 40,000, while there are many who are living illegally as well. Due to the non-ratification of the international treaty, India has complete autonomy to decide on the matter and take any decision as it may deem fit. The government has labelled them as 'illegal migrants'

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[35] Laingnee Barron, U.N.'s Top Court Orders Myanmar to Take All Measures to Prevent Genocide Against Rohingya, TIME, (January 23, 2020), available athttps://time.com/5770080/myanmar-rohingya-genocide-un-court/.

[36] Louise Hunt, Gambia's genocide case against Myanmar shows that smaller countries can also help balance the scales of international justice, EQUAL TIMES, (March 27, 2020) available athttps://www.equaltimes.org/gambia-s-genocide-case-against#.XsFTHHUzbIU.

[37] Rodion Ebbighausen, Opinion: Gambia's case against Myanmar no help to Rohingya, DEUTSCHE WELLE, (December 11, 2019) available atdw.com/en/opinion-gambias-case-against-myanmar-no-help-to-rohingya/a-51636281.

and thereby due to deportation.[38] As per the UNHCR, India has been welcoming to many refugees even though there are no concrete protection mechanisms.[39] Further, requisite assistance has been provided, from time to from, depending on the subjective nature of each crisis. One of the most prominent example is that of the Dalai Lama, who continues to reside in India as a refugee.

The primarily concern of the present government is security concerns due to the fragile nature of those who have been shunned and forced to move out of their own homes. The matter was presented before the Hon'ble Supreme Court wherein the state held that there were issues of security as they believed that some of them had militant background and could be of significant threat to the security of the state.[40]

The international community, particularly the UNHCR and Amnesty International, have requested the state to address the issue with humanity as it concerned the lives of many victims who had done nothing wrong to face such brutalities in the hands of the majoritarian forces. Due to the lack of a concrete system or any legal framework, the various intricacies are difficult to identify and extremely unpredictable in nature. Apart from some specific laws, namely the Passports Act, 1967, the Foreigners Act, 1946 there are no clear laws for refugees. The Constitution only provides for who is a citizen in Articles 5-11 and there are some related provisions in the Citizenship Act 1955. However, there is no legal instrument akin to the Refugee Convention, 1951 in India. In 2015, Congress MP Shashi Tharoor introduced a Private Member's Bill titled the Asylum Bill, 2015 in the Lok Sabha. The Bill seeks to provide for the establishment of a legal framework to deal with refugee problem. However, it did not concretize into a substantial law. Therefore, the state is free to do as it may please depending on the circumstances in each case. Consequently, the Indian Government has time and again reiterated that the status of such Rohingyas is of illegal migrants and they shall be all deported in time.

7. OBSERVATIONS AND CONCLUSIONS

The conditions in the state of Myanmar are definitely not conducive for the minority Rohingya population. Irrespective of the stand taken by Myanmar authorities and officials on the issue; there is enough evidence to conclude that excessive brutal force has been the practice of the state. The question of genocide and of state government collusion will have to be studied and investigated. Aung San Suu Kyi during her deposition in the ICJ confessed that the proportion of violence and action taken against the so-called armed rebellions may have been in excess and disproportionate. However, the major question that needs to be addressed by the international court is of genocide; whether they are armed rebellions or simply innocent civilians who have faced the wrath of discriminatory actions.

The Rohingya situation is one of the world's worst humanitarian crisis today and unfortunately one that has not received the attention and care it should have at the very beginning. The conditions have deteriorated over the years to a situation whereby an African nation had to recognise and step forward to bring attention of the ICJ to the matter.

The Rohingya crisis in Myanmar deserves more attention, support and aid. The crisis reflects a situation wherein targeted action has been taken against a community questioning their existence and citizenship. The lack of action and response of the world leaders, with the exception of Bangladesh, is owing to the broader issue of discriminatory perception towards Muslims globally.

The conditions in Myanmar, as reported on the ground, are deplorable. The aggression of the armed forces in the former military state coupled with a majoritarian attitude is extremely dangerous and lethal for the minority community. The government of Myanmar should be pressurised using pacific means to refrain from such acts and to ensure preservation of fundamental human rights. The government should take all necessary measures to protect the people and guarantee their citizenship.

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[38] Anjana Pasricha, Rohingya Refugees in India rattled after first ever deportation, VOA NEWS, (October 14, 2018), available at https://www.voanews.com/south-central-asia/rohingya-refugees-india-rattled-after-first-ever-deportations. Also see, Zakir Hussain, India deports second Rohingya group to Myanmar, more expulsions likely, REUTERS, (January 03, 2019), available at: https://www.reuters.com/article/us-myanmar-rohingya-india/india-deports-second-rohingya-group-to-myanmar-more-expulsions-likely-idUSKCN1OX0FE.

[39] UNHCR in India, UN REFUGEE AGENCY, available at: https://www.unhcr.org.in/index.php? option=com_content &view=article&id =18 & Itemid=103.

The two largest groups of refugees in India, notably, some 62,000 Sri Lankan and some 100,000 Tibetans, are directly assisted by the Government of India. In addition, there are some 36,000 refugees and asylum-seekers registered with UNHCR, mainly from Afghanistan and Myanmar and in smaller numbers from countries in the Middle East and Africa.

[40] Prabhash K Dutta, 'What is Rohingya crisis and why India needs to have a concrete refugee policy and a law', INDIA TODAY, (September 20, 2017), available at: https://www.indiatoday.in/india/story/what-is-rohingya-crisis-india-narendra-modi-refugee-policy-law-1047162-2017-09-18.

Regarding the conditions in Bangladesh and India, the former should receive all the possible aid and help to maintain and provide shelter, food and basic resources to the refugees living in Bangladesh. The international community should engage with the United Nations Refugee Organization, with the Bangladesh government and provide all forms of assistance as may be needed to assure the safety and survival of the Rohingyas. India should decide on how they wish to engage in the matter. The governments' position is that they are illegal migrants, but the question of refugee protection also needs to be considered. For the broader issue of refugee problems, India should draft a clear and precise law on refugee protection and should sign the United Nations Refugee Convention. India is a dominant power in South East Asia, and it needs to take concrete steps to demonstrate to the global world of its clear and objective position to address human rights violations, irrespective of any discrimination.

The current ongoing proceeding in the ICJ will surely take time. The proceedings have only started in the matter and there will be numerous rounds of discussions and deliberations before a conclusion is reached. In light of the current pandemic of COVID-19, all such actions and interests have shifted to dealing with the medical crisis globally. Nevertheless, the first step has been taken and it commendable that The Gambia determined to initiate this proceeding. The reaction of the international community has been bleak how ever this action has ensured that the world takes notice of an issue that is going to become one of the world's worsthumanitarian problems in the recent past.

A pertinent question though is the effect of the decision, whenever it may be so given. The implementation and effectiveness of decisions of the ICJ is debatable taking into consideration the position adopted by Myanmar on the matter and the latent attitude of the world leaders on the subject. Moreover, the decision may not actually change much for the ground-level human rights concerns as there are no mechanisms in place to verify that on ground in Myanmar. The Rohingya who is battling to survive will not necessarily be bothered with the ICJ proceedings and may feel more reassured if the Myanmar government takes any specific action for their protection rather than an international court. Nonetheless, it is a significant issue before the ICJ and one that requires a powerful, decisive and honest verdicton the current crisis and at the very earliest. The ICJ, once it gives a ruling, should ensure that Myanmar complies with its obligations on its part for the preservation of human rights. The preliminary order and the question of jurisdiction as decided by the ICJ gives a glimmer of optimism that a determination will be made that advances human rights shall be taken by the world court.

Human rights are for all, however in this case, it seems to be discriminatory in enactment. The Rohingya crisis needs to be addressed at the earliest possible opportunity. It is appalling that people are forced to live a life of refuge without any chance for a future. Contemplating the global situation, it should be the priority of the United Nations, of the international powerful leaders and of the state of Myanmar to engage with the Rohingyas and resolve this issue. Humanity should take precedence over discrimination, injustice, violence, abuse and brutality.

Internet Access as a Human Right in the Age of Information: Anatomy of Virtual Curfew

Dr. Priyanka Anand*

ABSTRACT

The balance between state powers and rights of citizens is a symbol of democracy, however we often see that the liberty of a person and the security of the country are at loggerheads and this fight is put before the Apex Court for Constitutional Adjudication. The present judgment has proved to be a shining beacon of hope in the thick of the clouds as it pledges to the citizen the consummate constitutional protection of internet access. This case analysis endorses a multifarious approach towards the synchronous bond between the facet of an internet shutdown and a multitude of rights and liberties affected by the same, by dwelling into the elements of the mutating contours of the constitution and the democratic principles of a growing modern democracy. The case analysis also tries to h

ighlight the unbridled power in the hands of the Government through which it builds contingencies into the national law that allows for government to take control of communication networks, and block or intercept them under the guise of national emergency or to protect national security. Towards the end, the paper highlights the role of the Indian Judiciary where it reconciles the individual interest to that of the state.

Key words: Cyber Democracy, Sunset Rules, Public Emergency, Transparency, Arbitrariness

INTRODUCTION

"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." – John Milton

The essence of free speech and expression means the ability to speak express freely without any restriction. The pre-requisite of a successful democracy is the equilibrium between state powers and rights of citizens. The speech and expression were taken to a new level through the advent of internet and social media networks. With the dawn of the Internet era, communication technology is made inexpensive, practicing of free speech, expression, association and assembly is facilitated and we have an affordable stage for self-expression. Nevertheless, most governments around the world imbibe eventualities into their national law which permit them to take command of communication networks, and bar or obstruct them under the pretext of Public Emergencies or for national security. However conditions under which a government could resort to this power are generally not indicated evidently.[1] If we look at the recent past few years, 'virtual curfews' or 'network shutdowns' have been increasingly resorted to in South Asian countries such as India, Pakistan, Bangladesh and Maldives. For example, India saw 23 such shutdowns in 2016 alone[2]. The Bangladesh government had shut down the Internet for about 90 minutes in November 2015[3] while Pakistan had suspended mobile phone services in more than 80 cities[4] for 16 hours as a security measure. The right to freedom of speech and expression in the medium of internet needs to be protected and regulated to prevent unwanted commotion in the society.

*Assistant Professor of Law (Sr.Scale), National Law University, Odisha

1 See the Article 35 of the International Telecommunication Union (ITU) Constitution http://www.itu. int/dms_pub/itu-s/oth/02/09/S02090000115201PDFE.PDF

2 News Article, Data : 46 Internet Shutdowns in India in 12 States This Year; https://www. nextbigwhat.com/Internet-shutdowns-india-2016-297/

3 News Article, "Internet access restored in Bangladesh after brief shutdown at BDNews "http:// bdnews24.com/bangladesh/2015/11/18/Internet-access-restored-in-bangladesh-after-briefshutdown; Accessed on March 25th 2020

4 News article, "'Mobile Phone Services Suspended In More Than 80 Cities'" https://www.geo.tv/ latest/66272-mobile-phone-services-suspended-in-more-than-80-cities; Accessed on March 20, 2020

'Power corrupts and absolute power corrupts absoultely'. This phrase becomes livid in the background of the present issue as this power of imposing 'virtual curfew' by the States needs to be controlled and regulated and should not be passed as a matter of ordinary course of operation. The protocol needs to be backed by sufficient procedural safeguards, in line with principles of proportionality, necessity and reasonableness as when the 'virtual curfew' is imposed, the immediate brunt is faced by the general public, who lose out upon the essential service of Right to access internet.

The judiciary has had often to take up the task of Constitutional Adjudication asthe liberty of a person and the security of the country are always juxtaposed and the choice between them is very arduous as one cannot be preferred to other, but a balance between them is required. The case on the point is *Anuradha Bhasin v. Union Of India And Ors. and Ghulam Nabi Azad v Union Of India And Anr.*[5] is a valid example of the work of the judicially stepping in to resolve the conflict. Post this judgment, our user-intensive country may be expected to move towards a Cyber Democracy where public participation is appreciated and encouraged.

FACTUAL TEMPLATE OF THE CASE:

The beginning of the issue was with the government order through which restrictions were levied on the tourists and the Amaranth Yatris, who were recommended to limit their tour to the valley and return back; following which the educational institutions and government offices were ordered to be shut down. On August 04, 2019,mobile phone networks, landlines and internet services were shut down by the Government, followed by the Constitutional Order 272 issued by the President, thereby applying all the provisions of the Constitution of India to the State of Jammu and Kashmir, and modifying Article 367 of the Constitution of India. Following it, on the same day, few District Magistrates of the state, imposed Section 144 of the Criminal Procedure Code levying restriction on movement and public gatherings.

The present case entails two separate Writ Petitions i.e. WP (C) No 1031 of 2019 and WP (C) No 1164 of 2019. The first petition was filed by the Executive Editor of Kashmir Times, Ms. Anuradha Bhasin, dealing with the restrictions imposed upon the Freedom of the Press and the distribution of the newspaper claiming that the movement of journalists was severely restricted and therefore, the Kashmir Times Srinagar Edition could not be distributed due to the restrictions. Further the Petitioner claims that all modes of communication including mobile, internet and landline services were suspended and made inaccessible throughout the State of Jammu and Kashmir.The second petition was filed by Congress Member of Parliament, Mr. Ghulam Nabi Azad, which dealt with the Restriction on Movement as he was not allowed to travel to his constituency in the State of Jammu and Kashmir.

LEGAL AND PROCEDURAL BACKGROUND:

The Indian Government has as many as 134 times issued orders for shutdown of internet as per the report of Access Now. org, the most recent one being the massive internet shutdown in Jammu and Kashmir. In this backdrop, we need to understand the legal mandate for the Internet shutdowns in India:

a. The Information Technology Act through Section 69[6],

b. Through Section 144 of the Criminal Procedure Code 1973 ('CrPC') - through which a restrictive measure to access the internet could be taken by a Magistrate, and

c. The third is the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules 2017 which lays down the procedure to be followed when bringing about such restrictions.

In the present matter, what impelled the Judiciary to get involved in the issue was the uttermisuse of uninhibited powers granted to the Central and the State Governments, and the same power being carried out in the normal course of operation.

CONTENTIONS RAISED:

1. PETITIONER:

The Petitioner contended that the curtailment of the internet was a restriction on the right to free speech and therefore, it should be tested on the basis of reasonableness and proportionality. The Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017 has provided the following rules regarding the suspension of internet services:

i. Restriction on internet should be of temporary nature.

ii. The reason for the necessity of the restrictions should be stated properly.

The Petitioner submitted that the suspension order was passed *ex facie* perverse with non-application of mind and

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[5] 2020 Scc Online Sc 25

[6] Information Technology Act 2000, s 69A which deals with the blocking of access to information on the internet. See also Information Technology (Procedures and Safeguards for Blocking for Access of Information by Public) Rules 2009.

did not comply with the procedure prescribed the Rules. There cannot be a blanket ban on the internet services and the restriction on internet impacts the right to free speech of individuals and also the right to trade. The Petitioner claimed a less restrictive measure like restricting only social media which was done earlier in Bihar and in the state of Jammu and Kashmir in the year of 2017 should have been passed rather than imposing a total ban of the internet access. It was further submitted that public have the right to access public orders of the State and the State cannot claim privilege over such orders.

2. INTERVENOR:

The intervenor to the Writ Petition, represented by Adv. Dushyant Dave, submitted that any restriction on Article 19 and 21 of the Constitution by the action of the State requires the five essential features:

i. Backing of a law,

ii. Legitimacy of purpose,

iii. Rational connection of the act and object,

iv. Necessity of the action,

v. Test of proportionality.

The intervenor contended that orders which have not been published for public notice cannot be accorded the force of law. The publication of the law is necessary and is also a part of the rule of natural justice and therefore, should be published and made available and accessible to the public. Further, the State should show the necessity of such order since every citizen has the right to speak their view, whether good or bad. The intervenor also referred to the judgment of the Supreme Court in the case of *K.S. Puttaswamy v. Union of India,*[7] where the test of proportionality was upheld while looking at the restrictions being imposed by the State on the fundamental rights of citizens.

3. RESPONDENT:

The learned Attorney General of India supported the submissions of the learned Solicitor General of India who contended that the facts relied by the Petitioners and Intervenors were incorrect about the factual position on the ground in the State of Jammu and Kashmir. Though the restrictions were imposed initially, the restrictions were relaxed on the basis of threat perception. He submitted that the restriction on communications and internet shutdown was to prevent the communication of messages through social media which can incite violence.

The very purpose of on the limited and restricted use of internet was to ensure that the prevailing situation should not be aggravated from outside the country. Internet allows transmission of false news which can be used to spread violence. He further submitted that the free speech relating to print media and internet cannot be considered together since both print media and social media are different.

VERDICT:

The Supreme Court of India concluded that

i) The State should publish all orders in force under Section 144 CrPC and also for the suspension of telecom services including internet to all the affected persons.

ii) The freedom of speech and expression over the medium of internet is protected under Article 19(1)(a) and any restriction upon the granted right should be reasonable under Article 19(2) of the Constitution, subjective to the test of proportionality.

iii) The order suspending the internet services indefinitely is not permissible under the Temporary Suspension of Telecom Services (Public Emergency or Public Services) Rules, 2017 and must adhere to the principles of proportionality and cannot extend beyond a necessary duration.

APPRAISAL AND CRITICISMS OF THE JUDGMENT

1. Appropriateness of the Decision

The judgment starts on a light note by quoting Charles Dickens' poem in 'A Tale of Two Cities' and then limits its scope in the preliminary stage as to what aspects the Court will delve into. The court limits its scope by not transgressing into the political reasons forthe said suspension of telecom services,and attempts to strikea balance between the Liberty and Security concerns in order to ensure the Right to Life. The judges start off by appreciating the history of the beautiful land which is also famously known as the 'Paradise on Earth' and take cognizance of the magnitude of the task before the Hon'ble Court. Pertaining to one of the parts of the judgment which deals with production of orders, the court observes that the States should take a proactive approach in providing all the necessary orders before the court to ensure proper judicial scrutiny of the same.It is also pertinent to note that the Apex Court establishes the principles of Natural Justice in terms of denial of evidence by citing the case of *Ram*

[7] (2017) 10 SCC 1.

Jethmalani v Union of India[8] and articulating the aspect of Right to Know of an individual under the Fundamental Right to Information of a citizen. Such observations reflect the ideals of an open democracy and values enshrined in a welfare state. Simultaneously the court directs the state authorities to review the need for the continuation of the existing Section 144 of CrPC orders passed, which acts as a duty on the state to not prolong such restrictions hitherto and effectively take necessary actions in a restricted manner. However, despite holding that the suspension orders should adhere to a necessary duration, the decision still does not take into account the sunset clause to be prevalent in such orders which fixes a specific time period for the suspension orders,[9] which will be reiterated in a later part of this case comment.

The next part of the judgment deals with the fundamental rights, and the court grants constitutional protection to the Freedom of Speech and Expression over the internet while at the same time also considering the freedom to practice any trade, business or profession on the internet. The decision is aimed at expanding the contours of the Fundamental Right and has adopted elastic and evolving nature given to Fundamental Rights and at the same also cherished the modern approach towards the Constitution also termed as the 'Transformative Constitutionalism'.[10] This comes as a relief for the citizens since the access to the internet is to be treated as right enshrined under the Constitution. The most quintessential part of the decision deals with internet shutdown where the Court has deliberated upon the procedural adherence and the applicability of the substantive law, which includes the situation of public emergency by citing a plethora of cases while establishing a concurrent link with the suspension rules and the effective need for the suspension orders. The decision also takes into account the International Conventions on declaring a situation asa public emergency[11] and giving due regards to the principles adopted by various countries around the world, there by in corporating the general accepted principles followed. The latter part of the decision deals with the Freedom of the Press, and one of the contentions was in regard to the 'chilling effect' of the restriction on the Freedom of Press but the court has not accepted this submission as there was no evidence on whether other individuals were also restricted to publish a newspaper.

The authors will not be addressing the Production of Orders and Section 144, CrPC orders in much detail as the authors would like to stick to the aspect of Access to Internet as a Human Right and the Fundamental Rights violations which arise out of such shutdowns.

2. Expanding horizons of Article 19 of the Constitution

The decision has modified the interpretation of Article 19 which lays down the freedoms guaranteed to a citizen. Post this decision, the Freedom to Speech and Expression and Freedom of Trade and Commerce over the medium of internet has been constitutionally protected, after deliberating upon the aspect of protection given to freedom of print medium in previous judgments by this Court.[12] This decision comes as a huge relief for the masses in India as it had been recently reported that India has one of the highest number of internet users in the world;[13] restrictions on Freedom of Access to Internet act as an impediment to the fundamental freedoms. Such observations by the court signifies the dynamic nature of law which is ever growing to accommodate the technological development in modern times, which ultimately leads to adequately serving the evolving needs of the citizens. It is pertinent to note that protecting such freedoms over the internet also upholds the civil liberties which are enshrined by our law makers as an important facet of modern democracy and may possibly lead to a road towards a balanced cyber democracy in the future. However, anequally acceptable criticism has also been considered by the Court in terms of modern terrorism over the medium of internet which can be used as a method to propagate terrorism. In an attempt to balance these competing concerns, the court has attempted to safeguard the interests of individuals by upholding the Test of Proportionality.

3. Promoting Transparency and Public Participation

The decision also takes into account the aspect of Right to know granted to the citizens, which finds its mandate through Right to Information under Article 19 of the Constitution with reference to the production of orders related to the suspension of the telecom services. This helps in bringing in transparency and accountability in passing such orders and ensuring procedural regularity. It

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8 (2011) 8 SCC 1.

9 Nakul Nayak, 'It's Time to Fix Our Internet Shutdown Laws' Hindustan Times (16 January 2020).

10 Navtej Singh Johar v Union of India (2018) 10 SCC 1.

11 International Covenant on Civil and Political Rights, art19(2) of the Covenant states that every human has a right to freedom of expression on any form of media and the same also includes the expression in any form i.e orally, writing or print

12 Indian Express v UOI 1985 1 SCC 641; Odyssey Communications Pvt Ltd v LokvidayanSanghatana 1988 3 SCC 410.

13 Harsh Walia and Shobhit Chandra, 'How Internet Access is Integral to Freedom of Speech and Expression' (FortuneIndia, 13 January 2020) <https://www.fortuneindia.com/opinion/how-internet-access-is-integral-to-freedom-of-speech-and-expression/103987> accessed 31 January 2020.

is extremely essential to not leave the citizens out in the darkand shut down all means of communication as it willpose a great harm tothe individual's right to know in a modern democracy. On similar lines, it is pertinent to point out that the Federal Communication Commission had issued a public comment request to the public of the United States on whether or when the police should interrupt the cell phone and internet service to protect public safety.[14] After this decision, it is evident that stakeholder involvement will be encouraged before taking such restrictive measures and the public will be involved in the process before enforcement of such suspension orders. Thus, such a decision also promotes prior approval by the public in taking a restricted measure in imposing such Internet Blackouts, which is another remedial measure pointed by the Court in this decision to be carried out by the state.

4. Arbitrary Action of the State

The Hon'ble Bench, in the present case, has expressed its distress over the failure of the Government to publish all orders in force at the time. This inadequacy of material on record led to a situation that prevented the Court from issuing a clear order to quash or uphold the validity of the action of the Government.[15] The Court thus had to switch to the alternative of constituting a Review Committee as provided under the Suspension Rules 2017.[16]

While providing such a relief, the Hon'ble Court failed to consider the fact that the Review Committee prescribed under the Suspension Rules 2017 is entirely composed of the members of the Executive. Ideally, such a committee should have been constituted of members that can function without a bias. The review process may therefore be possibly undermined by conflicting interests of the members of the Committee. Furthermore, even if the Committee does come up with a finding, the Rules do not stipulate any powers upon the Committee to take an action to strike down the orders issued arbitrarily.

This implies failure incurtailing the unchecked and arbitrary use of power by the functionaries of the State in the present case, and the decision of the Hon'ble Court does not entail an actual relief for the affected citizens of Kashmir.[17] The holding of the Court in this case is more of a 'declaration' of law rather than an 'application' of law.

5. Scope of 'Reasonable Restrictions'

The Hon'ble Bench did not recognize access to internet as a fundamental right in the present case as the same was not contended by the parties. However, the Court laid down that the Right to Freedom of Speech and Expression[18] and Freedom of Trade and Commerce[19] through the medium of Internet was constitutionally protected under the ambit of Article 19 of the Constitution. This holding furthers the growth of jurisprudence relating to the use of Internet in the present era.

Further the Court highlighted the importance of Article 19(2) as discussed in the case of *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat*.[20] Reasonability is interpreted by the Court to mean that the restriction must be either with a view to further the interests of the sovereignty, security and integrity of the State, foster friendly relations with foreign States, maintain public order, uphold decency or morality, or as a safeguard against contempt of court, defamation of incitement of an offence.[21] Such restrictions must however be imposed only in times of necessity. Another test discussed by the Court to determine the reasonableness of a restriction was the Proportionality Test which attempts to strike a balance between free speech on one hand and national security on the other hand.[22] This decision of the Court undoubtedly steers the interests of the Constitution makers in the right direction, however the road remains incomplete because of lack of conclusiveness as to the scope of the term 'reasonable restrictions'. The explanation supplied by the Court uses terms with a very wide meaning, and therefore fails to lay down a framework to define the scope of restrictions that can be reasonably levied by the State.

6. Public Emergency and Internet Shutdown

In the present case, declaration of Public Emergency was followed by an Internet shutdown in the State of Jammu and Kashmir. The Suspension Rules do not lay down the

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14 Elinor Mills, 'FCC Seeks Comment on Police Shutdowns of Cell Service'CNet(2 March 2012).

15 V Venkatesan, 'Verdict on Internet Curbs in J&K in Defence of Free Speech, but Relief Remains Elusive' Frontline, The Hindu (11 January 2020).

16 UjjainiChatterji, 'The Sweet Taste of Liberty – As the Supreme Court Reminds' (The Leaflet, 11 January 2020) <https://theleaflet.in/the-sweet-taste-of-liberty-as-the-supreme-court-reminds/> accessed 27 January 2020.

17 'India's Top Court Orders Review of Kashmir Internet Shutdown' (Al Jazeera, 10 January 2020).

18 Indian Constitution, art 19(1)(a).

19 Indian Constitution, art 19(1)(g).

20 (2005) 8 SCC 534.

21 Right to Internet is Part of Fundamental Right: AnuradhaBhasin v. UOI' (VidhiWise,17 January 2020) https://www.vidhiwise.in/right-to-internet-is-part-of-fundamental-right-anuradha-bhasin-v-uoi/accessed 25January 2020.

22 Aditya Gaggar, 'Access to Internet, Now a Constitutional Right – Supreme Court in Anuradha Bhasin v. Union Of India And Ors.' (Law Street Journal, 11 January 2020)<https://lawstreet.co/speak-legal/accesstointernet-constitutionalright-supremecourtofindia-sc/> accessed 25 January 2020.

grounds on which a shutdown may be ordered; it broadly states that such an order may be passed in cases of public emergency or public safety in conjunction with the Telegraph Act, a colonial legislation. No prior intimation is provided for it under the rules. This leads to serious implications as rights of individuals are seriously restricted in cases of internet shutdowns across the state.[23]

While the Court rightly directed the Committee to review all such orders passed, there remain certain points that have not been addressed by the Court. For instance, the Court does not adequately deal with the implications of such public emergencies upon human rights of individuals and the permissible limits therein. This is a very important aspect considering the UNESCO report that highlighted that in 2017-18 India experienced the maximum number of Internet shutdowns in the world.[24]

The Hon'ble Court accepted the merits in the submissions of the Solicitor General of India regarding the necessity of the declaration considering the vulnerabilities of terrorism and circulation of misinformation. However, a wider perspective highlights the need for development of a framework for timeline and instances wherein such orders may be passed. The power to impose such a declaration must not be used by the State in the ordinary chain of circumstances; it must be used sparingly, only at times of necessity.

7. Judiciary – The Guardian of the Constitution

The circumstances require the Courts to function actively to safeguard the Constitutional mandate. The role of the Courts should not be confined to only interpreting the law, rather sufficient regard must also be given to the implementation and enforceability of such interpretation. Mere interpretation of law unaccompanied by mechanisms to enforce it effectively results in a dead letter. For instance, the Court can rightly lay down instances that would not fall under the ambit of reasonable restrictions, or even constitute a body to review such declarations before they have been imposed. The Court rightly ordered the Legislature to review the loopholes in the Suspension Rules. Prior intimation in case of internet shutdowns is a very important aspect that has been left unaddressed in the Rules. A framework prescribing the timeline of such shutdowns may effectively meet the ends. This would, in fact, greatly limit the multiplicity of internet shutdowns on account of Public Emergency being imposed in States. This may be achieved by framing a sunset clause as seen in Roman legislation.[25] Such a clause shall clearly lay down the time limit after which the declaration will cease to have effect.

CONCLUSION

The decision of the Supreme Court is welcoming and favourable to the citizens of India and is an advancement of jurisprudence pertaining to the dynamic digital age. The principles laid down by the Court in the present case will greatly supplement future claims against violations of fundamental rights associated with the use of Internet. The judgment is ineffective in the sense that it does not provide any conclusive relief to the affected citizens of the State. A possible reasoning behind such a decision can be the Doctrine of Separation of Powers which allows the Judiciary limited powers to interfere with the discretionary powers of the Executive as laid down under the law. The author believes that an effective solution to the grave problem at hand can be in the form of increased Judicial Activism. This would ensure that the Constitutional mandate prescribed by the law makers is not fiddled with by the elected representatives as a result of the exercise of discretionary powers by the State.

The directions of the Court with respect to re-looking into the Suspension Rules in fact are seen as a necessary step which would strengthen the procedural aspect of the legislation. Recognition of the importance of transparency by the State in passing such orders is also a positive step towards actualizing the concept participation of citizens in the democracy of the country. Further, such participation ensures that the rights of individuals are not taken away arbitrarily by the State without prior intimation of the same.

In essence, the decision of the Court, though well intended, does not sufficiently strengthen the state of the country which is facing repeated internet shut downs under the garb of public emergencies, citing national security as the interest sought to be protected. Nevertheless, the principles laid down under this case and the criticism thereof that have surfaced are big steps toward the development of the country and ensuring the rights and interests of individuals in its attempt to sustain in a Digital Age.

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[23] Niha Masih, Shams Irfan and Joanna Slater,'India's Internet Shutdown in Kashmir is the Longest Ever in a Democracy'(The Washington Post, 16 December 2019) <https://www.washingtonpost.com/world/asia_pacific/ indias-internet-shutdown-in-kashmir-is-now-the-longest-ever-in-a-democracy/2019/12/15/bb0693ea-1dfc-11ea-977a-15a6710ed6da_story.html> accessed 27th January 2020.

[24] Venkatesan(n 15).

[25] Nayak (n 9).

Legal Initiatives in India Towards Protection of Migrant Labours in Covid-19 Pandemic

Dr. R.Seyon*

No one has a clear idea about their total strength but all concur that the country's economic engine cannot hum without the full participation of migrant labour. They are underpaid and overworked, and often live under pathetic conditions. The coronavirus scare has dramatically placed their plight under the lens, forced as many of them were to walk for days to reach their native villages because of lack of food and shelter at their workplace.

- The New Indian Express, 10.04.2020

Introduction

In the COVID-19 pandemic, migrant workers are the most affected section of people not only due to health risk but also due to economic scarcity caused because of nationwide shutdown. It was roughly estimated that India has about twelve crores of migrant labourers, whereas the Government of India estimates the same at 4.14 crores. In human civilisation, migration plays a major role. In India, migration existed historically. It assumed significance only after India opened the doors for world economy through Liberalization, Globalization and Privatization. The factor of higher wages caused migration. In India, the concept of migrant labourers is on the higher side. The problems of migrant labourersare increasing in developing countries like India due to the adoption of Indian economy into Liberalization, Globalization and Privatization. One third of India's population comprises of domestic maintenance. The National Sample Survey Organization shows that 30 million workers in India are migrant labourers. The report also shows that there was regular increase in number of migrant labourers. A study shows on migrant labourers shows 75 percent of migrant labourers come from West Bengal, Bihar, Assam, Uttar Pradesh and Orissa. Sixty percent of migrant labourers engaging construction sector and the rest are in hospitality, manufacturing, trade and agriculture. Difficulty in finding employment with a good salary package in his native is the prime cause for migrant labourer.

The legislations on migrant labourers provides for safety measures such as fixing minimum wages, providing displacement allowance and

licensing of contractors. But, in actual practice, the non-implementation of the provisions of the enactments in letter and spirit is the major cause for misery of migrant labourers. This paper discusses the concept and meaning of migrant labourers, position of migrant labourers in unorganized sectors, international legal framework of migrant labourers, National Legal Regime of migrant labourers and judicial initiatives towards protection of migrant labourers in the pandemic COVID-19 situation.

Definition and Meaning of Migrant Labour

Section 2 (e) of the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 defines a Migrant Workman as a person who is to be engaged or has been engaged in a remunerated activity in a state of which he or she is not a national. In Wikipedia, the term migrant labour is defined as “someone who migrates within a country, possibly their own, in order to pursue work such as seasonal work”.In Encyclopedia Britannica, migrant labour is defined as a casual and unskilled workers who move about systematically from one region to another offering their services on a temporary, usually seasonal, basis. In the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,1990, migrant worker is defined as a term refers to a person who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national. In Free Dictionary, migrant labour is a term applied in the United States to labourers who travel from place to place harvesting crops that must be picked as soon as they ripen. In Dictionary.com, migrant worker is defined as a person who moves from place to place to get work, especially a farm labourer who harvests crops seasonally. In short, migrantlabour can be defined as movement of an individual worker from his place of birth or residence to a new place for employment.

Position of Migrant Labour in Unorganized Sector

The position of migrant labour in unorganized sector is in

*Advocate And Notary Public, Sai Law Associatescourt Road, Mayiladuthurai,TamilNadu

India is very vulnerable. The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, provides for sufficient safeguards to protect the rights and interests of migrant labourers. But, most of them are unaware of the existence of such legislation because of their illiteracy. Migrant labourers in unorganized sector includes agricultural labourers share croppers, bonded labourers, scavengers, toddy tappers, drivers of animal driver vehicles, loaders and unloaders, salt workers, workers in brick kilns and stone quarries, leather workers, weavers, workers in saw mills, midwives, domestic workers, barbers, vegetable and fruit vendors, newspapers vendors, cobblers, handicraft artisans, handloom weavers, lady tailors, rickshaw pullers, auto drivers, carpenters, masons and physically handicapped self-employed persons. The extent of migrant workers is unorganized sectors is high in agriculture, building and other construction works and home based works. The Economic Survey 2007 – 2008 says agricultural workers constitute 52% of total workers and they are the largest segment of workers in the unorganized sector. The labour market in India with the advent of Liberalization, Privatization and Globalization has undergone tremendous transformations including the growth of workers in informal sector, deterioration of quality, weakening of trade unions and decline in social security.The position of migrant workers in Indian unorganized sector is that the workers are subject to indebtedness and bondage and are subject to exploitationand receive poor working conditions. They are the most marginalized and exploited sections of the work force. Government agencies have no data of the presence of migrant labourers in various sectors. No proper accommodation facility is provided to migrant labourer in work place. The migrant labourers in India are transported to various places like cattles and goods. Mostly, they are exploited by their agents.Migrant workers are recruited by malfunctionedmiddlemen on payment of advances which leads to bondage. They are not free to come back to their native unless the advances have been fully liquidated. The provisions of various labour laws were not observed in the case of migrant workers and they have to work on all days without any holiday continuously under bad working conditions. The labour movement in India shows a clear trend of movement of labour from North and East of India to the West and South of India. The States namely Uttar Pradesh, Bihar, Rajasthan, Odisha, West Bengal, Jharkhand and Uttarakhand are the primary suppliers of migrant labour. The States namely Maharashtra, Gujarat, Hariyana, Punjab and Tamilnadu are the primary receivers of migrant labour. Tamilnadu receives more number of migrant labourers from Bihar, Odisha and Rajasthan. Kerala is a new entrant which receives migrant labours. In Urban India, migrants have no access to reasonably priced, good quality public facilities for food, health, transportation and financial services. They have inadequate nutritional intake which affects their work ability. Long working hours, poor living and working conditions and inadequate nutrition are the breeding grounds for health problems of migrant workers. They are susceptible to tuberculosis, HIV and occupational health hazards. Women and child migrant laboursare subjected to trafficking and various forms of sexual exploitations including forced prostitution.They are compelled to live on work sites, pavements and slums which have no provisions for basic amenities and sanitation facility. Migrant workers who migrate with their children, the access of good and quality education are a big challenge. Migrant workers are subjected to harassment and abuse by police, local mafia and there were blatant abuse of human rights of migrant workers. Migrant workers because of their migration are unable to enjoy the freebies offered by the Government and even they are unable to exercise their democratic rights of voting.

Position of Migrant Labourersin Pandemic COVID-19 Era

In India the sector wise breakup of migrant labourers are 40% involved in construction work, 15% in agriculture, 20% in services and 25% in other sectors. As per the report of Private Consultants, 3.25 crore migrant labourers work in the construction sector. Among the States, Karnataka tops with sixty lakhs migrant labourers, out of which twenty one lakhs labourers work in the construction sector. Kerala ranks second of hosting thirty five lakhs migrant labourers. Maharashtra shelters five lakh and fifty thousand migrant labourers, whereas Uttarakhand accommodates five lakhs migrant labourers and Uttar Pradesh accounts for two and half lakhs migrant labourers. Tamil Nadu accommodates two lakhs migrant labourers. One lakh forty thousand labourers work in factories, shops and other places and fifty thousand labourers are working in construction sector. 268 relief camps have been providing shelter for the migrant workers in Tamil Nadu and 4,325 migrant workers are provided shelter by the Chennai City Corporation. The Government Assistants in Tamil Nadu includes passes were issued for free feeding of workers in Amma Canteens. Migrant Labourers living in smaller towns and districts have been taken care by the local body and district administration. The State Labour Department took social media to reach out to the standard migrant workers by including 27 members belonging to the State Association. To provide 15 Kg of rice, 1 Kg of dhal and 1 litre of cooking oil to the migrant labourers, Rs. 8.5 Crores was allotted by the State Government. In Karnataka, Rs. 2,000/- was deposited in Bank Accounts of labourers. They were given free food. Mobile Health Clinics were setup to check the health of pregnant, lactating women, senior citizens and children below five years of age. In Kerala, food was distributed through community kitchen to migrant

labourers. Provision kits were issued to labourers who were without ration cards. Rs. 2 crores was allotted by the State for migrant worker welfare. In Maharashtra, 3,000 temporary shelters were setup for the migrant labourers. Schools, Colleges, Marriage Halls and Open Grounds have been converted into shelters. Rs. 45 crores has been allotted for putting up shelters and providing foods to the migrant labourers. The District Collectors are directed to feed the migrants in their respective Districts. Routine checkup by Doctors and Health Workers are also done to the migrant labourers. In Uttar Pradesh Rs. 1000/- was extended as monetary help to 35 lakhs labourers which included the migrant labourers. Free food grain distribution of 15 Kg wheat and 15 Kg rice was given to the people of Uttar Pradesh including of migrant labourers. Village heads, ASHA Workers and other quasi – government officials are ensuring food and other amenities to the migrant workers. In Uttarakhand community kitchens are being run in schools and other public places to provide free food for the migrant workers. West Bengal had setup 711 relief camps and Government has arranged free accommodation and community kitchens for migrant workers. Andhra Pradesh had setup 393 relief centres to provide shelter and food to the migrant labourers. Periodical medical checkup, yoga training classes are done in the relief camps apart from providing basic amenities such as tooth brush, paste, blankets, soaps and clothes. Telangana accommodates 3.35 lakhs migrant labourers and Government provides 12 Kg of rice and Rs. 500/- to each migrant labourer. Masks, sanitizers and food provided for the migrant workers. Though, the various State Governments have provided various reliefs to the migrant labourers, they were not feeling comfort in shelter homes as that of their house. But, express their gratitude to the administration for arranging several facilities at the time of the coronavirus crisis. The Ministry of Home Affairs, Government of India issued advisory dated 27.03.2020, 28.03.2020 and 29.03.2020 to all States/Union Territories suggesting various measures to be taken by the state and district administration concerning migrant agricultural labourers, industrial workers and other unorganised sector workers.. It also highlighted that the Police and other administrative authorities have to adopt a humane approach in dealing with migrant workers and stranded tourists. The Government of India issued a Advisory on 24.03.2020 for authorities to effectively deal with rumor mongering, to prevent unnecessary panic and fear among the migrants.

International Legal Regime on Migrant Labour

The advent of industrial revolution in Europe during the 18th and 19th Centuries saw the emergence of factory workers in World Economy which paved the way for maintenance of labour standards for workers and International Labour Organization was established in 1919 to frame labour standards for workers. The advent of United Nationssaw the enactment of United Nations Charter, 1945, the Universal Declaration of Human Right, 1948, The International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights 1966 which guaranteed basic protection of Human Rights, freedom from torture, freedom of movement, freedom of employment, social security right to rest and leisure, reasonable limitation of working hours, periodic holidays with pay, labour rights, right to health, right to education, right to an adequate standard of living, right to work freely chosen, right to enjoyment of just and favourable conditions of work, right to form and joint trade unions, right to physical and mental health, right to life, liberty and security of persons, right to privacy, right to own property, prohibition of slavery and forced labour, right to liberty of movement and freedom to choose residence, equality before law and right to be treated with humanity and dignity. The International Labour Organization has adopted several International Labour Conventions but no one is directly related to the protection of rights of migrant labour in unorganized sectors. The United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 (ICRMW) was adopted by the United Nations General Assembly vide Resolution No.45/158, on 18.12.1990 and accepted by 43 countries including India. The convention on ICRMW protects all migrant workers and their family members. The Convention stresses the principle of equality with respect to remuneration, working conditions and medical conditions as per Articles 18(1), 25, 28 and 30. Article 22 protects the migrant workers from expulsion. The Convention on ICRMW 1990 is a milestone which protected the rights of migrant workers.

National Legal Regime of Migrant Labour

The Constitution of India, 1950 is the major National Document which protected the rights of migrant labourers indirectly. The concept of right to equality is guaranteed under Article 14of the Constitution which reads, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 19 (1) (c) guarantees fundamental right to form association and unions (All Citizens shall have the right to form association or unions). Article 21 guarantees right to life and personal liberty prohibition of traffic in human

beings and beggar and other similar forms of forced labour are guaranteed Article 23. Employments of Children below the age of 14 years are prohibited in factories as per Article 24. Article 39 (a)directs the States to secure an adequate means of livelihood. Article 39(d) paves the way for equal pave for equal work. Article 39 (e)and (f)protects against abuse and exploitation, protection of health and dignity. Articles 39 A, 42 and 43 provides for securing equal justice, free legal aid provisions for right to work, to ensure just and human conditions of work, maternity relief and decent standard of life. The above mentioned provisions are indirectly helpful for the migrant labours to establish the rights. The problem of untouchability in unorganized sectors can be tackled by migrant workers by invoking the provisions of Protection of Civil Rights Act, 1955. The Protection of Human Rights Act, 1993 guarantees various human rights and safeguards for ensuring human rights to all migrant workers. The Minimum Wages Act, 1948; The Motor Transport Workers Act, 1961; The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; The Dangerous Machines (Regulation) Act, 1983; The Child Labour (Regulation and Prohibition) Act, 1986, The Workmen Compensation Act, 1923; The Payment of Wages Act, 1936, The Weekly Holidays Act, 1942; The Beedi and Cigar Workers (Conditions of Employment) Act, 1966; The Contract Labour (Regulation and Abolition) Act, 1970 and the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996, The Unorganized Workers' Social Security Act, 2008 are the major labour legislations guaranteeing various human rights to migrant workers directly or indirectly. The Equal Remuneration Act, 1976 prevents discrimination on the ground sex in employment and provides for payment of equal remuneration to both for same work or work of a similar nature. The Bonded Labour System (Abolition) Act, 1976 provides for Abolition for Bonded Labour System and prevents economic and physical exploitation of migrant workers. The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 was enacted in the year 1979, received the Presidential Assent on 06.06.1979 and brought into force on 02.10.1980. The Act applies to every establishment where five or more inter-state migrant workmen or employed. It is also applicable to every contractor who employees five or more inter-state migrant workmen. The establishment which employs inter-state migrant workmen shall be registered and every contractor shall be required to obtain a licence. The contractor is also required to furnish particulars of migrant workmen and a passbook containing details of employment is to be issued to every migrant workmen. They are entitled for displacement allowance, journey allowance, fair wages and amenities including residential accommodation, medical facilities, clothing and suitable conditions of work. As per the provisions of the act, the migrant workers are entitled to raise industrial disputes. Any contravention of the provisions of the act attracts deterrent punishment. The Unorganized Workers' Social Security Act, 2008 provides for social security and welfare for unorganized sector workers such as beedi workers, non-coal mine workers, cine workers, handloom weavers, fishermen etc., though plethora of legislations exists for protection of migrant workers, lack of awareness disentitled them from enjoying and enforcing their rights in a proper manner.

Judicial Initiatives on Migrant Labourers

The Indian Judiciary played a vital role in enforcing the fundamental rights guaranteed under the Constitution and it liberally interpreted various provisions with a human face. It extended a helping hand to workers on various issues. Various rights guaranteed under the International Instruments were enforced by Indian judiciary through their landmark judgments. In *People's Union for Democratic Rights v. Union of India* (AIR 1982 SC 1473), the Supreme Court held that non-payment of minimum wages to construction workers is violative of Article 23 of Constitution and held that where someone works for less than minimum wages the presumption is that he is working under some compulsion. In Labour Working on Salal Hydro Project v. State of Jammu and Kashmir, (AIR 1984 SC 177), The Supreme Court held that the Inter-State Migrant Workmen Act was enacted with a view to eliminate abuses to which workmen recruited from one State and taken for work to another State. In *National Campaign Committee for Central Legislation on Construction Work Labour v. Union of India* ((2018) 5 SCC 607), the Supreme Court discussed the status of the implementation of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996. The Supreme Court reprimanded the Central Government, State Governments and the Union Territories Administration (UTA) for sheer ignorance and official apathy shown over the plight of the construction workers and issued the following directions:

1. To put in place and strengthen the registration machinery, both for the registration of establishments as well as registration of construction workers.
2. To establish and strengthen the machinery for the collection of cess as there is a tremendous amount of construction activity going on and it is unclear whether the pay the cess or not.
3. The Ministry of Labour and Employment to frame one composite Model Scheme for the benefit of construction workers in consultation with all stakeholders including NGOs.
4. The Ministry of Labour and Employment, the State Governments and the UTAs to conduct a social audit

on the implementation of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 so that in future there is better and more effective and meaningful implementation of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996

The Courts also issued directions for responsible implementation of Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996constitution of advisory committee by State Governments and Union Territories Administration, establishment of welfare board and issuance of Universal Access Number to construction workers. In pursuance of the directions, the Ministry of Labour and Employment formulated the Model Welfare Scheme for Building and Other Construction Workers and Action Plan for Strengthening Implementation Machinery.

In *Alakh Alok Srivastava Vs. Union of India* (Writ Petition (s) (Civil) No (s). 468/2020 & 469/2020), the Supreme Court of India consisting of the Chief Justice and Justice L. Nageswara Rao while dealing with the Writ Petition filed in Public Interest for the redressal of grievances of migrant labourers in different parts of the country in the COVID-19 pandemic, in their order dated 31.03.2020, has held that,

"The concern of the Petitioners pertains to the welfare of the migrant labourers. They are seeking a direction to the authorities to shift the migrant labourers to government shelter homes/accommodations and provide them with basic amenities like food, clean drinking water, medicines, etc".

"In the instant writ petitioners, we are concerned about the migrant labourers who have started leaving their paces of work for their home villages/town located at distant places. For example, thousands of migrant labourers left Delhi to reach their homes in the States Uttar Pradesh and Bihar, by walking on the high ways.

We are informed that the labourers who are unemployed due to lock down were apprehensive about their survival. Panic was created by some fake news that the lock down would last for more than three months.

The initial reaction of the State Governments and the Union Territories was to transport migrant labourers from their borders to their villages. Later, on 28.03.2020 the Ministry of Home Affairs has issued a circular prohibiting movement as transportation of migrant labourers in overcrowded buses would cause more damage than help to the migrant labourers. The very idea of lock down was to ensure that the virus would not spread. It was felt that transportation of migrant labourers would aggravate the problem of spread of the virus. In such view, the movement of migrant labourers was prohibited and a direction was given to the State Governments to stop the migrant labourers wherever they were and shift them to nearby shelter homes/relief camps. A further direction was issued to the District Collectors/Magistrates to ensure that medical tests were done and the migrant labourers be provided with basic amenities like, food, clean, drinking water, medicines, etc. in the shelter homes".

The Supreme Court also was concerned with the fake news created that lockdown would continue for more than three months which triggered a panic among the migrant labourers and expected the media (print, electronic or social) to maintain a strong sense of responsibility and ensure that unverified news capable of causing panic is not disseminated and also directed the media to refer and publish the official version about the developments and also held that, "The anxiety and fear of the migrants should be understood by the Police and other authorities. As directed by the Union of India, they should deal with the migrants in a human manner. Considering the situation, we are of the opinion that the State Governments/Union Territories should endeavor to engage volunteers along with the police to supervise the welfare activities of the migrants. We expect those concerned to appreciate the trepidation of the poor men, women and children and treat them with kindness". The above judicial pronouncement of the Supreme Court reveals the activeness of the Apex Court in protecting the migrant workers and this judgment confirms that the Supreme Court is vigilant in supervising that the letter and spirit of the notifications and advisories of the Government of India was carried into action.

In *Harsh Mander and another Vs. Union of India* (Writ Petition Dairy No. 10801/2020), a direction was sought to the Government for payment of wages to the migrant workers. The Supreme Court considered the above issue and by its order dated 03.04.2020 directed the Union of India to respond for payment of wages to the migrant workers. Again in its order dated 07.04.2020 directed the petitioners to consider the averments of the status report filed by the Government of India.

The Supreme Court had suo moto taken up the issue regarding the migrant workers being stranded due to the lockdown based on a letter written to the Chief Justice of India S.A. Bobde by Ms. Mahua Moitra, Member of Parliament, Krishnanagar (WB) stated that she has personally received over 300 requests of help from stranded migrant workers belonging to her area from faraway places in Kerala, Gujarat, Maharashtra, Telangana, Delhi, Gurgaon etc. She has annexed some of the messages along with the letter. She has stated that "These poor workers, some of them employed at construction sites and others in factories, are thousands of kilometers away from their homes and live in extreme penury" "Given the loss of life involved and the terrible

hardships being faced by these poor workers, I beseech your lordships to urgently take up the matter and issue appropriate direction to the Government of India and private employers", "My lords, these workers are the poorest of the poor and they subsist on daily wages. Unless a serious and immediate intervention is made by the executive agencies, thousands will perish from starvation and lakhs will be put to the risk of contracting and spreading COVID-19 virus"and she has prayed for directions to the executive agencies to make arrangements for the stranded workers, as well as for the employers to release wages to these workers, along with food ration and shelter during this period. The Supreme Court on 07.04.2020 issued notice to the Union of India to answer for the letter sent to Chief Justice of India by Member of Parliament Mahua Moitra highlighting the plight of migrant workers stranded amid the lockdown which was taken suomotu by the Apex Court.

The Supreme Court of India in *Jagdeep S. Chhokar & Another Vs. Union of India* (Writ Petition (Civil) Dairy No. 10947/2020) consisting of Justices N.V. Ramana, Sanjay Kishan Kaul and B.R. Gavaisought the Centre's response regarding the movement of migrant workers wishing to head back home from cities and a proposal, thereto, if any, in this regard and directed the Centre to filed its response as aforementioned within a week to the PIL seeking enforcement of the Fundamental Right to Life of stranded migrant workers across the country who have been left in dire straits owing to the coronavirus induced lockdown. The PIL also sought directions to the Centre and the state to arrange for their safe travel back to their hometowns & villages.

Accordingly based on the directions of the Supreme Court in the above case, the Ministry of Home Affairs, Government of Indiaon 29.04.2020 issued an order permitting inter-state movement of migrant workers, students, pilgrims and touristsetc, who are found to be asymptomatic of COVID-19. Detailed guidelines have been issued in this regard in the order issued by the Home Secretary invoking powers under Section 10(2)(l) of the Disaster Management Act, 2005.Migrant workers, students, pilgrims, tourists and other persons stranded at different places due to lockdown will be permitted to move on certain conditions.

The issue of redressal of grievances of migrant labourers in the State of Maharashtra pursuant to the 21-day lockdown declared by the Government of India after the COVID-19 pandemic and subsequent restrictions placed on their movement was discussed by the Bombay High Court in Sarva Hara Jan Andolan through Ulka Mahajan & Another Vs. State of Maharashtra & Others (PIL (L) No. 5443/2020). Justice A.A.Sayed in the above case held that, "in my view, the first and foremost endeavour of the State Government must be that no victims go hungry and the food/food-grains reach all victims (even in remote areas), and drinking water, medicines, healthcare and hygienic toilette facilities are provided to them. So far as other grievances highlighted by the Petitioners are concerned, that can be considered at a later stage. Hence, for the present, the following directions are issued:

a. The Petitioners are permitted to make representation (by email) to the concerned Collector/s pointing out in which areas of the District, the aforesaid benefit/facility is not provided.

b. A copy of the above representation shall be marked and sent to the concerned District Legal Services Authority (by email).

c. The concerned District Legal Services Authority shall ascertain the grievances made in the representation by deputing appropriate person/s (who shall take all necessary precautions including wearing of masks, etc) and shall bring them to the notice of the concerned Authorities and file a report before this Court on the next date (by email) AKN 4/5 PILST. 5443. 2020 & PILL. 22.2020.doc d. The State Government shall file an Affidavit in Reply in both the above Petitions.

e. Considering the gravity of the problems being faced by the migrant labourers and homeless persons the learned Advocate General is requested to appear in the matter and assist the Court".

The above said directions clearly show that the Bombay High Court had clearly understood the problems faced by the migrant labourers and has directed the Government to solve their problems.

In *C.H. Sharma and others Vs. State of Maharashtra* (Writ Petition No. 3427/2020), the Nagpur Bench of the Bombay High Court directed the Maharashtra Government to make arrangement for stay, food, sanitation, clothing and health care of the labourers, working class including migrant labourers, in need of these provisions.

The Registry of the Orissa High Court moved the issue for issuing for appropriate directions to the Government of Odisha relating to prevention of COVID-19 pertaining of transportation of migrant workers from different States to the State of Odisha in a Public Interest Litigation in W.P.(C) (PIL) No. 9095/2020.The Acting Chief Justice Sanju Panda and Justice B. Rath of the Orissa High Court in their ordered dated 29.03.2020 has held that, " A serious problem is taking place involving movement of labourers/working class and their family from neighboring states as well as neighboring districts. There is no system in place to check if any of them is already 'Corona' affected or

not. Such large scale movement may aid the spread of Corona and again it also becomes difficult to attend such persons at thousands and thousands destinations. Providing vehicles to such large scale movement is also an uphill task. Keeping this in view and in an attempt to restrict spread of 'Corona', the movement of such large number of persons during lock down period in the entire nation and as the Government is preparing to provide food and water to all such persons at their place, this Court taking this issue under PIL jurisdiction directs the State Government to give direction to all bordering district Collectors and Superintendent of Police to make arrangement of stay, food and sanitation arrangement including medical checkup of all such persons in the bordering districts itself. In the event of shortage of space they can take over closed college and school premises having toilets for the above purpose. Similarly, involving district level shifting similar arrangements can also be made by all concerned district Collectors and Superintendents of Police. This arrangement can continue at least till lifting of lock down". This direction of the Orissa High Court has helped the stranded migrant workers in the State of Odisha.

The Division Bench of the Kerala High Court consisting of Justices A.K. Jayasankaran Nambiar and Shaji P. Chaly in their order dated 03.04.2020 in the Suo Motu Writ Petition in W.P. (C) No. 23724/2016 (Suo Motu) has discussed about the steps taken by the State Government in providing food and shelter to the migrant workers who are not able to leave for their homes outside the State, pursuant to the outbreak of COVID-19 virus pandemic and issued the following two important directions:

(i) The District Labour Officers concerned shall, in co-ordination with the respective Taluk Legal Services Authorities, monitor the effective implementation of the steps taken by the State Government in providing food, shelter and other essential commodities and services to the migrant workers in the State, during the lockdown period.

(ii) The State Government, as also the authorities mentioned above, shall also take note of the directions issued by the Supreme Court in the order dated 31.03.2020 in WP (C) No.468/2020 that directs the State Government and other authorities to strictly abide by the directives issued by the Union of India in these matters".

In P. Arularasu Vs. The Chief Secretary, Government of Tamil Nadu and Others, (W.P.No. 7423/2020), the Division Bench of the Madras High Court consisting of Justices N. Kirubakaran and R. Hemalatha while discussing the Writ Petition which sought to provide relief measures to the people who did not have family ration card, migrant labourers and those who are struck due to the lockdown and unable to travel to their native place has held that, "The endeavour of this Court is to see that nobody suffers from starvation in the State and therefore, effective steps have to be taken by the concerned and further held that, "Since this issue is concerned with the migrant labourers who was struck in Tamil Nadu, this Court suomotu impleads the following official as necessary party to this proceedings: The Government of Tamil Nadu, Represented by its Secretary, Labour Department, St. George Fort, Chennai – 9" and passed over the matter with a further direction to the Government to verify the position of the migrant labourers in Periya Erikarai, Pallikaranai and Kalkuttai, Perunkudi and the Government assured the Court that necessary relief measures will be provided to the deserving migrant labourers.

The same Division Bench of the Madras High Court in India Awake for Transparency Rep. by its Director Vs. Government of Tamil Nadu and Others (W.P. No. 7443/2020) in its order dated 08.04.2020 has directed the Government to have community kitchens to provide food and shelter to the migrant workers. It held that, "…… lakhs and lakhs of people are affected because of the lockdown. The daily wagers, migrant workers and platform dwellers are without food and shelter. Though the Government is taking all efforts to provide food, it is reported in the media that in some places like Tirupur and Coimbatore, the migrant workers have staged a protest as they have not been given food and shelter. Therefore, the authorities are directed to verify the persons who are without food and shelter and provide them by having community kitchens".

The above discussed two judgments of the Madras High Court shows that the judiciary is vigilant in even watching the media and giving directions to the Government in protecting the migrant workers in the COVID-19 pandemic.

Conclusion and Suggestions

The International Instruments, National Laws and Judicial decisions provides for various rights and protections to migrant labourers. But, the availability, observance and enforcement of these rights to migrant labourersare only a dream. The lack of awareness and illiteracy are the major causes for non-implementation of various rights available to the migrant labourers. Though plethora of legislations and judicial decisions guarantee migrant workers a wide range of rights, the rights still exist only in paper form and not actually implemented. The various provisions of Inter-State Migrant Workmen Act, 1979 were not properly implemented in India. The various rights of migrant workers namely decent work, decent standard of living, decent working conditions, decent shelter, and dignityare unaddressed. The right of social security is mere a dream for migrant labourers in India. Construction after

agricultural is the major sector where most of the migrant labourers are employed in India. They work from sunrise to sunset from 14 to 16 hours, they are work place is unsafe. They have no social security, compensation to injuries, access to drinking water and health care. They are victims of constant verbal and sexual abuse. They have to live in tents and forced to bath in open public and do not possess Public Distribution Cards and forced to buy food grains at higher prices. There is lack of sincerity on the part of rulers in enforcing the labour legislations. The major issues concerning migrant labourersare not adequately addressed by the Government. Legislations failed and migrant workers lack support from civil society. Trade Unions do not lend their supportive arm for protection and enforcement of rights of migrant workers. The following are the suggestions for the betterment of migrant labourers in the COVID-19 pandemic. They are:

1. A cash transfer of Rs. 6,000/- every month to the next three months to each family of migrant workers in the COVID-19 pandemic is absolutely necessary.
2. The cereals and other essentials should be provided freely to the migrant workers through the Public Distribution System for six months in the COVID-19 pandemic.
3. The Government should create a scheme to compensate the migrant workers for the payment of full salaries during the lockdown.
4. The staying condition in the shelter homes of the migrant labourers should be as comfort as that of their home in this coronavirus crisis.
5. There will be a huge problem of unemployment, once the lockdown is the lifted and the Government will have to frame measures to tackle this problem.
6. It was alleged that the migrant workers were not served food in a systematic manner in shelter homes and many go hungry. The Governments should see that the food is distributed three times a day in all shelter homes without any break
7. The Government and District Administration should see that social distancing is maintained in every aspect including arranging of beds, serving food and others in shelter homes of migrant workers.
8. The Government and District Administration should see that the migrant workers are the partners of the development of their State and should not want even a single migrant labourer to go to bed hungry.
9. A comprehensive law covering various rights such as social security, shelter, food, humane conditions of work, decent standard of living, and protection from harassment is the need of the hour. The provisions of the convention on ICRMW, 1990 should be adopted in the comprehensive legislation on migrant labourers.
10. The Grama Panchayat should compulsorily register all migrant workers within the jurisdiction.
11. The provisions of Unorganized Sectors' Social Security Act, 2008 should be properly amended to address the needs of migrant workers.
12. Health Insurance Schemes to be provided to migrant workers. Migrant workers should be provided with clean housing.
13. All Government Schemes and freebies to be provided to the migrant workers.
14. The Government should adopt a practical approach to cater the needs of migrant labourers.
15. Migrant Workers are to be treated on par with other workers and there should not be any difference in wages or working hours or conditions of work.

References:

1. Deshmukh, M.B., Study of Floating Migration UNESCO, Research Centre, Five Studies in Asia, Delhi, 1956.
2. Gill, Sucha Singh, Migration of Labour in India, The Indian Journal of Labour Economics, Vol. 41, No.4, 1998.
3. ILO, Report on Why Labour Leaves the Land, Geneva, 1960
4. Krishnaiah, M. Rural Migrant Labour Systems in Semi-Arid Areas, A Study of Two Villages in Andhra Pradesh, The Indian Journal of Labour Economics, Vol. 40, No.1,1997
5. National Commission on Rural Labour (NCRL) Vol. Part II, Reports of the Study Group on Migrant Labour, Ministry of Labour, Government of India, New Delhi, 1991.
6. Srivastava, Ravi.S. Migration and the Labour Market in India, The Indian Journal of Labour Economics Vol.41, No.4, 1998
7. The Hindu, February 27, 2012
8. The New Indian Express, March 10, 2014
9. The New Indian Express, July 6, 2014
10. The New Indian Express, April 10, 2020
11. Various Volumes of AIR, SCC, SCALE and CTC.

Victim Blaming: Transgression from the Real World to the Virtual World

Sakshee Sharma*

ABSTRACT

The phenomenon of Victim Blaming has long been associated across the world with the crime of rape and sexual harassment. Various theories of victimology deal with the root cause of such blaming by the society. Just World Theory, sexism, cognitive biases and theories of self-blame delve into the cause behind the widespread practice of blaming the victim. However, it has been noticed over the time that victim blaming has not restricted itself only to cases of physical sexual harassment, but has transgressed into cyberspace as well. With greater number of people, especially women, falling prey to sexual harassment online, victim blaming has become a reality of the virtual world. The present article cites various examples and cases of online sexual harassment and the reaction of the cyber community depicting unmistakable colours of victim blaming. The parallel drawn between such blaming in physical sexual harassment and virtual sexual harassment demonstrates the all-pervading practice of subjecting the victim to double victimisation.

Keywords: Victim Blaming, Victim, Just World Theory, Sexism, Sexual Harassment, Rape Victims, Cyber, Misogyny.

Introduction

The present article is a modest endeavour of the researcher, to discuss various facets of victim blaming as a manifest tendency of misogynistic societies, while addressing various cyber harassment occurrences against women. For this purpose, the researcher wishes to inspect victim blaming trends in cyber harassment cases and draw parallels with much discussed yet, still prevalent victim blaming of rape victims.

The aim of the paper is to study the various theories and aspects of victim blaming that mostly occurs post a sexual assault or rape incident, recognize the psychology behind such practice and its ultimate implication on the victim's decision making process. But first, it is important to understand the various nuances of victim blaming and its severe negative consequences.

Victim-Blaming

The act of holding the victim of the crime or abuse, partly or entirely responsible for the crimes committed against them is commonly termed as *Victim Blaming*[1]. The two major reasons for such psychosocial conduct is to avoid culpability and deny vulnerability by placing the blaming the person who suffered the harm rather than the perpetrator.[2] Victim blaming is carried out predominantly after sexual and abusive victimization of women in order to excuse ourselves from the responsibility to care for the victim and punish the culprit. Victim blaming as an unfortunate phenomenon has been in practice in various parts of the society for quite some time, but has only recently been identified as a dynamic used to empower the criminal and maintain the status quo.[3] The term *Victim Blaming* is attributed to the phrase "blaming the victim", coined by William Ryan in his book 'Blaming the Victim' in 1971. The book was in response to years of oppression and the civil rights movement, and the phrase 'blaming the victim' was used to describe one of the tactics used by the privileged to remain in power. Lately, the term has been widely adopted in the victimological perspective by the advocates and scholars, particularly in respect of sexual assault and rape cases.[4]

Victim-Blaming in Rape and Cyber Harassment Cases

The victim-blaming culture is majorly perpetuated by sexism, the Just World Theory, cognitive biases and the theories of self-blame[5]. Through victim blaming, the perpetrator, the bystanders and the society at large relieve themselves from their tacit accountability, to ensure a potential victim's safety, prior to the incident; and to deliver justice to the victim, post the crime. For the purpose of this paper the researcher wishes to revisit sexism and the Just World Theory in the context of rape and abuse culture.

*Assistant Professor, IMS Unison University, Dehradun

1 S.L. Maier, "Sexual Assault Nurse Examiners' Perceptions of the Revictimization of Rape Victims", Journal of interpersonal Violence, 27, 287-315.

2 Juliana Breines, "Why Do We Blame Victims?" Psychology Today: Health, Help, Happiness. p. 24, Nov. 2013. Webvisited 06 Oct 2014.

3 Julia Churchill Schoellkopf, ,"Lesbian Gay Bisexual Transgender Queer Centre", Paper 33, 2012 at 2.

4 Supra Note 3.

5 Ibid.

Sexism (both *hostile* and *benevolent*)[6] is quite often cited as one of the reasons which encourage rapists and the society to blame the women for the abuse they face. Victim-blaming in rape cases has often been used as a medium to trivialize sexual violence inflicted by men on women by shifting the blame from the rapist to the victim. This in turn, furthers the oppression and social control of women and also exonerates sexually aggressive men from their culpabilities.[7] While going through the literature related to cyber harassment and gender trolling, one realises that similar sexist attitudes have time and again given voice to individuals who don't shy away from calling cyber harassment victims as "whiny baby girls" who are overreacting to "a few text messages"[8]. The blaming does not stop with the absolving of the perpetrator of his acts; it continues to serve a bigger purpose of preserving the status quo. The dismissal of cyber harassment as "no big deal" reeks of a sexist conspiracy to undermine women's autonomy, to discredit them and make them responsible for their own harassment by portraying them as "fragile", "hysterical" and "particularly sensitive"[9].

A parallel narrative employed by the critics, suggesting to the women of the cyber world to either "man up" or to go offline, suggests another misogynist attempt to establish male dominance over the cyberspace, in affirmation with the prevalent norm of the physical world. In this light, examining The Telegraph's Brendan O'Neill's calling of 'combating the personal attacks' as a "Victorian effort to protect women from coarse language"[10] demonstrates the social psychology of misogynist conformists, who believe that women should expect to be addressed and subjected to coarse and crude language and that is the inevitable price that they will have to pay if they wish to be on the internet. O'Neill remarked, "If I had a penny for every time I was crudely insulted on the internet, labelled a prick, a toad, a shit, a moron, a wide- eyed member of a crazy communist cult, I'd be relatively well- off. For better or worse, crudeness is part of the internet experience, and if you don't like it you can always read The Lady instead."[11]

Citron cites various commentators disparaging Kathy Sierra, a tech blogger who was initially criticised for her blogs by a few readers, which rapidly snowballed into receiving constant death and rape threats accompanied by pornographic and death suggestive graphics and images. Many commentators exclaimed while ridiculing her, "if you aren't comfortable with the possibility of this kind of stuff happening, then you should not have a public blog or be using the internet at all"[12] Markos Moulitsos, the founder of the liberal blog Daily Kos, trivialized the threatening situation of Kathy with a "Look, if you blog, and blog about controversial shit, you'll get idiotic emails. Most of the time said death threats don't even exist...But so what? It's not as if those cowards will actually act on their threats."[13] These statements are suggestive of the belief, that a woman receiving a flood of threatening messages and images, which causes her distress and fear for her life, isn't really a victim as long as these images and messages are physically manifested on her person. Ironically, many commentators tend to relegate cyber sexual harassment and abuse by comparing it to "real rape". They claim that unlike "real rape", words and images on a screen cannot really hurt anyone[14]; however the incongruity in this statement becomes detectable when the "real rape" victims too are handled and criticised in the manner similar to the victims of online sexual harassment and abuse.

Another theory that has been associated much closely with victim-blaming is the Just World Theory,[15] according to which, people in order to maintain a sense of control over their own lives, like to believe that they could not be a victims in a sexual assault or rape incident as the world is

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6 Hostile sexism: This expresses a negative evaluation of women and misogynistic attitudes. Benevolent sexism: which is positive in tone but considers women stereotypically and expects them to remain in restricted roles". See: Ma. Luisa, et al, "Ambivalent Sexism, Attitudes Towards Menstruation and Menstrual Cycle-Related Symptoms, International Journal of Psychology, 49, 280-287, 2014.

7 Rose Mary Lynn Ubell, "Myths and Misogyny: The Legal Response to Sexual Assault", Master of Studies in Law Research Papers Repository,4 , 2018, at 13.

8 Danielle citron, Hate Crimes in Cyberspace (Harvard University Press 2014), p. 19

9 Jacqueline Vickery & Tracy Everbach eds., Mediating Misogyny: Gender, Technology and Harassment (Springer International Publishing, 2018) p. 15.

10 Supra Note 8 at 73.

11 Brendan O'Neill, "The Campaign to 'Stamp Out Misogyny Online' Echoes Victorian Efforts to Protect Women from Coarse Language," Telegraph (U.K.) (blog), November 7, 2011, http:// blogs .telegraph .co .uk /news /brendanoneill2 /100115868 /the -campaign -to -stamp -out -misogyny -online -echoes –Victorian-efforts -to -protect -women -from -coarse -language /; Danielle Citron, Hate Crimes in Cyberspace (Harvard University Press 2014).

12 "I Never Told Kathy Sierra to Shut Her Gob (But I Wish I Would Have)," Violent Acres (blog), March 27, 2007, http:// www.violentacres.com /archives /147 /i -never -told -Kathy -sierra -to -shut -her -gob -but –I; Danielle Citron, Hate Crimes in Cyberspace (Harvard University Press 2014)

13 Supra Note 8 at. 74

14 Supra Note 8 at 76.

15 R.M. Hayes et al.,"Victim Blaming Others: Rape Myth Acceptance and the Just World Belief", Feminist Criminology, 8, 202-220

overall a good and safe place[16]. By deeming the world to be just and fair, the people believe that everyone gets what they deserve and they deserve everything that they get.[17] In other words, the bystanders and the society tell themselves that they will not fall prey to the perpetrator as long as they don't do what the victim did to "deserve" the abuse. By conforming to this belief, the bystanders and the society mechanically distance themselves from the victim and create a false sense of in control and safety in their lives[18]. They accept the victims' characters and behaviours to be the cause behind their victimization instead of the perpetrator and/ or the circumstantial factors[19]. This further leads to the question, as to what set of characteristics and behaviours do the bystanders commonly associate as the cause of victims' (much deserved) sexual abuse? Here one can refer to the stereotypical approach of the society towards gender expectations. These gender expectations coupled with the inherent sexism in the society generates certain sets of normative behaviours which the women 'should' follow, in order to protect themselves from being victimized. For example, women are constantly advised on how to behave and dress to avoid harassment and rape. This promotes a more general perception, that those women who don't dress according to the social expectations and choose to "dress like a slut", might get raped or harassed as they are "asking for it"[20].

These gender expectations even facilitate in providing subtypes of women[21] such as good/bad, traditional/non-traditional, and chaste/promiscuous[22] and these subtypes may lead to blaming of those women victims who don't conform to the more traditional subtype[23]. For example, women who are promiscuous or dress sexy are believed to be more likely to be raped[24], or victims who were intoxicated received more blame[25]. Victims of rape are blamed more or seen as more responsible for, and deserving of, the rape when they are seductively dressed rather than plainly dressed, they resist a rape or fight back rather than remain passive, are intoxicated rather than sober, or carrying a condom[26]. Similar patterns of subtype profiling are seen to be exhaustively employed when it comes to abuse and harassment online. In a number of cases, women who expressed their views on subjects that are considered controversial or taboo for women to talk about, have been on the receiving end of tasteless, offensive and often times threatening attacks by the cyber community. What starts as a garish comment here and there by an individual, often develops into a potential mob attack. Such attacks, by the sheer volume of the offensive and harassing messages sent, cause great distress and harassment to the victim. Lena Chen, a Harvard University student, blogged about her hookups, alcohol use, and "feeling like a misfit at an elite school". As a reaction to her posts many anonymous commentators attacked her not with criticisms related to her writing, but rather with death threats, suggessions of sexualized violence, and racial slurs.[27] The harassment did not stop just here. On a gossip blog, someone posted her sexually explicit photos, taken by her boyfriend, without her permission. This continued even after she shut down the blog and her nude pictures were reposted all over the internet[28]. This woman faced this excruciating and embarrassing agony because some individuals, who labelled her as an "attention whore", believed that she should be made to learn a much deserved lesson for "making a blog about her personal sex life"[29] and not observing the behavioural norms that a good natured woman should follow.

The case of leading women's rights and anti rape activist Kavita Krishnan draws attention to attitude of the bystanders and the society when it comes to taking steps in order to protect the rights of women at the occurrence of

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16 Tomas Stahl et al., Rape"Victim Blaming as System Justification: The Role of Gender and Activation of Complementary Stereotypes", Soc Just Res 23:239-258, 242(2010)

17 Megan Crippen, "Theories of victim blame", Senior Honors Projects 66, at 4 (2015)

18 Supra Note 3 at 7

19 Supra Note 17

20 Supra Note 3 at 4.

21 M.R Burt,"Cultural myths and support for rape",Journal of Personality and Social Psychology, 38, 217-230(1980).

22 Ibid.

23 Ibid.

24 Ibid.

25 R.A. Schuller & A.M. Wall, "The Effect of Defendant and Complainant Intoxication on Mock Jurors' Judgment of Sexual Assault", Psychology of Women Quarterly, 22, 555-573 , (1998)

26 Nicole M. Capezza & Ximena B. Arriaga, "Why do People Blame Victims of Abuse? The Role of Stereotypes of Women on Perception of Blame", Sex Roles(2008) 59:839-850(2008).

27 Supra Note 8 at 78 ; Cassie, "Harvard Asian Slut to Be Next Kaavya," Auto Admit, January 24, 2007, http:// www .autoadmit .com /thread .php ?thread _id = 569172 & mc = 19 & forum _id = 2

28 Ibid ; Maureen O'Connor, "Lena Chen and the Case of the Naughty Nudie Pics," Ivy Gate (blog), December 22, 2007 , http:// www .ivy

29 Supra Note 8 at 78; Lena Chen, "The Five Types of Haters Female Bloggers Encounter (And What to Do about Them)," the ch!cktionary (blog), August 2010, http:// the chicktionary .com /post /409408816 /the -fi ve -types -of -haters -female -bloggers -encounter -and

any such harassment attack on her. In the wake of the Nirbhaya (Delhi gang rape) case 2012, as a part of the protest, Kavita Krishnan agreed to participate in a live web chat organized by the news portal, Rediff. During the chat, a user with the handle 'RAPIST' threatened Krishnan repeatedly with rape threats. Eventually the moderators asked Krishnan to log off the chat as the threats escalated. Krishnan complied reluctantly.[30] This incident makes on to ponder over two major points of interest. Firstly, the death threats that Krishnan received, according to the Just World Theory, can be viewed as a justified reaction to a woman who dares to transgress the gender expectation that has been approved by the society for her. Any woman, who tries to fight back for justice in a misogynist society and in turn endangers the established status quo, is, through her actions, provoking the much deserved abuse against herself. Secondly, the reaction of the moderators of the platform in asking Krishnan to log off rather than making efforts to silence the threats unfortunately prove, that the efforts of the society to provide a safe environment to the woman, in the physical or the virtual world, might just fall short and thus it is the woman's responsibility to protect herself from harassment.[31]

Conclusion

The objective of this paper was to understand and discuss the similarities in the victim blaming of the "real rape" victims and the victim blaming of "virtual sexual harassment" victims. After careful perusal of the various incidents cited by various authors, we understand that when it comes to the true cause behind the process of victim blaming, a few factors can be held responsible for such. The need of the perpetrator to exert superiority over the victim and to escape culpability, the need to experience control over one's own life under the Just World Theory, distancing oneself from the victim in order to deny such similarities with the victim which can indicate future victimization of the individual; and projection of gender expectations on the women victims are some of the mostly cited factors which lead to the blaming of the victims of rape and sexual abuse. In a similar manner, cyber harassment and online sexual abuse too, are being denied the much deserved focus and attention due to the widespread victim blaming attitudes prevalent among the critics. Understanding the role of stereotypes in the process of victim blaming is vital to identifying ways to counteract this harmful tendency. It is the unfortunate truth of today that many women, who face cyber harassment and online sexual abuse, are ultimately forced to quit the internet or are made to shut up by large number of cyber citizens who conform to the victim blaming attitude.

[30] Supra Note 9.

[31] Ibid ; Pal, D. (2013, August 25). Rape threats on Rediff: Kavita Krishnan speaks out. First Post. http://www.firstpost.com/living/rape-threats-on-rediff-kavitakrishnan-speaks-out-727395.html

Significance of Equity in Globalized World

Maryanka*

INTRODUCTION

It is difficult to imagine a world where through the spread of Globalization the world is becoming a more just and equitable place for everyone. Which place can be termed as a just and equitable place for any individual? The question does not have any definite and precise answer but it can be said that where an individual gets the equal opportunity of growth in all aspects can be termed to be a equitable place for him. Globalization has impacted the world both in the positive and negative manners. In this context, it becomes necessary to understand the relation between the globalization, inequality and marginalization so that the questions regarding policies can be raised. There are many questions which are directly related to the increased trend of globalization, for example has the inequality increased in the world in the past few decades? Has globalization led to a greater inequality or less? These questions have to a great extent exercised the minds of many analysts. The reason why this question has loomed so large in our debates is that, for many ideologues, how we answer this question amounts to a verdict on globalization. A single answer for the impact of globalization is too much to expect, and that globalization is beneficial to all. We will see that the answer is mired in debate. If we take a very long run view, the answer is fairly transparent. It has been observed that over the last five centuries, the world has become more globalized and much more prosperous, and, if we consider inter-regional inequality (in contrast to inter-personal inequality), it is clear that inequality has grown[1]. This inequality can easily be understood through this example- if we compare the per capita of the richest and poorest country (according to World Development Indicators 20150)[2] which is Norway and Ethiopia respectively, then we see that there is a huge gap because Norway has a per capita income of $43,400 and whereas Ethiopia and Burundi has a per capita income of just $40. Even if the corrections are made on Purchasing power parity (PPP) then also the gap is huge.

The growing inequality existing in the different nations has actually resulted from "greed is good" mentality and one of the most devastating features of the globalization is that it has somewhere given promotion to this mentality. It is evident from the fact e where the world markets for goods and services are suddenly and fully opened up.

MEANING AND CONCEPT OF EQUITY

The terms "justice", "judgment", "equity" might seem synonymous to many people but they all together hold different meanings. When we consider justice, then it gives the idea of justness or righteousness that is "what is just should be done."The term judgment is concerned with deciding between the competing claims on the basis of existing laws and practices.

Equity refers to the higher principles of fairness. Fairness is the essence of equity. Aristotle has defined justice as "Justice in its narrower sense signifies fair mean or ideal mean between excess and defect. It constitutes a definite national criterion for the administration of human conduct, a concept, in other words, which is primarily concerned with the proportionate ratio of commensurable goods and by means of which the law in action can more specifically be evaluated[3]. As such it deals with the examination of human actions as regards their effects upon others in the light of the criterion of whether they coincide with, or whether they exceed or fall short of that fair mean expressed by the principle of equality." Aristotle assumes that in certain cases the matter may not be sufficiently dealt with the help of general rule or common law but needs to be considered as an exception to the general rule then in such cases the equity comes into play. He considers that equity is itself "just" or "justice" and in some way superior to one sort of justice however, not superior to Justice in general, to absolute Justice, but only to the possible errors which might occur due to the absolute pronouncements of the Common Law Justice.

The purpose of equity is to treat everyone with fairness and hence it is synonymous with "natural justice". Henry Maine has described it as "anybody of rules existing by the side of original civil law, founded on principals and claiming incidentally to supersede the civil law in virtue of a superior

*Assistant Professor of Law, IMS Unison University, Dehradun

1 Kaushik Basu, Globalization, Poverty, and Inequality: What is the Relationship? What Can Be Done? available at https://www.biu.ac.il/soc/ec/students/teach/835/data/Basu-2006.pdf (last visited 17.02.2018)

2 See, World development indicators 2005(World Bank, 2015), available at http://documents.worldbank.org/curated/en/947951468140975423/World-development-indicators-2005 (last visited 17.02.2018)

3 See, for instance, 1108 a 6 f. (quoted from "Aristotelis Opera Omnia," edit. Academia Regia Borusica, Berlin, 1831, vol. 1H, page 1108).

sanctity inherent in those principals." Equity played an important role in the development of English law because it helped in removing the defects of common law by providing adequate remedy in those cases where common law failed to provide any remedy.

GROUNDING THE PRINCIPLES OF MORAL EQUALITY AND EQUITY

Equity being a normative concept has been long known in religious, cultural and philosophical traditions and is associated with the fundamentals of equality, fairness and justice. There are several conceptions attached with the understanding of equity as a principle and a way of practice in the globalized front. As a concept, equity finds its overall meaning through moral and political philosophies.

Equity tracked as being propounded on the philosophy of moral equality which laments equal treatment placing reliance on the idea that by virtue of sharing a common humanity and uncontrolled difference, adequate consideration ought to be given in treating people of divergent groups. This principle, in essence is most definitely not the same as treating people equally but rather it demonstrates that on the parameter of *"moral calculus"*, role played by every individual is to be given due consideration. Acceptance of moral equality is an attribution to the fact that our moral conduct stands socially justifiable on certain standards associated with such justifications. "Relevance" and "Consistency" form an important criteria while analysing conducts of either Citizen, State or other instrumentalities of the state like International Organizations, bodies, Associations etc. The standpoint with respect to the 'Relevance Standards' establishes a kind of connection in relation to the treatment of a person preconceived with some feature of the person itself. For instance, *"I gave him money because he needed it"* would certainly fulfil this criterion. On the other hand, giving money because he looked poor would not be justifiable in establishing a relevant connection. Additionally, the standards of consistency deals with relationships taking into account the underlying reasons of treatment of people in contrast to different occasions and circumstances. For instance, giving money to one person who needed it but abstaining from doing so to the other who equally needed it does not justify the act and hence does not qualify upon this standard. It is important to note here that the theory of inconsistency would prevail even if the relevance criterion stands vitiated provided adequate reasons behind such decision is given.

In determining the structure of moral equality, both these theories play a relevant role and the question of ensuring the standards on grounds of moral equality would be adjudged through value judgments keeping various determinants in consideration. *"Equity on the other hand, relates to the application of this principle of moral equality to the ways in which people are treated by society"*[4]. This principle through the macroscopic front included every action undertaken in society and advocates several goals in relation to roles played by governments and states along with imposing several constraints and restrictions. *An important highlight upon this role was contended back in 1971 by Rawls examining the relationship between the state and its citizens and arguing that the state should respect moral equality.*[5] Equity therefore, can be seen as a principle forecasting macro-governance that advocates realization of the concept at the level of society as a whole.

There are various ways on observance of principles of equity as propounded on degrees of fairness in distributions (Rawls, 1971); equality of opportunity; treating people with equal concern and respect (Dworkin, 1983); and that the notion that alike cases should be treated as alike, with similar benefits (or burdens) to be enjoyed (or suffered) by similar people. In order to draw conclusions of some uniform pattern one particular principle would not suffice and the general ideologies of equitable distributions have to be understood in a certain contemplated way. Firstly, we have to take into account the various things that are distributed within the society like power, wealth, knowledge, work etc. secondly, there has to be an examination of the relevant principles on the basis of which different categories of goods are distributed which is usually done by categorizing the goods along with categories of people entitled to them or the dejected category which is disentitled and the reasons for the abovementioned decision making. Lastly, a judgment on whether the decision of distribution was made on a prudent basis following the principles of moral equality has to be achieved.

PRINCIPLES OF EQUITY

There are several principles contrasted when relating policy decisions under the lens of equity, which predominantly play important roles in formulation of policies. The aggregative principles suggest allocation of goods with an objective of maximization of the average value of a particular property. An example to demonstrate this could be the practice contemplated by the utilitarian state's approach that examines the worthiness quotient of a

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[4] Harry Jones, Equity in Development: Why it is Important and How to Achieve it, ODI Working Paper 311, Nov 2009, p.4, Available at: https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4577.pdf

[5] See, An Introduction to John Rawls: Rettferdighetsomrimelighet, (Erin Kelly, ed. Justice as Fairness) (2003) This theory establishes that there is a social contract comprising set of norms whereby the citizens have an option of holding the state responsible in the event of any unfair conduct or wherein the prescribed standards are not duly met by the instrumentalities of the state.

decisions only when it maximizes overall utility for all the people.

Equity cannot be solely ruled but in consonance with the other principles that ensure distribution based on a harmonious belief to respect people's common humanity which is an attribute of principles of *"Distributive Justice"*. The above mentioned arguments clearly indicate that equity cannot be interpreted as a nascent concept but as an assimilation of several principles considered together in a value judgment.

- *Equal life chances: "There should be no differences in outcome based on factors for which people cannot be held responsible".*[6] There are certain differences that could be concluded as being 'reasonably unfair'. The birth of a person in a poor family or in a calamity prone demography might reasonably deprive him of different opportunities and alter his chances of overall well-being and potentials despite no fault of his own. Here the principle of equity comes into picture by analysing broad range of outcomes like health, wealth, education and other factors that affect the overall wellbeing of an individual. The first principle, therefore advocates absence of any discrimination on treatment of individuals on the basis of factors beyond the person's control.
- *Equal concern for people's needs: "Some goods/services are matters of necessity and should be distributed proportional to people's level of need and nothing else"*[7].This principle is applied with an objective of harmonising respect for 'human community'. Several goods and services that are vital for fulfilling basic needs of the entire community in general and such goods by virtue of being basic and universal need to be distributed on some firm basis so that needs of the society at large are taken care of. Upon this issue, taking into consideration the domain of health equity we consider two children suffering from same disease with similar health condition. One child is fully examined and treated well while the other is made to wait for weeks and then not properly treated. This example demonstrates two equal problems that were provided different treatments. On a wider level state run wealth care systems these problems are commonly reported defying principles of equitable distribution.
- *Meritocracy: "Positions in society and rewards should be distributed to reflect differences in effort and ability, based on fair competition".*Different positions and jobs in the society impart various advantages to the people who profess it and this principle simply relates to the allocation of such position on the basis of merits and focuses more on the scheme of 'equality of opportunity'. The applicants of these positions should be judged fairly and a standard procedure establishing qualifications should be uniformly applied. The observance of preferential treatment at any occasion to any individual or the class of individual based upon the family background, gender, race or any unjustified reason would violate the object of this principle. Often in the society, we observe that a person's political/social power influences the opportunity cycle for the post thereby depriving others of fair competition. For ensuring meritocracy, it is pertinent that the positions are open to all on a fair competition basis and such access should not be obstructed anyhow. Additionally, the requirement for the competition to be a fair one, everyone should have sufficient opportunity to showcase the skills and talents.

ANALYSING THE APPLICATION OF PRINCIPLES OF EQUITY IN THE INTERNATIONAL FRONT

The principle of moral equality holds good in almost every policy framing irrespective of the national boundary, reason being sharing of 'common humanity' regardless of nationality. Therefore, the principle of global equity, being a precursor to global distributive justice, has been concluded as *"Equity as the source and motivation for development".*[8] There are two notions attached with the concept of equity on the international front. One is, when global equity is harmoniously accepted as an inspiration to the international community while implementing distributions ad channelizing domestic actions that might possibly render effects on other states. The other ideology with this regard has been brought about by the propagators of "particularism" that emanates from the idea that interaction amongst nations should be driven by informed self-interest. One important attribute to this is that the State's participation and influence entails advents of liability and accountability within national spheres.

GENDER EQUALITY AND EQUITY

"The time is past when a women's movement had to exclude men in the fight 'against' patriarchy. The time has come rather for women's visions to restructure and redefine work in order to fashion a new society for women and men

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6 Supra Note. 4

7 Ibid

8 World Development Report on Equity, World Bank (2005)

based on women's experience and skills as care-givers and reproducers. It is not a question of adding gender to the world's major cosmologies, but rather of rewriting the latter at their very roots."

-Wendy Harcourt

The United Nations Educational, Scientific and Cultural Organization ("hereinafter UNESCO") has time and again highlighted the issue of 'gender and equity' and directed several reforms in order to provide opportunities to integrate planning, programmes and implementation of a gender mainstream practice by United Nations, other inter-governmental bodies like OECD, the European Convention etc., private foundations and Non-Governmental organizations. Gender main streaming is predominantly viewed as a centric strategy to combat issues of inequalities between men and women. Placing equity in consideration all the policies and programs are analyzed by the government and other actors with respect to the calculation of its effects on men and women respectively. Sustainable development in the long run could only be ensured when both the sexes are placed at equal fronts and when there is respect towards full equity and equality of each of the two genders, i.e., of the social roles that men and women assume in their lives. Gender equality corresponds to equality between men and women and believes in providing equal opportunities for the free overall development of personal abilities without ant limitations as determined by stereo-notions, rigid gender roles and prejudices. *"Gender equity means fairness of treatment for women and men, according to their respective needs. This may include equal treatment or treatment that is different but which is considered equivalent in terms of rights, benefits, obligations and opportunities".*[9]

In relation to applying goals of holistic equity in the field of gender rights and movement, the "gender and development" *("hereinafter GAD")* was proposed in the process leading to the Beijing Conference, and is usually seen to be a precursor to "women in Development" *("hereinafter WID")* approach. The 'gender and development' approach aims at propagating gender awareness, analyzing the effects of a certain developmental activity differently on men and women with a view to implement suitable planning that renders conditions and results are equitable to women and men. Gender main streaming as described by the UN Documents refers to a nation's capability of striving towards gender equality and equity at the domestic as well as global fronts, viewing and scrutinizing of policies, management and legal affairs within the gender perspective and observing its effects likewise, increased women participation in all sectors of the economy as well as policy making platforms and lastly providing tools and training for awareness and effective implementation.

Another remarkable program for promoting equality in gender was taken up in 1980's when UNESCO took the initiative of applying various non-institutional measures to educate and empower the marginalised women from various parts of the world. To this effect, the organisation conducted various volunteering programmes in Peru, Cape Verde, Indiaetc with a view to support and strengthen poor women economic conditions and enhance standards of living. Several actions in furtherance of promoting equality was taken up by UNESCO's Women in Higher Education programme to analyse position of women's participation and studies at various universities in India. Thereinafter the organisation being constantly committed to its goals of promoting equitable social status across the globe chaired programmes on Women, Society and Development in Poland, Korea, Tunisia and Morocco. *"The Special Project Women Speaking to Women (1996) was a community based radio project that addresses itself to the specific communication needs of women, especially in their struggle against poverty and marginalisation".*[10] The project provides local radio stations that are run by women, also successfully operational in parts of India, conducts programmes based on rooted problems of a community and deals with several concerns of women. Additionally, these programmes also features issues of discrimination against women and gender equity, targeting social evils associated with human rights prevailing in the sphere in general.

Equality as enshrined in the preamble of Indian Constitution is the first fundamental right assured to people of India. Article14[11] embodies the ideology of equality as laid down in the preamble and the succeeding Arts.15, 16 & 17 enunciate further applications to this principle. "Equality as a prerequisite to the development of the society was declared to be a *'basic feature of the Indian Constitution'."*[12]

CONCLUSION

We are living one of the phases of strongest economic growth in history, with unimaginable innovation and

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[9] ABC of Women Worker's Rights And Gender Equality, ILO, Geneva, 2000, p.48.

[10] "Gender Equality & Equity", Unit for The Promotion of the Status of Women and Gender Equality, May 2000, pg. 38 ¶ 2, Available at: http://unesdoc.unesco.org/images/0012/001211/121145e.pdf This report reviews UNESCO's accomplishments upon the agendas set forth by Fourth World Conference on Women held at Beijing in 1995.

[11] See A. 14 of The Constitution of India.

[12] Indra Sawhney II v Union of India, AIR 2000 SC 498.

productivity capacity. However, we also live an era of unprecedented inequality. A major part of the world's population feels it has been left "out", because they don't have the means, intellectual and material, to participate systematically in the positive dynamics of globalization. To enable these people to benefit from economic growth, growth through innovations is one of the main global policy challenges of our time. There is a need to create dynamic interrelation between growth, innovation and equity. There is a great potential for human progress in fostering this interrelation.

Womanhood vis-a-vis the Right to Termination of Pregnancy: A Constitutional Framework

Pallavi Bajpai*
Ruchika Sharma**

ABSTRACT

Abortions in India till now confronted with lots of ups and downs, it has consistently been considered as a no-no in our nation. Before getting a legitimate acknowledgment under the Medical Termination Act, it was hard for a woman to get ended with such pregnancy. Majority of women still lack in the safe abortion facilities. The MTPA, in 1971 considered mother's security regarding the clinical accessible by then on time. The MTPA, in 1971 considered mother's safety with respect to the medical facilities available at that point of time. After that there were various amendments made by the government with respect to MTPA. There was an urgent need for the proper guidelines while deciding the abortion after 20 weeks. Women have complete right over their bodies. They have right to decide whether they want to continue with the pregnancy or terminate it. Various provisions were made to the act, which could prevent unwanted pregnancy and which could affect the health and life of the mother and the unborn. The amendments also considered about the safety and welfare of the woman's and hence made it mandatory to be done by a proper registered, trained medical practitioner. All the clinics should be well equipped with the latest technologies and should be well assisted with the medical practitioner. The termination is supposed to be done irrespective of the marital status of a woman. It is important to consider the right and give protection to the unmarried pregnant girls and the rape victims. In this paper a clear timeline presentation has been made as to what was the condition for abortions in India, how the MTPA brought a change, how it affected the health and safety of women and its relationship with the Indian Constitution.

Keywords: Abortions, Medical Termination Act, Safety and Health of women, Indian Constitution.

INTRODUCTION

"A women's freedom of choice whether to bear a child or abort her pregnancy are arears which fill in realm of privacy."

Recapturing the awful instance of 2017 Chandigarh rape survivor, whose request for abortion was dismissed by Supreme Court for having crossed the then-20-week time limit? She delivered an untimely infant in August 2017 at the young age of 10. "The minor girl was uninformed that she had delivered a baby". Her folks told her that she has a stone in her stomach and she must get operated for that. Her dad had mentioned the emergency clinic specialists that the new-born ought to be for adoption[1]. Abortion is a phenomenon that has been deliberated upon when you consider that instances immemorial and continues to be a subject of rivalry even nowadays. This debate may be recapitulated in phrases- Pro Choice and Pro Life[2]. The pro-life and pro-choice positions, which are much debated in various countries, have not really been manifested in the Indian discourse on abortion because of the complex reality of our country. Abortion is multi-faceted because it involves the culmination of many aspects such as faith, ethics, medication and regulation. It is a social issue that offers liberation to girls and offers them energy to make their personal choices. There are endless ways in which the abortion can be seen or the articulated views of people determine the consistency of the direction, in which it is seen. It depends on the societies as well; like abortion in a village will be dealt more dramatically than any other thing whereas same in a metropolitan city will take its direction as an inherent right. But the abortion debate in India might be meaningless if it did now not take into account the important hassle of girl foeticide. Liberation of girls, consequently, desires to be equilibrated against the rights of the unborn infant.

*Senior Assistant Professor of Law
**Student, The Northcap University, Gurugram

1 Press Trust of India, Chandigarh: 10-year-old rape survivor denied abortion by Supreme Court gives birth to a girl, India Today (19 August,2017), available at https://www.indiatoday.in/india/story/chandigarh-rape-survivor-delivers-baby-abortion-plea-supreme-court-1030038-2017-08-17 (Last visited on May23, 2020)

2 Shilpa Dubey, Abortion Laws in India: Is India Taking A Step Towards Being Pro-Choice?, Femina (03February,2020) available at https://www.femina.in/trending/in-the-news/abortion-laws-in-india-is-india-taking-a-step-towards-being-pro-choice-147652.html, (Last visited on May23, 2020)

HISTORY

The Medical Termination of Pregnancy Act[3] (hereinafter referred to as MTPA) is considered to be one amongst the other to bring significant change in India's social legislation. The act is said to be the opening doors for reform and social change. Women in India still lack safe access to the abortion process. Initially, talking about abortion it wasn't that effective.

Under the Indian Penal Code, 1860 it initially criminalized Abortion and made it a punishable offence under Section 312, 'Causing Miscarriage'. Abortion earlier was a crime for both woman and the abortionist. The only exception to this was when it was done to save the life of the woman. After this, in 1964 for the first-time liberalization of Abortion law was introduced in India in the context of high maternal mortality due to unsafe abortion. It took time for the government as well as to the people to realise that how crucial it is to have a particular law, which can deal with it in a systematic as well as a prolonged manner. During this time, it was observed that the women were ill-treated and the abortion was carried out by unskilled practitioners, which has to be true because during that time abortion was supposed to be illegal and it would be tough to get a proper authority which can illustrate in a systematic manner. Due to which The Shantilal Shah Committee[4] was set up and a report was passed by the Government of India in 1966 stating a comprehensive review of medical, legal and socio-cultural aspects of Abortion. Recommendations were made for abortion and reproductive laws which were to be regulated properly.

ABORTIONS, THE MEDICAL TERMINATION OF PREGNANCY ACT & THE CONSTITUTION PROVISIONS

In 1971, for the first time in India, abortions were legalised under MTPA, 1971 which laid down various provisions for the protection of registered medical practitioners against any criminal proceedings due to any injuries caused to the woman seeking an abortion, whereas the abortion was always done in the good faith. The MTPA, 1971 had expected to change the current arrangements identifying with end of pregnancy keeping in see the peril to life or hazard to physical or emotional well-being of the lady, on philanthropic grounds, for example, when pregnancy emerges from sex violations like assault or intercourse with a neurotic lady, and eugenic grounds where there is generous hazard that the youngster, whenever conceived, would experience the ill effects of deformations and ailments. Therefore, in other words the pregnancy should not harm the wellbeing & conscience of the women in direct or indirect manner. In the words of Hillary Clinton, one cannot have maternal health without reproductive health, it is necessary to always keep in mind that reproductive health includes contraception and family planning and access to legal and safe abortion. Explanation 1 to Section 3(2) proposes that were any pregnancy is claimed by the pregnant lady to have been brought about by assault, the anguish brought about by the equivalent must be attempted to comprise a grave physical issue to the emotional well-being of the pregnant lady. Pregnancy not only put a barrier physically it also adds a grave in the emotional wellbeing of lady, which has to be dealt with due care and diligence. When such a statutory assumption is given, similar comes extremely close to grave injury to psychological well-being of the women. For many women therefore, the choice to undergo abortion is clearly because of structural issues. Often it becomes extremely difficult for women, especially poor working-class women, to bring up children as pregnancy might mean loss of livelihood for them. This is evident from Anandhi's case study[5] on Tamil Nadu where she demonstrates that abortions are often opted for due to a lack of structural support and in order to negotiate with their societal conditions.

While the satisfaction of one medical practitioner is requires for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

Under section 3(2)(a) the length of pregnancy should be 12 weeks for proper termination. There should be a medical practitioner with an opinion that if the pregnancy continues, it would risk the life of the woman or may cause physical injury/grave, mental injury or the child born may be with some deformity due to physical or mental abnormalities/pressure suffered by the lady indeed. This clearly violates Article 14 and Article 21 of the Constitution of India as it imposes severe unnecessary restrictions and fails the tests of reasonability and proportionality. Further, section 3(2)(b) of MTPA where the pregnancy is between 12 weeks to 20 weeks, gets terminated only if, there are two registered medical practitioners with the opinion that continuation of pregnancy would lead to imminent danger to the life of the woman. If the child is born out of that pregnancy, it can result in physical abnormalities, mental instability which can further result in seriously handicapped or improper growth. *In Nikhil D. Dattar v. Union of India*[6]*,*

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3 The Medical Termination of Pregnancy Act, 1972

4 See, The Shantilal Shah Committee Report, Ministry of Health, Government of India

5 Anandhi, Women Work and Abortion: A Case Study of Tamil Nadu,ECONOMIC AND POLITICAL WEEKLY 1054-1059 (March 24, 2007)

6 Nikhil D. Dattar v. Union of India, [2008] SCCBom 1348: (2008) 110 (9) Bom LR 3293

woman wanted to undergo an abortion because she was carrying a foetus which could have been born with congenital heart disease. The Bombay High Court disallowed her from doing so on the grounds inter alia that the requirement of the MTP Act was not met inasmuch as there was no categorical opinion from the medical experts that if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped. The incorporation of this understanding is clearly visible in the Constituent Assembly Debates, where it is asserted, "The Indian woman has been reduced to such a state of helplessness that she has become an easy prey of those who wish to exploit the situation. The said judgement was again challenged and was held that right over one's own body is an essential concept and should be taken into consideration. The courts should not neglect health of the woman.

The main issue which arise with respect to this part is that, section 3(2)(b) impose an excessive restriction by limiting the eligible length of pregnancy, for abortion, to 20 weeks. It is not even possible to figure out all the circumstance which are possible but cannot be predicted with certainty that may turn up harmful to woman's mental and physical health or abnormalities of the foetus within 20 weeks of the pregnancy. What was found under a scientific research was that fetal brain is sufficiently developed, waves also get stronger enhancing auditory and visual sensors, approximately after twenty- six weeks[7], hence putting a twenty-week bar on the termination of pregnancy is not even morally incorrect but scientifically also does not make any sense. It is biologically tough to but pregnancy in a legal framework and constituting it to a limited time frame which is not easy to predict and definitely not easier to put up with. This is one of the loopholes of the legal system of the country where they try to frame and put unpredicted and uncertain biological things in the purview of the legal fraternity.

Further, the Explanation 2 to Section 3(2) which states no restriction on the length of pregnancy, for termination states the condition that pregnancy should be caused due failure of the contraceptive pill or any other method adopted by the married woman and her husband.

The abovementioned explanation, strictly violets Article 14 of the Constitution, by creating an illustrative discrimination between married and unmarried woman. The act is contradicting itself without creating a line of distinction between married and unmarried women. The act specifically puts up a restriction for termination over unmarried women, where it is very necessary to bring them up and patiently try to take them put from an unwanted situation. The act itself has classified women into married and unmarried categories. Law is different for married and unmarried women, but the thought to put attention upon is that, marriage is supposed to be done only after the attainment of 18 years of age and consequences for the act of sex becomes personalfor the "married women" but the law has itself disregarded the same for unmarried women.

Section 3(4)(a) requires guardian's consent if it is a case of minor or mentally ill persons and abortion is required, which violates Article 21 by giving the guardian complete autonomy over individual's right of reproductive choice. When the child is in mother's womb, it is still a part of woman's body. It her right to decide whether to terminate the pregnancy or not. If she is being not allowed to do so, then it is directly infringement of her right to life and personal liberty as stated under Article 21 of The Indian Constitution. It is necessary to note here that our Constitution does not confer any specific rights for an unborn and it can never be preceded over fundamental right of a women to electively abort as she is the one who ultimately has to carry the weight of an undefined and unborn child in her womb. Right to life and personal liberty offered under Article 21 has a very wide scope of interpretation[8].

At a place, the law is favouring one category and disregarding other for the same implications and categories. Further, the law is providing full choice of illustrative powers to a third person for the same "act". It is clearly visible that law is contradicting itself in every possible way which on the other hand is going against the supreme law on the land.

Lastly, section 5, where the pregnancy is beyond 20 weeks and the registered medical practitioner believes that such termination is important to save the life of woman. This is clearly arbitrary and disproportional, as it imposes high threshold of immediate necessity to save life of the woman. Again, the law is giving power to a third person i.e. the medical practitioner to determine the abortion for the women. The act is done by individuals, where they have a free choice and consequences are the lady gets pregnant, but as per law it is not their choice to terminate the pregnancy, it is favoured by a 3rd person.

Various amendments were made to MTPA in the year 2003 and 2004 which includes the return of abortion regulations to the district level, punitive measures to determine provisions for unsafe abortions, rationalization of physical requirements for establishments to perform early abortions, approval of medical abortions and their

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[7] Clifford Grobstein, "Science and the unborn: choosing Human futures (Basic Books. 1988) p.13, Basic Books. 1988

[8] Mahendra Pal Singh, The Constitution of India, V.N Shukla, Twelfth Edition, Eastern Book Company

safety measures. The Union Ministry of Health and Welfare proposed a draft bill in the year 2014 with the recommendations made by the National Commission for women concerning a change in 20 weeks to 24 weeks and proposed that the right to abortion should be given to all the women[9] irrespective of their marital status. Many significant changes were demanded in the draft of 2014. The gestation limit for termination was increased to 24 weeks, improvement in the process of abortion, increase in the provider base of abortion- registered medical practitioner should conduct the abortion after specialized training, replaced 'married women' to 'all women' and contraceptive failure which provides safe abortion to all women in case of contraceptive failure. There was no green sign for the increase in the gestation period from 20 to 24 weeks. The proposal was again put forth the Rajya Sabha in 2017, which intended to raise the gestation period to 24 weeks. The bill in 2018 was introduced in Lok Sabha with the same proposal for 24 weeks and added that the gestation period should be 27 weeks in case the women are the rape survivor. Till date, there are so many proposals put forth for the abortion and laws related to it.

The Union Cabinet recently accepted the Medical Termination of Pregnancy Bill 2020, which extended the period of gestation from 20 to 24 weeks making is safe and easier for the women to terminate the pregnancy.

NEED FOR AMENDMENTS

The main question which comes in our mind is why there is a need for such an amendment? In my opinion, firstly all the women who desire to terminate their pregnancy beyond 20 weeks have to face cumbersome legal recourse which leads to violation of the reproductive rights of women. Earlier, women could easily terminate the pregnancy up to 20 weeks. But if the pregnancy is beyond 20 weeks, the termination process becomes difficult. Women were supposed to reach to the Medical Board and Courts for seeking permission to abort, which was very difficult. Secondly, to provide safe abortion services. It has been found that 10-13% of maternal death in India is caused due to unsafe abortion. Thirdly, if a minor wants to terminate the pregnancy, it requires consent from the guardians. Fourthly, the right to terminate the pregnancy was only given to a married woman and her husband. There was no provision for unmarried women who due to the failure of the contraceptive pill became pregnant. Bill of 2020, MTPA clearly states that there should be one registered practitioner in the case where the gestation period is 20 weeks and the opinion of two registered practitioners is required in the case of 20- 24 weeks. The bill, 2020 made it very clear that termination of pregnancy can be done by “any women” who includes both married and unmarried women. The Medical Termination Bill, 2020 also enhanced the gestation period for women of “special category” which includes survivors of rape, victims of incest and other vulnerable women like differently disabled women and minors.

But the real trouble lies within the implementation of the legal guidelines and the current framework. The authorities should ensure that the MTPA is achieved through certified surgeons in registered clinics or hospitals. The concerned authorities need to deal with any other principal project and this is of the genuineness of motives behind asking for the termination of being pregnant.

There have been instances suggested in which in MTP Act is executed flimsy floor which includes examinations, the circle of relative's weddings, excursions and so on. Such abortions are carried out via the scientific practitioners for economic gains and move unchecked on most activities due to fabricated reports. Such abortions have both long term and brief time outcomes. It is also unlucky that abortion regularly is used as an opportunity for ordinary methods of family making plans. Such problems can most effectively be addressed with the aid of government projects and focus packages. It is the social duty of doctors to suggest all sufferers coming for termination of pregnancy approximately the use of some contraception. It ought to be emphasized that birth control use is much safer than the termination of pregnancy. To mitigate the sick outcomes on society, the balancing of the bad and fine elements of this social regulation desires to be taken up. Though prima facie it may seem in contravention with early feminist jurisprudence, which demands for equality for men and women in the personal as well as private sphere, such an affirmative action is taken only in order to overcome the ill-consequences of subjugation that women had to undergo for centuries. It is believed that such affirmative action will in fact raise women to the same platform as men, so that they can efficiently participate in public life.

India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993 and is under an international obligation to ensure that the right of a woman in her reproductive choices is protected. The Convention is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. States Parties shall take all appropriate measures to eliminate discrimination against

[9] Shilpa Dubey, Abortion Laws in India: Is India Taking A Step Towards Being Pro-Choice?, Femina (03February,2020) available at https://www.femina.in/trending/in-the-news/abortion-laws-in-india-is-india-taking-a-step-towards-being-pro-choice-147652.html, (Last visited on May23, 2020)

women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.[10]

A woman's right to make reproductive choice is also a dimension of her own 'personal liberty' as understood under Article 21 of the Constitution held in *Meera Santosh Pal* and *Ors. vs Union of India And Ors.*.[11] Reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on exercise of reproductive choices such as woman's right to refuse participation in sexual activity or alternatively, insistence on use of contraceptive methods. Women are also free to choose birth control methods such as undergoing sterilisation procedures. Reproductive rights include a woman's entitlement to carry pregnancy to its full term, to give birth and to subsequently raise children.

In Justice *K.S. Puttaswamy and Others V. Union of India (UOI) and Others*[12] the court, keeping in view *Suchita Srivastava v. Chandigarh Administration*[13], the court held that, there is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood Under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices

Constitutionality of Abortion was being challenged in *Swati Agarwal v. Union of India*[14], The petitioners contend that, right to reproductive desire is a fundamental right guaranteed under Article 21 of the Constitution because it lies inside the middle of individual's private life and dignity. Further, they contend that the selection of abortion and right to secure abortion is an essential aspect of the right to healthy life under Article 21 of the Constitution. Therefore, they challenge Section 3(2), Explanation 2 to Section 3(2), section 3 (4) and section 5 of the Medical Termination of Pregnancy Act, 1971. They additionally plead the establishment of secure abortion clinics to lessen maternal mortality as a high-quality obligation of the State beneath Article 21's guarantee of the right to health.

The Supreme Court has further established the doctrine of removal of inequality in status and opportunity in conjugation with directive principles under the Constitution. Article 39 of the Indian Constitution directs the State to follow the principles while making policy for the Citizen. It states that men and women will have an equal right in the means of livelihood. Women have complete right over their bodies and hence no question should be raised with respect to her reproductive choices.

The law is very versatile and the choices of people as well. There is a continuous development among the society, people are educated and have the knowledge between right and wrong. The pregnancy starts from a very private thing and an intimate relation between the couple, but it doesn't remain private when it comes to termination of unwanted pregnancy. There should be “no restriction whatsoever” on the exercise of reproductive choices, such as a woman's right to refuse participation in sexual activity, insist on the use of contraceptive methods, or to carry a pregnancy to its full term, to give birth and to subsequently raise children. It is women's free choice to go with whatever she wants from herself, but the law is being an unwanted barrier on the path of the women, this puts another big question and put the law in jeopardy.

CONCLUSION

Women being the most significant part of the society should be always treated equally. They should have complete right over their bodies. The decision for termination of pregnancy should be with the woman who holds the baby in her womb. Laws in the country are made, so that they can provide benefit to the society as a whole.

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[10] Article 12, UN General, Convention on the Elimination of All Forms of Discrimination Against Women CEDAW January 1979, ISBN No.-Declaration 1981-187-001 available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx(accessed May 24,2020)

[11] Meera Santosh Pal and Ors. v. Union of India and Ors., (2017)3 SCC 462: 2017SCC Online SC 39

[12] Writ Petition (civil) NO 494 OF 2012

[13] Suchita Srivastava v. Chandigarh Administration: (2009) 9 SCC 1 ("Suchita Srivastava")

[14] Swati Agarwal & Ors. V. Union of India (1-7-2019) W.P. (C) 825/2019 Supreme Court

Medical Termination Act was enacted so that it could safeguard and provide proper and safe termination of the pregnancy. The act emphasized on safe, affordable, accessible abortion services to women who need to get their pregnancy terminated under certain specified conditions. It should be considered that if the pregnancy is actually harmful and will affect the lives of both mother and child, then it should get terminated. Timeline in these situations should not be a matter of concern. What if, the problems occur after 20 weeks, which as a result could take up mother's life? Abortion in such circumstances becomes the need. The establishment of the National Commission for Women by the Parliament, instead of the state legislatures again reeks of the woman and her problems now being considered "national". Moreover, the centrally-constituted Indian Constitution provides directive to the State to secure for women, equally to men, adequate sources of livelihood, and imposes duty upon the citizens to refrain from practices derogatory to the dignity of women. In addition, a very important component of such a category of legislations is the exemption of personal laws from civil and constitutional authority.

Though prima facie it may seem in contravention with early feminist jurisprudence, which demands for equality for men and women in the personal as well as private sphere, such an affirmative action is taken only in order to overcome the ill-consequences of subjugation that women had to undergo for centuries. It is believed that such affirmative action will in fact raise women to the same platform as men, so that they can efficiently participate in public life.

For the purposes of this article, it is considered that women have independent legal rights as an Indian citizen, whose legal rights may be protected by means of their being recognised as having locus standi to litigate on their legal rights either by themselves or through their representative, acting on their behalf and in their interests.This of course leads to the question of how liberal theory would resolve the multi-pronged questions that the right to choose can pose through the pregnant body of a mentally disabled female. This seeks to explore this dichotomy from a largely Indian perspective in general and in relation to different cases in the Supreme Court of India and in various High Courts.

The most important question which comes forward is whether feminists should continue to argue for abortion rights along the lines of a woman's right to choose as a part of her right to privacy while at the same time recognizing the historicity of the concept of privacy which in practice often acts to the disadvantage of women. More importantly, the question is how feminists are supposed to argue that child-bearing and child-rearing are both individual (inasmuch as it is only the woman concerned who can choose whether or not to undergo abortion as a part of the woman's right over her own body and as such a part of her right to privacy) as well as social (inasmuch as child-bearing and child-rearing are not simply the responsibility of the woman but also of the state, family and social set-up of which she is a part). This would of course affect how feminists, liberal or radical, think about the questions of procreation, contraception and child-rearing which are so deeply caught between the two terrains. Hence, "reproductive choice should be respected". A woman's right to make reproductive choices is a dimension of her "personal liberty" and it is "important to recognise" that "reproductive choices can be exercised to procreate as well as to abstain from procreating."

How Effective is the Insolvency and Bankruptcy Code 2016?

Siddharth Dubey*

The paper discusses the efficiency of Insolvency and Bankruptcy Code of 2016, wherein the author has discussed the need for IBC and the objects it sought to achieve, various Institutions and Personnel under IBC, Corporate Insolvency Resolution Process provided under the code with specific time lines and Corporate Resolution plans. The efficiency of the code is analyzed in respect of CIR process, resolution plan; time bound mechanism and creditor-debtor relationship under the code when company shifts from going concern to insolvency which marks a change from debtor control to creditor control regime. The collective mechanism of the code to protect interests is worth praising and promoting interdependency and independence simultaneously. The IBBI is responsible for regulations and to keep the code dynamic.

Keywords: Financial Creditors, Operational Creditors, Resolution/Insolvency Professional, Corporate Debtor/Debtor, Committee of Creditors, Corporate Insolvency Resolution Process, Resolution Plan, National Company Law Tribunal, Insolvency and Bankruptcy Board of India.

Introduction

With accumulation of bad loans and rising problems of Non-Performing Assets (NPAs) especially after 2008 due to extensive lending by banks to corporates with lax lending norms, optimistic cash flows for highly leveraged companies with low profit margins, New Delhi in 2016 sought to root out this practice, and extricate about Rs 10 lakh crore stuck in debt in industries as diverse as steel, cement, infrastructure financing, housing and jewellery. In its scope, therefore, the Insolvency and Bankruptcy Code (IBC) was not only the most well-intentioned, but also ambitious piece of economic legislation in the country.[1] Insolvency is a state of financial distress in which someone is unable to pay their bills. It can lead to insolvency proceedings, in which legal action will be taken against the insolvent entity & assets may be liquidated to pay off outstanding debts if resolution exceeds prescribed time period and proves to be futile. The Code is aimed at addressing the concerns of both domestic and foreign creditors by creating a level playing field, and ensuring greater certainty around the bankruptcy process. IBC applies to matters pertaining to insolvency, liquidation or bankruptcy in respect of companies and other body corporates. The main aim of the code is to resolve insolvency proceedings in a time bound manner for maximization of value of assets, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders, and to establish an Insolvency and Bankruptcy Board of India, which has the overall responsibility to educate, effectively implement and operationalize the Bankruptcy Code.

Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016 is the talk of the town and most incipient issue in the history of the bankruptcy in India. This makes us reminisce the already faded aura of the legal regime governing insolvency prior to the enactment of the Insolvency and the Bankruptcy code. There has been a reservoir of laws on insolvency prior to the IBC that came and went, and which apparently failed to resolve the complex bankruptcy issues. The Non-performing asset crisis surmounted, however no one-stop solution emerged. From Sick Industrial Companies (Special provisions), Act, 1985 to The Provincial Insolvency Act, 1920, The Presidency Towns Insolvency Act, 1909, The Code of Civil Procedure, 1908, and the SARFAESI Act, 2002 the journey has been quick and full of potholes that effusively started, however later failed to stick to the very purpose for which they were established. It was clearly stated in *M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr*[2] that the Code prevails over every other law in case of any in consistency between the two. The efficiency of any code lies in fulfillment of the underlying objectives of the designed code, its effectiveness in addressing problems and serving solutions suiting the circumstances of the case.

Institutions And Personels Under The Code

The institutions established under the code and key personnel involved in the Corporate Resolution Insolvency Process are distinguished and unique that work as collective mechanism under the code and plays a major role in effective expedition of process of insolvency, restructuring or liquidation.

*Research Scholar, Dr. ShakuntalaMisra National Rehabilitation University, Lucknow, UP

[1] Joel Rebello, Atmadip Ray, With IBC about to be 3, a look at the hits & misses and the road ahead, The Economic Times, April 24, 2019.

[2] M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr (2018) 1 SCC 407

Simply put, Sec 7, 8 and 9 allows Financial and Operational Creditor separately to file Application for insolvency, and the same shall be admitted by the authority after satisfaction upon information by the Information Utility as to debt and default. The Court in *Akshay Jhunjhunwala and Anr.v. Union of India*[3] held that the difference in Financial creditors and Secured creditors is an intelligible differentia having reasonable nexus with the object sought as a prerequisite of Art 14. The difference between the both is marked by the type of debt owed to such creditor i.e. Financial Debt to Financial Creditor and Operational Debt to Operational Creditors. The Financial Creditors are secured creditors who lend money on working capital or term loan, they pool the money thereby have the ability to decide on matters of insolvency having powers of restructuring loans and business reorganization of debtor whereas Operational Creditors are unsecured creditors who are indulged in payments relating to goods and services and payments to workers and dispute in respect of Operational Creditors' application under sec 8 shall be relatable only to *the existence of the amount of the debt, quality of good or service or breach of a representation or warranty*[4] hence are not able to decide on insolvency and do not possess such power of restructuring and reorganization[5]. Consequently, priority accorded to financial debt of secured creditor under sec 53 was justified upon the justified differences.

Insolvency Utilities, are the assessment units who inspect the financial position of debtor, properties of debtor, related party of debtor, transactions entered, debts due whether as financial or secured, and give overall account of Debtor's management of the entity and majorly the default on the part of debtor. The authentication and verification of their 'inability to pay' and information from the default debtor, is to be done and must be effectively communicated to parties. But such information is conclusive only when it is made by the utility registered under and governed by the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations,2017. To avoid collusion and maintain transparency, Private Utilities' information is not deemed to be conclusive evidence.

Resolution Professionalis *'an insolvency professional appointed to conduct corporate insolvency resolution process and includes an interim resolution professional*[6]. By virtue of Sec 23 they are tasked to chalk out the efficient resolution plan in consonance with the code that works well both with debtor and creditors, verification of claims by updated books of accounts and prepare information memorandum with the aid of officers. The Professional must maintain integrity and avoid undue influence, coercion and conflict of interests amongst claimants. They assume the powers of Board as soon as the Application is admitted as Insolvency is deemed to commence from such date. Though the board is under a duty to assist RP, and also he may work in collaboration with COC to gather support, yet his decision making process must be independent.

Committee of Creditors (COC) is an association of creditors who owns debt against the debtor. The committee shall only consist of financial creditors as pointed by Bankruptcy Law Review Committee for they can be willing to postpone their payments in comparison to Operational Creditors, who are only notified of the meeting if their dues amount to 10% of debts but then too they do not have voting rights while Jhunjhunwala case has justified the difference between the two, yet the need is to exclude and include them under COC must be on case to case basis and not as a general rule. COC approve the plan with 66% voting and may even disapprove it, after which liquidation commences. It takes or causes a haircut of any amount to all or any stakeholders required for rescuing the company. COC is also empowered to choose RP or replace the existing one.

Insolvency and Bankruptcy Board of India constituted under IBC is a central regulatory body entrusted to administer insolvency ecosystem of the country which enacts rules as well enforce them to resolve the corporate insolvency, liquidation, individual insolvency and individual bankruptcy as per Insolvency and Bankruptcy Code, 2016. It regulates eligibility criteria of Insolvency Professionals to grant them license to discharge their functions effectively and in accordance to code and governing rules. It is obligated to promote growth, competition, innovation and research and development in the field of insolvency. It also acts as a vigilant authority which time to time checks the efficiency of the code and ensures it doesn't lags behind in meeting the requirements by amending the code time to time. As regards the functions of IBBI, the BLRC recommended four strands of activities viz., malleability in the operations- to be achieved through a formal regulation making process, performing legislative, executive and quasi-judicialfunctions visà-vis the two regulated entities of information utilities and also insolvency professionals and agencies, and maintenance and public release of granular data about the working of all thein solvency and bankruptcy transactions.

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[3] Akshay Jhunjhunwala and Anr.v.Union of India, W. P. No. 672 of 2017

[4] Mobilox Innovations Private Ltd. V. Kirusa Software Pvt Ltd. 2018 1 SCC 353

[5] Vidhi Centre for Legal Studies, Provision for Mutual Settlement after the Admission of a Case under the Code Understanding Insolvency and Bankruptcy Code,2016, (June 19, 2020,07:41PM)

[6] Sec 27(5), Insolvency and Bankruptcy Code, 2016

The Adjudicating Authority (AA)i.e. National Company Law Tribunal (NCLT), the National Company Law Appellate Tribunal (NCLAT) who have a limited jurisdiction and exercise jurisdiction under sec 60(5) without compromising Sec 30and the Supreme Court (SC) have played a key role in effective implementation of the Code and resolve grey areas of the code.

The efficiency of a code lies in effectiveness of process it opted resolving in a time bound manner, yielding better results justifying its inception and protection of rights and interests of stake holders; playing a pivotal role in steering fiscal discipline and preserving confidence in the markets by techniques of good governance. The author has majorly discussed about the efficiency of code in respect of CIR Process, Time bound mechanism under the code, efficient resolution plans and creditor debtor relationship.

Efficiency Of Code In Terms Of Corporate Insolvency Resolution Process

Section 255 of the Code has effectively omitted the application of the insolvency procedure under the 2013 Act and replaced it with Sections 7 to 9 of the Insolvency Code, being initiation of Corporate Insolvency Resolution Process by financial and operational creditors.

Talking broadly, about the Corporate Insolvency Resolution Process (CIRP), an application to the Adjudication Authority for initiation of Corporate Insolvency Resolution Process can be made only when there is an occurrence of "default" in payment of debt by a corporate debtor. The Code creates a deeming fiction such that a corporate debtor which defaults in payment shall be considered insolvent for the purpose of the Code. The legal effect of such deeming provision is that the treatment of 'inability to pay' and 'failure to pay' is alike. This a hallmark difference from the erstwhile regime wherein 'inability to pay debts' stood for commercial insolvency. Sec 6 empowers corporate debtors, operational and financial creditors to initiate the process of insolvency by an application. Once, the application for adjudication of Insolvency is admitted by the authority if the application is in compliance to Sec 8 and 9, the powers of board of directors who run the company shall stand suspended. During the corporate insolvency resolution process period, the management of the operations of the corporate debtor is vested with IP, in consultation with the committee of creditors aimed at revival of the company. The resolution plan is to bedrafted by the IPs within 180 days (extension of 90 days if needed) after receiving financial information of debtor's from Information Utilities, which is to be approved by the Committee of Creditors (COC) according to which debtor's assets will be hands of IP as application can only be withdrawn if debtors satisfy the claims of creditors, held by the Court in *Mother Pride Dairy India Pvt. Ltd. v. Portrait Advertising & Marketing Pvt. Ltd*[7]. The option to withdraw application by the applicant has encouraged voluntary settlements between debtor and creditor at the earliest possible because of the fear in the minds of debtors of losing the company because of shift in powers of management in the otherwise the claims of creditors are to be satisfied once the application is admitted.

As soon as the process is triggered, a paradigm shift is made from debtor control to creditor control regime. The Board shall stand suspended and the power to manage the company rests with Insolvency professional where the Board is obligated to extend cooperation and assistance to IP in respect of information possessed by him relating to Debtor entity. Due to this shifting, fraudulent removal of assets and concealing documents, falsification of books and insider trading like undervaluing transactions by way of gift or transfers to gain benefits or indulge in preferential transactions to creditors to give them undue advantage over another could be traced and minimized effectively. If the insolvency professionals propose to raise interim finance before the formation of the creditor committee, approval of the existing secured creditors would be required while any interim finance raised upto a prescribed threshold after the formation of creditor committee requires the prior approval of the creditor committee. Where by majority, the resolution plan has been approved, the distribution of assets as per the plan will be done and where no such approval is given, the NCLT may pass an order declaring the entity insolvent and notifying the period within which the liquidation will be deemed to have commenced and the distribution of assets in case of liquidation will follow the priority order of Sec 53, with highest preference to workmen's dues and secured creditors followed by unsecured creditors and with least priority to Central and State Governments followed by preferential and equity shareholders manifesting creditor centric approach and gaining the confidence of lending institutions so that there is no scarcity of credit because of NPAs and less recoveries.

The moratorium period under Sec 14 implies declaration by order prohibiting initiation of suit, continuation of pending proceedings and execution of order, judgment and decree against corporate debtor and prohibits debtor to transfer, or alienate assets, rights or beneficial interests, prohibits foreclosure, recovery or enforcement of any security created by debtor in respect of property or any recovery of property by owner or lessor which is occupied by debtor and had allowed Central Govt. to grant exemption to certain transactions from such moratorium.

[7] Mother Pride Dairy India Pvt. Ltd. v. Portrait Advertising & Marketing Pvt. Ltd, [2017] ibclaw.in 05 SC

This is implemented in the code because the code recognizes certain transactions to be completed as essential to the overall interconnected financial system and to avoid the risk of falling of all as a result of one. However, this has a negative impact too as it accords preference to transactions and creditors whose transactions are covered under Sec 14 over other transactions and creditors falling out of Sec 14.

The Court in *Swiss Ribbons Pvt. Ltd. V. Union of India*[8] stated that, step by step process under the Code bifurcates and separates the interests of the firm from that of its promoters / management with a primary focus to ensure revival and continuation of the firm by protecting it from its own management and from a death by liquidation. Therefore, the major object of promoting entrepreneurship is always in the minds of key decision makers under the code to protect the life of a company and making it a going concern while at the same time giving them the right to exit to protect the company from always ending up with a loss in battlefields and creating risks for institutions by their working below optimal level of efficiency with their unsustainable business. The process comes to an end after approval of plan by COC and distribution of assets as per the plan within a stipulated period of time. So, far if a comparative analysis is done with prior regimes the code and the process stands on a better footing as to effective disposal of cases as complexities in process ended with advent of IBC.

Efficiency Of Resolution Plan

The first resolution plan returned 6% claims of creditors the reform was highly condemned on the ground of inefficiency and the grim realities of the existing laws was forget as hopes were high from the code which is specifically designed to get out of situations in which previous laws were a major failure. Since then, the constant urge to come out as a single major fruitful reform, the code has undergone several storms and tried to stand hard against them. The success of the code was celebrated when the resolution plans have yielded about 188 per cent of liquidation value for FCs[9]. They are realising on an average 43 per cent of their claims through resolutions plans under a process which takes on average 340 days and entails a cost on average of 0.5 per cent, a far cry from the previous regime which yielded a recovery of 25 per cent for creditors through a process which took more than 5 years and entailed a cost of 9 per cent. Although, since its inception, liquidation of companies is estimated to 34% which is more than the restructuring percentage and one can think that the object of promoting entrepreneurship is being defeated by the code. But such a thought must be scrapped as one must bear in mind the pending matters before the previous authorities who proved incapable to dispose of majorly because of hefty laws with no one stop mechanism. It can also be noted that debt recovery rate was 26 percent only after prolonged proceedings which is 46% after IBC and that too in a time frame of 270 days. Though a haircut can be perceived in recovery process under the code, yet this can't be used to discourage the code if a comparative analysis from previous regimes is done and are majorly of defunct entities facing huge reduction in value of assets. The gap between original code and insertion of sec 29A led to massive haircuts for Financial Creditors and the defaulters were gaining benefits and value of assets minimized. This is where the urgency was felt to remove certain persons not having credible track record from submitting resolution plans adversely impacting the credibility under the code and reducing haircuts with retrospective operations extending applicability over pending matters.

Once the pending cases are done away, it would be easy to trace the real picture and data in respect of IBC, and fecund the implication of desirable or useful results because of one door solution and effective and unambiguous provisions of code. The resolution plans have yielded about 200% of the liquidation value. It also maximises value through sale of the company or its business as a going concern, even after the liquidation process has commenced. These provisions endeavor to maximise the value of the company.

Efficiency Of Code In Terms Of Time Bound Mechanism In Cirp

The main aim of the code is a time bound process of insolvency or restructuring of companies to be completed within the period of 180 days and can be extended once to ninety days. Hence the overall process was to be done away within the period of 270 days. The time period for admission of application by NCLT is 14 days and it can resend the application for rectifying defects within 7 days time period. With the passage of time, some cases emerged wherein extension of time period was demanded but was considered ultravires and also against the basic object of time bound mechanism. So, the Supreme Court in *JK Jute Mills Company Ltd. v. M/s Surendra Trading Company*[10], considered both these periods as a mere directory one and where upon urgency of a case demands extension of such time period, it may be extended to more than 14 or 7 days as the case maybe. As per Sec 33, after the expiry of 180 days (or 270 days as the case may be), in

[8] Swiss Ribbons Pvt. Ltd. V. Union of India, [2019] ibclaw.in 03 SC

[9] Quarterly Newsletter of the IBBI-, April-June, 2019, Vol. 11

[10] JK Jute Mills Company Ltd. v. M/s Surendra TradingCompany[2017] ibclaw.in 08 SC

the event a resolution plan has not been submitted, or if submitted, and rejected under section 31 of the Code or even after the dismissal of an appeal filed under section 61 contesting rejection of a plan, the Code directs that the debtor initiate a liquidation process. The position was further clarified by the Supreme Court in *Arcelor Mittal India Pvt Ltd v. Satish Kumar Gupta*[11], stating the outer limit of 270 days as mandatory in nature and not a directory one as in case of internal time periods. The Court held that the internal time periods can be extended from that prescribed on a case to case basis, however due to such extensions the outer limit can't be extended. The whole process was to be mandatorily wrapped up in 270 days but exclusion was granted in the time taken by litigation or legal proceedings.

Further, illustrative lists was rolled out which excludes certain situations and time period to not be calculated within 270 days. There are unforeseen circumstances like current COVID- 19 or as determined in *Quinn Logistics v. Mack Soft Tech*[12], if the adjudication is stayed by Court or Authorities or upon non-functioning of Resolution Professional, period between order of admission and actual taking of charge by RP, period between reserving the order and actual passing of it, the time period of setting aside or reversal of CIRP to when it is restored. Apart from the list no time period could be excluded out of 270 days. Though the list rolled out is beyond the objective of the code yet, it points specific situations only and only in which such exclusion is allowed. Somehow, these circumstances provide exact time period which needs to be excluded from the computation of 270 days but legal proceedings was highly an uncertain ground as to the time period which might defeat the objects of the code because of the proceedings in our country are tedious and prolonged. To meet out the open ended exclusions in Quinn's case and litigations' time period confusion, the proviso was added in sec 12 which prescribed 330 days as the outer limit including any extension granted and time taken in legal proceedings[13] thereby protecting the ends of code for which it was designed, otherwise, the day was not far when these exemptions were to be used as tool or weapon to screen CIRP and it could have led to extended time periods as was the case under other laws and with asset reconstruction companies previously due to which need of the code emerged.

Creditor Debtor Relationship Under The Code

The efficiency of code in terms of simultaneous creditors' rights and debtor's duties is the major concern of a sound relationship between the two. Under the Insolvency and Bankruptcy code, the rights of creditors are more secured because the interests of the creditors started from when the *'company was insolvent, or even doubtfully solvent'* as pronounced by the Court in *Brady v. Brady*[14]. Also, *in India*, it was recognized in N.Babu Janardhanam v. Official Liquidator, Golden Firms (P) Ltd[15] that a company owes duty towards the creditors specifically emphasized in situation where a company is in the state of liquidation or is in the case of insolvency. Principle of 'alter ego' was propounded in Sunil Bharti Mittal vs. Central Bureau of Investigation[16] wherein it was stated - a company acts through persons in charge of its affairs and the intent of such person is the *mens rea* in an offence by the company. While the board of directors run and manage the affairs of a company, they are under a duty to know by all means if there is a reasonable prospect of insolvency and exercise due diligence in minimising the potential loss to the creditors of the corporate debtor putting the creditors at a safe end during twilight period which may be two years preceding from the date of commencement of in solvency in case of a related party, or one year preceding from the date of commencement of insolvency in any other case failing which the Adjudicating Authority on application of Resolution Professional order the directors to make such contribution to the assets of debtor as it may deem fit which makes the creditor centric approach more prominent under the code. However, it is deemed that director must have acted diligently as a reasonable man in respect of affairs of corporate debtor[17].

These duties can be considered an additional or shift in duties of directors from that given under Company's Act when company is a going concern. US court well explained that when a company is operating on theverge of insolvency, the board of directors owes its duty to the creditors, who in essence, become the residue risk bearers in the company. *The Court in Credit Lyonnais Bank Nederland, N.V v. Pathe Communications*, goes on to clarify that when the company is solvent, it is the shareholders who are the residue risk bearers, and hence the primary stakeholders in the company[18]. However, once the company is insolvent, or facing insolvency, it is the

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11 Arcelor Mittal India Pvt Ltd v. Satish Kumar Gupta [Civil Appeal Nos. 9402-9405 of 2018].

12 Quinn Logistics v. Mack Soft Tech [2018] ibclaw.in 09 NCLAT

13 Ins. by Act No. 26 of 2019, sec. 4 (w.e.f. 16-8-2019).

14 Bradyv. Brady 2 All ER 617 (1988, House of Lords).

15 N.Babu Janardhanam v. Official Liquidator, Golden Firms (P) Ltd (1993) IMLJ 10

16 Sunil Bharti Mittal vs. Central Bureau of Investigation (2015) 4 SCC 609

17 Sec 66(2), Insolvency and bankruptcy Code, 2016

18 Credit Lyonnais BankNederland, N.V v. Pathe Communications Corp, 1991 WL 277613,

creditors who become the primary risk bearers, and hence their interests cannot be ignored. In that respect, section 3(24) of the Code is a remarkable provision which includes the directors and relatives of directors under the definition of 'related party' in relation to a corporate debtor and this inclusion gave sleepless nights to directors making them more responsible towards the company and its affairs to avoid the insolvency. Debtors are not allowed to undervalue transactions like gift or transferring assets to another at significantly less consideration than valued by the debtor and Adjudicating Authority is empowered to make the transaction void and restore the position to avoid prejudice. Punishments for willful and material omissions from statements relating to affairs of corporate debtor, false representations to creditors, contravention of moratorium period, furnishing false information, non-disclosure of dispute or payment of debt by operational creditor are also separately penalized acts of directors under sections 72,73,74,75,76 of the code.

These provisions of IBC of protecting the interests of creditors and other stakeholders during insolvency and at pre insolvency stage by entailing personal liability against the one who caused company to land in a situation like this makes it worth appreciating.

The COC are also under a duty to sense the signs of distress and initiate the process of insolvency against the default debtor and under the code they are not privileged to form the core or sub-committee to delegate its power to approve the plan or tweak with the role of Resolution Applicant and decide distribution of amount amongst the stakeholders causing conflict of interest even when as a COC they are interested party[19]. The Code and the Courts are vigilant towards the defaulter as well as the interested party in not crossing the benchmark of rights accorded to them by the code and has clearly circumscribed the outer limits of the parties by chalking out the rights and duties. While the Code under sec 43 prohibits the debtor to make any preferential transactions in favor of the creditors putting the creditor in a beneficial position than it would have been by distribution of assets under the approved plan. Private and secret recourses by creditors and directors instead of a proper plan are curbed under the code to avoid unfair practices and transactions which results in the conflict of interest among the left out parties hence ensuring transparency.

While the companies who were created for perpetual succession are facing distress some because of less availability of credit from institutions because of dwindling confidence of creditors on account of non-willingness of debtors to pay and sometimes their inability to pay to its stakeholders. Due to this the companies are pushed to insolvency and liquidation and eventually face a death. Few Companies like Kotak after undergoing insolvency, had made a major comeback, making huge profits again and winning the confidence of lending institutions and creditors. Yet the attention is to be drawn towards the declining age of companies, the directors who are in a hurry to file insolvency proceedings to get rid of their liabilities are not so diligent to put in efforts to make the company a going concern with their skills and competence rather they find it easy to leave it in a state of gradual slipping towards insolvency when company could have been easily saved from the jeopardy of insolvency. This could be noted as a masked assigning of power and burden on the Adjudicating Authorities to evade from the duties and liabilities entrusted under the code which in turn results in the untimely delay and prolonged proceedings thereby defeating the approach and objects of the code.

Conclusion And Suggestions

The Insolvency and Bankruptcy Code 2016 is a milestone in insolvency regime which has come up as a saviour for the companies whose life expectancy has fallen to minimum in recent years. The cash influx has been resisted by the lending institutions because of growth of NPAs which caused disruptions in business activities of institutions and as aresult of lack of confidence upon entities, lending activities were reduced or given at a higher rate of interest which in turn halted business of companies.

The IB Code is focussed on restructuring of companies, or liquidation in case the company is unable to pay its debts. The better resolution plan approved by COC works well in management and distribution of assets. If the said plan is not so approved by 66% voting, the company proceeds towards liquidation and proceeds are distributed as per sec 53 of the code with priority to financial creditors in comparison to Operational Creditors and last priority to Central and state Governments in respect of their claims. Generally all laws prioritize the claims of Govt. but this code is creditor centric to meet the ends of primary risk bearers by prioritizing their claims.

The IBBI, central regulating and supervising authority keeps the code contemporary with the changing circumstances via proper amendments in the code and not let the paradise of effective insolvency ecosystem slip out of its hands. The code demands effective adjudication and implementation via NCLT, NCLAT, and Supreme Courts which have somehow acted as a guiding force for IBBI to make reforms by interpreting the code as it is and filling the gaps where code has not properly gripped in case of unforeseen conditions.

The code has the most effective outcomes if one seeks comparison from the previous set of laws covering

[19] Supra; 11

insolvency as there is timely debt recovery with greater efficiency, low costs and less haircuts. Yet, it shouldn't be forgotten that since this code is the major reform after GST, effectiveness is to be analysed internally with the code itself rather than only comparatively. The collective mechanism of the code to act in close association of each other and their mutual interdependency on one another together with independence avoids complex situations and provide one gateway solution which is the need of the hour. The CIR process under the code is a specified timely and effective process to rejuvenate the lamented entity. If there is proper and timely disposal of a matter by competent Professionals and adjudicating authority with minimum haircut, such a process is deemed efficient which marks it beginning from perceiving signs of insolvency or distress at an early stage, and, it ends with proper reconstruction of company, distribution of assets or liquidation.

The process could be made more efficient if it always tries to strive to keep balancing the interests of debtors and creditors and do not let defaulters take any kind of advantage under the code. Further, it can be pointed out under specific reports that liquidation as a result of insolvency is over weighing restructuring. In 2019, the number of liquidation of entities through CIRP rose to 780. Though, the report also includes percentage of liquidation in respect of pending cases before the code came into picture, yet the efforts are to be made to restructure the company and promote entrepreneurship rather than finalising death of company by liquidation. The haircut over value of assets is comparatively good in respect of defunct entities and scrapped assets but this is to be minimized to achieve greater returns and in future prospect increasing lending activities by creditors. The credit influx will promote a company to continue its business and protect the companies facing untimely wiping off and reduce the number of voluntary winding up which was 579 in 2019.

Further under the code, section 32A was inserted which ceases the liability of Corporate Debtor for an offence committed prior to commencement insolvency, if the approved resolution plan results in change in management and control in the hands of promoter who was not a related party or in the hands of person who has been adjudged as not a party to the offence whether by abetment, conspiracy and commission. Such steps must be welcomed as they ensure that the company remain a going concern even after a default and simultaneously change in the management and control of person would also keep intact the creditor's trust and confidence in the company and it could be saved from liquidation.

Now that the code has completed 3 plus years, effectiveness of a code will come into question as pending matters must have been resolved till now. And as the reports suggests there are still pending cases which are not taken up by NCLT for resolution. Those pending and the recent cases must be resolved speedily and effectively for which there is a greater need to improve the structure by enhancing the prevailing number by infusing skilled and more competent Professionals in IP agencies and Judges in NCLT and NCLAT so that the assurance of PM Modi and Finance Minister as to the return of nearly Rs. 3 lakh crore into the system and increase our rank in ease of doing business and with real time changes come up to international standards.

References

PRIMARY SOURCES

Legislations:

? Indian Companies Act,1956

? Indian Companies Act, 2013

? Sick Industrial Companies (Special Provisions) Act, 1985 [SICA]

? Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) Act, 2002

? Insolvency and Bankruptcy Code, 2016

Reports

- Ernst & Young Report – Interpreting the Code,2017
- VIDHI Law Centre - Understanding The Insolvency and Bankruptcy code: Analyzing developments in Jurisprudence.
- Insolvency and Bankruptcy Board of India- IBC: A Miscellany of Perspectives

SECONDARY SOURCES

Article

- Chelladurai C., A Bird's View of Insolvency and Bankruptcy Code, 2016
- Sakate Khaitan, Satyendra Shrivastava and Jyoti Krishnan, Insolvency and directors' duties in India: Overview

E-Resources

- www.researchgate.net
- www.ibbi.gov.in

Newspaper

The Economic Times

The Hindu

Book Review

World Trade Law: Text, Materials and Commentary (Third Edition), Simon Lester, Bryan Mercurio&Arwel Davies

Dr. Rinu Saraswat*

World Trade Law: Text, Materials and Commentary (Third Edition), Simon Lester, Bryan Mercurio & Arwel Davies, Published by Hart Publishing, Bloomsbury Publishing Plc, Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK.

The publisher's note makes it amply clear that they have used many sources for their publication.

The book can be said to be one of the rare book on the subject. It contains text in the form of law relevant material and commentary.

In part one, the author has dealt with the legal and economic aspects of world trade regulations. The author emphasized that why world trade regulations are required and pleaded for free trade and development.

In part two, the author has discussed institutional aspects and the relationship between world trade law, international law and domestic law. The author has discussed multilateral trading system like GATT, WTO, etc.

In part third, the author has provided the wage and means for settlement of disputes in the GATT/WTO. The author has also discussed the important procedure and systematic issues.

In Part four, the author explained in details traditional GATT obligations, MFN and National treatment principle in detail along with the FAQs on the subject.

In part five, the author has discussed bilateral/regional trade agreements along with general exceptions relating to health, the environment, and compliance measures as per Article XX 20. This aspect has been dealt with suitable examples.

In part six, the author has discussed the remedies available for fair and unfair trade. He has dwelt upon subsidies and counter veiling measures, dumping and anti dumping measures. And the safe guards provided for this.

In part seven, the author has discussed beyond trade in goods like domestics regulations, services , investment, procurement and intellectual property. Under this head, the author has discussed the SPS and TBT agreement, trade in services, trade and investments, TRIPS agreement and procurement by government.

In part eighth the author has explained in details the social policy issues relating to the World Trade. The author has explained the status of developing countries in the multilateral trading system and the difficult being faced by them. He has also explored linkages between trade and social policies like environment, culture , labor standards, human rights and health and safety.

I am of the view that the material and commentary put forth by the author will facilitate that government who are either under developed or developing countries. The language used in the commentary is very effective enabling and understandable by the readers. This facilitates them to take practical benefit out of the material.

*Assistant Professor of Law Jagannath University, Jaipur

Book Review

Introduction to the Constitution of India (24th Edition) by D.D Basu published by Lexis Nexis, Chennai

Mr. Nikunj Singh Yadav*

"Introduction to the Constitutionof India" by Dr. Durga Das Basuis a fantastic book on the subject of Indian Constitution and presents a wonderful commentary on the same. It deals with everything and nothing substantial is left out. The language is simply beautiful which is least expected from an Indian academic author at university level. Indian constitution is the largest written constitution of the world and it is difficult to read and understand everything. However, Dr. Basu has written this masterpiece to make things easy for us. A person from any field, with its set of examples makes it easier to understand the Constitution.

It presents the Indian Constitution in a pleasant way and defines it philosophy in such a manner that you feel proud of it being an Indian. However, at points where you feel Indian Constitution lacks something, the author is also critical of the same or explains why that is the case and you again start feeling that it is fine.After so much of trouble that the country faced in the recent years - Black Money case, Citizenship Amendment Act, Abrogation of Article 370 & 35A, which had lead me to feel devastated and having lost my faith in the system and the law of the land, this book comes as a refresher and bring back the hope that Indian Constitution will act as a check on the government and other persons and will make everything better by asserting itself.

Fundamental Rights and Directive Principles have been explained in much detail with the help of its history, amendments, working and several landmark judgements of the Supreme Court. I liked the last chapter of this book how Constitution has worked most where author has put his view on many sensitive issues of the constitution such as on large number of amendments, Bangladeshi infiltrators, demands of minority groups and vision of the Constitution. It has a very good interpretation of the Constitution by Scholarly and impartial academician. Though it is an Herculean task to interpret each and every article and provisions of the Constitution, the book does it in a neat and concise manner. What's more astonishing about the book is that unlike many other academic books which just get the things done through mere facts, this book has done a fair job in interpreting various judgements and correlating them to the aforementioned provisions in the book.It is a very apt guide to Indian Constitution with crisp interpretations. The author has even provided some raw texts from the original Constitution document to make things more clear and transparent in analysis.

This book is the epitome of the sovereignty of India. It provides a glimpse of what a free man in free India can do and should do. One of the most simple and fast way to understand the fundamentals of the Indian Constitution, specially for the new-learners. It is the best source to understand exactly what the framers of the country wanted India to look like. Given the details, the book holds as compared to the other books available in the same subject, I would consider it best. This book by Dr Basu, introduces the Constitution and its strengths and vulnerabilities. It tells you about the differences and the similarities that the Indian Constitution shares with that of the American, British, Australian, Canadian, Russian and Irish Constitutions. It also introduces you to the basic structure of parliamentary democracy, federalism, judicial system, Union and State legislatures and public service commissions.

The book also clearly states the vulnerability that the Indian Constitution faces. The numerous amendments carried out easily by each successive government after 1950 validates author's concern. The importance of the Constitution is also implied by the numerous interpretations and the referrals to it by the Judiciary from time to time. The book is good for understanding the power Constitution wields over the nation and its people, but what dissatisfied me a little was just the perfunctory references provided while explaining the content. It would have been more prudent to include a brief description of all the cases in an appended case-story section.This is a good text to understand the most important document but it would be better if it could specify few things more and could elaborate on the parts that need a little more explanation. For Example:

* Assistant Professor, School of Law, IMS Unison University, Dehradun

elaboration on why the Assembly chose the parliamentary form of government and not the presidential system of government or on fundamental rights etc.Notwithstanding, these issues (which I feel should be addressed), it is still a great text to understand the foundation of Indian Polity.

Dr. Basu comes across as a passionate writer. While most other writers of consequence on Indian Constitution are dull and drab, the inherent strength of this book is the energy that the author has put in to defend the cherished ideals of the Constitution. But also, when the judiciary and executive have been on a collision course again (like on NJAC), the book is not updated regularly and will lose its esteemed place unless some scholar updates it.

I had read couple of books on the Constitution, namely V.N Shukla and J.N Pandey, before stumbling upon this masterpiece. Dr. Basu's book is by far the best work on Constitution I've come across.Dr. Basu has done a remarkable job of presenting the Constitution of India in a lucid manner, without compromising on the nuances of various legal interpretations. The language is simple, and content pretty much exhaustive.I'd recommend the readers to supplement it with some bare act and refer it whenever in doubt. This strategy will go a long way in making someone not with a law background to understand the constitution.

If you need a trustable book to learn various provisions of the Indian Constitution, go for 'Introduction to the Constitution of India' by D. D. Basu. You might need more than one reading to grasp the subject, but it would be worth the effort. Basu's place in the world of law as an eminent jurist is unique, and that makes learning from his masterpiece special.

It is necessary read for everyone. Whether you are a lawyer or not does not matter. It should be read by every citizen of the country to know the Constitution which is the basis of the laws of the land.

Book Review

"LEGAL WRITING STYLE" Third Edition, 2018 , Author Antonio Gidi Teaching Professor of Law Syracuse University College of Law and Henry Weihofen Late Professor of Law University of New Mexico School of Law, Hornbook Series,

Prof. (Dr.) R. N. Sharma*

The Book Titled "LEGAL WRITING STYLE"ThirdEdition, 2018 , Author Antonio Gidi Teaching Professor of Law Syracuse University College of Law and Henry Weihofen Late Professor of Law University of New Mexico School of Law, Hornbook Series, published by West Academic Publishing Co. 444 Cedar Street, Suite 700 St. Paul, MN55101 1-877-888-1330. Printed in the United States of America with ISBN: 978-1-63459-296-3 The book has nine chapters having total 257 pages

It has rightly been said that language is the principal tool of the law professionals like Judges, lawyers and legislators. Similarly Writing skills are essential to get success for the legal profession. That's why good writing skills a legal practitioner should have in its toolbox. As legal professional has the duty to convince the client and audience it should have its own specific rules and structure that need to be followed.

A lawyer should use every word in such a manner that the reader and audience can understand the message which he wants to convey. He should omit extraneous words, complex sentences, and should use those words which make their document more powerful, dynamic, and vivid. Good legal writing should have accuracy, brevity, clarity and affirmativity as negative statements lack force and can be confusing and ambiguous.

To write effectively is not going to work unless one communicate the writing effectively. Therefore, communication skills are considered even more important for lawyers than for other professionals.

The lawyers should develop the art of writing documents with facts and facts only. One should use plain language. In legal writing one should avoid adverbs and passive voice as these make the writing more complicated and lengthy, ultimately resulting in lack of clarity.

After writing the document the author should summarize it by way of reading again and again and by editing again and again. This process enables the author to correct spellings, punctuations or grammatical errors which can undermine the author's credibility as a legal expert or professional.

The author of the book under review has discussed all the above tools of legal writing. These tools have been discussed one by one in nine chapters.

In chapter I "Introduction" the author has stated that lawyers, however, are verbal creatures—words are their primary tools. For them knowing the right answer is not enough; they must explain their reasoning and persuade another lawyer, a judge, a jury, a client. Knowing and communicating are two different skills—a writer must bridge the gap between mind and paper through language.

According to him language, the greatest of humanity's inventions, is the only means we have for communicating ideas.

Writing is a skill acquired only with practice. It is practice, that improves writing style. You learn by doing, not by reading advice on how to do it. According to him style and substance are inseparable: style is the sculpture; substance, the clay.

The style should reflect the subject matter, the document's purpose, and the mood the writer wants to evoke in the reader. A lawyer might need to narrate facts, expound upon a legal principle, or argue a position.

His emphasis is on the fact that if the judge reading your brief is impressed solely with how well you write, you have defeated yourself—make the judge feel that your client has a good case, not a good writer. Rigorous writing is excellent training in rigorous thinking. "Thought and speech are inseparable from each other." According to him language and thought—style and substance—are so closely inter connected that it is impossible to dissociate one from the other, as it is impossible to dissociate an author from his or her style.

In second chapter "Precision"he has discussed what role can be played by preciseness .According to him the lawyer must write more precisely than almost any one else as their work is to be read in good faith, and with an honest desire

*Professor & Dean, School of Law, IMS Unison University, Dehradun

to understand what was intended. There fore, they must take pains to say precisely what they mean—no more and no less—not only so that a person reading in good faith can understand, but also so that a person reading in bad faith cannot misunderstand.

In chapter three "Conciseness"he stressed upon the fact that if the first aim in writing is to communicate with accuracy, the second is to do it with dispatch. Conciseness is particularly important for lawyers, who, more than most writers, must say exactly what they mean, no more and no less. One should understand that every additional word is one more potential source of ambiguity, error, or conflict.

According to him "The aim of legal writing "must be to convey the greatest quantity of thoughts with the smallest quantity of words.""Everywordthatcanbespared must be spared,"

In chapter four "Simplicity" the author stated that the main objective in writing is to make yourself understood. Simple, everyday words are more likely to convey meaning than unusualandpretentiousones,andmorelikelytosoundsincere.Simplicity has always been held to be a mark of truth; it is also a mark of genius."

Chapter five deals with the concept of "Clarity". By quoting Lord Mansfield where he stated that "Most of the disputes in the world," "arise from words." Words are, indeed, the source of misunderstandings and emphasised that clarity is the core of language

Chapter six deals with another tool of writing "Forcefulness".According to author the subject of most legal writing is complex and demands a reader's concentrated attention. But readers tire and stop paying attention. A vigorous style is particularly important for lawyers, who need to make the impact on the reader strong and indelible.

Before considering how forcefulness can be attained, let's make clear how it cannot. Avoid Ineffective Techniques to Emphasize

In speaking, we can use devices to gain forcefulness that are not available in writing, such as pauses, gestures, and raising or lowering the voice.

Avoid abusing typographic techniques, such as highlighting words, phrases, even whole sentences.

Chapter seven deals with "Organization" of sentences. According to author some aspects of your writing may improve after you are in practice. Your vocabulary may increase and you may develop tactful ways to say what you mean without unnecessary bluntness. But a logical mind is the product of rigorou straining.

One should Master his Subject. As one cannot write more clearly than you think. "Thought and speech," "areinseparablefromeachother.MatterandExpressionarepartsofone:styleisathinkingoutintolanguage."

Liberate yourself from the delusion that ideas will come and fall in place if you jusstart writing. To write clearly you must have gathered your material and arranged it in some sort of order; you must also have thought through the relationship of one part to others, evaluated their relative importance, decided which one.

Chapter eight deals with yet another important tool "A Touch Of Eloquence"The author put emphasis on Precision, conciseness, simplicity, clarity, forcefulness, and organization, we discussed in previous chapters, are the essential qualities of style—for a lawyer even more than for most writers. Generally, the lawyer must avoid the more literary qualities of eloquen ceororna mentation. But occasions will arise when a lawyer will want more than cold clarity or logic, and should be able to express an idea with grace and elegance.

Chapter nine is the "Conclusion"He concludes the discussion by saying that anyone who habitually commits every error in the book is a poor prospect for the profession.

The key to good writing is rewriting. When you reread your early drafts for style, you will find intensifying adverbs you put there to add force that now sound exaggerated. You will find weak nouns qualified by one or more adjectives; if you think, or consult a thesaurus, you will find a single noun that will do the job by itself, and do it more pungently. You will find loose, unharnessed sentences that you can rearrange and tighten.

Finally, with hard work and perhaps a little luck, you succeed in erasing all the evidence of your sweat and toil.

If you succeed, you will have the gratifying feeling that the words you have used and their arrangement hit just the right note to produce the effect you want. As you reread your work, phrases, sentences, whole paragraph string pleasingly in your mind and in your ear. "This is good!" you will say, a little surprised and more than a little pleased. That is your reward: the sense of satisfaction with a job well done, the ultimate reward of any creator. This book is a unique for all those who are interested in improving their writing style. Though it will be more useful for law students, law professors, lawyers, and legal professionals, but it will also be very useful for everyone.

This book provides useful tools and techniques to improve legal writing and will help the readers in developing the technique to avoid those common vices which generally prevail in legal writing. This book will be very useful for all the writers and particularly legal professionals, lawyers, judges and law students.

Case Comment

Public Interest Foundation v Union of India, (2019) 3 SCC224

Ms. Shalini Saxena*

Background:

This is a landmark case in which the hon'ble Supreme Court of India issued guidelines and directions to curb the criminalization of Politics in India. The petition was filed by a BJP leader Ashwini Upadhyay and an NGO – Public Interest Foundation. The petition was filed to seek directions from the Apex Court of India regarding criminalization of Politics and restrictions on the criminalisation of contesting elections.

Facts:

1. There were many writ petitions filed in this case but the most important one is the one filed in 2011 to seek directions from the Apex Court of India regarding criminalization of Politics and restrictions on the criminalisation of contesting elections.
2. Earlier a three judge bench was hearing the matter but later under Art 145(3) it was referred to a Constitutional bench.
3. The main prayer was that the people against whom any charges are framed in any court of law should be debarred from contesting elections.
4. In the landmark judgment, on September 25, 2018, the Five-Judge Constitutional Bench of the Supreme Court held that candidates contesting election cannot be disqualified merely because charges have been framed against them in a criminal case. Further, the bench also urged the legislature to consider framing law to ensure decriminalization of politics.

Issues Raised:

Whether any disqualification for membership of Parliament can be laid down by the court beyond Article 102(a) to (d) and the law made by the Parliament under Article 102(e)?

Arguments Advanced:

- The petitioners suggested that the court may direct the Election Commission to restrain political parties from granting tickets to or accepting support from independent candidates with criminal antecedents. Referring to the Election Symbols (Reservation and Allotment) Order, 1968, it was also argued that the assignment of an election symbol to a recognised political party be rescinded if it is found in violation of such a mandate of the EC.
- It was also argued that the person who break law should not be allowed to become law makers as the right to contest elections is not a Fundamental Right.
- Senior Counsel Dinesh Dwivedi submitted that the presumption of innocence was misplaced, while indicating to sections 227 and 228 of the Cr. P. C., on discharge and the framing of charges respectively. While the former allows the judge to discharge the accused if, after considering the submissions of the prosecution and the records of the case, he believed that there were no sufficient grounds for proceeding, the latter envisaged the framing of the charges only when the Judge was of opinion that there was ground for presuming that the accused had committed an offence.
- The Respondents on the other hand argued that in India, the principle of Separation of Power is followed and that the Court did not have the power to make laws.
- It was also contended that Art. 142 did not give the power to the Court to add words to in the already existing laws.

Held:

The five-judge Constitution Bench held that candidates could not be disqualified merely because charges have been framed against them in a criminal case. The bench also gave directions to the legislature to consider framing law to ensure decriminalization of politics.

Directions:

- Each contesting candidate shall fill up the form as provided by the Election Commission and the form must contain all the particulars as required therein.
- It shall state, in bold letters, with regard to the criminal cases pending against the candidate.
- If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him/her.

*Assistant Professor, School of law, IMS Unison University, Dehradun

- The concerned political party shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents.
- The candidate as well as the concerned political party shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media. When we say wide publicity, we mean that the 98 same shall be done at least thrice after filing of the nomination papers.

The Bench observed that time has come that the Parliament must make law to ensure that persons facing serious criminal cases do not enter the political stream.

Significance and Analysis of the Verdict:

The Supreme Court limited itself in mandating that all candidates contesting an election having any criminal cases pending against them be accountable to their respective parties and to the public at large. The court assumed that the problem is one of an information gaps to the voters. This is either naive or a wistful hope. Although the hon'ble Supreme Court had already mandated the disclosure of criminals' antecedents in 2003, but the proportion of members of Parliament facing criminal charges and criminal charges of a serious nature, respectively, increased rapidly from 24% and 12% in 2004 to 30% and 15% in 2009 and 34% and 21% in 2014. Indeed, a candidate facing a criminal case was thrice as likely to win in these elections as one without.

The judgment is disappointing as even though the bench shares the concern about the growing criminalisation of polity, as a threat to the basic structure of the constitution, still it expresses its inability to go beyond what it did, on the ground that it is bound by the doctrine of separation of powers between the legislature and the judiciary .

S. Teja Singh vs Satya and Ors.,1971 CrLJ 399

Anand Singh*

Under Private International Law (PIL) enforcement of any foreign judgment is quite very difficult because if flexible nature of laws under PIL. Though there are specific provisions in India under CPC, 1908, which clearly says that a foreign judgment is a judgment which is passes by a court which is not located in Indian Territory. But the question is whether the provisions are sufficient or not? Or what are the possible solutions for such neediness if there is a case of PIL.

In this case commentary there is a case in which the Indian court does not accept the judgment, which is passed by a foreign court in respect of divorce in marriage between two Indians. The name of the case is *S. Teja Singh vs Satya And Ors*.

FACTS OF CASE

The proceedings arise out of a petition under Section 488, Criminal P. C., moved by the respondent-wife. Satya on the 22nd of April, 1965, claiming maintenance on behalf of herself and her two minor children against her husband Teja Singh. It was averred therein that the marriage between the parties took place according to Sikh rites on the 1st of July, 1955, in Basti Guzan at Jullundur. Two children were born of the wedlock in the year 1956 and 1958. Towards the end of the year 1958, the petitioner-husband planned to go to U. S. A. to secure a Doctorate in Forestry and accordingly left for the United States on the 23rd January, 1959. He is said to have joined the University in the State of New York and spent more than five years for obtaining higher education there and subsequently had secured employment in the States and was said to be receiving a salary of about Rs. 2,500/- per mensem. During this long period it was alleged that he had wholly refused and neglected to maintain the respondent-wife and her two children.

The petitioner in his reply whilst controverting the allegations made in the petition primarily pleaded that prior to the institution of the petition, the respondent had moved and secured a decree of divorce on the 30th of December, 1964, against the petitioner in accordance with law from the Second Judicial District Court of the State of Nevada in the United States and thus the bond of marriage stood dissolved and the petitioner was not liable to pay any maintenance to the respondent-wife. Objections regarding the jurisdiction of the Magistrate's Court at Jullundur to take cognisance of the matter were also taken and agitated but as these have not been pressed in this court. I deem it unnecessary to refer to them. The Judicial Magistrate Ist Class, Jullundur by her order dated the 17th of December, 1966, held that the court had territorial jurisdiction; the annulment of marriage can only be done under the Hindu Marriage Act, that the decree granted by the Court of the State of Nevada contravened Section 19 and 2 of the Hindu Marriage Act, and the respondent-wife not being a party to the divorce proceedings, the decree granted by the Court in the United States was not binding between the husband and the wife. Accordingly maintenance at the rate of Rs. 300/- for the respondent-wife and Rs. 100/- for each of the minor children was directed. A revision petition against the said order was also dismissed by the Additional Sessions Judge, Jullundur, who held that as the marriage between the parties had been performed in India, according to Hindu rites, the same could be annulled only according to the provisions of the Hindu Marriage Act and therefore the decree of divorce of the foreign Court was not of a binding nature between the parties.

On the basis of arguments presented by both the parties the Indian Court reverses the judgment pronounced by foreign court and allows maintenance to women.

Conclusion

Though there are specifies laws regarding the application of foreign judgment in India under section 13 and under section 44A. But still the Indian court refuse to accept the judgment pronounced by any foreign court according to above mentioned case. Here in the present case the foreign court need to understand the laws of India, as the marriage is solemnized according to the Indian laws, customs of India and the marriage is followed by the traditions of India. As the foreign court does not have that capacity to understand the India laws because they had never gone through any such type of cases. If they had any

*Assistant Professor, School of Law, IMS Unison University, Dehradun

1 Section 2(6) "foreign judgment" means the judgment of a foreign Court; Section2(5) "foreign Court" means a Court situate outside India and not established or continued by the authority of the Central Government;

2 1971 CriLJ 399.

case of similar issues then may be the court able to see the proper meaning and purpose of Indian marriage. But in the present case the court didn't analyze the meaning and purpose of Indian marriage, the foreign court failed to understand the meaning Indian marriage and pronounced divorce without any maintenance. As in country like US both the women and men posse's equal opportunity in any field whether it is marriage, education, jobs etc. But in India the position of Indian women remain down as compare to Indian men. For providing the equal opportunity for such women's the laws of India are made in such a manner that they can support women in such difficult situations which was present in this particular case. So, the District Court of the State of Nevada in the United States failed to understand the meaning and purpose of Indian laws and pronounced divorce which on later stage in India is reversed by Indian court.

If talking about rules of PIL in such type of cases, so, there is a need of unification of rules of Private International Law, which is again quite very difficulty. But if the countries want to resolve such issues in Private International Law, the countries need to go beyond their difficulty level and they need to compromise at different points. That,s the only possible solution for such type of issues in Private International law.

Our Contributors

Dr. L.S. Nigam
Former Vice-Chancellor, The ICFAI University Raipur, C.G., India

Dr. Anand Kumar Tripathi & Professor (Dr.) Kaushik C. Raval
Dean, School of Security Law, Raksha Shakti University & Director, University School of Law, Gujarat University, Ahmedabad

Prof. (Dr.) R N Sharma
Professor & Dean, School of Law, IMS Unison University, Dehradun

Dr. Dennis Odigie
Associate Professor of Law, University of Benin, Benin City, Nigeria.

Mr. Mahesh A Tripathi & Mr. Anand Kumar Tripathi
Assistant Professor (Psychology), Raksha Shakti University& Assistant Professor (Law) Raksha Shakti University,Gandhinagar, Gujarat

Dr. Nitesh Saraswat
Assistant Professor of Law, Law Centre II, Faculty of Law, Delhi University, Delhi

Dr. Madhu SoodanRajpurohit
Principal, Government P.G. Law College, Pali, Rajasthan

Dr. Surender Singh
Associate Professor, Govt. PG. Law College, Pali, Rajasthan

Dr. Sheetal Prasad Meena
Assistant Professor, Faculty of Law, Jai Narain Vyas University, Jodhpur, Rajasthan

Dr. Anila
Assistant Professor, Dr. Anushka Vidhi Mahavidyalaya, Udaipur, Rajasthan

Mr. Arnav Bishnoi
Rajiv Gandhi National University of Law, PatialaAssociate (Disputes Resolution), Singh& Associates, Gurugram

Mr. Saif Rasul Khan
Assistant Professor, NERIM Law College, NERIM Group of Institutions,Guwahati, Assam

Dr. Priyanka Anand,
Assistant Professor of Law, National Law University Odisha

Dr. R.Seyon
Advocate and Notary Public, Sai Law Associates,Mayiladuthurai, Tamil Nadu

Ms. Sakshee Sharma
Assistant Professor, School of Law, IMS Unison University, Dehradun

Ms. Maryanka
Assistant Professor, School of Law, IMS Unison University, Dehradun

Ms. Pallavi Bajpai & Ruchika Sharma
Senior Assistant Professor of Law & Student, The NorthCap University, Gurugram, Haryana

Siddharth Dubey
Research Scholar, Dr. Shakuntala Misra National Rehabilitation University, Uttar Pradesh

Book Review

Dr. Rinu Saraswat
Assistant Professor of Law Jagannath University, Jaipur

Mr. Nikunj Singh Yadav
Assistant Professor, School of Law, IMS Unison University, Dehradun

Prof. (Dr.) R. N. Sharma
Professor & Dean, School of Law, IMS Unison University, Dehradun

Case Comments

Ms. Shalini Saxena
Assistant Professor, School of Law, IMS Unison University, Dehradun

Mr. Anand Singh
Assistant Professor, School of Law, IMS Unison University, Dehradun

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Volume 10, Issue 2, December 2020

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Dehradun – 248009, Uttarakhand (India).
Phone: +91-7055900042
E-mail: pragyaan.law@iuu.ac
Website: http://pragyaanlaw.iuu.ac

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The Chief Editor
Pragyaan : Journal of Law
IMS Unison University, Dehradun
Makkawala Greens, Mussoorie Diversion Road,
Dehradun – 248009, Uttarakhand (India).
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E-mail: pragyaan.law@iuu.ac
Website: http://pragyaanlaw.iuu.ac

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