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CPJ LAW JOURNAL

Volume XV, Issue No. 1 JAN-2024

Editorial Advisory Board

MESSAGE FROM MANAGEMENT'S DESK

In today's competitive and globalized world, having a professional and specialized education becomes an imperative for future success. We, at the CPJ College of Higher Studies and School of Law, are committed to providing academic excellence in the fields of Management, Commerce, IT and Law. The research skill has been the most important part of legal field along with other intern disciplinary subjects. Keeping this in mind, we sought to create a platform which appreciates and accepts each and every idea and thoughts which are there in the form of treasure.

The initiative of the Chanderprabhu Jain College of Higher Studies & School of Law in regularly publishing CPJ Law Journal containing insightful research papers is an appreciable attempt by the Editorial Team in spreading legal awareness and knowledge. Quality legal research and standard publications constitute one of the important mandates of CPJ Law journal.

I am confident that readers will find the present issue of the Law Journal interesting and thought provoking. My highest regards to the Editorial Board to have meticulously worked and created this impeccable issue. We are also indebted to all our authors whose contributions in the form of article, legal studies etc. have made CPJ Law Journal listed with UGC CARE.

We hope that this Jan-2024, Volume XV, Issue No. 1 of our prestigious Journal will make a strongmark in the legal research fraternity.

Dr. Abhishek Jain

General Secretary

CPJ College of Higher Studies
& School of Law

MESSAGE FROM EDITOR-IN-CHIEF

While welcoming you to the Jan-2024 (Vol. XV, Issue No. 1) edition of **CPJ Law Journal**, it is, indeed, our honour to share that CPJ Law Journal, has been recognized by the legal fraternity as a leading Law Journal. It is a Peer reviewed Journal that aims to create a new and enhanced forum for exchange of ideas relating to all aspects of Legal Studies and assures to keep you updated with recent developments and reforms in the legal world in the form of Articles, Research Papers, Case Studies etc. Research Studies have always been challenging with positive outcomes witnessed as a result of meticulous and persistent efforts. Researches in the field of Law have benefitted both the Industry and the Academia and it has always been our continuous endeavor to publish such scholarly Research Papers in this Bi-Annual National Journal of **CPJ School of Law**.

CPJ Law Journal is an open access Journal that aims at providing high-quality teaching and research material to Academicians, Research Scholars, Students & Law Professionals. This issue Includes papers from Constitution of India, Medical Termination Laws, Criminal Liability to Artificial Intelligence, Doctrine of Equality, POSCO Act, Health Rights, Gender Equality, Dispute Resolution, ADR in E-Commerce, Legal Framework & Jurisprudence, Competition Law, Trans-Gender Identity, Human Rights, Victim Compensation Scheme, Plea Bargaining, Anticipatory Bail etc.

We appreciate the tremendous response towards our **"Call for Papers"** and this compelled us to publish our CPJ Law Journal Bi-Annually (in January & July) from the year 2022. We once again welcome contributions in the form of unpublished original Articles, Case Studies or Legal Research Reviews for publication. We are obliged to our widespread readership for their continued support and encouragement in our endeavor to strengthen every issue of **CPJ Law Journal.** The credit to this achievement also goes to all Authors, Law Academicians, Editorial Board & Advisory Committee who have contributed to make CPJ Law Journal a quality journal. We highly solicit to have your continuous support and feedback for further growth of the Journal with quality learning for all the readers.

With this note, welcome once again to **CPJ Law Journal**, **Jan-2024** edition!!

Dr. Yugank Chaturvedi
Director General
CPJ College of Higher Studies
& School of Law

MESSAGE FROM EDITOR

It is with pride and enthusiasm that I present Volume XV, Issue No. 1, (Jan.-2024) of the CPJ Law Journal (CPJLJ). It consists of words and complete analysis of the articles/ research papers covered. This issue of the Journal touches upon a number of issues worthy to note in present scenario. A highly evolved and complex justice system makes enormous demands on the people who work in it. Therefore, academicians, law students and legal professionals need upto date information as well as professional analysis on land mark judgments. CPJLJ delivers this vital information to them.

It is pertinent to mention that CPJLJ is a blind two fold Peer Reviewed Annual Journal. Accordingly, it brings to the readers only selected articles/research papers of high standard and relevance. In a country governed by the rule of law, it is important that awareness about the research is created among those who are supposed to be concerned with these researches. Academicians can play a very important role in the development of the higher research, and there is need to encourage young minds to participate in development of research based on the needs of the changing society and technical advances. This Journal provides an excellent platform to all the Academicians and Research Scholars to contribute to the development of sound research for the country.

I would like to express our gratitude to the Editorial Advisory Board and the Panel of Referees for their constant guidance and support. Appreciation is due to our valued contributors for their scholarly contributions to the Journal. Finally, and perhaps most importantly, I wish to thank the entire Editorial team of the CPJ Law Journal for the hard work, positive attitudes and dedication that make this Journal excellent in so many ways.

I, therefore, hope that this issue of CPJLJ will prove to be of interest to all the readers. We have tried to put together all the articles/research papers coherently. We wish to encourage more contributions from academicians as well as research scholars to ensure a continued success of the journal.

Prof. (Dr.) Amit Kr. Jain

Director, Corporate Affairs

MESSAGE FROM CO-EDITOR

It is the supreme art of the teacher to awaken joy in creative expression and knowledge- Albert Einstein

Dear Readers,

We are presenting to you Jan-2024, Vol. XV, Issue No. 1 of CPJ Law Journal. Our aim behind introducing this journal is to create a new forum for exchange of ideas on all aspects of legal studies and we assure to keep you updated with recent developments in the legal world. Future scope of journal is open to your suggestions. You are invited to contribute for the Journal and your submissions should include original research articles, criticism and commentaries on legal aspects.

The CPJ Law Journal is published Bi-annually. The journal publishes scholarly articles and commentaries on various aspects of law contributed by jurists, practitioners, law professors and students. The primary aim of this journal is to provide close insights into the various contemporary and current issues of law to the readers. Contributing to this journal provides an opportunity to authors to take an in-depth study in specific areas of the law and enhances their skills in Legal Research Writings and Analysis.

Talking about this Journal, it is great to be part of such a great initiative which provides all possible services to legal fraternity. Since it is not just confined to being a paper collection activity, rather it aims at providing services for all round development of law students, professionals and all others in this field. Also, being from law background, we feel that it is our prime duty to contribute for development of the society and we have taken many initiatives in this regard also by organizing various events of social relevance as well. Many exciting years for the journal have passed. Some notable developments might have been recognized by most of our readers but others probably have passed unnoticed to the majority. Therefore, this CPJ Law Journal is not only a retrospective on the previous years but also a good opportunity to summarize recent developments.

I hope you find this issue of Journal informative and interesting. The success of this enterprise depends upon your response. We would appreciate your feedback. You are also requested to submit your articles for the next issue Jan-2024 of CPJ Law Journal.

Dr. Shalini Tyagi
Principal
CPJ School of Law

MESSAGE FROM HON'BLE JUSTICE RAJESH TANDON

Any democratic country with rule of Law as its core value principle must guarantee Freedom of Speech and Expression. It is considered the mother of all freedoms. At times, the right to ask is more important than the right of life. Unless we express, we cannot live. It is, therefore, the social responsibility of any Educational Institution to further the understanding of Democratic Governance. It is in this context that a journal like CPJ Law Journal adds importance and relevance.

The CPJLJ is being launched with the aim of remedying the lack of authoritative academic writing devoted to the critical analysis of Law and Legal Institutions. It is intended to serve as a platform where Students, Academicians, Lawyers, Policymakers and Scholars can contribute to the ongoing Legal, Political Disciplinary research in the field. The Faculty of Law at CPJ aims at excelling in interdisciplinary research in the field of Law and other disciplines like Sociology, Political Science, Public Policy and Economics etc. As one of the first academic journals, it will have to look at the inter-disciplinary aspects between Law, Development and Society, which are three value-loaded terms in themselves.

I believe that it is the obligations of the academia to initiate discussion, analyze the various issues that are being faced by India and the world at large and offer solution for the same. The CPJLJ provides a forum for interdisciplinary legal studies and offers intellectual space for ground–breaking critical research. It is not committed to any particular theory, ideology or methodology and invites papers from a variety of standpoints, ideologies, perspectives and methods. The journal aim to explore and expand the boundaries of law and legal studies.

I wish the CPJLJ and the Editorial Board success in all their endeavours and hope that they will keep up their academic work, which may provide some guidelines for the betterment of Socio-legal scenario in India in particular, and across the world in general.

Justice Rajesh Tandon

Former Judge

High Court of Uttarakhand

MESSAGE FROM SH. R.S. GOSWAMI

Dear Readers,

CPJ Law Journal is in its 14th year of continuous publication with a diverse, professional, highly engaged and expert global readership. This Law Journal is a box filled with original research-based papers, articles etc., which is an attempt to cover almost all the subjects relating to legal field.

Getting published is something all Law professionals strive to achieve, and it feels great to me that Chanderprabhu Jain College of Higher Studies & School of Law is providing that platform by bringing out the 12th Volume of the CPJ Law Journal with eagerness and enthusiasm.

The CPJ Law Journal Team deserves very high appreciation for this endeavor. I cherish my association with this journal since its inception and wish it all success and endurance. Such a journal for the practitioners, Law professors and Law students is the need of hour.

Adv. R.S. Goswami
Ex-Chairman
Bar Council of Delhi

MESSAGE FROM SH. MURARI TIWARI

I feel extremely exhilarated to be a part of CPJ Law Journal which aims to create all aspects of Legal Studies and also gives a highly readable and valuable addition to the recent developments and reforms in the legal world. It also helps to provide a different outlook to various legal issues that are prevalent in the contemporary society and also to extract exact solutions for the same. As Nelson Mandela said and I quote, "Education is the most powerful weapon which you can use to change the world."

The journal is a great way to invite one's thoughts for a fruitful experience in Legal Research and Drafting and especially for Academicians, Lawyers and the Law students as it has become a demanding area for the highly complex legal system. The relation between the Bar Council of India and Law Colleges/University of Delhi is exceptional and the Bar Council of India also promotes Legal Research such as conducting Seminars, Workshops, Conferences etc.

In my entire career as an Advocate, I have always affirmed with the idea that Journals and Research Work have quintessential means for advocating Societal Issues and thereby, changing the entire horizon of the Indian Legal system and for the betterment of Legal Fraternity.

I honor CPJ School of Law for giving me an opportunity to be a part of the Law Journal Advisory Board.

Adv. Murari Tiwari
Ex-Chairman
Bar Council of Delhi

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Freedom of Speech and Expression under the Constitution of India: A Critical Analysis

*Prof. (Dr.) Anil Kumar Dixit**

ABSTRACT

The right to express oneself as well as the right to acquire information are both included under freedom of speech. The ability to freely communicate thoughts and opinions plays a crucial role in the development of a society. The paper tries to evaluate the growth of freedom of speech and expression law in India. The meaning, extent, origin, and relevance of the right to freedom of speech and expression granted by Article 19(1)(a) of the constitution are discussed in this paper. This research also highlighted the role of free speech protection and many facets of freedom of speech and expression. It also addresses the historical review of the right to freedom of speech and expression. The researcher has attempted to describe briefly the right to freedom of speech and expression provided by the Indian Constitution with reasonble restraints concerning hate speech.

Keywords: *Freedom of Speech and Expression, Article 19, Democracy, Freedom of Press, Constituent Assembly.*

INTRODUCTION

Freedom of speech and expression has played an important part in human evolution. We may also conclude that freedom of speech and expression has played an important role in Indian civilization. This element has spawned culture, especially literature, as well as many theological systems. Thesis, Anti-Thesis, Synthesis: the process that develops knowledge. Thus, freedom of speech and expression have been asserted and denied throughout Indian history. It has also seen views arguing for and against freedom of speech and expression. In other words, the history of Indian civilisation is a fight between opposing ideas. Free speech and expression were vital in this battle. The British administration established its legal system in India. Modern attacks against freedom are harsh. It tried to deny the right via press and sedition legislation. The liberation struggle movement and its leaders knew this. Knowing the importance of this right, the architects of modern India strived to provide it to her people.

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Constructing the Constitution acknowledged this. The Constituent Assembly discussions clearly show this.

A HISTORICAL REVIEW OF FREEDOM OF SPEECH AND EXPRESSION

A look at the efforts to suppress newspapers under the British reign will help us understand the origins of free speech challenges. Other words, for instance, the history of censorship in India parallels the history of freedom of speech and expression.

FREEDOM OF SPEECH VS. PRE-CENSORSHIP

English education opened the path to enlightenment in India. The press had an important role. But the 1857 mutiny and following uprisings endangered the British regime's very existence. So the Brits wanted to destroy the press. So, press regulation rules were created. It was intended that the police should control the printing presses and prevent them from publishing provocative material in newspapers and periodicals. No press could function without a government-issued licence. It didn't matter whether the press was English- speaking or not. Criticism of British policy was investigated and may result in punishment. The Vernacular Press Act (1878) went too far. Lord Lytton, when Viceroy of India, conceived this Act. This legislation required government consent before publishing editorials. The Act allowed a court or police commissioner to compel a newspaper's printer or publisher to sign a bond promising not to print undesirable information. 1. Rather than the courts, the police were empowered to determine what constituted a seditious print.

The Newspapers (Incitement to Offences) Act of 1908 targeted radical nationalist movements. It allowed courts to seize press property containing offensive information likely to incite murder or violence. The Indian Press Act of 1910 also authorised the government to require a security deposit when registering a newspaper. If a newspaper is found to have published obscene content, it may be deregistered. 2 During both World Wars, the government repressed the press, arbitrarily restricting freedom of speech and expression.

The right to free speech and expression is recognised by modern law.To trace its genesis and progress as a right, we must look at both pre-and post-Constitutional India. This research may reveal the origins and evolution of free speech laws in India.

THE PRE-CONSTITUTIONAL LEGACY

The current Indian Constitution's core liberties, including freedom of speech and expression, are rooted in the values of the victorious independence movement. This freedom's exercise might be considered as a constructive resistance to arbitrary Brit control. The function of the British Parliament altered once the Queen took over the Company rule. After 1857, British legal rules were introduced to protect or constrain rights. It has seen legislation implemented to quell dissent against the rule of law. By the end of the 19th century, opposition to the authoritarian and ruthless British government had become louder. Among the requests were freedom of speech and

expression. Listed below are a few notable occasions when freedom fighters made their demand.

The Constitution of India Bill, or Home Rule Bill, was introduced in 1895. The Bill guaranteed all people's rights to freedom of speech. It suggests that any citizen may express himself verbally or in writing. It also recommended ensuring the right to publish without fear of retribution. It also limited the exercise of this privilege. The exercise of rights was subject to abuses that may occur. The Parliament might set the right's limits. Thus, people were guaranteed freedom of speech and expression subject to parliamentary constraints.

It also provided members of Parliament with a specific privilege. So every member had the right to challenge the Empire's government. This was absolutely a matter of freedom of speech, but only for MPs.

The British administration promoted the Law of Sedition to restrict freedom of speech. Section 124 A of the Indian Penal Code was born as a consequence. In 1897, the Select Committee studying the Bill advised that sedition be separated from inciting class enmity. It argued Sedition is a crime against the Committee. It is distinct from the charge of inciting class-hatred. It belongs to the chapter on public order offences. The sin of inciting class hate only indirectly harms the state, and the core of the charge is that it predisposes groups of people to actions that may disrupt public peace. The fact that seditious libel is a crime in England is probably due to historical reasons rather than logical order. The claimed infringement of legitimate restrictions on freedom of speech and expression must thus harm India's sovereignty, integrity, and security.

A special session of the Indian National Congress convened in Bombay in August 1918 demanded that the new Government of India Act declare the rights of Indians as British citizens. The declaration would also encompass freedom of speech and the press. In the same year, the Indian National Congress approved a resolution in Delhi demanding the immediate removal of all laws, rules, and ordinances restricting free political debate. The resolution dealt with Indians' right to self-determination. To enable the implementation of this concept under Clause 2(a) of the resolution, all impediments to open debate were to be eliminated. All rules, regulations, and ordinances restricting free political speech in the press, private, or public gatherings must be eliminated. The resolution wished for all people's legitimate goals and viewpoints to be openly voiced.

The 1920s constitutional changes in Ireland inspired the Indian independence fight. As a consequence, the Commonwealth of India Bill approved by the National Convention in 1925 contained freedom of speech, conscience, and religion as essential rights. The Commonwealth of India Bill guaranteed everyone's basic rights. That includes freedom of speech.

The All-Parties Conference established by the Nehru Committee (1928) outlined many essential rights with a view to incorporating them into the future Indian Constitution. The Nehru Committee Report recommended freedom of speech be limited to public order or morality. The Nehru Report only mentioned two justifications for restricting

free speech. As a result of the framing of such freedom, dynamic transformation happened. Parliamentary privileges and immunities were also mentioned in the study, which reminds us of the legislative advantages granted to MPs. The Indian Statutory Commission (Simon Commission) opposed the inclusion of basic rights in the Draft Constitution Act. The majority of Indians rejected the commission, making it a contentious element of Indian history. In March 1931, the Indian National Congress approved a resolution in Karachi calling for a formal guarantee of basic rights under the new Constitution. The three Round Table Conferences examined Indian rights.

CONSTITUENT ASSEMBLY: THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

A rapid political process preceded the Constituent Assembly's formation. The 1946 British Cabinet Mission acknowledged the necessity for a formal protection of basic rights. The Mission plan also suggested forming an Advisory Committee to report on basic rights issues. Thus, it was born the Constituent Assembly.

DEVELOPMENTS IN PRE-CONSTITUENT ASSEMBLY DEBATES

To design the Constitution for an independent India, the Constituent Assembly unanimously approved the Objectives Resolution on January 20, 1947. It also promised that the new Constitution would protect freedom of speech and opinion. The act of expression is preceded and impacted by the mind's thinking. In his note on fundamental rights, the Honorable K. T. Shah recommended guaranteeing fundamental rights, including freedom of speech. Among other things, he defined freedom of speech as "the right to express oneself freely." Any public power could not suppress this freedom. But he backed censorship under emergency laws, like war.

As a result, the Constituent Assembly elected a Reporting Advisory Committee. Later, on February 27, 1947, the Advisory Committee formed five sub-committees. A basic rights committee was formed. Rajkumari Amrit Kaur, Alladi Krishnaswami Ayyar, Sardar Hukum Singh, Maulana Abul Kalam Azad, B. R. Ambedkar, Jairamdas Daulatram, and K. M. Munshi were members of the Sub-Committee on Fundamental Rights, which was chaired by J. B. Kripalani. The proposed Constitution's essential rights were designed and drafted by

B. N. Rau, Alladi Krishnaswami Ayyar, K. M. Munshi, and Dr. B. R. Ambedkar. During its historic session on August 14 and 15, 1947, the Constituent Assembly assumed complete sovereign powers for India's government. It is time for us to repay our vow, not fully or completely, but significantly. We made a tryst with destiny years ago, and now is the time to fulfil our pledge. India will awaken to life and independence at the stroke of midnight, while the world sleeps. As stated by Nehru, the Constituent Assembly would invigorate Indians and fight for their independence. The Constituent Assembly debated the proposed basic rights provisions in November-December 1948 and August-October 1949. A revised draught was offered for final debate in November 1949.

FREEDOMS AND CONSTRAINTS

Various proposals were presented to various committees before the Constituent Assembly could address freedom of speech and expression. To explore the nature and extent of freedom of speech and expression in the proposed Constitution, the Sub-Committee on Fundamental Rights was formed. It also discussed the limitations.

EXAMINING DIFFERENT DRAFTS

In his note on fundamental rights, the Honorable K. T. Shah recommended guaranteeing fundamental rights, including freedom of speech. Among other things, he defined freedom of speech as "the right to express oneself freely." Any public power could not suppress this freedom. But he backed censorship under emergency laws like war. So, the extent of this flexibility is as follows. This right should be protected by legislation, according to K. M. Munshi's proposal for the Sub-Committee on Fundamental Rights. Munshi recommended in his proposal that:

A) public well-being and health;

b) the obligation to respect others' rights;

c) Defense (italics added)

On March 18, 1947, Harnam Singh advocated that the Constitution protect freedom of the press and speech. Wearing the Kirpan, a way of expressing one's Sikh identity, should not be infringed upon.

Except for public order and morals, Dr. Ambedkar's proposal said "no legislation will be established abridging freedom of speech, press, or association." To restrain freedom, Munshi alluded to public order or morality, but Ambedkar distinguished between the two. The Sub- Committee on Fundamental Rights accorded priority to drafted by K. M. Munshi and others.

B. R. Ambedkar, March 25, 1947 as a result, the subcommittee proposed five rights for the people of independent India in its draught report. One was freedom of speech. These liberties were also restrained by the report's recommendations. Alleged obscene, slanderous, and libelous remarks are punishable under section 153 A of the Indian Penal Code (IPC). He wanted "class hatred" to be specifically mentioned as a reason to limit freedom. As a result, hate speech has become a threat to Indian democracy. On the grounds of public order and morals, Ayyar proposed adding "severe emergency" to clause 9. His worry was based on the current socio-political climate. His letter to B. N. Rau on April 4, 1947, confirms this point. In his opinion, the basis of "public order and morality" are ambiguous. He believes that these ideas are context-dependent and that their meaning changes with time.

Alladi Krishnaswami Ayyar proposed including situations of severe emergency and threats to the state's security as a basis for restricting liberties. A single clause, number 10 was created by the subcommittee. Subject to public order and morality, or a severe emergency endangering the state's security, every citizen's right to freedom of speech and expression (subclause 10) should be respected. Freedom of speech and

expression did not extend to publications or statements that were seditious, obscene, slanderous, libelous, or defamatory. Rather, there were legal justifications for limiting freedom.

The Advisory Committee permitted debate on appropriate restrictions on freedom of speech and expression while evaluating clause 10 and the Minorities Sub-proposals. committee's Alladi Krishnaswami Ayyar's most recent recommendation was to add the phrase "class hatred" to the proviso to clause 10's subclause (a). This was Alladi Krishnaswami Ayyar's most recent recommendation on April 21, 1947.A lack of zeal might help counteract communal hostility, according to Rajagopalachari. Alladi Krishnaswami Ayyar and Rajagopalachari disagreed with Alladi Krishnaswami Ayyar and Rajagopalachari. For fear of police abuse of section 153A, they objected to the phrase "class hate" being included. Several revisions were made to it. The provision was eventually drafted as follows:

a) The right to free expression and expression of ideas

In accordance with article (2), the privilege was limited to offences against decency or morals or attacks on the authority or basis of the state. Jai Prakash Narayan recommended rewriting the whole sentence, citing its clumsiness. The inclusion of freedom of the press was particularly rejected by B. N. Rau.

CONSTITUENT ASSEMBLY DEBATES-A STUDY

The Constituent Assembly members vigorously debated the draught constitution after it was presented to them. For the Constituent Assembly, introducing freedom of speech and expression as a constitutional right was a welcome step. The arguments demonstrate how the members rated its significance. Defending basic rights' importance To "...protect the freedom of the citizen..." against future legislative and executive intrusion, the Honorable Sardar Hukum Singh said.According to Sardar Bhopinder Singh Man, a Sikh delegate from East Punjab in the Constituent Assembly, freedom of speech and expression is guaranteed.For the broader population, and especially minorities, he values association and free expression. So, we can make our voices heard by the government and oppose any injustices that may be done to us by them, he believes.

IMAGINATION

According to Prof. K. T. Shah, the phrase "expression" in Art. 13 (1) (a) of the Draft Constitution is broader than in Art. Thus, the Constituent Assembly saw this right as essential. The history of the press in India parallels the battle for freedom. The independence fighters used the press to educate the Indian population and protest the British tyranny. In reaction, the Brits sought to limit press freedom. As a result, the regulation stifled this vital freedom. They curtailed the freedom of the press, whether English or Indian. B. G. Tilak was convicted of sedition for opposing British policy via his journal. The Constitution's founders were well aware of this. Thus, the Constituent Assembly debated the subject of freedom of speech and the press.

Shri Damodar Swarup Seth, a member of the Constituent Assembly, wanted the freedom of the press expressly included suggested constitution Prof. K. T. Shah wanted to add freedom of the press and publishing to clause (1), sub-clause (a), of article 13. According to Prof. K.

T. Shah, the suggested draught article should thus include "freedom of the press and publication" as well as He stated that the press has suffered and sacrificed for liberal constitutions (globally) and the bitterest constitutional fights. Conventions and legal decisions have established press freedom in nations with unwritten constitutions. They explicitly mentioned press freedom in their written constitutions. So he was astonished that press freedom was not explicitly highlighted. So he wanted the UN Charter to include press freedom. He also said that although press freedom may be abused, it is vital to safeguard it, else we cannot call ours a progressive liberal Constitution.

Dr. Ambedkar answered and explained why the draught Constitution did not address press freedom. Mr. Ananthasayanam Ayyangar, a member of the Constituent Assembly, gave an adequate response. He argued that the press should have the same rights as people. In truth, journalists and managers are citizens. They are using their right to free speech and expression when they write in newspapers. So, in his opinion, "no particular mention of press freedom is required."

DEMOCRACY

Various scholars and philosophers have defined and conceptualized democracy. However, these views often centre on governance and the political system. This has over-emphasised election-related political activity. The Constitution's founders interpreted the phrase differently. In this respect, Dr. B. R. Ambedkar's ideas must be considered. Ambedkar endeavoured to define democracy in his last statement to the Constituent Assembly on November 25, 1949.

He says

"We" must not confine ourselves to political democracy. Our political democracy must become a social democracy. From FluencyWhat is socialism? It is a way of life based on liberty, equality, and fraternity. The values of liberty, equality, and fraternity The values of liberty, equality, and fraternity must never be separated. They are a trio... From Fluency Liberty and equality are inextricably linked. The two are inextricably linked. Without equality, liberty would lead to ...[tyranny]... of the few over multitudes. Equality Individual initiative is killed by liberty. Liberty and equality would not be natural without fraternity. A constable would be required to enforce them.

In short, he maintained that political democracy is useless without social democracy. To achieve social democracy, liberty, equality, and fraternity must be human values. Separating these three principles, he said, would destroy the fundamental purpose of democracy. With this he wanted to provide his own dynamic philosophy of democracy. On may also deduce from his perspective that when liberty, equality, and fraternity are societal values, there is freedom of speech and expression. That

would be perfect circumstance when genuine democracy would ensure free expression. He was aware of the obstacles to social democracy. A realist, he recognised Indian society's flaws. said he.

"We must first acknowledge the lack of two things in Indian society. One is parity. On the social level, India is a society structured on caste-Varna-gender-based inequality, where some people have enormous riches while many live in abject poverty. On January 26, 1950, we [Indians] would begin a life of paradoxes. We shall have equality in politics and disparity in social and economic life. In politics, we will have to accept the principle of one man, one vote, and one value. Our social and economic structures [of discrimination] will continue to defy the idea of one man one worth".

So he projected a contradictory post-constitutional history. While we will have political equality, we will face social disparity. He believes that if we continue to live in contradictions and reject equality in our social and economic lives, democracy is in grave danger. This threat to free speech and expression threatens the viability of democracy. So he warned We will only endanger our democratic democracy if we continue to deny it. Unless this issue is resolved quickly, people who suffer from inequity will destroy the democratic democracy that [this Constituent] Assembly has worked so hard to establish. So he desired a social order in which all people and groups had equal rights and opportunities to thrive. This was his democracy. This speech is viewed as an effort to theorise his position on democracy. Until now, Voting and election politics are presented as examples of democracy. This is a pretty restrictive interpretation. Dr. Ambedkar saw democracy as a living, breathing thing.

He presented a specific plan to maintain the democratic setup. "What must we do to sustain democracy in actuality as much as in form?" he asked. He suggests that instead of violent revolution, we should use constitutional means to achieve our social and economic goals. He also suggests that if we have constitutional options for accomplishing economic and social goals, we should forgo civil disobedience, non-cooperation, and Satyagraha. Only when the constitutional procedure fails may these unlawful tactics be justified. "Where constitutional techniques are accessible, these unconstitutional tactics cannot justify themselves." His words ring true today as violent satyagraha's and agitations (modes of expression) rage throughout India. It's all in the name of democracy. These approaches may have appealed to certain elements of society, succeeded in changing governments or questioning their power, but he opposed them. This is the Grammar of Anarchy, and it is in our best interest to forsake it as quickly as possible. So, Dr. Ambedkar wanted to utilize freedom of speech and expression in a democratic fashion that would not lead to anarchy. If permitted, we will be unable to create a new social order based on liberty, equality, and fraternity. Dr. Ambedkar intended to link social democracy to freedom of speech and expression. Thus, only social democracy can guarantee freedom of speech and expression. Political democracy alone cannot ensure this fundamental right.

DETERMINING REASONABLE RESTRICTIONS

Indians have paid a high price for their independence movement. During the fight,

Indians' basic rights were often violated. Freedom of speech and expression also suffered under restrictive laws. The founders of the Constitution were aware of these sacrifices. So they did not want freedom and rights curtailed. They want unrestricted liberty and freedom for all Indians. To what extent is the basic right to freedom of speech and expression absolute? Members had differing views.

Article 13 of the Draft Constitution was criticised for limiting citizens' rights. They said the limits robbed liberty. Dr. B. R. Ambedkar reacted angrily to the drafting committee's criticism. He showed that liberties can never be absolute by using the American case of Gitlow v. New York (1925). This prepared the path for acceptable constraints to be inserted into liberties. Post-Constitutional debates have raged about limits and their reasonableness. From Fluency

Few members, including Shri Brajeshwar Prasad, advocated limiting these liberties. Their rationale was unique. Shri Brajeshwar Prasad argues that personal freedom must be limited to combat capitalism. Members agreed that liberties could not be absolute. In his "Note on Fundamental Rights (December 23, 1946)," the Honourable K. T. Shah presents his views on citizens' and human rights. He claimed that in a civilised society built on cooperation, citizens' and human rights are neither absolute nor unconditional. His full independence leads to wild urges that fit ferocious cage dwellers or jungle beasts. Aside from legislation dealing to libel or defamation of character, he wanted to ensure every citizen's right to freedom of expression.

The topic of restriction was raised in relation to proposed draught Art 13 (Freedom of Speech and Expression). The Honourable Mahboob Ali Baig Sahib Bahadur wanted article 13 (2) to (6) deleted because they restricted freedom of speech and expression. He maintained that basic rights are eternal and holy and should be protected from state coercion by excluding the executive and legislative authorities. The executive and legislative powers would be limited to ordinary rights, and the basic rights would be lost. Like Ambedkar, he thought basic rights were not absolute. He also recognised that basic rights are always subject to public interest and state security. But he noted a practical issue. According to him, if a citizen crosses a line, who will decide whether the state is in danger? He also replied. He wanted neither the government nor the legislature to judge, but only the independent judiciary. In this aspect, he supported his point with the American Constitution. The Fourteenth Amendment (1791) states that Congress (the American government) cannot adopt laws that restrict freedom of speech, association, or the press. And if any American citizen crossed the line, jeopardising the State, the court would decide, not the legislative or government. So he opposed legislative and executive restraints on freedom of speech and expression in India.

He also mentioned the British judicial system. In the absence of a codified constitution, the idea of due process preserves freedom of thought and speech. He also warned against allowing the legislature to curtail fundamental rights, as in the German Constitution. Hitler could thus pass any law removing fundamental rights. This paved the way for totalitarianism and fascism in Germany.

Sardar Bhopinder Singh Man, an honourable member of the Constituent Assembly and Sikh representative from East Punjab, explained how we fought a hard battle to gain recognition for these rights. So he wished that these rights and freedoms were not so restricted. He thinks opposition is essential to a democratic government. So he expected all peaceful, non- seditious opposition to be fully heard. He added that suppressing peaceful opposition would lead to fascism. The essence of democracy, says K. M. Munshi, is criticism of government.

T. T. Krishnamachari said we are a complex society with diverse ideas. In this situation (on the verge of independence), absolute rights may prove disastrous. So he praised the drafting committee, especially Dr. Ambedkar, for finding a golden mean in reasonable restrictions. Members like K. M. Munshi expressed concern that such laws would not have a future in India. They were finally justified. Some of the restrictions enshrined in the Constitution have been the subject of debate for decades. So we must evaluate the path that shaped them. The Constituent Assembly understood the value of freedom of speech and expression. Some members argued for absolute protection of this fundamental right, but this was not enough. As a result, restrictions were imposed. One restriction, Public Order and Morality, was hotly debated.

According to Dr. Ambedkar's draught, "no law shall be made abridging the freedom of speech or of the press... except for public order and morality." Munshi alluded to public order or morality, but Ambedkar considered them as distinct notions, thereby limiting freedom.In his opinion, the grounds of "public order and morality" are too vague. He believes that these ideas are contextual and that their meaning shifts with time and space.

HATRED

Alladi Krishnaswami Ayyar was irked by Section 153A of the Indian Penal Code, which refers to obscene, slanderous, and libellous utterances. He sought "class hatred" as a reason to limit freedom. This reminds us of his view on hate speech, a 21st century threat to Indian democracy.

SEDITION: AN UNJUSTIFIED BAN

Throughout British rule, native Indians' freedom of speech and expression was brutally suppressed. After the 1857 revolt, the anti-freedom laws became stricter. In fact, the subsequent anti-colonial uprisings (after 1857) necessitated stricter speech restrictions. The reason was that such freedom of speech and expression could threaten British rule. To stifle dissent, the regime enacted the Law of Sedition. It was a natural progression. Victim freedom fighters challenged the law. Famous leaders like B. G. Tikal and Mahatma Gandhi were accused of sedition. The Constituent Assembly took note. Swarup Seth argued that the continuation of the Law of Sedition and other repressive laws like the Official Secrets Act would subordinate all civil liberties to the police. So he wished that the restrictions be removed from the Draft Constitution. Mr. K. M. Munshi, a member of the Constituent Assembly, opposed the use of sedition as a basis for limiting freedom of expression. He explained the history of the law of

sedition in the west and the havoc it caused due to its ambiguity. In doing so, he distinguished between criticism of the government and incitement to undermine the security or order that underpins civilised life, or to overthrow the State. In a democracy, earlier is preferable. So he justified leaving sedition out of the constitutionally allowed restrictions. He even stated that criticising the government is a democratic right. In a democracy, advocating for a change of government is required. So government criticism is good for a democracy. So he opposed using sedition to restrict freedom of speech and expression.

Freedom of speech and expression referred to in Article 13(1) (of the Draft Constitution), sub-clauses (a) [along with (b) and (c)] aims to give constitutional protection to the individual against state coercion, provided they stand alone, unfettered. But the proposed restrictions under sub-clauses (2) to (6) of article 13 appear to take the soul out of these protective clauses, he said. Such restrictions would continue to abridge rights and restrict freedoms. He feared it would be like the British regime. He added that the main purpose of declaring these rights fundamental was to protect citizen freedom from the ordinary legislature and executive of the day. He argued that Article 13(1) rights are inalienable and cannot be defeated by free will. In the context of restricting freedoms, he claimed that the Draft Constitution has made freedom of the press (including freedom of assembly and other freedoms) so precarious and subject to legislative whim that it has lost all beauty and charm.

These members of the Constituent Assembly were opposed to the restrictive clauses (2): Damodhar Swaroop Seth; Mehboob Ali Baig; Hukum Singh; Syed Karimuddin; Amiyo Kumar Ghosh; Lakshminarayan Sahu; and H. J. Khandekar (6). They saw them as a hindrance to the enjoyment of rights. So they suggested removing the restrictive clauses. According to Kazi Syed Karimuddin, the restrictive clauses (2) to (6) are dangerous because they rob the people. It was the only guarantee that the people had.

Those opposed to the restrictive clauses were few. The vast majority of members approved of these restrictions. They felt it was needed at the time. They were Govind Das, K. Hanumanthaiya, Brajeshwar Prasad, Shibban Lal Saxena, Algu Rai Shastri, Deshbandhu Gupta, and T. T. Krishnamachari. Asserting that the restrictions are justified due to centuries of backwardness and foreign misrule Such restrictions, he believed, could right wrongs. T.T. Krishnamachari emphasised the need for restrictive clauses in light of the new country's socio-economic and political situation. He believed the clauses would help the state deal with the issue.

In this regard, the United States of America enacted the Sedition Act to prevent a violent overthrow of the government, as in the French Revolution. The Act's constitutionality was never tested by the Supreme Court, so it expired in 1801. President Thomas Jefferson also pardoned those convicted under the Act. The Congress even passed a law to reimburse the fine. However, after the Russian Revolution and the end of WWI, Americans saw communism as a threat. The same Congress amended the Espionage Act in 1918. It criminalised statements or publications that were disloyal, profane, scurrilous, and abusive towards the US Government or Constitution. A

revolutionary communist unionism was quelled by the law. Suprême Court affirmed the convictions Finally, in Abrams v. United States [250 U.S. 616 (1919)] and Whitney v. California [274 U.S. 357 (1927)], Justice Holmes dissented, limiting the scope of Sedition laws.

The curbing and suppression of free speech did not stop there. From FluencyMcCarthyism made the suppression of freedom of speech and expression the communists' worst nightmare. The courts did not show sympathy towards dissenters against the curb. Later on, the Court tried to distinguish between the advocacy of communism and the incitement of illegal action. In Yates v. United States, the court indicated that suppression of incitement to illegal action was constitutional, while suppression of communism would not be constitutional. Thereafter, in Brandenburg v. Ohio, the court declared that only the suppression of incitement of imminent lawless action is justified under the First Amendment. This clearly indicates that an act similar to McCarthyism does not have any place in a democracy.

PARLIAMENTARY PRIVILEGES: AN EXEMPTION

In British law, legislators have always had unlimited freedom of speech and expression. The British worked hard to guarantee this freedom to lawmakers. Parliamentary rights were therefore exempted from reasonable constraints. These advantages elevate legislators above ordinary Indian residents. These advantages make the right to freedom of speech and expression absolute.

Mr. Naziruddin Ahmad said that some sections of Article 85 (then a provision under the draught Constitution, now Article 105) relate to the privileges and immunities of members. He saw press freedom as one of the most vital human rights. He wanted the Press to be allowed to report on the House's proceedings and make fair judgments on them. He desired that the Press be free to publish everything the House could print. He thought it was odd that the Press was forbidden from publishing what the House could print. So he believed this is the gap in the Draft Constitution that has to be addressed.

But Shri Jagat Narain Lal vehemently disagreed with Mr. Naziruddin Ahmad. He wanted a member who had made a speech in parliament to lose their immunity and, hence, the ability to publicise their speech in the press. Allowing him to do so may be related to press freedom, but not to a member's right to speak or vote in parliament.

The right honourableShri M. Ananthasayanam Ayyangar stated that the 1919 Act prohibited legislators from using seditious language, even in the House. The Speaker of the House had the ability to limit such discourse. But the Act of 1935 altered this. A member of the House could make any comment that he couldn't say outside. That liberated the house completely. The study does not try to distinguish parliamentary privileges from appropriate restrictions. Since India's coalition administrations began, opposition party members have been denied the right to speak in the house, rendering the privilege useless. Adjournments and verbal disagreements have eroded this prerogative.

THE INFLUENCE OF FREE EXPRESSION ON OTHER FUNDAMENTAL RIGHTS

Articles 19 (1) (a) and 19 (2) are not the exclusive constitutional protections for freedom of speech and expression. Freedom of speech extends beyond these principles to freedom of peaceful assembly without weapons, freedom to organise groups and unions, and freedom to practise any profession or activity.

Article 17 condemns and abolishes the right to express support for untouchablity. Article 21 of the Constitution guarantees the right to life and freedom of expression. India is a multi- faith nation. Public religious manifestations are a fact of life. Article 25 of the Constitution provides everyone the right to profess, practise, and promote their religion. But reasonable constraints, i.e., public order, morals, and health, as well as Part III of the Constitution, apply. Thus, the protection and practise of freedom of speech and expression must be interpreted in conjunction with other constitutional and legal restrictions. The expression of religious views encouraging Sati is thus illegal. The ban goes so far that even supporters of such inhumane and degrading practises are forbidden from voting under the 1951 Representation of People Act.

AFTER THE CONSTITUTION, REASONABLE RESTRICTIONS

Upon the adoption of the Constitution, the judiciary faced challenges. Leftist groups allegedly slammed Nehru's policies. The judges sided with freedom of speech and expression. But the administration considered that the Constitution's Article 19 (1) (a) freedom of speech had been exploited. The cause was constant criticism of Congress's policy. The communists led the assault against the state. In parallel to these events, communist doctrine was gaining ground in Madras and Kerala. In 1950, the former Madras State banned Romesh Thapar's Marxist English publication, Cross Roads, for expressing critical views on Nehruvian policies.

As a result, the Supreme Court ruled in Brij Bhushan v. State of Delhi that the right to freedom of the press is incorporated into Article 19(1). (a). Thus, imposing pre-censorship on a publication by presidential order was deemed a violation of the Indian Constitution's spirit. This enraged Nehru. So the government wanted to empower the executive apparatus to stifle unbridled freedom of speech. This was intended to be done in cases of public peace and order. All of these events and ramifications led to the First Amendment. It is obvious that the mentioned change was made to maintain favourable ties with other powers. Unfavourable statements on the government, like in Romesh Thapar's Cross Roads, were also avoided.

The First Constitutional Amendment's goals and motivations make this plain. Abolishing judicial decisions via constitutional amendments is now a precedent. These judgements allegedly hampered the government's ability to implement certain policies and programmes. This resulted in significant changes to the Constitution's Art 19 and First Amendment. Previously, Article 19 (1) stated that all people have the right to (a) freedom of speech and expression;... The freedom under section 19 (1) (a) was subject to limitations under clause (2). It guaranteed that even if the basic right conflicted with existing laws, the legislation remained constitutional. This provision

also authorised the state to legislate against libel, slander, defamation, contempt of court, or any other issue that offends decency or morals, threatens the state's security, or seeks to overthrow it. That implies the laws in place when the Constitution was introduced would still be legal, even if they restricted freedom of speech and expression. These are-

1. The Amendment defined appropriate constraints. It allowed the state to set reasonable limits. The judiciary was tasked with adjudicating and applying reasonableness.
2. It raised the basis for restricting freedom of expression.
3. It wanted cordial connections with international states. In terms of regional politics, it may have given cause to build favourable ties with neighbours.

Fear of overthrowing state authority was replaced by other reasons, i.e., instigation of a crime. Previously, freedom of speech and expression might be curtailed in severe instances when the state's power was threatened. The new law permits the state to restrict freedom of speech and expression for inciting an offence. This terrain gave the cops extra authority. The state now has the ability to restrict freedom of speech and expression in cases where the communication may instigate an offence. That limited India's free speech jurisprudence. This paved the path for post-Amendment restrictions on freedom of speech and expression.

5. The inclusion of public order in the framework of decency or morality broadened the interpretive range. The more police powers are used,

Thus, the Press (Objectionable Matter) Act of 1951 came into being and lasted until 1956. To publish "objectionable matter," the government might demand and lose security. Angry owners and printers might now seek a jury trial. Worse was to follow. They arrived with the national emergency. The Publication of Objectionable Matters Ordinance was adopted in 1975. The Janata Party-led government revived the Parliamentary Proceedings (Protection of Publications) Act, 1956.

a manner of speaking But one thing is certain: the Indian Constitution's First Amendment revolutionised free speech law in India.

The Constitution of India recognises Parliamentary Democracy. In such a system, the people's right to self-determination and representation is paramount. An individual may use corrupt methods to win elections. The candidate or his agents, representatives, or party members may use free speech to polarise voters. The Representative of the People Act, 1951, has been amended to include this danger to democracy. It is specified in Section 123 of the Representation of the People Act 1951. In virtue of Section 123 (3) of the Act, it is unlawful to make an appeal to vote or not vote based on religion, race, caste, community, or language.

Similarly, Section 123 sub-section (3A) restricts speech and expression if it constitutes hate speech. Specifically, the paragraph prohibits:

Article 19 also does not shield a candidate or his agent from glorifying the bad practises of Sati (1) (a)

HATE SPEECH AND RELIABLE RESTRAINTS

Following the applicable constitutional amendments, Sections 153A, 153B, and 295A of the Indian Offenses of broad expression of hate speech are dealt with under the Penal Code. According to the Penal Code, offences against public tranquilly and criminal intimidation are connected to hate speech. Rather, these rules act as appropriate limitations on freedom of expression. So one (an Indian citizen) cannot claim protection for speech. Sedition is punishable under Section 124A of the Indian Penal Code, whereas actions detrimental to maintaining peace are punishable under Section 153A. Assertions harmful to national integration by words (spoken or written), signs, or physical representation are also punishable under Section 153B of the Code. Section 295A of the Code punishes intentional and malicious conduct designed to offend a class's religion or religious beliefs. In support of this clause, Section 298 of the Indian Penal Code punishes the expression of statements intended to offend someone's religious emotions. Section 505 penalises remarks (through publishing, dissemination, or rumour) that cause public annoyance.

These rights are crucial in free speech jurisprudence in plural societies that fight to exist.

Aside from that, a patriarchal culture outrages women's modesty. But it goes against the fundamental constitutional right to equality. Thus, insulting a woman's modesty is punishable under Indian Penal Code Section 509. Section 499 also penalises defamatory speech.

The Indian Law Commission has a rating of 2.9 out of 5 stars.

The Indian Law Commission explored expanding the scope of Article 19 (1) (a) of the Constitution. So, the Commission dealt with two major concerns in its 101st report.

1. To ensure that companies have the same rights as individuals, in accordance with Article 19 (1) (a);
2. Ensure that corporations, like natural persons, have an "Indian" character.

As a result, the Commission proposed that Article 19 be added with an explanation to (expand the area of protection) to include companies.

On trial by media and its interplay with free expression, the Law Commission of India examined a key problem of democracy in the digital age, dominated by media. The paper recommends amending the Contempt of Courts Act, 1971 to address this threat. The Report has examined investigative journalism's value. It also highlights the benefits of investigative journalism to the legal system. This dissemination may bias the courts, witnesses and the public, and can amount to contempt, according to the study. As a result, the Commission recommends amending Section 2 (c) of the Contempt of Courts Act to broaden the definition of "publication." It was suggested that "publishing includes publication in print, radio, electronic media, cable television network, and the internet" be included to broaden the meaning. So we can see how the media has changed the meaning of freedom of speech and expression.

The report's IX Chapter explains the recommendations. They try to educate both the media and the public on what is unacceptable in the media. Regardless of the judges' tolerance, this may be considered contempt of court.

In Chapter IX of the Report, media releases are classified as detrimental to a suspect or accused offender. There is a need need to provide Diploma and Degree Courses in Journalism and Law, according to the Report.

A broad interpretation of the word "publishing" (through an amendment) would reduce the area of freedom of speech and expression, yet it is essential to control media hooliganism. This is required to protect the democratic justice system from preconceptions and biases.

Its 267th Report is another important step in the evolution of free speech law in India. An important report against hate speech was given by a commission led by Justice Dr. B. S. Chauhan in March 2017.

As a justification for the study, the report cited the Supreme Court of India's comment in Pravasi Bhalai Sangathan v. Union of India and Ors. In this instance, the court asked the Indian Law Commission to look into hate speech. It was anticipated that the Commission would define "hate speech" and provide recommendations to the Indian Parliament to strengthen the Election Commission of India.

In its 267th report, the Indian Law Commission suggested changes to the Indian Penal Code and the Criminal Procedure Code.

It is suggested that Section 153 C (Prohibiting incitement to hate) be amended. It suggests that:

A person's religious, racial, or ethnic background; gender identity; sexual orientation; language; handicap; or tribe-(a) employs threatening words, indications, or actions visual representations within a person's hearing or sight intended to provoke fear or panic;

Incitement to violence is punishable by imprisonment of up to two years and/or a fine of up to Rs. 5000. (Emphasis added)

The Commission also suggested adding a new Section 505A to the Indian Penal Code. In this case, the section would read:

Whoever uses or displays highly threatening or insulting words, signs, or other visual representations in public;

I cause fear or anxiety in a person's hearing or vision;

The intent to instigate illegal violence against that person or another is punishable by up to one year of imprisonment and a fine of up to Rs. 5000. (Emphasis added)

The Law Commission also suggested amending the 1973 Criminal Procedure Code. The proposed amendment's Section 153C (Prohibiting inciting to hate) makes the offence cognizable and non-bailable. The crime of "causing fear, alarm, or instigation of violence in certain cases" will be declared non- cognizable and bailable under Section 505A of the Indian Penal Code.

Calling someone by their caste name in public is humiliating, according to the Indian Law Commission. It need not always be against the law. Such hate speech may not be connected to public order, but to decency and morals. The S. C. & S. T. (Prevention of Atrocities) Act penalises anybody who knowingly insults or intimidates a member of a Scheduled Caste or Scheduled Tribe in public.

THE NATIONAL CONSTITUTIONAL REVIEW COMMISSION

The then NDA government set up the National Commission to Review the Constitution, headed by former Chief Justice M. N. Venkatchaliah. It was reported to the PM on March 31, 2002. The report addressed several constitutional concerns. Clearly, it addressed freedom of speech.The report's chapter 3 refers to press and information freedom. Article 19 (1) (a) of the Constitution must specifically include freedom of the press and other media (in the current context, electronic and social media), freedom of expression, and freedom to seek, receive, and impart information. It also restricted the disclosure of information obtained in confidence, except where necessary in the public interest. That implies the court must redefine the public interest. That may further restrict freedom of speech. Notably, the Constituent Assembly rejected the then-members' demands to incorporate press freedom. The causes are explained well, yet the report wishes to alter them. Because the media is not a natural person, it cannot exercise its freedom without human activity.

The study also recommends that courts have the option of allowing defendants to defend utterances that constitute contempt of court.

Parliamentary privileges are viewed as a tool that almost makes freedom of speech and expression absolute. The study suggests amending Article 105(2) to exclude corrupt activities from parliamentary privileges. Taking a bribe to vote was mentioned as a corrupt practise, generating special concerns in the house. So the report allegedly unlocked Pandora's Box.

The right to free speech and expression is a moving target in the Constitution. Events and forces have shaped its development. The British tried to regulate and limit freedom, culminating in to implement restrictive legislation The Indians had to scarify a lot. Modern India's creators and liberation warriors desired a constitutional guarantee to this freedom. Foresight made the liberties conditional. They had limitations. They were later dubbed reasonable constraints. Since independence, these grounds of limitation have been hotly debated. We got an amendment. Since the Constitution came into being, the number of acceptable limits has grown, while freedom of speech and expression has shrunk.

Restricting political opposition has frequently resulted in the repeal of sedition laws. The effect of the capitalist economy, community intolerance, and hooliganism has made journalistic freedom insecure. So the National Commission to Review the Constitution advocated amending Article 19 (1) (a) to include freedom of press and other media, as well as freedom to seek, receive, and impart ideas. These are just suggestions. Using limits haphazardly has raised concerns about democracy's durability.

Existing constitutional doctrine has so far been unable to address the difficulties facing free speech and expression.

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- Draft Article I (5), B. Shiva Rao- *Select Documents*, Vol. 2, p. 73.
- Article II-Section I (12), Ambedkar's Memorandum and Draft Articles on the Rights of States and Minorities (March 24, 1947). *See* B. Shiva Rao- *Select Documents*, Vol. 2, p.87.
- Shri K. M. Munshi pointed out that, "the word 'sedition' has been a word of varying import and has created considerable doubt in the minds of not only the members of this House but of Courts of Law all over the world. Its definition has been very simple and given so far back in 1868. It says "sedition embraces all those practices whether by word or deed or writing which are calculated to disturb the tranquility of the State and lead ignorant persons to subvert the Government". But in practice it has had a curious fortune. A hundred and fifty years ago in England, in holding a meeting or conducting a procession was considered sedition. Even holding an opinion against, which will bring ill-will towards Government, was considered sedition once. Our notorious Section 124-A of Penal Code was sometimes construed so widely that I remember in a case a criticism of a District Magistrate was urged to be covered by Section 124-A."

Selective Abortion and Female Infanticide: A Critical Study of Medical Termination Laws in India

Dr. Ankita Shukla*

ABSTRACT

Sex-selective abortion is the practice of terminating a pregnancy based upon the predicted sex of the infant. The selective abortion of female fetuses is most common in areas where cultural norms value male children over female children. It is the most common practice for years in India in which abortion of female fetus is performed in the womb of mother after the foetal sex determination and sex selective abortion by the medical professionals.

Daughters as a child were and till date are never considered a good omen as with them there are colossal obligations attached which in turn creates a havoc in lives of those who feel they are burdened with their birth. These burden results in child marriages, cruelty and dowry deaths and to escape these tribulations the families prefer to kill them in the fetus itself or after their birth.

The laws of India do not permit abortion. The Medical Termination of Pregnancy Act, 1971 (MTP) Act, which prohibits abortion, was enacted with a view towards containing the size of the family. However, in some cases the desire for a small family may have outweighed the desire for a child of a specific gender, leading to abortions where the sex of the fetus was different from that desired by the family. The MTP Act stipulated that an abortion may lawfully be done in qualified circumstances. But the unscrupulous connived to misuse the law to have abortions conducted for the purpose of sex selection.

Later, innovative technologies made sex selection easier, and without the regulations to control the use of such technologies, these technologies began to be misused for sex-selective abortions. These actions necessitated enactment of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT) in 1994. This act was amended in 2002 and recently in 2021 to close loopholes contained in the original act and to empower women.

Indian laws do not, under any circumstance, allow sex determination tests to be undertaken with the intent to terminate the life of a fetus developing in the mother's womb, unless there are other absolute indications for termination of the pregnancy as specified in the MTP Act of 1971. Any act causing the termination of the pregnancy of a normal fetus would amount

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to feticide, and in addition to rendering the physician criminal liable, is considered professional misconduct on his part, leading to his penal erasure.

Keywords: *Female foeticide, MTP, PNDT.*

Most abortions are caused because the pregnancy is unplanned and having a child causes a crisis for the woman. Therapeutic abortions result from a medical problem where allowing the pregnancy to continue to birth would endanger the woman's health. Selective abortions, which are a small fraction of all abortions, occur in those cases where a particular foetus is perceived as having undesirable characteristics. Selective abortion is also done when there are too many foetuses in a pregnancy.

These include cases where:

- the unborn child is a girl, and the parents, for cultural or other reasons, want a boy;
- the foetus is defective;
- the foetus does not suit the parents in some other way; or
- the pregnancy is intended to produce a child with specific genetic properties, and this foetus doesn't have them.

The laws of India do not permit abortion. The Medical Termination of Pregnancy Act, 1971 (MTP)[1] Act, which prohibits abortion, was enacted with a view towards containing the size of the family. However, in some cases the desire for a small family may have outweighed the desire for a child of a specific gender, leading to abortions where the sex of the fetus was different from that desired by the family. The MTP Act stipulated that an abortion may lawfully be done in qualified circumstances. But the unscrupulous connived to misuse the law to have abortions conducted for the purpose of sex selection.

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Under the Indian Penal Code, causing an abortion, even if caused by the pregnant woman herself, is a criminal offense, unless it is done to save the life of the woman. The offense is punishable by imprisonment for a period of three years, by fine, or by both.[3]

The MTP Act provides for an abortion to be performed by a registered medical practitioner in a government hospital provided, in his opinion;

1 The Medical Termination of Pregnancy Act, No. 34 of 1971, as amended by the Medical Termination of Pregnancy Act, No. 64 of 2002.

2 The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, and the Pre-natal Diagnostic Technologies (Regulation and Prevention of Misuse) Amendment Act, No. 2002, No. 14 of 2003

3 The Indian Penal Code, Act No. 45 of 1860, Section 312.

- continuance of the pregnancy, (which at the time must not exceed twelve weeks and);
- involves a risk to the life of the woman or a grave injury to her physical or mental health; or,
- there is a substantial risk that the child, when born, would suffer such physical or mental abnormalities as to be seriously handicapped.

A pregnancy caused by rape is presumed to constitute a grave injury to the mental health of the pregnant woman. The Act also allows an abortion to be performed when the pregnancy occurs due to the failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children. Where the pregnancy is more than twelve weeks but less than twenty weeks, the opinion regarding the medical necessity for an abortion in the above circumstances must be formed in good faith by two medical practitioners. When the pregnancy is less than 12 weeks, the opinion of one medical practitioner is necessary for the approval of an abortion. All abortions must be performed in a government hospital, regardless of the length of the pregnancy.

The initiative to enact the MTP Act came from groups that looked at it as a law for family planning. However, the government and the then ruling Congress party consistently defended the law by saying that it was not for family planning and that it was social legislation aimed at empowering women.[4]

The MTP Act of 1971 did not provide abortion as a right to women. It expanded the permitted reasons for abortion in India, legalizing abortion subject to the fulfilment of the following conditions: (a) risk of death or grave mental or physical injury to the health of the pregnant woman; (b) risk that the child, if born, would suffer from serious physical or mental abnormalities; (c) where the pregnancy is caused by rape and (d) where a married woman is pregnant as a result of the failure of a contraceptive device. The number of medical practitioners required to give their assent for termination of the pregnancy is contingent upon the duration of the pregnancy. Abortion on any grounds other than those specified in the law is an offence punishable under the Indian Penal Code.

These conditions may appear to be inflexible, but each condition can be interpreted according to the ethics of the practitioner. For example, the definition of "serious physical and mental abnormalities" is subjective and this permits practitioners to devise different standards to judge specific situations. Similarly "failure of contraception" has been read as "non-use of contraceptives". It is pertinent to note that this condition comes from the context of family planning in which the law emerged.

While context is important, it is not the only factor that determines the justness of legislation. A lot of progress has been made in theories of law, especially laws that relate to the rights and roles of women.

4 Government of India. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002. Gazette of India, January 20, 2003, No. 14 of 2003 Available from: http://mohfw.nic.in/.

The MTP (Amendment) Act, 2021was introduced to expand the access to safe and legal abortion services on therapeutic, eugenic, humanitarian, and social grounds to ensure universal access to comprehensive care.[5] The new law is aimed to meet the SDGs and to help and prevent unsafe abortions and also to give more power to women to retain and respect their privacy and their right to body and reproduction.

Key changes in the MTP Act, 2021 are as follows:

- Increasing the upper gestation limit from 20 to 24 weeks for special categories of women, including survivors of rape (marital rape), victims of incest and other vulnerable women (differently abled women, minors, among others).
- The opinion of one provider needed for the termination of pregnancy up to 20 weeks of gestation. Requirement of the opinion of two providers for the termination of pregnancy from 20-24 weeks of gestation.
- Upper gestation limit to not apply in cases of substantial foetal abnormalities diagnosed by a Medical Board.
- Confidentiality clause. The name and other particulars of a woman whose pregnancy has been terminated cannot be revealed except to a person authorized by law.
- Extended MTP services under the failure of contraceptive clause to unmarried women to provide access to safe abortion based on a woman's choice, irrespective of marital status.

However, there are certain serious concerns:

- No right to abortion at will: It has various conditions for the termination of pregnancies.
- No recourse for rape victims: For the termination of pregnancies beyond 24 weeks, rape victims cannot approach the Medical Board (can approach in case of 'substantial foetal abnormalities' only). so, the only recourse remains is through a Writ Petition.
- No time frame for the medical board: Bill doesn't provide the time frame within which the Medical board must make its decision – any delays may lead to further complications for women.
- Transgender and unmarried, if they require abortion beyond 20 weeks, are not considered in the bill
- Potential for executive overreach: Special categories of women whose gestation limit will be increased from 20 to 24 will be decided by the central government – and not by a sovereign body like parliament
- Doesn't considers institutional lacunae: According to the bill only Registered medical practitioners having experience or training in gynecology or

5 https://www.who.int/india/news/detail/13-04-2021-india-s-amended-law-makes-abortion-safer-and-more-accessible

obstetrics can perform the abortion, but according to NH&FS (2015-16) data only 53% of abortions are performed by a registered medical doctor, the rest are conducted by a nurse, midwives, family members, etc

- Expecting the presence of two gynecologists in rural areas to ascertain the need for abortion is irrational.[6]

PNDT ACT

The PNDT Act of 1994, later amended in 2002, was enacted with the objective as stated in the preamble ;

> …to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female feticide and for matters connected therewith or incidental thereto.

Thus, the PNDT Act prohibits the use of all technologies for the purpose of sex selection, which would also include the new chromosome separation techniques.

With the blanket prohibition contained in sections 3, 4 and 5 of the PNDT Act, there is effectively a ban on sex selection in India. It is not possible to use pre-natal diagnostic techniques to abort fetuses whose sex and family history indicate a high risk for certain sex-linked diseases, or to choose a fetus whose sex is less susceptible to certain sex-linked diseases. This blanket prohibition may appear to be a contradiction to the provisions of the MTP Act, which permits the abortion of a fetus that is at a risk of being born with serious physical or mental disabilities. While it is legally permissible to abort a fetus at risk of serious physical or mental disabilities, it is not permissible to select a fetus of a sex which is less likely to suffer from a sex-linked disease.

The PNDT Act primarily provides for the following:

- Prohibition of sex selection, before and after conception.
- Regulation of prenatal diagnostic techniques (e.g., amniocentesis and ultrasonography) for the detection of genetic abnormalities, by restricting their use to registered institutions. The Act allows the use of these techniques only at a registered place, for a specified purpose, and by a qualified person who is registered for the purpose.
- Prevention of the misuse of such techniques for sex selection, before or after conception.
- Prohibition of the advertisement of any techniques used for sex selection as well as those used for sex determination.

6 https://www.insightsonindia.com/2022/07/22/recent-issues-related-to-indias-law-on-abortion/

- Prohibition on the sale of ultrasound machines to persons not registered under this Act.

The two laws related to abortion create ethical dilemmas for doctors as well as pregnant women. The MTP Act contains general provisions but also restricts abortion due to contraceptive failure to married women alone. This effectively gives doctors the power to provide or refuse abortions depending on their personal views. While the MTP Act permits abortion of a foetus with serious abnormalities, the PCPNDT Act does not permit the identification of the sex of the foetus for the purpose of eliminating sex-linked disorders.When technologies were developed that made it possible to detect the sex of the foetus, and in the absence of any regulation of the use of such technologies, they began to be used for sex-selective abortions that discriminated against the girl child.

In 1994 the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was enacted; subsequent amendments resulting in the Pre-conception and Pre-natal Diagnostic Technique (Prohibition of Sex Selection) (PCPNDT) Act, 2003, plugged certain loopholes[7] and as far as MTP (Amendment) Act 2021 is concerned India can follow the examples of the UK where pregnancy can be terminated anytime. Importantly, the WHO does not specify any maximum time limit after which pregnancy should not be terminated. Transgender and other vulnerable communities must also come under the ambit of the bill. Also, India needs to create a cadre of certified medical practitioners including ASHA, ANM workers in its health system.[8]

These two major anti-abortion laws are a progressive legislation which give our women a semblance of reproductive rights and autonomy. PC-PNDT Act is a pro-life legislation aimed to prevent female infanticide that also address the issue of right of a woman to give birth and her autonomy.

7 Thomas J M, Ryniker BM, Kaplan M. Indian abortion law revision and population policy: an overview J Indian Law Inst 1973; 16(4):513-34.

8 Ibid 7

The Future of Artificial Intelligence (AI) in the Legal Spectrum: A Study on the Attribution of Criminal Liability to AI

*Dr. Bandita Sengupta**

1. INTRODUCTION

The beauty of technology lies in the boundless scope of innovation that persists, and the giant leaps and bounds that have occurred in technological development over the past century is a testament to the fact that there is no limit to scientific endeavor. This constant thirst for knowledge, innovation and scientific progress, as well as the exponential growth of computing technology in the latter half of the 20th century has led to the birth, and subsequent growth of a synthetic form of intelligence that can compute as well as take decisions on the basis of its programming to arrive at specific conclusions, and this computational intelligence of machines has been termed as artificial intelligence.

However, this growth of artificial intelligence has also brought into jurisprudence the question of liability of these 'intelligent' bodies. The legal definition as well as attribution of legal personality is necessary for amounting any kind of liability to any distinct body, be it human or otherwise, and this issue of attribution is further complicated when criminal liability is brought into the foray due to the very fact that *mens rea,* which connotes to the mental ability of a criminal, is a fundamental aspect of determining liability under criminal law. However, due to the very nature of artificial intelligence bodies, the meaning and scope of *mens rea* as attributed to humans does not exist due to the pre-programmed nature of their functioning. A related problem that arises is the nature of punishment that is to be awarded under criminal law, and the fact that traditional methods of punishment cannot be given to forms of artificial intelligence goes without saying due to the abstract nature of their composition; for such bodies are the result of lines of mathematical code and nothing else.

Keeping these in mind, the paper aims to analyze the nature of criminal law with respect to its scope in attributing liability to forms of artificial intelligence, and also try to look at how laws can be implemented in India to address the issue.

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2. AN INTRODUCTION TO THE CONCEPT OF ARTIFICIAL INTELLIGENCE

Ever since the first computer was invented, and the age of 'intelligent' machines was ushered in, a consideration wherein intellectual machines and humans would work together to give rise to a new utopian society has often found itself in popular culture as well as literary fiction. In his classic science fiction novel *I, Robot,* published in the year 1950, Issac Asimov laid down three fundamental rules of autonomous robotics, and later on, in the year 1968, Stanley Kubrick, in his movie *2001: A Space Odyssey*, depicted a conscious robot named HAL-9000 that was designed to control everything onboard an interstellar spaceship, but which eventually attempts to kill the astronauts. The concept of artificial intelligence has thus existed for some time now in fiction, and only over the past few decades has attempts to turn fiction into fact borne some definite results.

The term artificial intelligence has been over the years been connoted to a *'thinking machine'*, or a machine that has the ability to reason on the basis of facts and data presented to it. The ubiquitous presence of such intelligence range from complex ones such as the assistants prevalent in the Android and IOS phones that can do a plethora of tasks to much simpler ones designed for one sole purpose, such as the safety system in cars that helps drivers stay safe by applying the brakes or shutting off the engines whenever it deems necessary.

This apparent ability to function without external stimulus once the necessary inputs relating to both data and programming have been provided has enabled such artificial forms of intelligence to take over a number of tasks that no one would have been performed solely by humans due to the systematic nature of the task at hand.

However, a question that arises when such a definition is used to describe AI is what differentiates an AI from any other machine, for example a robot, which can also function autonomously once the necessary inputs have been provided? In order to tackle this issue, and also describe the nature of intelligence, Alan Turing, the famed mathematician and computer scientist had come up with what is now known as the 'Turing Test', wherein he stated that a machine could be classified as intelligent if a person conversing with the machine could not differentiate it from a human on the basis of the conversation.[1] However, this was criticized due to the fact that Turing considered all human intelligence to be of equal magnitude, and did not account for the differences in intellect among humans. A similar approach was undertaken by Roger Schank, one of the foremost theorists of artificial intelligence, came up with five parameters that differentiates an 'intelligent' machine from a 'non-intelligent' one. The five parameters that he denoted were communication, internal knowledge, world knowledge, creativity and intentionality.[2] The existence of AI programs such

1 Gabriel Hallevy, When Robots Kill: Artificial Intelligence Under Criminal Law, 05-06. (1st ed. 2013).

2 Roger C Schank, What is AI, Anyway? 4 AI Magazine. 59, 60-61, (1987).

as *'Deep Blue'* that beat chess grandmaster Kasparov[3], or the presence of AI such as *'Alpha Zero'* that can learn without any external human intervention[4], prove that we are on the right path to an 'intelligent' Artificial Intelligence entity.

Despite this analysis though, the question still remains on whether a *'thinking machine'*can actually think, or is it simply using a set of calculations to arrive at a conclusion on the basis of its programming. Some people have even concluded that the term *'thinking machine'* may be an oxymoron in itself,[5] for the two words that make up the phrase are themselves contradictory in nature.

3. CRIMINAL LIABILITY AND AI

In order to ascertain criminal liability on any entity, be it a legal person or a natural person, two major elements need to be present; *mens rea* and *actus reus.* While *actus reus* is the explicit act of the person in question, and thus the external element of the crime, *mensrea*is far more intimate in nature due to the fact that it is the internal mental element that led to the crime. This poses a problem when liability of an intangible or abstract entity is to be ascertained due to the fact that although *actus reus* can be easily determined on the basis of commission or omission that led to the criminal act, determining *mens rea* is far more difficult in nature. Since *mens rea* is represented in the form of knowledge and intention at the highest degrees, and negligence at lower degrees[6], it becomes extremely difficult to consider the existing *mens rea* of any entity, and the same becomes even more difficult in case of an intangible and artificial form of intelligence that is abstract in nature. As the principles of criminal law necessitate the presence of both of these principles in a criminal, and the absence of even one of these absolves the entity from criminal liability, it needs to be determined how exactly can the mental element of an abstract entity be taken into account under traditional criminal jurisprudence.

To tackle the matter of criminal liability, Gabriel Hallevy, one of the pioneers of criminal law relating to artificial intelligence had proposed a model named 'Perpetration via Another' wherein Hallevy considered that due to the programmable nature of an entity possessing artificial intelligence, both the programmer who formulates the programme that gives birth to the AI entity, as well as the end user who utilizes the

3 Malcolm Pein, Chess computer beats Kasparov in 19 moves, THE TELEGRAPH, 12 May 1997. https://www.telegraph.co.uk/news/matt/9885264/From-the-archive-Chess-computer-beats-Kasparov-in-19-moves.html.

4 Samuel Gibbs, Alpha Zero AI beats champion chess program after teaching itself in four hours, THE GUARDIAN, 7 Dec 2017, https://www.theguardian.com/technology/2017/dec/07/alphazero-google-deepmind-ai-beats-champion-program-teaching-itself-to-play-four-hours.

5 Gabriel Hallevy, The Criminal Liability of Artificial Intelligence Entities - From Science Fiction to Legal Social Control'4 AKRON INTELLECTUAL PROPERTY JOURNAL 171, 176 (2010).

6 David C Vladeck, Machines without Principals: Liability Rules and Artificial Intelligence, 89 WASHINGTON LAW REVIEW 117, 124 (2014).

AI entity for his benefit can be considered to be the perpetrator, and the AI does not have any direct liability for its actions.[7] This seems applicable due to the very nature of modern artificial intelligence machines, for a change in a few lines of code either by the initial creator or by the user may drastically change the purpose of an AI from a peaceful protector to a murderous killer. Here, the*actusreus*element may be performed by the entity with artificial intelligence, and yet, the *mensrea*lies either with the end user or the programmer, which ultimately led to the act. Thus, going by the traditional notion of criminal law, since one of the two elements necessary to place criminal liability are missing from the act of the AI entity, the AI cannot be held guilty of the *actusreus*committed. However, although this model may be applicable to some of the AI entities in existence today, and a crime of such nature may realistically happen, the AI in question is relegated to the position of a mere tool, and thus, despite its nature may not fall under the wholesome definition of what an AI is. In other words, these are, despite their sophistication, they are nothing more than mere agents in the hands of a human for furthering his prospects.[8]

But, this begs the question: what if the AI in question is a sentient being, possessing all the traits of a human intellect except for its artificial origins, and such an AI commits a crime? Surely, the *actus reus* aspect is clear, but where does the *mens rea* lie? Going back to Asimov's three fundamental rules of robotics, his first law states *"A robot may not injure a human being or, through inaction, allow a human being to come to harm"* while the second law states *"A robot must obey orders given to it by human beings except where such orders would conflict with the First Law."*[9] If an AI entity is formulated to be governed by these two laws alone, then it is wholly evident that there may arise situations wherein these two laws may be contradictory in nature.

The dilemma pertaining to liability is further complicated by the question of whether the programmer who created the programme be liable for the crime even though he didn't programme it for the purpose of the same, or will the liability fall on the AI entity despite the fact that at the end of the day the entity is a product of someone else's programming? These are the questions that arise when this model of liability is applied. Furthermore, considering the fact that *mens rea* also contains negligence as a mental element for ascertaining criminal liability, can the person who was responsible for creating the AI entity be charged under negligence if his creation commits an offence? Owing to the nature of criminal law, if proper care and due protection had been taken by the creator to ensure that such an event may not happen, then perhaps he may not be liable, for that is what the law denotes in any other similar scenario, and thus, that must be the principles applied even when the perpetrator of the offence is an AI entity.

But these analyses only consider the entity with artificial intelligence as simply a tool or a part of any crime. What if the entity in question is awarded the same rights and duties as a person, and also the same level of conscience and sentience as a

7 Gibbs, Supra Note 5, 180.

8 Hallevy, Supra Note 6, P - 121.

9 ISSAC ASIMOV, I,ROBOT, 04-05 (1st Ed. Turtleback Books 1999).

human being, and yet, the entity ends up committing a crime. In such a scenario, it needs to be considered about whether the entity in question will be equated with a human being on equivocal terms, despite its intelligence being synthetic in nature, or will the synthetic nature be ignored simply due to the fact that it possesses a legal identity on par with a human due to its conscience. The basic necessities for imposing criminal liability on any entity given a legal personality, be it human or otherwise, are *mens rea* and *actus reus,* and if an AI entity fulfils both of these necessities, there may not be any choice other than to impose direct liability on the AI entity.[10] For example, if an AI entity possessing the qualities of conscience and sentience as discussed above, and in control of any external mechanism such as a robot that resembles a human's external anatomy chooses by its volition to use force against another human, and kill the person by using brute force, while having sufficient knowledge regarding the consequences of its action, such a situation will ultimately lead to the fulfilment of both the internal element as well as the external element necessary for imposing criminal liability, and as such, it is imperative that direct liability be imposed upon the AI entity according to the traditional principles of criminal law.

Imposing criminal liability on an AI entity however brings to light the question of punishment, for under criminal law, appropriating a quantifiable amount of punishment that is justified on the basis of the degree of crime committed, is one of the basic tenets of criminal law. But, case in point, even if an AI entity is perceived to be guilty of a criminal act, can the traditional methods of punishment be imposed? For example, under Section 302 the Indian Penal Code, 1860, anyone who commits murder is punishable with death or life imprisonment, along with fine. However, if an AI entity is to be implicated under this section, it needs to be denoted what exactly death and life imprisonment will mean for it. Being an abstract entity, the life of an AI may be infinite under practical terms, and thus, how does the concept of life imprisonment apply to such an entity? Similarly, death for an AI may mean termination of its programme, after which it will cease to exist, and yet, the imperative question is whether it will have the same impact as death does in the traditional sense? Incarceration which forms perhaps the most substantial part of criminal law punishments in every nation of the world are there for the basic purpose of deprivation of human liberty and freedom and thus form the crux of the idea behind keeping a person locked up within the confines of a jail.[11] However, freedom and liberty for an abstract entity such as an AI will again not have the same effect as it does on a human being. Perhaps some thought needs to be levied and appropriate conclusions need to be drawn as to the nature of punishment to be levied on AI entities.

The situation becomes even more complicated in case of pecuniary fines that are to be levied against crimes as part of the punishment. The value of money will not have the same implication for a synthetic entity that it does for a human being, or even a body such a corporate legal person, an entity which is involved mainly in

10 Gibbs, Supra Note 5, 187.

11 Gibbs, Supra Note 5, 195.

financial matters and its very existence depends on the state of finance of the corporation in question. However, for an AI entity, the same may not be the scenario. Furthermore, for the payment of fines, a legal person be it a human or a corporation within the definition of law, needs to have some sort of property or money in its possession. However, an AI entity may lack the ownership of these things, and hence, pecuniary fines in the common understanding of the term may not be imposed on entities governed by artificial intelligence.

4. INDIA'S LEGAL APPROACH TO REGULATING AI

Ever since its independence, India's growth in the fronts of technology as well as economy has been well above most of its peers, and today, the nation boasts one of the most robust economies as well as one of the most technologically innovative populations throughout the globe. Despite this technological growth and progress over the past few decades however, the legal for a of India has been unable to keep up with the level of scientific progress, and has been somewhat slow in embracing the changes. This is evident from the fact that until recently, before the formulation of the Information Technology Act, 2000, India lacked any comprehensive legal structure to deal with crimes related to the computer, the internet and other basic tenets of cyber security. Furthermore, the presence of cyber security laws within the Indian Penal Code is also lacklustre at best.

Recently, India has also taken certain steps in trying to usher in an era of Artificial Intelligence, and that is most evident by the NITI Ayog report titled *'National Strategy for Artificial Intelligence'* released in the year 2018. The paper talks about the various avenues wherein inclusion of AI technology may be made possible, such as education, healthcare and agriculture.[12] There have also been discussions regarding the utilization of AI technology, coupled with robotics, for surveillance purposes in harsh weather conditions of Siachen.[13]

However, an issue that is yet to be addressed is the legal framework pertaining to the regulation and management of Artificial Intelligence within the nation. A proper statutory provision dealing with these issues will make India one of the foremost players in the arena, and a source of future inspiration for foreign legislations.

5. CONCLUDING OBSERVATION AND SUGGESTIONS

The exponential progress of technology over the past few decades has led to an unprecedented growth in the advent of artificial intelligence programs over the world. And yet, there exists a significant lack of any substantial jurisprudence dealing with the matter, especially with regard to criminal law. The first issue that needs to be dealt with is regarding the legal liability of AI entities pertaining to criminal law.

12 National Strategy for Artificial Intelligence, NITI AYOG.

13 *Hi-tech Robots to help in surveillance in harsh areas like Siachen* THE ECONOMIC TIMES, Jul 15 2018, https://economictimes.indiatimes.com/news/defence/hi-tech-robots-to-help-in-surveillance-in-harsh-areas-like-siachen/articleshow/50975187.cms.

However, the first question that arises from this approach is considering whether AI entities possess a legal personality, possibly something akin to the personalities of other non-natural persons such as corporations, or whether the nature of their existence as regards to law is somewhat different. The second question pertains to whether AI entities possess the pre-requisite *mens rea* and even if they do possess, does it amount to the same meaning that is prescribed within traditional criminal law needs to be pondered upon. Another related issue is whether an *actus reus* committed by the AI will amount to any liability on part of its programmer or developer. The nature of punishment too needs to be taken up as a matter of concern, since the traditional methods of punishment such as incarceration and pecuniary fines, and even the death penalty do not apply to an abstract entity such as an AI and hence, the question of punishment, even in case of appropriating liability upon AI entities needs to be subjected to proper analysis. To conclude, the necessary jurisprudence of criminal law needs to be appropriately developed and evolved in order to meet the necessary requirements and requisites within the scope of AI entities.

Critical Analysis of Burden of Proof in the Light of Cratology and the Doctrine of Equality

*Dr. Moumita Sen**

ABSTRACT

The aim of this paper is to explore the link between burden of proof and doctrine of equality from the perspective of cratology. It highlights some of the theoretical issues that are raised in understanding this complex cratological phenomenon keeping in the backdrop the inquisitorial mode of access to justice in ancient India. This paper will analyse how far the modern Indian democratic constitutional state and its essence of the power process, consists in the attempt to establish an equilibrium between the various competitive plural forces within the state society, with due regard to the free unfolding of the human personality taking examples from national and international judiciary system to illustrate how the hegemony of adversarial ideology and its implementation compromises the ability of sentencing outcomes to resonate with the concept of parity of power. To illustrate this more specifically in the context of cratological aspect, this paper will then examines how this system depicts contest between parties and results in subordination of the search for truth. The burden of proof places an additional burden on the person who has already suffered an injury and places him in a position lower than what he was subsequent to suffering the injury. So this concept of burden of proof in an adversarial system is cast on the plaintiff or the prosecutor. So this goes against the concept of parity of power.

Keywords: *Parity of Power, Cratological Analysis, Burden of Proof, Access to Justice, Adversarial System, Inquisitorial System.*

I. INTRODUCTION

Presumption of innocence is a significant legal right that every accused enjoys in criminal trials in several contemporary nations. It highlights that no person shall be considered guilty unless and until he is finally convicted by the court of the land. Thus it places burden of proof on the prosecution in criminal cases and the prosecution has to convince the court that the accused is guilty beyond a reasonable doubt. Similarly in civil cases the burden of proof is lies on the plaintiff who then has to prove that the defendant has committed the breach or violation or caused the legal injury that is complained of. In principle, the defence has nothing to prove initially.

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However, the defence may place evidence tending to show that there is doubt as to the guilt of the accused. Conversely, in many authoritarian regimes the prosecution case is, in practice, believed by default unless the accused can prove he is innocent, a practice called presumption of guilt.[1] This presumption of guilt is unfair and even immoral because it allows the strategic targeting of any individual, since it is often difficult to firmly establish proof of innocence.[2] The Universal Declaration of Human Rights, Article 11, states "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he which he has had all the guarantees necessary for his defence."[3] Many countries of Anglo-Saxon legal tradition, the principle of presumption of innocence is coined or phrased such that "the accused is presumed to be innocent until it has been declared guilty by a court."[4] This abbreviated form neglects the point that a person may continue to appeal a decision, and will be presumed innocent until a final decision is made. Therefore "people who have been found in lower courts of law, but have pending appeals, cannot have their citizen's rights (such as to vote and to be elected) stripped nor can they be permanently removed from their offices, but merely suspended."[5]

The expression "burden of proof" as defined in section 101 of the Indian Evidence Act, 1872, states that "when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." Under this principle the burden of proof is initially on the plaintiff and subsequently shifts to the defendant. This is a principle which is a result of the adversarial legal system introduced by the British. Ancient Indian legal system was based on the inquisitorial method in which the king played an active role and was personally responsible to find out the truth. The burden of proving the guilt or innocence of the accused was on the king in his capacity as the head of the executive and he had to conduct investigation which would help in finding the evidence. It is, therefore, necessary to understand the legal system existing in ancient India.

Mode of Access to Justice in Ancient India

The ancient jurisprudence of India has advocated the supremacy of 'Dharma' that is the rule of law. The law that is envisaged under the supremacy of Dharma is the 'Natural Law.' The law was the king of kings and nothing was superior to law.

1 R. L. Akers, *Rational Choice, Deterrence, and Social Learning in Criminology: The Path Not Taken*, the Journal of Criminal Law & Criminology, 81(3), 653–676 (1990).

2 T. Trusts, India Justice Report, *Ranking States on Police, Judiciary, Prisons & Legal Aid, New Delhi: Tata Trusts* (2019).

3 European Law Institute Statement on case-overload at the European Court of human rights (6th July 2012, 20-21).

4 John Rawls, A THEORY OF JUSTICE, Harvard University Press, (1997).

5 P. Rahangdale, *Witness Protection: A Comparative Analysis of Indian and Australian Legislation. Journal of the Gujarat Research Society*, 11(3), 141–149(2019).

All 'Dharma' ultimately merged into the prominent philosophy of 'Raja dharma' (which means constitutional law) and therefore the Dharma was of paramount importance. Therefore the power of the king that is the state is to enforce the law by punishing the wrongdoer was recognized as the driving force that is the sanction behind the whole law which could compel implicit obedience to the law. The legal system in ancient India can be understood by the principle "law is the king of kings; nothing is superior to law; the law aided by the power of the king enables the weak to prevail over the strong."[6] The mighty instrument was therefore recognized to be the Law itself that was necessary for the protection of vulnerable individual rights and liberties. Whenever individual rights or liberties were encroached by another, the aggrieved individual could seek the protection of the law with the assistance of the king, however powerful the opponent (wrongdoer) might be. Dharma (law) was considered to be a power superior to that of the king and "even kings were subordinate to Dharma, to the rule of law."[7] The supreme law and its supremacy that is Dharma prevailed.

According to the western jurisprudence the law is an imperative command which is enforced by some superior power or sovereign by way of sanctions. Hindu jurisprudence defined law as an instrument that was enforceable against individuals with the aid of the physical power of the king. The power of the king constituted the instrument of coercion. The law was a command even to the king and was held as superior even to the king.

This can be seen by the principle "Dharma or law aided by the power of the king enables the weak to prevail over the strong."[8] It was the primary responsibility of the king to protect the people and give them equal protection of the laws. This was followed by many kings in ancient India including kings of the Magadha dynasty and also emperors like Humayun and Akbar of the Mughal regime. Any violation of Dharma was personally investigated by the king. A person aggrieved by the action of another had only to make a complaint to the king that was mainly by word of mouth sans any complicated procedure or form. The king would then investigate the violation either himself or through some trusted and able ministers appointed by him. If after the investigation it was found that there was an abridgement of the complainant's or informant's rights by the offender severe penalty would be imposed on him. If, however, it was found that the plaintiff's claim was false, a heavy fine was imposed on him and he was able to pay as fine double the amount claimed.12 This shows that the 'Raja Dharma' was the supreme power of the state; the embodiment of ultimate purpose of human life, and the king was only an instrument to realize this goal of 'Dharma.' The highest duty of the king according to raja dharma was to afford protection to his subjects and to dedicate him for their welfare and happiness.

6 M. Rama Jois Bharatiya, *(Indian) Cultural Values for the Protection of Human Rights, the Oriental Anthropologist*: A Biannual International Journal of the Science of Man (2019).

7 *Id.*

8 Jois M.Rama, Legal and Constitutional History of India: Ancient Legal, Judicial And Constitutional System, N.M. Tripathy pvt. Ltd. vol. 2, 1st edn.(1984).

The concept of Raja Dharma gave great importance and impetus to administration of justice and declared that it was the personal responsibility of the king himself. He was required to preside over the highest court and render justice to the litigants as well as punish the offenders in an impartial manner. Ensuring people the protection of all laws of the land was the king's primary responsibility. Punishing the wrongdoer was the duty of the king as dealing with litigants justly brings forth the idea of impartial and fearless administration of civil and criminal justice. It was also significant to note that the king was required to protect his subjects even against his own officers, the queen, the princess and all others close to him and more than all against himself. The king had personal responsibility for the administration of the justice. Thus the ancient Indian method of dispute resolution principles lays emphasis on inquisitorial method of dispute resolution and there was no pitting of one party against the other. The king played an active role in the trial and personally questioned the witness. The king was bound to gather evidence on behalf of the parties by conducting investigation by himself. In some cases he would take the assistance of his officers or ministers. The system of leading evidence was free and not complicated by procedures. Emphasis was laid on searching for the truth or establishing the truth rather finding guilt. The Vedas also promoted equality between all human beings. The first and the highest authority among the sources of law is the Charter of Equality that is incorporated in the Vedas.

"The Rig Veda declares that no one is superior or inferior. Manu states that the king should protect and support all his subjects without any discrimination in the same manner as the earth supports all living beings."[9]

Further it was the duty of the State through the king to give equal protection of the laws to the subjects. It was made part of the Raja Dharma, the constitutional law. This can be seen in the manner in which justice was rendered by the king consequent to a complaint being made by an aggrieved party. All parties were treated equal by the king and justice was delivered to anybody who sought the assistance of the king to obtain justice. This helped in maintaining parity of power between the parties and both parties were considered to be an equal footing before the king. Hence it can be seen that it was the duty of the State (king) to provide justice strictly according to law and it was the duty of the king to investigate any violations of the laws by his subjects. Subsequently, however, kings were not as pro-active as they were required to be. They stopped personally investigating breach of laws when a complaint was made to them. However they continued to administer justice with the help of able, independent and impartial judges and in accordance with dharma. A person injured by others in violation of a law of the smritis and usage, had to inform the king and if the king was satisfied that there was violation of a law, that became a fit matter for judicial proceeding. Even under the ancient laws notice was served to the defendant and he was permitted to file his written statement as an answer to the plaint filed by

9 Dilek Kurban, *Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations*, 4 HRLR 731 (2016).

the plaintiff. This method of dispute resolution introduced the concept of "burden of proof."

II. PARITY OF POWER IN ADVERSARIAL LEGAL SYSTEM IN CLOSE NEXUS WITH BURDEN OF PROOF

The Anglo-American or the so called strict or adversarial or common law system and eminently the continental which is also referred to as the enquiry type or free or civil law system which is actually applied in pre-colonial Africa and also in most of the non-English speaking countries of Europe are basically two significant legal systems which are meant for establishing fact.[10] The development of these two seemingly opposite systems commenced in the twelfth century. The adversarial system also called the accusatorial system was followed by United Kingdom and they introduced it in all countries which they colonized. Hence at present all countries which were former colonies of Britain follow the common law system or the adversarial system including India. This system believes in the presumption of innocence until proven guilty beyond reasonable doubt and has developed the cross examination of the plaintiff in a civil suit or the accuser in a criminal trial thereby making it more of a contest between the parties rather than finding the truth. In an adversarial system if the prosecution in a criminal case fails to prove the guilt of the accused beyond reasonable doubt the state will lose its case. This casts an additional burden on the person who has already suffered an injury due to the act of the accused in a criminal case or the defendant in a civil suit to lead evidence in such a manner that he is able to prove the wrong doing of the other person. This is not something which can easily be sought to be done. Moreover, in an adversarial system the presiding officer plays a passive role and the entire burden is on the parties themselves and on their lawyers.[11] If the party (plaintiff or his witness) is not able to recall the exact nature of the incident or the details of its occurrence which he is seeking to prove or it is not able to communicate it correctly either due to fear of the judge or the general formidable atmosphere of the courtroom and the lawyers, his suit or proceeding will fail due to lack of sufficient evidence. Moreover, the plaintiff is required to prove something which is done by the defendant and which is within the personal knowledge of the defendant and not of the plaintiff. Further, the victim in a criminal trial has no say in the matter and is cut off from the proceedings. It is entirely left to the State represented by the prosecutor to develop the case and conduct it which invariably generates lot of dissatisfaction in the victim and his family.

In a country like India the victim has no say in the appointment of the prosecutor who is to conduct his or her case, unless they are influential or have money power. This will invariably result in incompetent and corrupt people being appointed to represent their case and will only end in the victim losing the case and the accused going scot free. Also, the offender or the defendant is not a central party to the trial.

10 Richard H. Fallon, *Legitimacy and the Constitution*, Harvard Law Review, 118, 1787 (2005).

11 Wigmore J.H, *Treaties on the Anglo American System of Evidence in Trials at Common Law*, BOSTON: LITTLE BROWN, PARA 1367 (1940).

He steps in only when the plaintiff has not been able to substantiate his charges and there is no interaction between the judge and the offender or defendant. In this system the police play a primary rule. Police officers have been given absolute power and this has led to abuse of power and they have become very autocratic. The direct result of this is the increasing number of custodial violence and torture of prisoners to obtain 'confessions.' The system of leading evidence is very strict and the parties are responsible for the presentation of evidence which leads to a contest between the parties and which ultimately results in subordination of the search for truth and is more of fixing the guilt. Burden of proof in an adversarial system is cast on the plaintiff or the prosecutor. This goes against the concept of parity of power. Parity of power is the backbone of our constitution and the adversarial system is violative of Article 14 of our constitution along with article 256 is in reality reflective or based on the inquisitorial model as it binds the state to deliver the promise of law to its subjects.

The present position

The definition of 'burden of proof' is laid down in Section 101 of the Indian Evidence Act, 1872.[12] This Act was enacted by the British and it follows Common Law principle.

> "Section 101 states that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."[13]

Now the question that lies is which of the two parties has to prove a fact. And the answer to this significant question ultimately decides the question as to the burden of proof. So the burden of proof means or includes the obligation to prove a fact. Every party needs to establish certain facts that go in his favour or against his opponents. The underlying general principle is that a party who actually asserts the affirmative of an issue, the burden of proof lies on him to prove that fact.[14]

The reason that governs this rule is that it is rather easy to prove the affirmative than to prove the negative. Section 102 of the Indian Evidence Act states that "the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side." This means that invariably the initial burden is on the plaintiff in civil cases and on the prosecution in criminal cases. Once the plaintiff or the prosecution has satisfied the court of the guilt of the defendant or the accused, the onus is shifted to the defendant or accused to show as to why he should not be punished for it. The standard of proof required in criminal cases is that the prosecution must prove the guilt of the accused beyond reasonable doubt. This principle of burden of proof is followed by all countries following the adversarial

12 Dhirajlal & Ratanlal, The Law of Evidence, 19th eds, Nagpur: Wadhwa (1997).

13 R. Henham, Conceptualising Access to Justice And Victims' Rights In International Sentencing, Social & Legal Studies, 13- 21 (2004).

14 K. F. Koch, ACCESS TO JUSTICE, Capilletti, M and Garth B, ACCESS TO JUSTICE -A WORLD SURVEY, supra note 3 at 4.

method of legal system or the common law system.[15] If the prosecution fails to prove the guilt of the accused beyond reasonable doubt the state loses its case. In such a legal system the presiding officer plays a passive role. Parties are responsible for the presentation of evidence in support of their respective cases and there is no duty on the officials to search for the truth and evidence in support of and against the accused and the system of evidence is very strict, i.e., exclusionary rules of evidence. Also this system depicts contest between parties and results in subordination of the search for truth. Where the right to equality is the most valuable right so this unjust discrimination will always bring misery and unhappiness to those discriminated against. This concept of right to equality which is regarded as inviolable is enshrined in the Constitutions of most countries including India. Under Article 14 of the Indian Constitution 'the State shall not deny to any person equality before the law and equal protection of the laws within the territory of India.'[16] Under this mandate it is the duty of the State to aid the weak and make special provisions for them to enable them to prevail over the strong and bring them on par with others. This was a method of 'lifting' or 'levelling up.' And this reflects the concept of 'parity of power' where people are sought to be placed on an equal footing. This concept of parity of power is the basic principle underlying the Indian Constitution and is the backbone of our constitution. Both parties should have the same leverage of power in the power process. But the method of foisting the burden of proof in a suit on the plaintiff is against the principle of equality guaranteed under Article 14. The plaintiff files a suit as he has suffered an injury due to the wrong doing of the defendant. This places an additional burden on the person who has already suffered an injury and places him in a position lower than what he was subsequent to suffering the injury**.** Article 14 addresses executive power and directs the State to guarantee equality and equal protection of the laws to all. Article 14 reflects the ancient principle of 'Dharma aided by the power of the king or state enables the weak to prevail over the strong.' Under this article it is the duty of the State to deliver the promise of the law to the people. The concept of burden of proof in an adversarial system is cast on the plaintiff or the prosecutor. So this goes against the concept of parity of power. Parity of power is thus the backbone of our constitution and the adversarial system is violative of article 14. Article 14 of our constitution along with article 256 is in reality reflective or based on the inquisitorial model as it binds the state to deliver the promise of laws to its subjects.

III. BURDEN OF PROOF VIS-À-VIS CRATOLOGY AND DOCTRINE OF EQUALITY

The most valuable and significant right is perhaps the right to equality and without which happiness is really impossible as wherever there is any kind of discrimination that is unjust always bring misery and unhappiness to those discriminated against.

15 G. Boas, *Creating Laws of Evidence For International Criminal Law: The Icty And The Principle Of Flexibility*, Criminal Law Forum, 12, 21(2001).

16 H.M. Seervai, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY, N. M. Tripathy, Bombay (1991, 4th ed.).

Even the Vedas which has constituted the primordial source of Dharma has declared the charter of equality. This concept of right to equality which is regarded as inviolable is enshrined in the constitutions of most countries including India. Under Article 14 of the Indian Constitution 'the state shall not deny to any person equality before law and equal protection of the laws within the territory of India.' This Article guarantees the right to equality and equal protection of laws to all persons whether he/she is a citizen or non-citizen. There can be no discrimination on whatsoever grounds. Under this mandate the State should aid the weak and make special provisions for them to enable them to prevail over the strong and bring them on par with others. This was a method of 'lifting up' or 'levelling up.' This concept of parity of power is the basic principle underlying the Indian Constitution and is the backbone of our Constitution. Both parties should have the same leverage of power in the power process. Article 14 addresses executive power and directs the State to guarantee equality and equal protection of the laws to all. Article 14 reflects the ancient principle of 'Dharma aided by the power of the king or state enables the weak to prevail over the strong.' Under this Article it is the duty of the State to deliver the promise of law to the people. Power is the ability to affect another by its exercise. Cratology is the study of power. The aim and spirit underlying a written constitution as it is of India is to articulate the device for the limitation and control of political power. It is the duty of the State under the Indian Constitution to create and maintain a level playing field or maintain a parity of power. In the modern democratic constitutional state the essence of the power process lies or consists in the attempt of establishing an effective equilibrium between the various competitive plural forces operating within the state society with due regard to the free unfolding of the human personality.[17] The power element operates between the power holders i.e., those who hold and exercise power, and the power addressees, i.e., those to whom the power is directed and also beyond this, in the relationship among different and several power holders, provided they exist in the particular political system. Second, to understand the nature of the political system, three often interrelated stages of the political system have to be distinguished:

- The designation of the power holder, i.e., how political power is gained by the single or several power holders;
- How power, once gained, is exercised by them; and,
- How the exercise of power by the power holder is controlled

In this context the power holder is the State and the power addressees are the people. The exercise of power by the power holder, i.e., the State should be controlled as is done by our constitution because if this is not done it would lead to abuse of power by the power holder. The power holder has a duty cast on it under Article 14 to provide equality and equal protection of the laws to its subjects. The authority of the power holder is indispensable for carrying out the purposes of the State but this

17 Karl Loewenstein, POLITICAL POWER AND THE GOVERNMENTAL PROCESS, CHICAGO: THE UNIVERSITY OF CHICAGO PRESS, Pp. 442 (1957).

should be exercised by protecting and promoting the liberty under authority of the power addressees. Parity of power refers to a balance between the various sub-systems so that no one can hold more power than another so as to create disparity. According to this principle both parties should have the same leverage of power in the power process. Only then they will stand on the same footing. The method of foisting the burden of proof in a suit on the plaintiff is against the principle of equality guaranteed under Article 14. The plaintiff files a suit as he has suffered an injury due to the wrong doing of the defendant. This places an additional burden on the person who has already suffered an injury and places him in a position lower than what he was subsequent to suffering the injury.[18] In an inquisitorial system the judge himself acts as an investigating officer and tries to find the truth. The ancient Indian system of access to justice as we have seen it cast a burden on the king himself to investigate the matter and provide justice. This concept if applied to the present state implies that the State has a duty to search the truth. But this is not happening today. Instead the injured party himself is asked to prove that the other party is guilty of the offence complained of. When a person suffers an injury because of the wrongful action of another he is placed one step lower in the power process. The parity of power is disturbed by casting on the plaintiff the additional burden of proving what the defendant is has done and the defendant is much better placed in the power process. Hence the plaintiff is placed in a much more injuries state than he was in as a consequence of the action of the defendant. This principle of burden of proof increases the difficulty of the plaintiff as he has to prove what the other person has done. It would be much easier for the defendant himself to prove his actions. Law does not ask the other side to prove his misdemeanor. Though Section 106 of the Indian Evidence Act states that 'when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him', this is not practiced in the courts and the plaintiff has to invariably lead evidence to even prove what is within the personal knowledge of the defendant.

Here the defendant is the power wielder and the plaintiff is the power yielder.[19] The defendant exercises power whether he gained the power legitimately or not and he becomes the power wielder. Power is the ability to affect another by its exercise. Hence the exercise of power by the defendant being the power wielder affects the plaintiff who becomes the power yielder and he suffers an injury as a consequence. Hence, if parity of power has to be maintained between plaintiff and defendant, the power wielder or the defendant has to be asked to explain his or its exercise of power. If a person exercises his power wrongly he is putting the other person in a disability. Hence he should be made liable to cure the disability or to answer it. The burden of proof should, therefore, be cast on the defendant or the accused and he or

18 David A Larson, ACCESS TO JUSTICE IN ENCYCLOPAEDIA OF LAW AND ECONOMICS (8 October 2015) 1-2.

19 B.O'Flaherty & R. Sethi, Public outrage and criminal justice: Lessons from the Jessica Lal case. In B. Dutta, T. Ray, & E. Somanathan (Eds.), New and enduring themes in development economics (Vol. 5, pp. 145–164). Chennai: World Scientific (2009).

it should be asked to justify his or its exercise of power. If the defendant is able to justify his or its action then the burden would lie on the plaintiff to refute the same. On the other hand, if the defendant is not able to justify his exercise of power the court should then proceed to directly take action against him. The reasoning behind this is that the defendant is in a better position to show cause whether his action was right or wrong rather than ask the plaintiff to do so as this would be something which is within the personal knowledge of the defendant. For example, if the defendant is the Government or executive it would be difficult for the plaintiff to obtain official documents which are in the custody such Government or executive body to substantiate his claim. This would cast an additional burden on the plaintiff. On the other hand, as these documents belong to the defendant it could be easily accessed and produced before the court. There is a working presumption of innocence of the defendant or the accused until it is rebutted or confirmed after leading evidence.[20]

Burden of proof is against the concept of parity of power. It increases the difficulty in access to justice to the plaintiff. By placing the burden of proof on the plaintiff it would in effect allow the defendant to take advantage of his own wrong. The plaintiff is placed in a position much lower than what he was after suffering the injury. Hence there would be no parity of power between the plaintiff and defendant. The duty of the State under Article 14 is to maintain equality and provide equal protection of the laws to its subjects. This promise of the Constitution is violated in the present practice of foisting the burden of proof on the aggrieved party, i.e., the plaintiff.

Another aspect which has to be considered in this method of imposing the burden of proof on the plaintiff is the impact of 'party capability.' Under this concept of party capability, parties may not be on an equal footing due to factors like financial resources where one of the parties has better financial capability. This again will not help in maintain parity of power between the parties. If the defendant has better financial resources he will be able to manipulate the evidence and wriggle out of the suit.

Alternate Approach to the Present System

Ancient Indian legal system was based on the inquisitorial method. This method is also followed by most non-English speaking countries especially France. This is a better option if parity of power has to be maintained between the parties then disparity between parties is to be eliminated if the promise of the Constitution has to reach the people.

Confession is the essential component of the inquisitorial system. The judges play an active role. For example,

> "Under the French system, after the preliminary investigation the *juge d'instruction* enters the proceedings if the case is formally submitted to him.

20 G. S Bajpai, *Witness in the Criminal Justice Process: Problems and Perspectives – An Empirical Study*, ILR , Vol. 1, No. 1, (2009).

> The *juge d'instruction* has the powers of investigation, which he either carries out himself or which he may delegate to the police judiciaire by means of formal instruction."[21]

Here the judges are actually responsible for developing all the evidence and not the parties i.e., starting from summoning and questioning the witnesses himself or herself. There is a so called minority civil law jurisdictions and this jurisdictions may include access to the dossier compiled prior to the trial. Under this system the investigation is done by the investigating magistrate and it is really the dossier which he prepares that is on trial. The court and its adjuncts that comprise of the examining magistrate and the police prosecutor do exercises total and full control over their preliminaries and that also takes within its ambit the investigation procedure and presentation at the trial specifically. The offender then once formally charged is actually in the investigation is the central party i.e., in the sense he has the authority or as a 'partie civile' may intervene in the re-trial investigation as well as in the trial and also have his claim heard to the civil relief. Thus the inquisitorial system focus or objective is to establish the truth and moreover there are few little barriers that restrain or create impediments in the way of the judges in determining the actual guilt. This is in contrast to the adversarial system which frequently subordinates or create barrier in finding the actual truth. The participation of the accused in this system differs from the adversarial system. In the inquisitorial system the trial usually begins with the judge examining the accused followed by exploration of his or her background and his or her antecedents, his knowledge and his involvement and participation in the said crime. While the accused can exercise his right to remain silent and refusal to answer question is said to be exceptional. The accused's participation in the trial is encouraged and he should answer the questions and should he or she wishes to offer his evidence in mitigation then it must be done at the trial itself. The inquisitorial system makes difficult for plea bargaining to happen or to take place because of its objectivity in focusing on establishing the truth. The police therefore can be seen acting as agents on behalf of the prosecutor or examining magistrate. For example, in France the *police judiciaire* are under a duty to record breaches of the criminal law, to gather evidence of such breaches, and to find the perpetrators, as long as a preliminary inquiry (information) has not been opened. When information has been commenced, they act on the instructions of the *jurisdictions d'instruction*, which in practice, means that they act on the instruction of investigating judge, the *juge d'instruction*, which in practice, means that they act on the instruction of the investigating judge, the *juge d'instruction.*

According to this system, responsibility for the investigation of crime rests with two main authorities: the '*police judiciaire*' and the ' *juge d'instruction.*' The characteristic of this system are:[22]

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21 Jean Pradel, Director of the Institut de Sciences Criminelles, *Criminal procedure systems in the European community* France, p.108.

22 M. C. Stephenson, In Annual World Bank Conference on Development Economics-Regional: Beyond Transition, *Judicial reform in developing economies: Constraints and opportunities*, pp. 311–328, (2007).

i. Public trial
ii. Oral proceedings
iii. Examination of presiding officer
iv. Questioning of witnesses that is done by the presiding officer.
v. Prosecutor or rather judicial run investigation
vi. System of evidence is free.
vii. Question of competency is not required for witnesses
viii. All officials have the duty to search the truth and the evidences that are in support of and against the accused.
ix. An enquiry is done to establish the truth

So the ancient Indian legal system that existed till then was much more advanced and conducive to the conditions and culture of Indians which as we have seen had been developed since the time of Vedas. The provisions of the Indian Evidence Act are being followed till date in conducting any trial or proceeding before courts without considering whether it is right or not.

IV. CONCLUSION

With the advent of British colonization people witnessed drastic changes in the colonial period in the 17th century, which ultimately ended with the independence in 1947. Colonization thus brought an institutional guaranteed environment that has brought a sequential changes starting from that of ensuring property rights, boosting of free trade, and creating a single currency with fixed exchange rates followed by providing civil service that aimed to be free from all sorts political interferences, and more importantly among other things a common law, adversarial legal system. They introduced a legal system which was totally, if not alien, unsuitable to the Indian society. It can be seen that in the inquisitorial system the state plays a pro-active role through its officers and through judge himself. The inquisitorial system answers the requirement of parity of power which is the underlying principle of the Indian Constitution especially in the light of Article 14.

The burden of proof is cast on the defendant or accused who will be questioned by the presiding officer in the first instance itself. The defendant or the accused will have to disclose every piece of information related to the incident which is within the knowledge thus there is no undue disadvantage placed on the plaintiff. This also prevents disparity of powers between the plaintiff and the defendant and maintains equality between them. It also answers the requirement of maintaining parity of powers between the parties. The judge should aid the plaintiff, who is the injured party and hence in a weaker position, to prevail over the strong, the strong party in this case being the defendant.

Thus the inquisitorial system should be adopted in our country rather than following the adversarial system which is a legacy left by the British. Another alternate approach

which can be considered is the method followed by the French legal system.[23] Any person aggrieved due to an injury caused by another should thus have to make a complaint and this should be enough to set the executive machinery in motion. People should approach the executive machinery in the first instance instead of filing suits and agitating their claims in the courts. This will be in conformity with the provisions of Article 256 of the Indian Constitution. "Article 256 states the executive power of every state shall be so exercised as to ensure compliance with the laws made by the parliament and any existing laws, which apply in that state, and the executive power of the Union shall extend to the giving of directions to a state as may, appear to the Government of India to be necessary for that purpose."

The executive officers should themselves conduct investigation and call upon the defendant to prove that his conduct was lawful. If he does so successfully, then the plaintiff should be asked to show cause as to why action should not be taken on him for lodging a frivolous complaint. It will be the duty of the defendant or opponent to prove or disprove the charge in the first instance. If the executive machinery fails in delivering justice then filing a claim or suit in a court should be the next course. This would be the ideal way to maintain parity of powers between parties. It also imposes an obligation on the State to perform its duties in conformity with the Constitution and deliver justice at the doorsteps of its citizens. This will also be in conformity of the ancient Indian principle of 'Dharma or law aided by the power of the king enables the weak to prevail over the strong.

23 J. Jackson, *Finding the best epistemic fit for international criminal tribunals: beyond the adversarial-inquisitorial dichotomy*, Journal of International Criminal Justice, 7-17(2009).

Implementation of POCSO Act

Dr. Priya Rao & Ms. Meena Dhruw***

ABSTRACT

This article discusses about challenges regarding implementation of POCSO Act. At various steps victim as well as legal authority faces obstacles to understand and follow the rules and guidelines. This paper throws light upon important sections and rules as well as guidelines by apex authority. Also discusses about various important sections provided for recording of evidences, recording of statement, rights of child victim, and guidelines provided for implementation of POCSO Act.

***Keywords**: Child, child sexual abuse, parent or guardian, society, sexual assault, rape, POCSO Act, IPC, NCRB, video-audio means, dignity, compassion, mental health, discrimination, privacy.*

INTRODUCTION

37% of India's total population constitutes, children population. And this population is in grave danger of child sexual abuse which is subject of concern in our society where most of the population are not aware of existence of these type of abuse. In Indian society, children face much difficulty or hesitant to disclose the sexual abuse compare to adults, where even adults are hestitant to disclose the abuse happen to them. Over the years, legislature has made several attempts to curtail these types of abuses and protect our innocent children from these abuses as much as possible.

As the legislature faces the augmentation of child sexual abuse over the years and to curtail the serious problem that resulted into The Protection of Children from Sexual Offences Act, 2012, hereinafter the POCSO Act.

According to National Crime Records Bureau (NCRB) in its report '*Crime in India*' shows that

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S.No.	Year	Total registered child rape cases
1	2009	5,368 (22%)
2	2010	5,484 (20.5%)
3	2011	7,112 (21.5%)
4.	2013	12,363

- In 2009, child rape cases 5,368 registered (22% of crime against children)
- In 2010, 5,484 cases (20.5% of crime against children);
- In 2011, 7,112 cases (21.5% of crime against children);
- In 2013, 12,363 cases of child rape were registered (continued to increase)
- In 2014, 8,904 cases under POCSO Act and 13,766 cases were registered under child rape.[1]
- In 2015, 14,913 cases were registered under POCSO Act and 10,854 under child rape;
- In 2016, 36,022 cases were registered under POCSO Act and other relevant IPC provisions.[2]
- In 2017, only girl child victims cases under POCSO Act were 30,527;
- In 2020, 26,995 cases of child rape and 15,214 cases of sexual assault and total cases under POCSO Act were 44,969.

POCSO ACT

The reason behind the enactment of special legislation regarding sexual offences against children is that the existing laws were inadequate to deal with child sexual abuse cases. The object and purpose of this act is to protect children from offences of sexual assault, sexual harassment, and pornography and establish special court for trial of such offences.

Classification of offences under POCSO Act

- Penetrative sexual assault {Ss. 3 & 4}
- Aggravated penetrative sexual assault {Ss 5 & 6}
- Sexual assault {Ss. 7 & 8}
- Aggravated sexual assault {Ss. 9 & 10}
- Sexual harassment {Ss. 11 & 12}
- Offences relating to Child Pornography {Ss. 13, 14 & 15}

1 Cases under POCSO Act was first time published in 2014 Crime in India report by NCRB

2 Clubbed POCSO Act and IPC ; Ss 4& 6 of the PPOCSO Act / s. 376 IPC ; Ss. 8 & 10 of the POCSO Act/ S. 354 IPC ; S.12 of the POCSO Act / S. 509 of IPC. S. 377 separately categorized.

3 Available at www.wcd.nic.in

Punishments for the offences covered under this act are:

- Penetrative sexual assault – not less than 7 years, may extend to life imprisonment, with fine (section 4)
- Aggravated penetrative sexual assault- not less than 10 years, may extend to life imprisonment, with fine (section 6)
- Sexual assault – not less than 3 years, may extend to 5 years, with fine (section 8)
- Aggravated sexual assault– not less than 5 years, may extend to 7 years, with fine (section 10)
- Sexual harassment – 3 years with fine (section 12)
- Use of child for Child pornography – 5 years with fine, and in subsequent conviction may extend to 7 years with fine

Establishment of special courts

'Speedy trial' is a fundamental right implicit in Article 21 of Constitution of India.the POCSO Act is special act which provide "a speedy trial" under the special court under section 28 (1). This act enacted to provide child friendly procedures for recording of evidences, investigations and trial. Under section 28 (2) the special court has power to try other offences in the same trial. Under section 67B of Information Technology Act, the special court has power to try the child related offences in relation to electronic media.

Special public prosecutors required to be appointed with minimum 7 years experience as an advocate for conducting the prosecution under section 32 of POCSO Act. It is a right of child's family or legal guardian to receive legal advice and representation to present their case before special court under section 40n of POCSO Act and Legal Services Authority Act, 1987.

The time limit to complete the recording of evidence of child is within 30 days of taking cognizance of the offence under section 35(1), and if extension is required then it must recorded in writing with reasons.

Rights of Child Victims

In the pre-trial and trial stage the child victims get the assistance:

- For translator or interpreter who speak in mother tongue or local language {section 19(4)}, for disabled child, such as sign language interpreters {under Rule 3(5) of POCSO Rules}
- The children who require special educator for special needs, such as mental or physical disability, which include also emotional and behavioural disorders, difficulties in learning and communication. {section 38(2) of POCSO Act, Rule 2(d) of POCSO Rules}

- The person to whom child is familiar and has confidence and trust for more effective communication {section 38(2) of POCSO Act and Rule 2 (d) of POCSO Rules}
- Get mental health expert for psychotherapy {Rule 2(c) of POCSO Rules}
- To assist throughout process of investigation and trial , a person assigned by Child Welfare Committee {Rule 4(7) of POCSO Rules}

Procedure under POCSO Act

- **Medical examination –** even before FIR is filed, medical examination of the child victim can be conducted. Within 24 hours of receiving information of commission of offence, medical examination must be conducted by registered government medical practitioner in government hospital. If the victim child is girl child then medical examination must be conducted by female registered practitioner or doctor and the presence of guardian or parent whom the child have trust or confidence.
- **Reporting of cases –** any person who has apprehension of offence committed under the POCSO Act can report the matter. The matter or case must be reported to the local police station or Special Juvenile Police Unit (SJPU). FIR must be lodged and a copy, must be given to informant. If the case is reported by a child then it must be in simple language which can be understood by the child.
- **Vital information must be provided to child**- availability of services like counseling, legal aid and legal representations, procedural steps in criminal proceeding, compensation benefits, status of investigation, schedule of court proceeding, bail, release or detention status of offender, sentence imposed on offender.
- **Recording of statement**- the statement of child victim must be recorded in residence of child or place of choice, with audio-video recording. The statement must be recorded be woman police officer not below the rank of sub-inspector in the presence of parent or guardian whom the child has trust or confidence. The assistance of translator or interpreter can be taken during the recording of statement. In the case of the child with mental or physical disability the assistance of qualified special educator must be taken for effective communication with child.
- **Recording of statement by magistrate –** under section 164 of Criminal Procedure Code the magistrate must record the statement in the language spoken by the child. The statement must be recorded by audio- video means in the presence of parent or guardian whom the child has trust and confidence.
- **Recording of evidence**- within 30 days of taking cognizance of offence the evidence of child must be recorded. At the time of recording of evidence, the child must not be exposed to accused in any situation, also the accused must

not hear the statement of victim child and always communicate with the victim advocate. The recording can be done through video- conferencing method. The assistance of qualified translator or special educator, interpreter can be taken while recording of evidence of child as well as child mental or physical disability.

Guidelines under the POCSO Act

The Ministry of Women and Child development[3], laid down the for use of professional and experts assisting the child at pre-trial and trial stages.

- **Right to life**- under article 21 of Constitution of India the inherent right is provided to every individual of life and personal liberty. Every child comes under the purview of this fundamental right, which provide shield from any kind of hardship, abuse, neglect including physical, mental, psychological, emotional and abuse, and to have opportunities of standard development of physical, mental, spiritual and social growth. To ensure this every child who faced this trauma must be taken into consideration and steps should be taken to ensure the child's healthy development.
- **Right to be treated with dignity and compassion**- 'compassion' connotes that we sympathize with those who suffer. The child victims who have suffered long the way, should be treated with caring and sensitive manner. Their personal situation must be taken into consideration like age, gender, disability, level of maturity, moral integrity. Efforts should be made to reduce the interference in private life of victim child and also reduce media and interviews which can affect the mental and emotional health.
- **Right to be protected from discrimination**- the Constitution of India provides the right against discrimination. Professionals should be trained and educated according to differences like age, understanding, gender, caste, cultural, social background, socio-economic background, capacities and abilities.
- **Right to be informed**- every victim has a right to be informed about the procedure and legal proceedings, and also more specifically the progress of the case, schedule of the proceedings, decision rendered.
- **Right to effective assistance**- during the process the victim must receive the required assistance that enable the child to participate effectively in all stages of the case. The assistance may include financial, legal. Counseling, social, health, educational. Psychological, etc.
- **Right to privacy**- right to privacy is inherent under right to life and personal liberty under article 21. The victim child's privacy and identity must be protected at the stages of pre-trial, trial and after trail also. In comparison to accused, the victim child faces many difficulties in society of intense shame and humiliation, which may endanger the safety and life. In present scenario where

4 State vs. Freddy Albert Peats & Others; Goa, Session case No. 24 of 1992

internet is widely explored, media is available to everyone, the safety and identity of child is fragile. Therefore at first and every stage by restricting to disclose the information and also restricting the general public who are not essential at courtroom.

- **Right to be heard and to express**- the victim child has a right to participate at every stage of pre-trial and trial. It is necessary to explain the child why any step has been taken, why certain decision is made, why certain facts or elements are not discussed or put in question before court, in child friendly manner.
- **Right to compensation**- in POCSO Act, the sanction to every offence committed under this act is imprisonment with mandatory fine. The victim child get the compensation for own relief and rehabilitation. Victims may be repaid for material losses and damages incurred and also medical, psychological support.

Judicial Pronouncements

The Freddy Peats Case[4] of Goa which is the place famous for tourism, where orphanage in the name of Gurukul was being used for commercial sexual exploitation. Boys were supplied to foreigners for their sexual gratification who came in the name of tourism. This case was one of the most horrifying and first of its kind in India. on 04 april 1991, Freddy Peats was arrested , the day now observed as Anti- child Prostitution Day.

In ***Sheela Barse vs. Children Aid Society and Ors***.[5] A petition was filed before Supreme Court for the plight of children in orphanage and observation homes. The hon. Court issued several directions regarding trial of cases against juvenile and establishment of special court presided by special cadre magistrates trained specially with cases of children.

At present, the Juvenile Justice (Care & Protection of Children) Act, amended in 2010, which provides for special procedure to be followed in dealing with cases of children.

CONCLUSION

In order to tackle the huge challenge before court, when it comes to balance goals of deterrence and reformation there are guidelines which are mandatory to be followed. When it comes to category of children, the general act cannot be applied in these cases and also all children cannot be placed within same circumference. They differ in type and extent to vulnerabilities. In India numerous enactments have been enacted by legislation yet it cannot tackle the augmenting problem of child sexual abuse. At the ground level, we find that most families decide to conceal for image or reputation. And it turns out that the culprit gets more confident for repetition of abuse. The

5 (1987) 3 SCC 50

conventional society does not discuss openly sexuality or exploitation within family or society, therefore in many cases children get abused or exploited because or unawareness among them. The most vulnerable group is children who can be deviated with minimal capacity by crooks. In Indian society where sexuality cannot be disclosed publicly, the child who is victim fears about reputation of his family, instead of his pain he is going through.

Sexual offence against children is such type of crime which not only affects physically, but also mentally. Therefore, the individual, the family, the institution, the government must come forward to curtail this type of heinous crime. Today, in internet and social media era, a lot of inappropriate stuff is being provided easily. These stuffs or media are like termites in the mind of viewer which affect severely and in result one commits crime. Through television also the people's mind gets affected where every hour in routine 'crime petrol' is being watched by viewer. Instead of prevention, they learn the methods to commit crime.

SUGGESTION

Preventive measures should also be taken into consideration instead of only punitive. The key points which can be followed are:

- Through development of legal and social infrastructure specifically for children; - at institutions where children are frequent needs to have more children friendly environment.
- Intervention of other professionals according to need of victim;- need to develop multidisciplinary, integrated strategy to develop through child professionals.
- Personal safety education for children at school level;
- Insure strict privacy and safety of child , family and their reputation;
- Stricter regulation and measures taken in terms of media and internet.
- Implementation and enforcement of law strictly imposing through government.

The above mentioned measures are preventive measures which will ensure the safety as well as serve as precautionary measure taken by government, NGOs, any institution.

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An Amorphous Contest on the Issue of Taxability of Supplies Between the Clubs and it's Members: Appraising the Legislative Attempt to Reconcile the Defect of Earlier Judicial Decisions

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ABSTRACT

For many decades, one of the most contentious issues in the taxation legal regime has been the question of whether or not the goods and services that are offered to the members of a club or co-operative society are subject to taxation. Both the club and the co-operative society are, fundamentally speaking, the agents of the individuals who make up those clubs and societies. As a result, the question that needs to be answered is: Is it possible for there to be supply between the club and its members? What started out as a problem with sales tax and income tax has now spread to the Goods and Services Tax (GST) regime as well. This article will make an effort to draw attention to the various judicial advancements that have taken place over the course of the years in this field, as well as evaluate the most current legislative actions regarding this matter.

INTRODUCTION

The Indian Constitution allocates legislative responsibilities between the Union and the States including taxing powers. Prior to the implementation of GST through the Constitution (One Hundred and First Amendment) Act of 2016, the States were responsible for levying "taxes on the sale or purchase of goods." Soon after the implementation of the Indian Constitution in 1950, the Supreme Court in its famous *Gannon Dunkerley* case significantly restricted the scope of the States' taxation authority. In this case, it was determined that the term 'sale' comprised only the traditional category of sale as established by law through the Sale of Goods Act of 1930.

Following the reasoning in *Gannon Dunkerley*, the Supreme Court has on multiple instances rejected state sales taxation by emphasising the constraints on taxing authorities. Subsequently, the Constitution was amended so as to address the Supreme Court's reasoning in *Gannon Dunkerley* and the subsequent similar other decisions by increasing the scope of the States' taxing authority. Despite the amendment, the

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capacity of the states to tax transactions between clubs and their members has remained a difficult issue to be resolved over the years. The author attempts to discuss this issue in the present article, which attempts to clarify the controversy, the terms of the constitutional amendment, judicial interpretation of this amendment, etc. This investigation concludes with a critical evaluation of a recent modification to the Goods and Services Tax rules that appears to be intended to reassert the legislative authority to tax transactions between clubs and their members.

SCOPE OF SUPPLY BETWEEN CLUBS AND IT'S MEMBERS

To determine if there could be a supply between the club and its members, it is necessary to comprehend the meaning of the term "supply" as defined under the CGST Act of 2017. The scope of supply is described as follows:

Section 7 of CGST Act 2017: Scope of Supply (CHAPTER III LEVY AND COLLECTION OF TAX)[1]

1 Section 7 of CGST Act 2017: Scope of Supply (CHAPTER III LEVY AND COLLECTION OF TAX)[1]

(1) For the purposes of this Act, the expression "supply" includes,-

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation.- For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;

(b) import of services for a consideration whether or not in the course or furtherance of business; and

(c) the activities specified in Schedule I, made or agreed to be made without a consideration,

(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section(1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.

(2) Notwithstanding anything contained in sub-section (1),

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of sub-sections (1), (1A) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as-

(a) a supply of goods and not as a supply of services; or

(b) a supply of service and not as a supply of goods.

(1) For the purposes of this Act, the expression "supply" includes,-

all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

It is evident from the preceding rule that for a transaction to fall under the definition of "Supply," it must include two distinct parties. In other words, one cannot supply the services to oneself. It is essential to grasp the definition of "person" under the CGST Act. The following is how the CGST Act defines the term Person:

Section 2(84) of CGST Act, 2017:

"person" includes—

(a) an individual;
(b) a Hindu Undivided Family;
(c) a company;
(d) a firm;
(e) a Limited Liability Partnership;
(f) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
(g) any corporation established by or under any Central Act, State Act or Provincial Act or a Government company as defined in clause (45) of section 2 of the Companies Act, 2013;
(h) any body corporate incorporated by or under the laws of a country outside India;
(i) a co-operative society registered under any law relating to co-operative societies;
(j) a local authority;
(k) Central Government or a State Government;
(l) society as defined under the Societies Registration Act, 1860;
(m) trust; and
(n) every artificial juridical person, not falling within any of the above;

[Emphasis Supplied]

Therefore, there is adequate breadth in the meaning of the term "person," and it encompasses all associations of people, including cooperative societies. It is essential to understand that the CGST Act includes in its definition of the term "business" the "provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members." This provision refers to the provision of a club's facilities or benefits to its members[2]. Further, the Supply of Goods by an Unincorporated Association or Body of Persons to a Member

2 Central Goods and Services Tax Act, 2017; Section 2 (17).

Thereof for Cash, Deferred Payment, or Other Valuable Consideration is Treated as a Supply of Goods, as Provided for in Schedule II of the CGST Act[3], which Enumerates Activities That Are to be treated as Supplies of Goods or Services, provides that this activity is to be treated as a Supply of Goods.

When all of these provisions are read together, it becomes abundantly evident that the intention of the legislature was to levy a tax on the services that are rendered by an organization of persons to the members of that association.

SERVICES PROVIDED BY CLUB & SOCIETIES UNDER THE ERSTWHILE SERVICE TAX LAWS AND THE NEW GST LAW

Club and society services were previously taxed under the old Chapter V of the Finance Act, 1994[4], which was repealed with the introduction of GST. In 1994, the Finance Act established "Club's or Association's Membership Services"[5] as a new category of taxable services. Service rendered by a club or association to its members in exchange for a fee, dues, or other consideration is considered a taxable service under the Act. Under the same Act, the word "Clubs or Associations" was defined as follows[6]:

> "club or association" means any person or body of persons providing services, facilities or advantages, primarily to its members, for a subscription or any other amount, but does not include-
>
> (i) any body established or constituted by or under any law for the time being in force; or
>
> (ii) any person or body of persons engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry; or
>
> (iii) any person or body of persons engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature; or
>
> (iv) any person or body of persons associated with press or media;

After the Negative list was implemented on July 1, 2012, the definition of "service" was expanded to include any and all commercial endeavours. To clarify that members of unincorporated associations or bodies of persons should be recognised as separate individuals, an elaboration was added to the definition of service.

Nonetheless, despite the aforementioned unambiguous legislative provisions, a number of organisations have challenged the constitutionality and overreach of the aforementioned tax. The next paragraphs will explore the background of this debate.

3 Central Goods and Services Tax Act, 2017; Para 7, Schedule II.

4 Notification No. 15/2005-ST, dated 07-06-2005.

5 Chapter V of the Finance Act, 1994; Section 65(105)(zzze).

6 Chapter V of the Finance Act, 1994; Section 65(25a).

DOCTRINE OF MUTUALTY LAID DOWN BY THE SUPREME COURT

No one can make a profit off of himself, and this is the fundamental idea that underpins the principle of mutuality. To put it another way, one cannot engage in a transaction or commercial venture with oneself. Complete identity between those who contribute and thosewhoparticipateis at theheart of the concept of mutuality.

The services provided by clubs or cooperative societies have been subject to a service tax asof the 16th of June, 2005[7]. Any individual or group of individuals that provide their memberswith services, amenities, or benefits in exchange for a subscription fee or another sum arereferred to as "clubs or associations." Because of the principle of mutuality, one other schoolof thought maintains that a service tax cannot be imposed on supplies that are given by a clubor a cooperative society to its members in order to fulfill the requirements of the principle ofmutuality.

As a result of the implementation of the negative list-based tax structure that is part of theservice tax, the concept of a distinct person has been presented through the provision of anexplanation to the word "service." This was done in order to bring it inside the nature andscope of the service tax. Those supplies that are made available by a non - incorporated bodyor a not for profit body that is registered under any law to its own members by way ofrepaymentofcharges orshareof donation.

In light of the concept of "principles of mutuality," the concept of taxability, and specifically the amendment that was discussed in the previous paragraph, which is the concept of a distinct person as initiated via an explanation to the meaning of service, was questioned untilthe Apex Court upheld that principles of mutuality occur in the transaction, and as a result, notaxis owed as aresult of the ruling ofthe Calcutta Clubcase.

When the principle of mutuality is extended to clubs, an extensive discussion ensues, during which it is noted that in members' clubs, both the contributing and the participating parties are the same people, and are therefore considered to be asing leentity. The Apex Court cameat the following conclusion[8]:

> "…it is settled law that if the persons carrying on a trade do so in such a way that theyand the customers are the same persons, no profits or gains are yielded by the trade fortax purposes and therefore no assessment in respect of the trade can be made. Any surplus resulting from this form of trading represents only the extent to which the contributions of the participators have proved to be in excess of requirements. Such asurplus is regarded as their own money and returnable to them. In order that this exempting element of mutuality should exist it is essential that the profits should becapable of coming back at some time and in some form to the persons to whom the goodsweresold or the services rendered…"

7 Section 65(105) (zzze)of the Finance Act, 1994

8 Bangalore Club v. Commissioner of Income Tax and Anr.,(2013)5SCC509

Complete identity between contributors and participators.–

> "… The contributors to the common fund and the participators in the surplus must be anidentical body. That does not mean that each member should contribute to the commonfund or that each member should participate in the surplus or get back from the surplusprecisely what he has paid.' The Madras, Andhra Pradesh and Kerala High Courts haveheld that the test of mutuality does not require that the contributors to the common fundshould willy-nilly distribute the surplus amongst themselves: it is enough if they have aright of disposal over the surplus, and in exercise of that right they may agree that onwinding up the surplus will be transferred to a similar association or used for somecharitableobjects."

Regardless of the conclusions drawn above, the discussions about the principles of mutualitywill still be valid under the GST regime. As a result, the idea of the applicability of GST onco-operative societies and clubs will continue to be a difficult one until a resolution is achieved.

LANDMARK JUDGEMENTS BANGALORECLUB V. COMMISSIONER OF INCOMETAX AND ANR. (2013)5 SCC509[9]

In a detailed discussion of the idea of mutuality as it relates to clubs, it is noted that contributors and participators in members' clubs are the same and are therefore viewed as a single individual. According to the Supreme Court's ruling:

> ....17 "It is established law that no profits or gains are produced by a transaction for taxreasons, hence no assessment about the trade can be done, if the people carrying on the tradeare also the ones who are the clients. Any surplus from this type of trading merely reflects the degree to which the participants' contributions have proven to be greater than what is necessary. Such an excess is viewed as their personal property and is due to them. The profits must be able to return to the people to whom the goods were sold or the services were given at some point and in some capacity in order for this exempting aspect of mutuality toexist. ...
>
> 18. Complete identification of contributors and participants - "... The contributors to thecommon fund and the surplus participants shall constitute one and the same entity." This doesnot imply that each member must pay into the common fund or that each member must sharein the surplus or receive exactly what he paid in return. According to the Madras, AndhraPradesh, and Kerala High Courts, it is sufficient for the contributors to the common fund to have a right of disposal over the surplus, and in the exercise of that right, they may agree thaton winding up, the surplus will be transferred to a similar association or used for some charitable objects."

9 Bangalore Club v. Commissioner of Income Tax and Anr.(2013)5 SCC509

It is clear from the preceding that any tax can be imposed under the idea of taxation on anamount that is designated as a surplus. In theory, surplus might be reached when participantsreceive more than they actually need. The ability of the profits to eventually and in some way return to the people to whom the goods or services were sold or delivered is necessary for the concept of mutuality to exist. Such an excess is viewed as their personal property and is dueto them. As a result, for any amount to beconsidered "surplus," the identities of thoseproviding the money and those receiving it must be distinct, which is not the case in societies. As a result, the mutuality principle applies, and there are therefore no two distinct parties to the transaction.

STATE OF WEST BENGAL V. CALCUTTA CLUB LIMITED (2017) 5 SCC 356[10]

The 46th Amendment to the Constitution added Article 366 (29A) to broaden the applicationof sales tax to a number of specific activities related to the supply of goods or the supply ofgoods and services that had previously been under the control of the Supreme Court, whichhad relied on the Legal Commission 61 report that had suggested the amendment of the a for ementioned Constitution.

The report cited three justifications, including:

a) That there wouldn't be many of these groups and associations;

b) The cooperative movement might be hampered by taxes imposed on such transactions; and

c) Since a member of such group sistruly taking their own property with them, there is no significant tax evasion issue.

Sales made by an unregistered association or association of persons to its members are nottaxable by law; additionally, it does not exist independently from the court that failed to comprehend the Supreme Court's ruling in the statement of subjects and motives in the Young Indian Men Association case. Another associationof persons (the association or association of persons with corporate status) is taxable to its members.

The sale of property by a registered body to its members is deemed to be a sale to the registered body itself and is not a sale of goods for the purposes of VAT, according to a decision made by the Supreme Courtinthe *Indian Young Men's Association* case. The idea of reciprocity is still in for ceasa result of the constitutional amendment because it did not go beyond the decision in the *Indian Boys' Association* case. The courtal socited the Constitutional Court's ruling in the case of *BSNL v. Union of India*[11], in which it was made clear that the ruling in the Indian Boys'Association case was superseded by the 46th constitutional amendment.

10 *State* of West Bengal v. Calcutta Club Limited (2017) 5 Scc 356

11 BSNL v. Union of India(2006) 3SCC1

However, the Court determined that such a conclusion was not in accordance with ratioDecidendi and could not be taken into account as legislation in this case. The court further determined that the Contracting Act of 1872's requirements do not apply in cases where commodities are sold or delivered to members by unincorporated organisations or groups ofpersons since there is no agreed-up on compensation for the selling ofgoods for one's ownuse. In light of this ruling, the Court of Justice determined that there is never a sale, even when a corporation or organisation sells a person who is not a member of another member.

M/S The Poona Club Ltd. No. GST-ARA-123/2019-2020/B-12.[12]

The Maharashtra Bench of the Authority for Advance Ruling (AAR), composed of Rajiv Magoo and T.R. Ramnani, has declared that a club's membership and annual subscription fees are subject to GST under the Central Goods and Service Tax (CGST) Act and the State GSTAct.

Poona Club Ltd. applied to the Maharashtra Bench of the Authority for Advance Judgement for an advance ruling on whether the membership fee, annual subscription fee, and annual games charge it collected from its members was taxable under the Central Goods and Service Tax (CGST) Act or the State GST Act.

The Applicant Poona Club told the AAR that its membership, annual subscription, and annual games fees were not taxable under the CGST/SGST Act. The Applicant claimed thatsince the initial donation, or membership fee, was not a supply of goods or services, GST was not applicable. The Applicant also claimed that its Memorandum of Association stated that the club's major purpose was to promote sports and social contact. The club collected the money to cover administrative and maintenance costs and provide members with facilities,thus there was no financial motivation. The Applicant Poona Club also submitted to the AARthat despite Section 2(17)(e) of the CGST Act, 2017, the club's activities could not be called"business" since its main objective was not commercial, and since its members' fees werespentback on them, it did not qualify as a"supply" underthe Act.

The Applicant alsoargued that oneindividual could not supply or provide services tooneself since the CGST Act needed two parties. The Applicant argued that since the club andits members had the same identity, the principle of mutuality would apply, ruling out anyactivityor supply between them that wouldbesubject to GST taxation.

Section 2(17) (e) of the CGST Act defines "business" as a club, association, or society providing services or benefits to its members fora fee.

The Finance Act, 2021 added Section 7(1)(aa) to the CGST Act, which took effect onJanuary 1, 2022. The AAR noted that the Explanation to Section 7(1)(aa) states that a personand its members or constituents shall be deemed two different persons and that the provision of activities or transactions inter se shall be deemed to have taken place from one such personto another. The AAR noted that after the change to Section

12 M/S The Poona Club Ltd. No. GST-ARA-123/2019-2020/B-12

7 of the CGST Act, the Applicant Club and its members were distinct entities and its fees were a consideration for the provision of goods or services. The AAR ruled that the Applicant had to pay GST on its members' payments and that mutuality no longer applied after this adjustment.

The AAR noted that Section 2(17) (e) of the CGST Act is for associations, clubs, and societies. The AAR found that the provision did not require clubs and societies to have acommercial motivation to be considered "business."

The AAR ruled that the Applicant Poona Club's membership, subscription, and games fees were taxable under theCGST/SGST Act.

ANALYSIS OF THE JUDICIAL DEBACLE ON THE ISSUE

There is a long history about how taxation is premised on mutuality, whether a business isincorporated or not. State tax departments have often sought to tax transactions that mostpeople wouldn't think of as "sales" because they need money and want to stop people from avoiding taxes. One of these topics is the tax on the sale of goods by a club to its members for cash, apromise to pay later, or something else of value.

Because of the tax imposed on the a fore mentioned transaction, such clubs were compelled tofile petitions in a number of different courts. The primary argument put forward by the clubsin their defense was that they adhere to the principle of mutuality in their operations, and basing on this principle, there wouldn't be a tax imposed on the supplies that were provided tothe club's members. To put the meaning of the principle of mutuality into layman's terms, itcan be stated as follows: "No man can trade with himself; he cannot make, in what is truly themeaningof thephrase, taxable profit by dealing with himself."

Because there would be total individuality seen between contributors and beneficiaries in the scenario of the club, there is no way that trying to deal with their-self could result in any kind of profit. To put it another way, the central idea behind the principle of mutuality is that thereis rarely more than one person involved in any given situation; rather, it is always just one.The clubs have consistently maintained that they are exempt from taxation because they do not have two members, which is a requirement for any form of taxation to be applicable.

The question of whether or not residential societies, trade and industry chambers of commerce, and members' clubs fall under the purview of value-added tax or service tax has long been the center of a contentious legal debate. This disagreement can be traced back to its origins in the "principle of mutuality," which served as the foundation for the opposition to the imposition of a service tax or value-added tax. Even so, thanks to the landmark and significant ruling that it handed down in the case of *Calcutta Club Ltd*.[13], the Supreme Court has put an end to this decades-long legal dispute. This legal position remains unchanged even after the 46th Constitutional

13 State of West Bengal v. Calcutta Club Limited (2017)5SCC356

Amendment because the Supreme Court has held unequivocally in its ruling that the supply or selling of goods or services by Clubs, Associations, etc. cannot be applicable to the levy of VAT or service tax on the principle of mutuality. This is the case even though the 46th amendment to the constitution was passed.

Thestatutegoes as follows:

> "(aa) the transactions or activities, by a person, other than an individual, to its members orconstituentsor vice-versa, forcash, deferredpayment or othervaluable consideration.
>
> Explanation. - It is hereby clarified that, for the purposes of this clause: notwithstandinganything contained in any other law for the time being in force or any judgment, decree ororder of any Court, tribunal or authority, the person and its members or constituents shall bedeemed to be two separate persons and the supply of activities or transactions inter se shall bedeemedto takeplacefrom one such person to another."

However, the lawmakers used the power of retrospective amendments and made a change tothe law that went into effect on the 1st of July, 2017. This alteration was introduced by inserting under Section 7(1)(aa) of the statute, which states that any activity or transaction from a non-individual to its members or constituents, or vice versa, in exchange for cash, deferred payment, or other emoluments, will be regarded as "Supply".

In addition to this, they have made it clear through an explanation that the club or association and its members will each be considered to be two separate entities. As a result of this, beginning July 1, 2017, an association or club that provides services or goods to its membersis required to collect and report GST on those transactions, and the members themselves are responsible for determining whether or not they are required to do so. The matter of claimingITC (due to the limitations imposed by Section 16(4)) and the interest that will be levied on itwillbean important factor in liability determination.

It has been suggested that Paragraph 7 of Schedule II of the CGST Act which is associated with, should be removed, "supply of goods by unincorporated associations or bodies of persons to a member thereof for cash, deferred payment, or other valuable consideration"transaction involving the sale of goods by non- incorporated associationsor bodies of persons to a member of the association in exchange for cash, deferred payment, or some other valuable consideration. In this paper we have tried to discuss the types of clubs and cooperative societies, the taxability of the services provided by those clubs and cooperative societies to its members, Statutes providing provisions for taxability of the same and somerelated landmark judgments.

USING THE AGENCY NOTION UNDER THE GST REGIME BETWEEN CLUBS AND ITS MEMBERS

When read in conjunction with Section 7(1) of the Central Goods and Services Tax Act, Schedule I offers the operations to be regarded as supply even if they are done

without consideration. Clause 3 provides for the activities to be treated as deemed supply if they involve the supply of goods between an agent and a principal, with or without consideration. A reading of this paragraph reveals that the delivery of goods from an agent to the principalwould be considered to be a delivery where the agency commits to receive such goods on behalf of the principle. This is the case when the agent supplies the products. This provision doesn't really cover any of the services that fall under its purvieweither.

In the event that a members' club or cooperative societies serves its members with goods orservices, it is possible that the members' club or association acts as an agent on their behalf. Itis feasible for a club or association that operates on the concept of mutuality to be consideredto have acquired the goods from the vendors on their members' behalf for whom they areintended, and then to be considered to have supplied the members with the commodities inquestion.

In accordance with the provisions of Section 2(5) of the CGST Act, the term "agent" refers toa person who engages in the trade of supplying or receiving goods or services or both on behest of some one else. This definition comprises a wide variety of mercantile agents, such as a factor, broker, commission agent, auctioneer, and any other commercial and financialagent that may be called by a different name. The a for ementioned description is intended to encompass all of the many sorts of consignment agents that are active in a typical commercial supply chain; however, it does not in any way suggest that its scope includes mutual entities. Therefore, according to the definition of "agent" and clause 3 of schedule I, it is possible thatthis context does not apply to the scenario in which a members' club or organization supplies goodsor services to its members.

As a result of this realization, the tax departments in each state have begun the process of trying to amend their respective tax laws to state that a club is a dealer, that the operations of a club is a business, and that the activity of clubs supplying goods to their members in exchange fora consideration isincluded inthe definition of 'sale.' Theclubshad gone tocourt because, even though the definition of "sale" had been changed, the phrase "sale" usedin Entry 54 of List II remained referred to the normal meaning of "sell," even if the word had been changed in the state legislation. In the end, the cases were heard by the Apex court, which decided, in a case involving the *Young Men's Indian Association*[14], that there can be no property transfer from one person to the other, despite the fact that the definition of "transfer"inthesales tax law specifies that theremust besuch atransfer.

Before this judgement, the division bench of the Supreme Court had an occasion to deal withtaxation of goods and services supplied by co-operative society in the *Enfield case*[15]. The Supreme Court has decided that the word "sale,"which appears in Entry

14 Joint Commercial Tax Officer vs Young Men's Indian Association 1970(1) Supreme Court Cases 462

15 Deputy Commercial Tax Officer, SAIDAPET & Anr. vs. Enfield India ltd., co-operative canteen ltd. (1968) 2SCR421

54 of ListII, mustbe construed in the broadest possible sense in order to account for transactions that take placewithin clubs. Furthermore, the court continued by stating that a club is a body corporate withthe authority to hold estate and that it cannot be supposed that the property which it maintains is property of which its members are owners. This was in response to the common mis conception that clubs and cooperative societies become separate from their individual members once they are assimilated. It also issued a comment indicating that in the event of anthat is not incorporated, there is no distinction between the members and the club, and thatunder such circumstances, there could be no sale in the case of absence of two distinct individuals.

Goingback to case of *Young Men's Indian Association*, the Supreme Court's constitutional bench has differentiated the decision of Enfield India Co-operative Canteen Limited, in which it was asserted that if the club, despite being a separate legal body, is just going to act as an agent for its members in matters of supply of different goods and services to them, no sale will be committed because the aspect of transfer will become non-existent.

In addition, Justice J.C. Shah has issued an opposing view on ruling in the case of Young Men's. In this decision, he highlights the fact that the dependence put on the English rulings in the case of *Graff v. Evans*[16] and *Trebanog Working Men's Club*[17] to fully comprehend the concept of mutuality does not pertain to the tax statutes. This is because these English rulings were in the nature of Quasi-criminal rulings.

He further mentioned that the transaction's legal form is a significant factor in determining whether or not it is subject to taxation. Even if there is no expectation of a profit from the business process, the same would be considered as a leif an member's club which is incorporated supplied its assets to its members at a predetermined tariff. But nevertheless, ifthe club is simply acting on the member's behalf to avail snacks, drinks, and other such arrangements to them, then the transaction won't be viewed as a sale. This is because the clubis the intermediary via which the members have managed for to avail for themselves, snacks, drinks, and other such arrangements.

The question to ask in each scenario is if the club works as just an agent in providing propertythat belongs to its members or if the club sells property that it owns in exchange for monetary compensation. Justice J. C. Shah reached the conclusion that there wouldn't be any tax because the facts that were presented in the case of the Young Men's India Associationimplied that the club is not trying to transfer the property which is rightfully theirs, but ratherthatit wassimply acting asan intermediary and for the members on their behalf.

CONCLUSION

The issue whether Members' Clubs, Housing Societies or Trade and Industry Chambers/ Associations come within the scope of service tax or VAT has always been mired

16 Graff vs. Evans (1882)8 Q.B.D.373

17 Trebanog Working Men's Club and Institutive Ltd v MacDonald [1940] 1KB576 (KB).

into the legal dispute. The "principle of mutuality" has been at the roots of this dispute, based on which the challenge to the levy of service tax/VAT was being mounted. However, the Supreme Court, in its historic and significant judgement in Calcutta Club Ltd's case, has putat rest this decades old legal controversy. In its judgement, the Apex Court has categorically held that the supply or sale of goods or services by the Clubs, Associations, etc. cannot be subjected to levy of VAT or service tax on the principle of mutuality and this legal position continue seven after 46th Constitutional Amendments.

While all were heaving the sigh of relief at the possible end of a legal battle on this issue inthe context of VAT/service tax, there arose a possibility of a fresh legal battle with theintroduction of GST on 1st July, 2017. The issue being raised is clear: "Considering thespecific provisions of the CGST Act, 2017, whether the principle of mutuality would remain relevant and can it be made applicable under GST?" There have been conflicting views on this issue ever since the new tax regime has come into operation. However, more than anyoneelse, the GST Council was quite sensitive to this issue and didn't want to take any chance inthe matter. In its 39th Meeting held on 14th March, 2020, the Council had discussed theimplications of the judgement of the Supreme Court on GST levy on Clubs, etc. at length. Itwas concluded at the meeting that the principle of law laid down by the Supreme Court in itsjudgement would equally be applicable under GST and consequently, the levy of GST onClubs, Associations, etc. would result into the legal battle. In order to avoid any such legal conflict, the Council, at the said Meeting, had decided to carry out certain amendments to the specific provisions of the CGST Act, 2017.

Taking into account the recommendations of the Council, certain amendments have beenproposed by the Finance Bill, 2021 to Section 7 and para 7 of the Schedule II of the CGSTAct, 2017. It may be noted here that Section 7 contains the definition of supply. It is clear that the purpose of the proposed amendment is to ensure there covery of GST on the Members Club, Societies, Associations etc. without any legal hindrance. It is, however, a matter of concern that the proposed amendments are being given retrospective effect fromJuly 01, 2017. Proposed amendments will come into effect from the date to be notified by the CentralGovernment after the enactment of the Finance Bill and will be operative retrospectively.Undisputedly, the issue of retrospective effect being given to the amendments will once again become a matter of legal dispute and challenge. Moreover, on adeeper and critical examination of the proposed amendments and other relevant statutory provisions, a view canbe taken that even after these amendments, Housing Societies, Associations or Chamberswould remain outside the scope of the levy of GST. Proposed amendments are incomplete,half-hearted and vague and would certainly invite the legal battle. It would also be prematureto say that as a consequence of the proposed amendments, Members' club would come within the GST net.

The above discussion makes it abundantly evident that notwithstanding the retrospective revision, the nature of the supplies that are exchanged between unincorporated clubs and their members continues to be amorphous, and they may be the subject of yet

another round of legal scrutiny. According to the recommendations made in the 61st Law Commission report, the government should take a pragmatic approach to these challenges rather than engage in drawn-out legal battles. The Law Commission came to the conclusion that the revenue from such clubs would not be considerable, and there is no serious question of avoidance of taxes because a member of such clubs actually takes his own goods. This was the reasoning for the Law Commission's recommendation.

In the end, even if the need and validity of the proposed amendments is accepted, it is indeed unreasonable, unfair and unjust to make the amendment seffective retrospectively.

Impact of Mobile Addiction on the Health Rights of the Children and Adolescents: An Analysis

Dr. Reena Bishnoi & Ms. K. Usha Rani***

ABSTRACT

Health is very basic human rights. Health must be enjoyed without discrimination on ground of race, age, ethnicity or any other factor. Over the past two decades, digital technology has seen a sharp increase in use. Both cordless and mobile phones generate radiofrequency (RF) radiation while in use. No prior generation has ever seen this level of radiation exposure during childhood and adolescence. The primary organ that is affected by RF emissions from a portable wireless phone is the brain. The International Agency for Research on Cancer at the World Health Organization conducted an assessment of the scientific data regarding the risk of developing brain tumours in May 2011. In addition to cancer, neurological illnesses, physiological addiction, cognition, sleep, and behavioural issues must be taken into account when discussing the health effects of digital (wireless) technologies. The impact of changing behaviour in children and adolescents due to their interactions with contemporary digital technology needs to be properly assessed. The popularity of mobile computing and communication is currently on the rise. The market offers a wide variety of mobile networking systems, including 3G, 4G, Bluetooth, Wi-Fi, and Wi-Max technologies. Additionally, mobile access devices, like laptops and cell phones, are widely used. Worldwide, mobile communication is expanding at an unheard-of rate. There is a lot of discussion about teen smartphone addiction and abuse, as well as the effects it has on their health globally. Teens in India who are addicted to their smartphones run the danger of suffering from serious health problems, severe psychological impacts, and interpersonal skill deterioration.

***Keywords**: Mobile Addiction, Health Rights.*

INTRODUCTION

"We are all now connected by Internet like Neurons in a giant brain"

-Stephen Hawking.

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An improved mobile phone called a "smart phone" was created to address common accessibility issues. More than just texting and calling, smartphones offer a wide range of features. Due to its ability to carry out both simple and complex computing tasks, smartphones have grown to be a very popular technology. Today, a single touch can resolve any issue. Because of this, they have become essential to the modern way of life and are unable to be lived without. The usage of smartphones enables high-quality performance and quick access to information and entertainment, including mobile teleconferencing, audio and video chats, email sending and receiving, and simple internet access for a variety of users, including students. Social media and entertainment are two other uses of it. It offers many opportunities for amusement and social interaction. Because of this, individuals, particularly students, get dependent on it, which has an impact on their education, moral principles, and mental and physical health.

The young of many nations are discreetly becoming more and more affected by mobile phone addiction (MPA), a problem that is both common and unheard about. Mobile phones are generally praised for their technological contributions to humanity, the convenience they bring to carrying out daily tasks, and, most importantly, for overcoming communication and information gaps between individuals. Over the past two decades, digital technology has seen a sharp increase in use. Both cordless and mobile phones generate radiofrequency (RF) radiation while in use.[1] No prior generation has ever seen this level of radiation exposure during childhood and adolescence. The primary organ that is affected by RF emissions from a portable wireless phone is the brain. Since brain tumours, other malignancies, and neurological illnesses (neurodegenerative diseases) can take decades to manifest, it is yet unknown how severe and to what extent long-term health hazards are overall. Mobile phone use has already been linked epidemiologically to cancer risks for glioma and auditory neuroma, which should serve as a warning that this substance appears to be a particularly potent carcinogen given how soon observable increases in cancer risk have been observed. The main target organ of RF radiation when using a wireless phone is the brain, which has raised concerns about an elevated risk of brain malignancies.[2] Children's use of the Internet has a significant and negative influence. There is no doubting that technology may be a wealth of knowledge if used responsibly, but it also poses a severe risk to a child's safety and well-being if left unattended. Online gaming can cause addiction among kids and teens who have an accelerated onset of depression and anxiety, according to recent studies.

The purpose of the research is to investigate how smart phones relate to kids or teenagers. Nowadays, people from all social classes and practically all professions require a smartphone. They are especially drawn to smartphones due to its availability, usability, and accessibility. It has many features that can draw people in and is quite simple to use. The misuse of smartphones, or more accurately, "smart phone addiction,"

1 https://www.researchgate.net/publication/316974592_Effects_of_Mobile_Phones_on_Children's_and_Adolescents'_Health_A_Commentary

2 https://www.jetir.org/papers/JETIR1805620.pdf

has a very noticeable and profound impact on users' emotional competence, which is extremely crucial in the modern setting. One group of users who have been using smartphones most extensively and widely is teenagers. The study focuses on the impact of smartphones on teenage health issues and related aspects.

SIDE EFFECTS OF MOBILE PHONES ON CHILDREN'S HEALTH

Children nowadays are developing in a radio-frequency environment that has never before been experienced by humans. Children may be harmed by the radiation that mobile phones and mobile phone masts release. Several are:

1. **Cell phone usage damages immune system**: After a full day of use, cell phones have more germs on their displays than your toilet seats. As you regularly contact or use close to your face when speaking, these viruses are easily transferred to your body. Due to children's immunisation status not being fully established, this raises the danger of exposure to infections and lowers immunological strength.
2. **Increased Risk of Chronic Pain:** Prolonged use of mobile phones for messaging or game play involves constant hand movement, which increases the risk of chronic pain in the shoulders and hands' joints.
3. **The impact of a mobile phone on vision issues:** When a child reads for long periods of time on a small mobile phone screen, their eyes are put under a lot of stress, which can lead to headaches and dryness. Children who are intensely focused on playing games on their smartphones even stop blinking frequently due to their growing interest and attraction to the game. Conjunctival dryness and ocular strain are both brought on by this.
4. **Stress level** rises as a result of the negative impact on your feelings.[3]
5. **Effects on your brain:** Researchers from Heidelberg University in Germany evaluated the MRI scans of 48 volunteers, 22 of whom had smartphone addiction and the remaining 26 did not. According to the findings, those who are addicted to their smartphones have physical alterations to the size and form of their brains, especially in the grey matter. Since it contains the regions of the brain that regulate emotions, memory, decision-making, and self-control, grey matter in the brain is the centre linked to mental health as well as muscle control, speech, sight, and hearing. The MRI scans revealed reduced grey matter in crucial brain areas, including the parahippocampal cortex, a crucial memory processor, the inferior temporal, which uses memory to identify things, and the left anterior insula, which is responsible for emotions.
6. **The consequences of drug and smartphone addiction on the brain are same:** The same way as using a smartphone did, the U.S. National Library of Medicine discovered that consuming drugs like cocaine caused the grey matter in the

3 https://www.healthxchange.sg/children/childhood-conditions/children-mobile-devices-eye-problems

brain to shrink. This backs with earlier studies that claimed smartphone addiction stimulated the brain's central nervous system similarly to taking cocaine by releasing dopamine and activating it.[4]

7. **Cancer**: Cell phone radiation has been identified by the World Health Organization (WHO) as "possibly carcinogenic to humans." More than 60% of the radiation enters a child's brain compared to an adult. It is thought that because of their brains' thinner skin, tissues, and bones, children may be twice as susceptible to radiation absorption as adults. More research is needed to confirm this theory, though. They are more susceptible to this "carcinogen" because of the development of their neurological systems.[5]

OTHERS HARMFUL EFFECTS OF MOBILE PHONE ADDICTION

Lack of concentration: They are easily distracted by the virtual world they are viewing on their phones. Students find it interesting and often lose themselves in it for hours. In addition to being misleading, it is also unclear. Kids want to use their phones more than books, which causes them to be distracted from their schoolwork and athletics. They frequently lose focus, which negatively affects their academic achievement.

Isolation: Isolation is brought about by poor exam results. Students would rather spend their time on their phones than with friends and family. Their mental health may be severely harmed by this.

Immoral behaviour: The internet is full of unsuitable material. This is captivating to students who are unable to distinguish between reality and fiction and run the risk of being misled. Because of how compelling the virtual world is, societal unrest and moral decline are accelerated.

Cyberbullying: The use of information and communication technology, such as the Internet and mobile phones (forums, blogs, social networking sites, video posting, instant messaging, texting, or email), to hurt a person or a group is known as cyberbullying. Students lack the maturity and clarity of thought necessary to handle online crimes or bullying. They become victims of the negative forces at play in the virtual world and experience anxiety, despair, and low self-esteem in addition to possible psychological abuse at the hands of cyberbullies.[6] Most victims of cyberbullying are young people. Bullies have started to turn to mobile technology as the use of mobile devices among tweens and teens has increased. Every feature a bully would want is offered by this technology. It offers the bully the ideal platform via which the perpetrator could traumatise his or her victim without any fear. Anonymity, a

4 https://www.vice.com/en/article/qjdzx5/smartphone-addiction-affects-your-brain-in-the-same-way-as-drug-addiction-study-finds

5 https://www.iarc.who.int/pressrelease/iarc-classifies-radiofrequency-electromagnetic-fields-as-possibly-carcinogenic-to-humans/

6 https://bangalore.globalindianschool.org/blog-details/harmful-effects-of-mobile-phones-on-students

slow-responding telecommunications network, and lax rules all work in the bully's favour.[7]

Academic Achievement: Numerous youngsters bring their phones to school. The amount of time spent chatting with friends or playing games over lunchtime or even in class is growing daily. Children who don't pay attention in class miss out on vital teachings and end up having no idea what to study for and how to do well on exams.

APPLICATION THAT MAKESCHILDREN ADDICTED TO SMARTPHONE

People become addicted to smartphones due to the abundance of apps and games available. Most international software development firms create these applications. People's minds and hearts are affected by these applications. Here are some studies on the software that gets Indian youth addicted to cell phones and some astonishing situations that happened as a result of these games and programmes.

- **Player Unknown's Battleground (PUBG)**

PlayerUnknown's Battleground, or simply "PUBG," is a game that has gained enormous popularity since it was made available for smartphones. The National Child Rights Commission has recommended banning the game due to its tendency to incite violence in young players. Of fact, well-known and classic games like Call of Duty, Counter-Strike, Grand Theft Auto, Mad Max, Modern Warfare, and Max Payne are all extremely non-violent and non-addictive games.[8]However, some who play these games acknowledged that they are unintentionally addicted. Due to PUBG, there were some incredible events that happened. By issuing a reminder within the game, PUBG now addresses the issue of increased user engagement.

A 20-year-old boy from Jagitial, Telangana, passed away while participating in the game. According to a source, the little child had been playing the game for the previous 45 days when he started experiencing severe neck discomfort on a regular basis. The boy passed away while receiving care at the closest hospital in Hyderabad. Doctor's records indicate that the youngster played the game for an extended period of time, and as a result, the nerves in his neck were irreparably damaged.[9]

- **TikTok (A Social Media Application)**

TikTok is a well-known tool for sharing of short videos with others. Chinese developers created this programme. Within days of its release, it gained popularity in India. The use of this application leads to addiction.

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7 Šleglova, V., Cerna, A.2011. Cyberbullying in Adolescent Victims: Perception and Coping. Cyberpsychology,5

8 *PUBG Mobile Ban,* Bennett Coleman & Company, (Feb. 12, 2020, 03:26 PM), https://www.timesnownews.com/technology-science/article/pubg-mobile-ban-these-top-5-incidents-in-india-shows-how-harmful-pubg-addiction-is-and-how-to-fight-it/388792.

9 *PUBG Mobile Ban,* Network 18 Sites,(Feb. 13, 2020, 05:17 PM), https://www.news18.com/news/tech/pubg-mobile-ban-five-incidents-in-india-which-indicate-how-addictive-the-battle-royale-game-can-be-2076797.html.

The TikTok app was attempting to be outlawed in India by the Madras High Court. The key reason is because young people who use this well-known programme and are followers are particularly susceptible to porn. However, TikTok has somewhat corrected the situation lately. Pornographic videos are increasingly being watched and liked in order to gain more views. Not only that, but there have also been other instances in the recent past where individuals have gravely injured themselves while posting videos to the social networking platform TikTok.[10]

The last incident happened in April 2019. Salman Zakir, a 19-year-old teenager, was unintentionally shot in the face with a gun by his friend Sohail as they were attempting to record a TikTok video. They travel to the hospital to have Salman admitted. Salman was shot and killed as a result of the event, and his other two pals were also detained.[11]

These are a few instances where smartphone addiction was to blame. It is true that not just smartphones but also software, games, and applications are to blame for addiction.

LEGAL PROVISIONS

According to the World Health Organization, the definition of health stated in the introduction to its constitution is one that is generally satisfactory:

- Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.
- Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development.
- The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.
- Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.[12]

Article 21 of the Indian Constitution establishes the fundamental rights to life and personal dignity. To live with dignity, one has a natural right to health.

- **In Consumer Education and Research Centre v. Union of India**,[13] the Supreme Court explicitly held that the right to health and medical care is a fundamental right under Article 21 of the Constitution and this right to health and medical care, to protect health and vigour are some of the integral factors of a meaningful right to life.

10 https://www.indiatoday.in/trending-news/story/tiktok-accidents-kill-even-as-ban-order-sword-hangs-over-it-1502306

11 Supra 6

12 https://www.who.int/about/governance/constitution

13 AIR 1995 SC 636: (1995) 3 SCC 42.

14 AIR 1987 SC 994.

- **In Vincent v. Union of India**,[14] it was held that a healthy body is the very foundation for all human activities. In a welfare state, therefore, it is the obligation of the state to ensure the creation and the sustaining of conditions congenial to good health.

Article 39 (f): that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.[15]

Section 69A in The Information Technology Amendment Act, 2008

[83] [69A Power to issue directions for blocking for public access of any information through any computer resource.

(1) Where the Central Government or any of its officer specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2) for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.[16]

- **The Madurai Bench of the Madras High Court** started suo motu proceedings to regulate the use of Virtual Private Network (VPN) applications and the YouTube channels that publish tutorials for outlawed games out of concern over the addiction of children to violent online games like Free Fire and PUBG. The Court further requested that awareness-raising events about the effects of such games be held in schools and colleges by the Union and State governments.
- After hearing a woman's Habeas Corpus Petition (HCP), a bench made up of Justices R Mahadevan and J Sathya Narayana Prasad started the proceedings. The petitioner claimed that her adolescent daughter left home with a man she met while playing the video game Free Fire. Although the girl was eventually found, several advocates expressed concern throughout the hearing that their kids were also addicted to these games, which the judges took note of.[17]

15 https://indiankanoon.org/doc/555882/

16 https://indiankanoon.org/doc/10190353/

17 https://www.newindianexpress.com/states/tamil-nadu/2022/oct/14/madras-hc-initiates-suo-motu-proceedings-to-regulate-violent-online-games-2507938.html

How to Assist them in Overcoming Smartphone Addiction

There are several obvious steps you can take to assist handle the problem, but achieving a more balanced attitude toward technology in your family won't happen overnight.

1. **Establish limits** - Setting boundaries for device use involves designating specific times or locations. It's essential to give your family the chance to speak with one another away from their phones, iPads, and other gadgets. Parental control applications can be a lifesaver if you need help turning the devices off, but they should always be used in conjunction with a clear explanation of their purpose and any limits you want to impose on their use (e.g., If the gadget is bothering you, don't just switch it off at random; first give a warning ("If your homework is not finished by 6pm, your device will be locked for the remainder of the evening").
2. **Lead the way —** This will be a significant problem for many of us, as the Common-Sense Media survey reveals. Technology dependence is an issue that affects people of all ages. Younger children follow their parents' example most of the time, and while teenagers might not be quite as eager to do the same, they will undoubtedly be antagonistic toward any apparent hypocrisy on our side.
3. **Check in** - Don't let up on the discussion with your children about their use of technology and media. Inquire about the shows your child watches, the websites, applications, or games they enjoy, and the programmes their schoolmates discuss. To better understand the subject matter and to demonstrate your readiness to interact with technology and reach a compromise with them, watch an episode with them or participate in the activities they're playing. Get their opinions on the things they read, watch, and use in the media as well as the messages they believe those things are conveying.
4. **In addition**, more time should be spent by parents with their kids. Parents should be aware of the significant impact that smartphones have on their kids, and it's crucial to avoid just handing them smartphones. It's important to realise that children's smartphone addiction can have major consequences for just a moment's convenience. Children require parental control since they have poor self-discipline. Special attention is required, particularly when parents themselves have lax parenting styles, dual-income families, and generous attitudes toward smart phones. The society must make efforts. Schools like kindergarten and preschool should instruct kids not to use their smartphones excessively.[18]

INITIATIVE FOR DE-ADDICTION OF SMART PHONE

An innovative project, E-Mochan, a first-of-its-kind clinic for internet de-addiction, has been launched by the Kozhikode District Legal Services Society in collaboration

18 http://www.ijssh.org/papers/336-A10048.pdf

with the Health Department. Vinod Chandran, a high court judge and the executive director of the Kerala State Legal Services Authority (KELSA), opened a clinic at the city's Government Mental Health Centre. The clinic's mission is to assist kids, teenagers, and even adults in recovering from internet addiction, which has grown significantly in the State over the past year as a result of the pandemic scenario, which caused most people to spend their time online. Through behavioural changes in individuals, E-Mochan seeks to identify internet addiction in its early stages and steer people away from conditions like game disorder. Additionally, it aims to help kids develop their life skills and their mental health.[19]

Here's a first in the post-digital era for the capital. An NGO has opened Delhi's first online de-addiction centre out of concern for the utter lack of socialising that results from a lifestyle focused on the internet among children. At this NGO, which was founded by the Uday Foundation, counsellors and psychologists work with clients, some of whom are as young as 10 years old, to help wean them off the Internet. The NGO's director, Rahul Verma, established the Center for Children's Internet and Technology Distress. According to Verma, folks who battle addiction to alcohol and drugs are similar to those who battle drug addiction in many respects. According to Verma, the group of doctors and counsellors interact with the kids by enticing them to participate in more outside activities. He continues by saying that interactive education was an excellent indoor activity and that it played a role in the process of breaking an addiction, along with outlining the negative repercussions of continuing to use the Internet. "One of the main causes of this issue is that parents are unable to give their children personal attention. As a result, a youngster who visits the centre is accompanied by both parents. As part of the counselling process, parents are encouraged to spend more time with their kids and cut back on their online activities.[20]

CONCLUSION AND SUGGESTIONS

The widespread usage of smartphones has sparked worry over the social and psychological implications of excessive smartphone use, particularly among adolescents in India. The Indian generations of today abuse their smartphones because they have made mobile connectivity so accessible. Since teenagers may download and use a variety of applications on smartphones even without an Internet connection, there is a greater risk of smartphone abuse and addiction. It is suggested that future research should focus on smartphone addiction in greater detail, with both qualitative and quantitative studies having larger sample sizes, and that Indian governments develop policies to raise awareness of the problem as a top priority to improve the future of Indian adolescents. There was extensive use of mobile devices. Compared to SMS, the majority of research participants preferred phoning. The use of mobile

19 https://www.thehindu.com/news/cities/kozhikode/internet-de-addiction-clinic-launched/article37046407.ece

20 https://indianexpress.com/article/cities/chennai/tamil-nadu-deaddiction-centre-medical-college-hospitals-7672330/

phones was found to be positively connected with a variety of health issues, including headache, earache, neck pain, tinnitus, aching fingers, morning lethargy, exhaustion, eye symptoms, sleep disturbance, and restlessness.A negative correlation between mobile phone use and hypertension was discovered. The link between mobile phone use and health issues will need to be confirmed by larger investigations in the future. Parental and child variables were separated as the antecedents of smart phone addiction in children. Children are more likely to become addicted to smartphones when their parents have higher levels of parental education, income, and age, are dual-income families, have used smartphones for longer periods of time themselves, have permissive parenting styles, and have positive attitudes toward smartphones. In terms of child characteristics, boys, younger children, children with fewer siblings, and not attending an educational institution all predict smartphone addiction.

Children who are addicted to their smartphones have issues with their mental and physical growth. In other words, a child who is dependent on a smartphone is more likely to experience mental health issues like emotional instability, attention deficit, despair, aggression, and loss of control. Additionally, there are physical issues like hearing and vision impairments, obesity, bodily imbalances, and inadequate brain development. Children's smart phone addiction is likely to last their entire lives, which causes significant personal and societal loss. As a result, society and parents need to work together to avoid addiction. Although becoming addicted to new technology and being fascinated by them are frequently two sides of the same coin, we must exercise caution, especially when it comes to the lives of our future generations. Efforts should be made in unison to eliminate any negative effects that internet addiction could have.

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Gender Equality and State Policy for Gender Mainstreaming: An Inclusive Approach

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1. INTRODUCTION

The idea of gender mainstreaming was first introduced by the United Nations development community at the third World Conference on Women in Nairobi 1985, Kenya.[1] It was then formally featured in 1995 at the Fourth World Conference on Women in Beijing, China,[2] the Beijing Platform for Action, many countries have adopted and committed to make initiate for gender mainstreaming in their policy-making processes.[3]

As per the Global Gender Gap Index Report 2020 published by the World Economic Forum, India ranks 112 out of 153 countries with a score of 0.668 out of 1. India ranked 108 out of 149 countries with a score of 0.665 as per the Global Gender Gap Index Report 2018. Thus, India's performance has marginally improved from 0.665 in 2018 to 0.668 in 2020. Global Gender Gap Index (GGGI) consists of four dimensions, namely,

(i) Economic participation and opportunity;

(ii) Educational attainment;

(iii) Health and survival; and

(iv) Political empowerment.

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1 3rd World Conference on Women, Nairobi 1985, organized by United Nations, accessed at https://www.earthsummit2002.org/toolkits/women/un-doku/un-conf/narirobi-2.html

2 The Platform for Action is an agenda for Women's Empowerment. It aims at accelerating the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women, https://www.un.org/womenwatch/daw/beijing/platform/plat1.htm

3 Priyanka Sethi, Akhilesh Kumar, and et.al, Gender Mainstreaming in Governance, Development Monitoring and Evaluation Office (DEMO) NITI Aayog, New Delhi, accessed at https://dmeo.gov.in/sites/default/files/2022-06/Thematic_Paper_Gender_ Mainstreaming_ 220622.pdf

As per the computational mechanism of GGGI, highest performance score on each of these four dimensions is 1. According to the GGGI Report 2020 India has scored 0.354 in economic participation and opportunity, 0.962 in educational attainment, 0.944 in health and survival and 0.411 in political empowerment. In order to improve India's status in this index, this Ministry has adopted two-pronged strategy (i) Monitoring the performance by engagement with Publishing Agency of GGGI, namely, World Economic Forum (ii) Identification of Reform Areas and Reform Actions in consultation with concerned Ministries and Departments.[4]

2. WHAT IS GENDER MAINSTREAMING?

Gender Mainstreaming means integrating a Gender Equality perspective at all stages and levels of policies, programs, and projects, so that they benefit both women and men and do not perpetuate inequality between them. There are several hidden Socio-Economic gender inequalities, which need to be identified and rectified through affirmative action by government as well as society.

The agreed conclusions of United National Economic and Social Council (ECOSOC) 1997, defined Gender mainstreaming as, "The process of assessing the implications for women of any planned action, including legislation, policies and programmes, in all areas and at all levels. It is a strategy for making women's and experiences an integral dimension of the design, implementation, monitoring and evolution of policies and programmes in all political, economic and societal spheres. The ultimate goal is to achieve gender equality. Hence, gender mainstreaming has to take into account these differences while designing, implementing and evaluating polices, programmes and projects, and ensure that we achieve gender equality in a time bound manner.[5]

3. OBJECTIVES OF GENDER EQUALITY

Once Gender Mainstreaming is achieved, equality will be a natural element of all processes and measures instead of being treated as an aside. General equality objectives include:

(a) Economic empowerment through fair distribution of unpaid and paid work among women and men, wages and salaries that women and men can live on independently;

(b) Equality of women and men with regard to political representation and participation and Equal career opportunities ;

(c) Enhancement of gender roles and standards for Women and Men, elimination of restricting standards;

4 Press Information Bureau (PIB) report on notified on 25th March 2021, accessed at https://pib.gov.in/PressReleasePage.aspx?PRID=1707475

5 Dr. Shalini Rajneesh, Gender Mainstreaming in India: Issues and Challenges, Fiscal Policy Institute, Government of Karnataka, accessed at https://fpibengaluru.karnataka.gov.in/storage/pdf-files/Technical%20Reports/FPI%20Gender%20Mainstreeming%20Version-2%2013-07-2021.pdf

(d) Same personal freedoms for women and men, protection against all forms of aggression, violence and safety in public spaces; and

(e) Safe work environment and protection against sexual harassment.[6]

4. SUSTAINABLE DEVELOPMENT GOALS (SGD) AND GENDER MAIN STREAMING

Gender equally is a fundamentally human right and is a prerequisite for Sustainable Development; this goal aims to achieve gender equality by ending all forms of discrimination, violence and harmful practices, including trafficking and sexual exploitation against women and girls. It calls for full and effective participation and equal opportunities for leaderships at all levels of decision-making in political, economic, and public life for women. The Sustainable Development Goals target, its indicator selected for SDG India Index including national target value for 2030 is demonstrated in the below table.

SDG Goal	SDG Global Target	Indicator Selected for SDG India Index	Target 2030
5.1	End all forms of discrimination against all women and girls everywhere	Sex Ratio at Birth (Female per 100 Male)	954
		Average female to male ratio of average wages/salaries received per day by regular wage/salaried employees	1
5.2	Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation	Percentage of ever married women aged 15-49 years who have ever experienced spousal violence	0
5.5.	Ensure Women's Full and effective participation and equal opportunities for leadership at all levels of decision making in political, economic and public life	Percentage of seats won by women in the General elections to State Legislative Assembly	50
		Ratio of Female Labour force participation rate of Male Labour Force Participation rate	1
5.6	Ensure universal access to sexual and reproductive health and reproductive rights as agreed in accordance with the programme of action at Bejing Conference	Percentage of women in the age group of 15-49 years using modern methods of family planning	100

Gender equality is not only a fundamental human right, but a necessary foundation for a peaceful, prosperous and making sustainable world. There has been progress over the last decades, but the World is not on track to achieve gender equality by 2030.[7]

6 Gender Mainstreaming: An overview, office of the Special Adviser on Gender Issues, Department of Economic and Social Affairs, United Nations, New York, 2002, for more information/details are available at https://www.un.org/womenwatch/osagi/pdf/e65237.pdf

7 Goal 5, Achieve Gender Equality and Empower all Women and Girls, Sustainable Development Goals, adopted by United Nations Organisation in 2015, SDG India Index reported by NITI Aayog, available at https://www.niti.gov.in/sites/default/files/2020-07/SDX_Index_India_Baseline_Report_21-12-2018.pdf

India is committed, both constitutionally and through its policies, to achieving gender equality in all spheres of life. The Constitution of India prohibits discrimination based on gender, upholds women's right to participate in political and decision making processes and also reiterates the country's commitment towards the Socio-Economic well-being of Women in India.

5. CONSTITUTIONAL AND JUDICIAL APPROACH FOR GENDER EQUALITY

The Constitution of India is one of the best Constitutions in the world, which is providing many safeguard provisions for addressing the gender issues; these are interpreted by the judiciary from time to time to tackle gender issues, at the beginning Article 14, reads Right to Equality, "The State shall not deny to any person Equality before the law or the Equal protection of the laws within the territory of India." the State not to deny to any person 'Equality before Law', it also commands the State not to deny the 'Equal Protection of the Laws'. The concept of 'Equal protection of the laws' requires the State to give special treatment to persons in different situations in order to establish equality amongst all. It is positive in character. Therefore, the necessary corollary to this would be that equals would be treated equally, whilst un-equals would have to be treated unequally.

In case *Anuj Garg and others V/s Hotel Association of India*[8] The Court relied upon the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) and the Beijing Declaration, and held that "Domestic Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them". Further in *Randhir Singh vs. Union of India and Ors.*[9] the Court held that "non-observance of the principle of "Equal pay for equal work" for both men and women under Article 39(d) of the Constitution amounted to violation of Article 14 and 16, recognized that the principle was expressly recognized by all socialist systems of law including the Preamble to the Constitution of the International Labour Organization."[10] Articles 19(1)(g), of the Constitution to the extent it prohibited employment of any woman in any part of such premises in which liquor or intoxicating drugs were consumed by the public.

The Article 15 of Indian Constitution reads, State shall not to discriminate against any Citizen on the ground of Sex and Article 15 (3) –State to make special provision in favor of Women and Children. In the case of *Vishakka & others Versus State of Rajasthan*,[11] The Hon'ble Supreme Court held that the harassment of women at work places amount to violation of gender justice and right to life and liberty which is clear violation of Articles 14, 15, 16 and 21 of Constitution of India. In *C.B. Muttamma V/s UOI*.[12] It was held that if a woman has to obtain permission from the government

8 ILR 2008 Kar 697

9 *(1982 AIR 879),*

10 National Law University Delhi, Privacy Law library available at https://privacylibrary.ccgnlud.org/

11 AIR 1997 SC 3011

12 AIR 1979 SC 1868

before marriage then the same set of reasoning is also applicable to men. Government was advised to relook rules to remove any discrimination from them.[13]

Article 39 (d) of Indian Constitution explains - Equal work for equal pay both Men and Women, There are a number of provisions in the Constitution of India that ensure that there is equal pay for equal work in India especially when we talk of gender pay gap. towards securing balance there is Equal pay for equal work for both men and women, Equal Remuneration Act, 1976, An act to provide for the payment of equal remuneration to men and women workers and for the prevention of discrimination, on the ground of sex, against women in the matter of employment and for matters connected therewith or incidental thereto[14] Article 42, Humane conditions of work and maternity relief and Article 47, State to raise the level of nutrition and improvement of public health.

Major initiatives or measures taken by Government of India for achieving Gender Equality and Gender Mainstreaming are follows, India has also launched several national level schemes and programmes to initiate for reducing Gender Gap in all aspects of Social, Economic, and Political Life, which are as follows,

(a) Beti Bachao Beti Padhao (BBBP);[15]

Dr B.R. Ambedkar said that the State of a society's development needs to be measured based on the development of women. When taking the economic development at the level of a province, country, State and district, it is essential to take into account the status of a woman, women education and economic status is needs to be streamlined through the inclusive policies and progesmmes, to attempt in this regard Government of India, States have been initiated various programmes aiming to see women become self-reliance, which is governed by the core principles of respecting, protecting and fulfilling the rights of girls and women, including the ending of gender discrimination and violence is adopted, this place vital role in the development of the country, in this connection the Government of India introduced Beti Bachao Beti Padhao (BBBP) Scheme 2015 to address the issues of decline in Child Sex Ratio (CSR), main objectives of the schemes as follows,

13 Manvi Dikshit Sharma, Constitutional Provision for Empowerment of Women in Atma nirbhar Bharat, Indian Institute of Public Administration (IIPA) Available at https://www.iipa.org.in/publication/public/uploads/article/11881671102524.pdf

14 Duty of the Employer Duty of employer to pay equal remuneration to men and women workers for same work or work of similar nature under Equal Remuneration Act, 1976, Act, published by Ministry of Labour Govt. of India at https://labour.gov.in/sites/default/files/equal_remuneration_act_1976_0.pdf

15 Beti Bachao Beti Padhao (BBBP) Scheme under Government of India was launched on 22nd January, 2015 to address the issue of decline in Child Sex Ratio (CSR) in the country along with related issues of empowerment of girls and women, Ministry of Women and Child Development is nodal/implementation agency, accessed at https://wcd.nic.in/sites/default/files/Beti%20Bachao%20Beti%20Padhao%20Operational%20Manual.pdf

(i) To prevent gender-based sex selective elimination;

(ii) To ensure survival and protection of the girl child;

(iii) Encourage and improvement in the percentage of institutional deliveries; and

(iv) To ensure education and participation of the girl child.

This scheme was implemented thought out Country in selected district in State, applied in phased manner, there were nearly 640 districts identified for the purpose of implementation and same has been benefited since 2014-15 to 2017-18, the budget allocation under the scheme, as shown below,

Component and year wise expenditure

(Rs. in Lakhs)

S. No	Particulars at each level	Cost per unit	No of unit	2017-18	Cost per unit	No of unit	2018-19	Cost per unit	No of unit	2019-2020	Total
1	**Central Level**										
	(i) Media Campaign (by MoI&B, DAVP)	25	405	10125	25	405	10125	25	405	10125	
	(ii) Training/orientation/ Consultation, Workshops/Research/Development of MIS & its maintenance/other miscellaneous works	500	-	500	500	-	500	500	-	500	
	(iii) Monitoring and Evaluation	1000	-	1000	1000	-	1000	1000	-	1000	
	(iv)Media Campaign for 235 BBBP Alert Districts	25	235	5875	25	235	5875	25	235	5875	
	Sub Total (Central Level)			17500			17500			17500	52500
2	**District Level**										
i).	(i) Inter-sectoral Consultation & Meeting of DTF and BTF and media campaign (ii) Training & Capacity building/sensitization programme	8	405(161+ 244)	3240	8	405(161+ 244)	3240	8	405(161+ 244)	3240	
ii).	i) Innovation and Outreach Activities. (ii) **IEC material/awareness kit to Anganwadi Centers**	25	405	10125	20	405	10125	20	405	10125	
iii).	Monitoring, Evaluation and Documentation	3	405	1215	3	405	1215	3	405	1215	
iv).	Sectoral activities of M/O HRD	5	405	2025	5	405	2025	5	405	2025	
v).	Sectoral activities ofMoH&FW	5	405	2025	5	405	2025	5	405	2025	
vi)	Flexi fund (10%)	4	405	1620	4	405	1620	4	405	1620	
	Sub Total (District Level)	50	405	20250	50	405	20250	50	405	20250	60750
	Grand Total			37750			37750			37750	113250
				377.5 Cr			377.5 Cr			377.5 Cr	1132.5 Cr.

Central level norms

(Rs. in Lakhs)

S. No	Particulars	Cost per unit	No of unit	2017-18	Cost per unit	No of unit	2018-19	Cost per unit	No of unit	2019-2020	Total
1	**Central Level**										
	(i) Media Campaign (by MoI&B, DAVP)	25	405	10125	25	405	10125	25	405	10125	
	(ii) Training/orientation/ Consultation, Workshops/Research/Development of MIS & its maintenance/other miscellaneous works	500	-	500	500	-	500	500	-	500	
	(iii) Monitoring and Evaluation	1000	-	1000	1000	-	1000	1000	-	1000	
	(iv)Media Campaign for 235 BBBP Alert Districts	25	235	5875	25	235	5875	25	235	5875	
	Sub Total (Central Level)			17500			17500			17500	52500
				175 Cr.			175 Cr.			175 Cr.	525 Cr.

District Wise Component

S.No	Items/Components	Budgetary Ceiling (in lakh)	2017-18 No of Districts	2017-18 cost (in lakh)	2018-19 No of Districts	2018-19 cost (in lakh)	2019-20 No of Districts	2019-20 cost (in lakh)	Total cost (in lakh)
1	**(i) Inter-sectoral Consultation, Meetings of DTF, BTF and Media Campaign (ii) Training & Capacity building/sensitization programme**	8	405(161+244)	3240	405(161+244)	3240	405(161+244)	3240	
2	**(i) Innovation and Outreach Activities (ii) IEC material/awareness kit to Anganwadi Centers**	25	405	10125	405	10125	405	10125	
3	**Monitoring, Evaluation and Documentation**	3	405	1215	405	1215	405	1215	
4	**Sectoral activities of M/O HRD**	5	405	2025	405	2025	405	2025	
5	**Sectoral activities of M/O H&FW**	5	405	2025	405	2025	405	2025	
6	**Flexi Fund (10%)**	4	405	1620	405	1620	405	1620	
7	**Total**	50	405	20250	405	20250	405	20250	60750
				202.5 Cr.		202.5 Cr.		202.5 Cr.	607.5 Cr.

In this short duration, BBBP has been well-received and favourable trends are visible in many of the districts. The scheme has been successful in establishing the improvement in Child Sex Ratio as a National Agenda. Based on the successful implementation in 640 districts.[16]

(b) Mahila Shakti Kendra[17]

The Government of India has announced a new scheme namely, Mahila Shakti Kendra (MSK) for implementation during 2017-18 up-to 2019-20, meant to provide "one stop convergent support for empowering rural women with opportunities for skill development, employment, digital literacy, health and nutrition. In the first year (2017-18), this scheme is implemented at National, State, District and Block level, said scheme is covered all States/ UT's, and Block Level initiative will cover 115 most backward blocks (as identified by NITI Aayog).[18] Allocation of fund for the scheme is 60:40, in case UT its 100% and North Eastern States and Special Category State, 90:10, at the end of 2019-20, allocated fund worth of nearly 10,30,4000/-. MSK scheme implementation demonstration as shown below,

(c) Working Women's Hostel (WWH)[19]

The main objective of the scheme is to promote availability of safe and conveniently located accommodation for working women, with day care facility for their children, wherever possible, in urban, semi urban, or even rural areas where employment opportunity for women exist. The scheme is assisting projects for construction of new hostel buildings, expansion of existing hostel buildings and hostel buildings in rented premises. The working women's hostel projects being assisted under this scheme shall be made available to all working women without any distinction with respect to caste, religion, marital status etc., subject to norms prescribed under the scheme.[20]

16 Beti Bacho Beti Padhao Scheme, implementation guidelines for State Government and Union Administrations, release by Ministry of Women Child Development, Government of India, New Delhi, accessed at https://wcd.nic.in/sites/default/files/Guideline_6.pdf

17 To create an environment in which realize their full potential, convergent support is being proposed for equal access to health care, equality education, career and vocational guidance, employment, health and safety at Gram Panchayat level, Ministry of Women and Child Development is nodal/implementation agency details available at https://wcd.nic.in/sites/default/files/Mahila%20Shakti%20Kendra%20Scheme.pdf

18 Ministry of Women and Child Development is nodal agency for implementation of this scheme, more information access at https://wcd.nic.in/sites/default/files/Final%20Guidelines%20MSK%28English%29%20Scheme.pdf

19 The objective of the scheme is to promote availability of safe and conveniently located accommodation for working women, with day care facility for their children, wherever possible, in urban, semi urban, or even rural areas where employment opportunity for women exist, for more information/details available at https://wcd.nic.in/sites/default/files/Working%20Women%20Hostel_about_revised_about.pdf

20 The Ministry of Women and Child Development is nodal agency for implementation this scheme, for more details available at https://wcd.nic.in/sites/default/files/Working%20Women%20Hostel_about_revised_about.pdf

The Voluntary Organizations (registered Societies, Public Trusts etc.), Women's Development Corporations, Universities, Schools/Colleges of Social Work, Local Bodies, Cooperative Institutions, State Governments and Union Territories Administrations receive financial assistance under the Scheme. All these are registered recognized bodies that are mandated under the scheme to provide services on a not for profit basis. This ensures accountability and basic quality of services. Major weakness of the scheme is shown as below,

(a) Lack of maintenance;
(b) Lack of Funds;
(c) Lack of latest technology;
(d) Lack of other facilities;
(e) Lack of regular monitoring and accountability;
(f) Insufficient hostels;
(g) Inflexible timing
(h) Lack of publicity; and
(i) Poor quality of services,

These weaknesses are impact on progress of the said scheme, though this is very necessary and needed for working women across the country, total number of working women hostels is 914 as on 2014 across the country, later it has been increased.

(d) Rajiv Gandhi Scheme for Adolescent Girls (SAB or SABLA)[21]

A new comprehensive scheme, called Rajiv Gandhi Scheme for Empowerment of Adolescent Girls or SABLA, merging the erstwhile KSY and NPAG schemes has been formulated to address the multi dimensional problems of AGs. SABLA will be implemented initially in 200 districts selected across the country, using the platform of ICDS. In these districts, RGSEAG will replace KSY and NPAG. In rest of the districts, KSY would continue as before. An integrated package of services is to be provided to AGs that would be as follows, which are including;[22]

(a) Nutrition Provision;
(b) Iron and Folic Acid Supplementation;
(c) Health check-ups and referral services;
(d) Nutrition and Health Education;
(e) Counseling/Guidance of family welfare;

21 This Scheme would be implemented using the platform of ICDS Scheme through Anganwadi Centers (AWCs), for more information available https://wcd.nic.in/sites/default/files/1-SABLAscheme_0.pdf

22 The Ministry of Health and Family Welfare, Government of India, published and acessed at https://wcd.nic.in/sites/default/files/1-SABLAscheme_0.pdf

(f) Life skill education and accessing public service; and

(g) Vocational training for girls aged 16 and above under National Skill Development Program.

(e) Rashtriya Mahila Kosh (RMK);[23]

The Rashtriya Mahila Kosh (RMK) launched in 1993, RMK provides loans to NGO's and Self Help Groups (SHGs) for Women, main objectives of the scheme are follows,

(i) To promote or undertake activities for the promotion of credit as an instrument of Socio-Economic change;

(ii) To promote and support scheme for improvement of facilities for women for including employment, asset creation, social contingent needs;

(iii) To promote research, study, documentation and analysis of the role of credit and its management; and

(iv) Loans provide under this scheme are Loan Promotion Scheme, Main Loan Scheme, Revolving Fund Scheme, Refinance Scheme, Housing Loan Scheme, Repeat Loan, Family Loan Scheme.

The cumulative and State wise achievement of the scheme as on 31.03.2022, total amount sanctioned, 37312.29, No. of NGO's involved 1531, No. SHG's participated 74116, and No. of beneficiaries 7,41,163/-

(f) Deendayal Antyodaya Yojana-National Urban Livelihoods Mission (DAY-NULM);[24]

The mission would aim at providing shelter equipped with essential services to the urban homeless in a phased manner. In addition, the Mission would also address livelihood concerns of the urban street vendors by facilitating access to suitable spaces, institutional credit, social security and skills to the urban street vendors for accessing emerging market opportunities.[25] Main highlight of the schemes as follows,

(a) Employment through Skill Training and Placement;

(b) Social Mobilization and Institution Development;

(c) Subsidy to urban poor; and

(d) Shelters for urban homeless.

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23 RMK Scheme established in 1993 is a national level organization as an autonomous body under ages of the Ministry of Women and Child Development, for Socio and Economic empowerment of Women, who lend loans for Self Help Groups (SHG) details accessed at https://rmk.nic.in/

24 To reduce poverty and vulnerability of the urban poor households by enabling them to access gainful Self- Employment and skilled wage employment opportunities, resulting in an appreciable improvement in their livelihoods on a sustainable basis, through building strong grassroots level, accessed at https://nulm.gov.in/

25 Ministry of Housing and Urban Affairs, Government of India, Mission Document on NULM, accessed at https://nulm.gov.in/PDF/NULM_Mission/NULM_mission_document.pdf

The financing of the mission shall be shared between the Centre and State /UTs on the following basis,

Sl. No	States/UTs	Central Share (percent)	State / UT Share (percent)
1	North Eastern States -Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim and Tripura	90	10
2	Three Himalayan States- Jammu and Kashmir, Himachal Pradesh, and Uttarakhand	90	10
3	Other States (States excluding Sr. No. 1 & 2)	60	40
4	UTs with legislature- Delhi and Puducherry	100	Nil
5	UTs without legislature-A&N Islands, Daman & Diu, Dadra & Nagar Haveli and Chandigarh	100	Nil

(g) Sukanya Samriddhi Yojana (SSY) ;[26]

Sukanya Samriddhi Yojana is a small deposit scheme of the Government of India meant exclusively for a girl child and is launched as a part of Beti Bachao Beti Padhao Campaign. The scheme is meant to meet the education and marriage expenses of a girl child. Under the scheme, a minimum of Rs. 1000/- and a maximum of Rs. 1,50,000/- can be deposited. Some of the benefits associated with opening the account under the yojana includes high interest rate, saving on income tax, lock in period, when account reaches the maturity age account balance including the interest rate will be paid to the policy holder and lastly the policy holder receives interest even when the scheme reaches maturity.

(h) Skill Upgradation and Mahila Coir Yojana;[27]

Skill Upgradation and Mahila Coir Yojana (MCY) is one of the key schemes under the Schemes Coir Vikas Yojana earlier it was known as Coir Plan (General) scheme which provides development of domestic and export makers, skill development and training, empowerment of women, employment/entrepreneurship creation and development, enhanced raw material utilization, trade related service, welfare activities for coir workers, Mahila Coir Yojana, in particular, aims at women empowerment through the provision of spinning equipment at subsidies rates after appropriate skills development training. MCY is being implemented by the Coir Board for the empowerment of women artisans in the coir sector with an aim to provide self employment opportunities to rural women artisans in regions processing coconut husk and provides scope for large scale employment as well as improvement of standard of living of rural women artisans.

26 Which is aimed at the betterment of girl child in India. It is launched to help parents build a fund for the higher education and other expenses of their girl child, further details accessed at National Saving Institute at, http://www.nsiindia.gov.in/Home.aspx

27 Ministry through Coir Board, a statutory body is implementing various skill development activities across the country under the component 'Skill Upgradation & Mahila Coir Yojana' of Coir VikasYojana, a Central Sector Scheme. Among the various skill development programmes under Coir VikasYojana, the Scheme Mahila Coir Yojana (MCY) envisages provision for training only to women artisans. For further details accessed at https://pib.gov.in/PressReleasePage.aspx?PRID=1885661

(i) Stand-Up India;[28]

Recognising the challenges that energetic, enthusiastic, and aspiring SC, ST and women entrepreneurs may face many challenges in converting their dream to reality, Stand-Up India was launched to promote entrepreneurship amongst women, Scheduled Castes (SC) & Scheduled Tribes (ST) categories, to help them in starting a green field enterprise in manufacturing, services or the trading sector and activities allied to agriculture. "The scheme has created an eco-system which facilitates and continues to provide a supportive environment for setting up green field enterprises through access to loans from bank branches of all Scheduled Commercial Banks. Stand-Up India Scheme has proved to be an important milestone in promoting entrepreneurship among SC, ST and women," the Finance Minister said on the 7th anniversary of SUPI Scheme. promote entrepreneurship amongst women, SC & ST category;

Provide loans for green field enterprises in manufacturing, services or the trading sector and activities allied to agriculture; facilitate bank loans between Rs.10 lakh and Rs.100 lakh to at least one Scheduled Caste/ Scheduled Tribe borrower and at least one woman borrower per bank branch of Scheduled Commercial Banks.[29]

(j) Mahila e-Haat[30]

Mahila E-Haat is an initiative for meeting aspirations and needs of women entrepreneurs. It is an online marketing platform for women, where participants can display their products. It is an initiative for women across the country as a part of 'Digital India' and 'Stand Up India' initiatives. This provides an opportunity for women entrepreneurs to leverage technology for showcasing products made/manufactured/sold by them.

(k) Women Helpline Scheme[31]

Women Helpline (WHL) will be integrated with One Stop Centre Scheme (OSC) under which one OSC shall be established in every State/UT to provide integrated

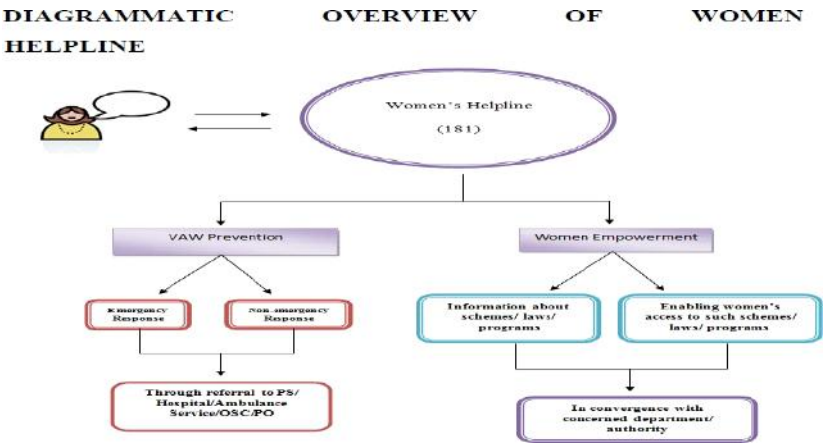
28 Stand-Up India was launched by the Government of India on 5 April 2016 to support entrepreneurship among women and SC & ST communities, details available at https://www.standupmitra.in/

29 https://www.standupmitra.in/

30 Mahila E-haat", is an online marketing platform for women entrepreneurs. Government has promoted platforms such as Government e-Market Place (GeM) and e-market place managed by National Small Industries Corporation (NSIC) to support the entrepreneurs. The list of vendors registered at Mahila E-haat has been allocated to Ministry of Food Processing Industries, details accessed at https://pib.gov.in/PressReleasePage.aspx?PRID=1695509

31 The Scheme of Universalisation of Women Helpline is intended to provide 24 hours immediate and emergency response to women affected by violence through referral (linking with appropriate authority such as police, One Stop Centre, hospital) and information about women related government schemes programs across the country through a single uniform number. For more information accessed at https://wcd.nic.in/sites/default/files/GuidelineapprovedMinisterandwebsite_1.pdf

support and assistance to women affected by violence, both in private and public spaces under one roof. Women affected by violence and in need of redressal services will be referred to OSC through WHL. A web enabled Management Information System (MIS) would be developed to provide a user friendly and easily accessible one single portal giving due regard to the confidentiality of women affected by violence,



(l) SWADHAR Greh (A Scheme for Women in Difficult Circumstances);[32]

The Ministry of Women and Child Development is implementing the Swadhar Greh Scheme which targets the women victims of difficult circumstances who are in need of institutional support for rehabilitation so that they could lead their life with dignity. The Scheme envisages providing shelter, food, clothing and health as well as economic and social security for these women.

(m) Women Entrepreneurship Platform (WEP)[33]

The Women Entrepreneurship Platform (WEP) is a first of its kind, unified access portal which brings together women from different parts of India to build a nurturing ecosystem that enables them to realize their entrepreneurial aspirations. Women enterprise development scheme provides loans to businesswomen of all sections. The applicant can receive a term loan and a working capital loan at 8% interest rate.

32 The scheme provides institutional support for rehabilitation of these women so that they could lead their life with dignity. The Scheme envisages providing shelter, food, clothing, counseling, training, clinical and legal aid along with economic and social security for the women victims of difficult circumstances. For more information at https://pib.gov.in/PressReleasePage.aspx?PRID=1777735#:~:text=The%20scheme%20provides%20institutional%20support,women%20victims%20of%20difficult%20circumstances.

33 NITI Aayog has launched a Women Entrepreneurship Platform (WEP) for providing an ecosystem for budding & existing women entrepreneurs across the country. SIDBI has partnered with NITI Aayog to assist in this initiative. at https://www.startupindia.gov.in/content/sih/en/government-schemes/Wep.html

The loans will be sanctioned to women who are engaged in a viable business. The maximum amount of loan is Rs.15 lakh, and 75% of assistance for a project will be offered as a loan, Main aid to encourage women's businesses in the nation by giving them financial support and coaching. The plan hopes to increase the number of women working in businesses through these actions, giving them greater possibilities for employment and a secure workplace.

7. CONCLUSION

A critical factor in successful implementation of gender mainstreaming is the commitment of management and the establishment of effective accountability mechanisms, One of the most important lessons learned from efforts to implement the gender mainstreaming strategy is that incorporating gender perspectives in all areas of societal development, it is not only important for achieving gender equality but is essential for achievement of other important goals. Sustainable people-centered development is only possible when gender perspectives are identified and addressed with identified with more focused by State. Lack of commitment and attention on the part of decision–making bodies, lack of continuous access to gender awareness and sensitivity training were identified as major threats to gender equality and gender mainstreaming. Even governments mainly focused on certain critical areas of mainstreaming including, child marriages, teenage pregnancy, child domestic work, poor education, health, sexual abuse, exploitation and violence, many of these manifestations will not change unless girls aware and valued more.

An Analytical Study of Online Dispute Resolution

*Dr. Sonia**

INTRODUCTION

In the Universe, conflicts are bound to occur now and then. There is nothing we can do about that but what we can do is to find new methods by which can try to reduce their number, manage them and resolve them quickly. When we talk about the methods of dispute resolution the ideal method would be one in which the situation and relationship of the parties are better when the dispute is resolved then it was when they initiated the process. Sadly, this cannot be achieved in every dispute.[1] People will no longer rely on face-to-face meetings to resolve disputes with parties they may never actually meet, whether they are located across town or across an ocean, as technological advancements continue to shrink the world. Technology is fundamentally altering how people interact with one another in society, and the legal profession has a responsibility to ensure that we are at the forefront of dispute resolution in this era, where technology is no longer just a thing of the future but a reality right now.[2] Online shopping is becoming more popular among consumers, and more traders are selling there as well. It is crucial to break down existing barriers and increase consumer confidence because both consumers and businesses need to feel comfortable conducting transactions online. This objective might be greatly advanced by the availability of dependable and effective online dispute resolution.[3] Disputes can generally be settled/resolved by employing either Judicial Dispute Resolution or the Alternative Dispute Resolution method.[4] Among these two methods, recourse to court for resolving the dispute is ordinarily found to be lengthy and costly process

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1 Davide Carneiro, Paulo Novais, *et.al.*, "Online Dispute Resolution: An Artificial Intelligence Perspective" 41 *Artificial Intelligence Review* 211 (2014).

2 Ethan Katsh, "The Nuts and Bolts of ODR" 23(1) *American Bar Association* 35 (2006).

3 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) ,*available at* :https://eur-lex.europa.eu/eli/reg/2013/524/oj (Visited on June 11, 2023).

4 Janet K. Martinez, "Designing Online Dispute Resolution" 94 *J. Disp. Resol.* 136 (2020).

when compared to the other method.[5] Nowadays, when the online commerce is in bloom, recourse to court for settling the disputes is sometimes found to be ineffective as online business carries with it its own demands and needs.[6] ODR is an innovative approach of resolving complaints, concerns, or disagreements. In this method, disputes are resolved using ICT tools to speed up the settlement of issues between parties. It can involve both online and offline disagreements and can be conducted wholly or partially online.[7] ODR has the potential to make justice accessible to all people in the world, regardless of their country's legal system. Because of the internet and mobile technology, information is now more widely available. ADR is now accessible on each person's computer via the Internet.[8]

RESEARCH METHODOLOGY

The approach chosen will be doctrinal using an exploratory research method in accordance with the needs of this study. The paper analyses the ODR's part in the administration of justice. Secondary sources (published articles, reports, and case studies) and primary sources (statutes, policies, etc.) were used in the research.

Research Objectives:

1. To understand what ODR means;
2. To gain understanding of the development of ADR;
3. To know about the value and importance of Online Dispute Resolution;
4. To learn about the obstacles that ODR must overcome.

Literature Review: The research has been conducted by utilizing the following literature available on the ODR:

Pablo Cortés in the book titled Online Dispute Resolution for Consumers in the European Union has opined that ODR is a growing consumer redress option and in the age of electronic commerce, consumer protection and access to justice are important. Joseph W. Goodman in his research paper entitled "The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites" has beautifully analysed the various Cyber-mediation websites and discussed merits and demerits of Cyber-Mediation. Martin C Karamo in his research paper entitled, "ADR on the Internet" has discussed various online tools for ADR and the effect of Internet on ODR. Colin Rule is his research paper titled "Online Dispute Resolution and the Future of Justice" has talked about the working mechanism of ODR and how technology is changing the justice administration. F Petrauskas and Eglë Kybartienë in their research paper titled "Online Dispute Resolution in Consumer Disputes" have shown

5 Supra note 1 at 212.

6 Supra note 4.

7 Joseph W. Goodman, "The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites" 2 *Duke L. & Tech. Rev.* 1-2 (2003).

8 Martin C Karamon, "ADR on the Internet" 11 *Ohio St. J. on Disp. Resol* 547 (1996).

deep concern about legal uncertainty in the electronic-commerce. They also stressed that by the use of new technologies of the internet, even the traditional methods of settling the disputes can be strengthened.

Origin

In the Vedic era, ADR was widely used. It proves that there was a strong alternative conflict settlement system in ancient India before the kingship system even existed. There were extremely effective mediation and arbitration systems in ancient India. The Kulas, Puga, Srenis, Parishads, and Panchayats were responsible for resolving conflicts during the pre-kingship era. People in India used mediation and other such methods to settle their disputes before establishment of courts. The philosophy of lok adalat conceptualises and institutionalises the concept of "nyaya-Panch," or the Ancient Indian method of resolving disputes through mediation, conciliation, or arbitration.

In the end of 1990s, ODR emerged as an offshoot of ADR. ODR uses technology to settle the differences between the parties. Earlier, those people who were strangers to each other and probably never met used the ODR to settle their differences. In online industry people sometimes have trust issues so some companies like eBay are taking measures to provide rapid resolution of the issues of the parties. Although, originally ODR was employed for online businesses, but it a short span of time it covered face-to face consumer issues as well. Apart from this, in the online field, issues do not only arise in the case of tangible goods but also the services for e.g. Uber, Airbnb, TaskRabbit, Upwork etc. These companies had their own ODR mechanisms to settle the issues of their customers. This in turn, spurred the ODR arena. Off-line companies also recognized that if they want loyalty of their customers then they have to work upon their dispute resolution methodology, hence they also moved to ODR for the settlements of issues. One such example is eBay, the company has its Resolution Center, whereby the users can report their issues faced by them and the company also has mechanism to track the individual cases till its final disposal.[9]

ONLINE DISPUTE RESOLUTION

The various alternative dispute resolution (ADR) procedures have proved to be better at providing speedy and cost effective justice when we compared them with litigation process.[10] ODR reinforces the trend that ADR started by moving conflict resolution outside of the realms of law enforcement and the courts. By incorporating highly advanced methods and technological advancements into the process, ODR can supplement the conventional methods of providing justice. All over the world, more and more disputes are coming up as the use of internet and technology has increased

9 Colin Rule, "Online Dispute Resolution and the Future of Justice" 16 *Annu. Rev. Law Soc. Sci.* 281 (2020).

10 María Mercedes Albornoz and Nuria González Martín, "Feasibility Analysis of Online Dispute Resolution in Developing Countries" 32 *The University of Miami Inter-American Law Review* 43-44 (2015).

in the electronic commerce as well. Numerous websites have been created to assist in resolving both online conflicts as well as any offline conflicts that might arise. Businesses are now able to reach large numbers of e-consumers and expand their markets owing to the Internet's explosive popularity. Online transactions are no different than offline transactions in that both can result in issues and disagreements. So far as online world is concerned, if we want to attract more customers than we need to work upon the dispute settlement process else people will hesitate in making online transactions dealing with buying of goods or services. Only then people will safe and protected doing online purchases.[11] To that end, the European Union passed international regulations[12] and directives on alternative dispute resolution and online dispute resolution, requiring each state to set up an online mechanism to settle the disputes which are the result of online commerce. Disputes that arise offline can be resolved using conventional dispute resolution procedures along with online technologies.[13] ODR can be used to settle both the online and the off-line disputes.[14] The adversary system's excessive cost, delay, complexity, and combative culture will be replaced by apps that resolve formal legal disputes as effectively as eBay resolves auction disputes.[15]

LEGAL PROVISIONS GOVERNING ADR IN INDIA

The Arbitration and Conciliation Act, 1996: It is based on the UNCITRAL Model Law on International Commercial Arbitration and provides a comprehensive framework for both domestic and international arbitration procedures.

Section 89, Code of Civil Procedure, 1908: This Section was added by CPC amendment Act, 1999. It enables dispute settlement outside of the court system. In, ***Sukhdev Singh Gambhir v. Amrit Pal Singh***,[16] the court stated that every effort should be made to reach an amicable resolution in order to comply with Section 89's mandate.

The Information Technology Act, 2000: Digital signatures and electronic records were given legal recognition by Sections 5 and 6 of this Act. This made it possible to sign contracts that called for arbitration or other forms of alternative dispute resolution digitally.

The Evidence Act, 1876: By modification of the Evidence Act 1876 in 2000, the electronic records and specific procedures for them are admissible under Sections 65A and 65B of the Act.

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11 F Petrauskas and Eglë Kybartienë, "Online Dispute Resolution in Consumer Disputes" 18 (3) *Jurisprudencija* 922 (2011).

12 Supra note 3.

13 Sankalp Jain, "Online Dispute Resolution: Mechanism, Modus Operandi and Role of Government" *SSRN* 2 (2015).

14 Enas Qutieshat, "Online Dispute Resolution" *ResearchGate* 2 (2017).

15 Norman W. Spaulding, "Online Dispute Resolution and the End of Adversarial Justice?", in David Freeman Engstrom (ed.), *Legal Tech and the Future of Civil Justice* 254 (Cambridge University Press, 2023).

16 2003 (105) DLT 184.

The Legal Services Authorities Act, 1987: The Act governs the creation and operation of legal services authorities in India at the National,[17] State,[18] and District levels. These organisations are in charge of organising Lok Adalats, non-adversarial forums for conflict resolution through negotiation and settlement, as well as offering free legal assistance.

The Commercial Courts Act, 2015: This Act speeds up the settlement of business disputes. Pre-institution mediation is necessary before taking a business dispute to court. The issue may only be brought before a court if mediation fails to resolve it.[19] Numerous other laws in India, in addition to the ones already mentioned, have provisions for specific ADR procedures. The Industrial Dispute Act of 1947 used ADR in labour disputes; the Consumer Protection Act of 2019 talks about mediation in the consumer disputes; and the Companies Act of 2013 permits the resolution of commercial disputes through processes like arbitration, mediation, and conciliation; the Mediation and Conciliation Rules, 2004, provides a framework for handling mediation cases in the country.

FUNCTIONS OF ODR PLATFORM

"(a) to provide an electronic complaint form which the complainant party need to fill;

(b) to inform the respondent party about the complaint;

(c) to identify the competent ADR entity or entities which is agreed by the parties and transmit the complaint to them;

(d) to offer an electronic case management tool free of charge, which enables the parties and the ADR entity to conduct the dispute resolution procedure online through the ODR platform;

(e) to provide the parties and ADR entity with the translation of information;

(f) to provide an electronic form so that ADR entities can transmit the information."[20]

IMPORTANCE OF ODR

ODR process was created to avoid the lengthy and congested court system. Additionally, it was considered a substitute for going to court in person to resolve certain disputes, offering a way to handle different court procedures.[21] It can enhance the justice accessibility, particularly for people with limited resources or who live in remote

17 The Legal Services Authorities Act, 1987, s. 3.

18 The Legal Services Authorities Act, 1987, s. 6.

19 The Commercial Courts Act, 2015, s. 12 A.

20 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), *available at* :https://eur-lex.europa.eu/eli/reg/2013/524/oj (Visited on June11, 2023).

21 Enas Qutieshat, "Online Dispute Resolution" *ResearchGate* 4 (2017).

areas. For ODR methods like mediation, preserving relationships between disputing parties is of utmost importance. This is especially true when disputes are resolved through message boards or other non-video conferencing techniques. Chat rooms have the advantage of enabling controlled communication and shielding physical aggression from public view. It guarantees the continuity of the legal system and assists in reducing the backlog of cases brought on by the pandemic. ODR allows consumers and small businesses to seek out dispute resolution without requiring extensive legal counsel or significant financial resources. ODR uses technological advancements to speed up and improve the effectiveness of dispute resolution. The use of technologies like video conferencing, electronic document management, and secure online platforms streamlines the dispute resolution procedure even more. ODR platforms have the benefit of gathering information and user feedback from a variety of cases and users. This data can be examined to find trends, patterns, and areas where the dispute resolution procedure needs to be strengthened. ODR providers can continuously improve their platforms, take user comments into account, and apply best practises to increase the calibre and efficacy of the services provided.

SOME PROMISING ONLINE ADR PLATFORMS

- The WIPO Arbitration and Mediation Center: It offers online ADR services for disputes involving intellectual property. For the purpose of resolving disputes involving international intellectual property, the centre provides a secure and efficient forum.[22] It also maintains WIPO eADR, by which parties and neutrals may exchange and gets access to case- specific details by an all-in-one, secure portal.[23]
- eBay: The platform provides a systematic strategy to negotiation, with the option of escalation to arbitration or mediation if necessary.[24] Its Square Trade, provides two kinds of services; one in which the users can try to settle their disputes on their own on its free online platform and second if they require they can also take the assistance of mediator.[25]
- The National Center for Online Dispute Resolution:[26] In the US, the Center utilizes online ADR with success for a range of disputes. A number of services, including negotiation, mediation, and arbitration, are offered through the center's

22 WIPO Arbitration and Mediation Center, *available at*: https://www.wipo.int/amc/en/center/background.html (Visited on July 12, 2023).

23 WIPO Online Case Administration Tools, *available at:* https://www.wipo.int/amc/en/eadr/index.html (Visited on July 11, 2023).

24 ebay Dispute Resolution Overview, *available at:* https://pages.ebay.com/services/buyandsell/disputeres.html (Visited on July 21, 2023).

25 Ibid.

26 National Center for Technology and Dispute Resolution, *available at*: https://odr.info/ (Visited on July 21, 2023).

27 Paypal, *available at:* https://www.paypal.com/ (Visited on July 12, 2023).

user-friendly online platform.

- PayPal Resolution Center[27]: It is a widely used online payment system that facilitates the resolution of disputes between buyers and sellers. Through the platform, parties can communicate with one another, reach a settlement, and mediate disputes.
- Square Trade[28]: It is an impartial third-party organisation that provides online dispute resolution services to a variety of markets, including e-commerce, consumer electronics, and online auctions. With skilled mediators directing the process, it offers parties a forum for negotiation and mediation of their disputes.
- Amazon A-to-z Guarantee:[29] The global e-commerce giant, Amazon, has a programme called A-to-Z Guarantee which has its own forum for ODR. To aid in the settlement of disputes, the programme offers mediation and arbitration services.

ODR'S DIFFICULTIES IN THE INDIAN CONTEXT

For India's technological infrastructure, the country's diverse geography presents challenges. The functionality of ODR platforms can be impacted by power outages, bad connectivity, and insufficient bandwidth. Moreover, parties are frequently drawn to alternative dispute mechanisms because of the confidentiality they offer. However, the Internet is not a secure medium. When hackers gain access to a computer network, they are able to modify the information that is being shared there in addition to consulting it.[30] In terms of security and privacy, not all ODR tools are created equal. ODR entails the transmission of private and sensitive data via online channels. The possible risks of the parties' ODR activities must be discussed with them and made clear to them. Data security and cybersecurity in ODR require the establishment of clear rules and standards. Than in the rural areas and marginalised communities, access to technology and the internet is frequently limited, which can make it challenging for them to participate in ODR processes.[31] In addition, the current legal system in India might not be fully equipped to handle the unique challenges and requirements of ODR.[32] ODR is gaining popularity, but there is a dearth of legal experts with specialised knowledge in ODR procedures and technology. Mediators and arbitrators

28 SquareTrade Dispute Resolution, *available at:* https://www.squaretrade.com/dispute-resolution (Visited on July 11, 2023).

29 Amazon A-to-z Guarantee, *available at:* https://www.amazon.com/gp/help/customer/display.html?nodeId=GQ37ZCNECJKTFYQV (Visited on July 11, 2023).

30 Catherine Kessedjian and Sandrine Cahn, "Dispute Resolution On-Line" 32 *The International Lawyer* 985 (1998).

31 Dr Rakhi Singh Chouhan, " Streamlining Online Dispute Resolution with Alternate Dispute Resolution: Chances and Challenges" 17 (7) *PalArch's Journal of Archaeology of Egypt / Egyptology* 5853 (2020).

32 Rudolph Cole and Kasten M. Blankley, "Online Mediation: Where We are Now and Where We Should Be" 38 *U. TOL. L. Rev* 208 (2006).

must have knowledge of the digital world and the ability to facilitate the resolution process in order for ODR to be successful. Also, India's diverse cultural landscape may pose challenges in terms of cultural sensitivity and ODR acceptance. Different communities and geographical areas may accept and trust online dispute resolution platforms to different degrees.

CONCLUSION

The number of disputes resulting from online commerce is growing as a result of the Internet's expanding usage globally. By incorporating cutting-edge methods and technological advancements into the process, ODR can supplement the conventional methods which settle the disputes. But it is also a sad reality that despite the amendments in the arbitration laws, India still lacks the fully functional ODR. For ODR to be successful in India we should adopt a distinct legislative framework and take security precautions in ODR field. Specialised institutions should be set up that can provide education, research, training, and policies for the success of ODR in India. Focus should also be on awareness of masses about ODR as a useful instrument for resolving disputes.

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Comprehending Role of ADR in Resolving Disputes in E-Commerce

*Dr. Unanza Gulzar**

ABSTRACT

If we look around globally, it is pertinent to note that there has been a tremendous change in the legal systems all across the globe. Among all other countries, India has been continuously attempting to implement a system-design approach for its legal system. Arbitration, conciliation, mediation, judicial settlements, and Lok Adalat have emerged as a result of a transition from traditional courts to alternative dispute resolution methods. Similarly, the idea of online dispute resolution has changed throughout time as a result of the effective and rapid use of technology. In this article, we shall discuss more about Online Dispute Resolution and its importance in e-commerce.

Keywords: *Alternative Dispute Resolution, E-commerce, IIC, Online Dispute, United Nations.*

I. INTRODUCTION

Online Dispute Resolution (ODR) is a method for resolving conflicts, especially those with small- and medium-sized financial stakes, using digital technology and ADR approaches like arbitration, conciliation, and mediation[1]. ODR is defined in paragraph 24 of the Technical Notes on Online Dispute Resolution 2016 by the United Nations Commission on International

Trade Law (UNCITRAL) as:

> *'A mechanism for resolving disputes through the use of electronic communications and other information and communication technology [ICT]. The process may be implemented differently by different administrators of the process and may evolve over time*[2]*.*

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1 NITI Ayog, NITI Aayog Pushes for Online Dispute Resolution for Speedy Access to Justice, available at https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1776202

2 Technical Notes on Online Dispute Resolution 2016, (UNCITRAL), available at https://uncitral.un.org/en/texts/onlinedispute/explanatorytexts/technical_notes

In simple words, Online Dispute Resolution (ODR) refers to the process of resolving disputes over the internet, using technology to facilitate communication, negotiations and decisionmaking.

II. PREREQUISITE FOR ODR IN INDIA

In India, the ODR mechanism is used to arbitrate over bulk matters which was earlier impossible. Imagine that a Fintech is assigned with client data running into 15,000 PAN India, In such a scenario, ODR comes as a saviour.

It is evident that India has experienced a significant expansion in the use of legitimate measures, moving from traditional courts to alternative conflict resolution methods that facilitated the emergence of Lok Adalat, Arbitration, Conciliation, and Mediation. The main problem is not how to get access to justice, but rather the growing quantity of cases being submitted every day. ODR not only lessens the court's workload but also expedites and lowers the expense of justice for the general public.

Physical proceedings necessary for the ADR procedure are frequently prohibited by geographical restrictions, and these restrictions have taken on an unusual quality in the COVID-19 era. Online dispute resolution is a potentially beneficial approach that must be adapted in order to overcome this dilemma. It gives us the option of using online dispute resolution techniques like video conferencing and document sharing to settle disputes through arbitration, negotiation, or mediation.

Online dispute resolution is becoming more popular in India, as it is less expensive and less time-consuming. It becomes more advantageous for conflicts that aren't heard for a variety of reasons, such as time or expense constraints; in these cases, ODR, which is both time and money efficient, can be used.

During COVID-19, ODR was used to settle disputes relating to lending, property, credit, commerce, and retail, which are crucial components of economic recovery. There have been instances when the courts have acknowledged the necessity of ODR practises being used by all courts. Even the former Chief Justice, *Justice Bobde*, has stressed the significance of making steps to make courts virtual in order to prevent the closure of the highest courts in light of the COVID-19 pandemic[3].

There are numerous ODR platforms available, including CADRE, SAMA, the Centre for Online Dispute Resolution, AGAMI, etc. Key parties were recently brought together at a meeting on "Catalysing Online Dispute Resolution in India" organised by NITI Aayog in association with Agami and Omidyar Network India[4]. The gathering's goal was to bring online dispute resolution to a larger audience in India. It was agreed by the dignitaries that ODRs have great opportunities in India especially when it comes to commercial conflicts. Since efficient dispute resolution will be crucial to

3 SCO Team (2021, May 21) COVID Coverage: Court's Functioning. The Supreme Court Observer https://www.scobserver.in/journal/covid-coverage-courts-functioning/

4 Dalberg (Online Dispute Resolution: Shifting from Disputes to Resolutions) https://www.indiansmechamber.com/drive/ODR%20Handbook_Revised%20final%20.pdf[5] (2003) 4 SCC 601

reviving the economy in the midst of COVID-19, it has the ability to improve access to justice and ease of doing business. Video conferencing has been recognised by the Supreme Court of India in the case of the ***State of Maharashtra vs. Dr. Praful B. Desai***[5] as a legal way to record witness testimony. Due to this, the legal framework and precedents established by the Supreme Court of India support the use of technology in dispute resolution as well as the use of ODR procedures. The ability to file a lawsuit electronically using e-Filing and pay court fees or fines online at https://vcourts.gov is now available in India as well. Through a variety of channels designed for service delivery, the litigant can also examine the status of the case online.

It is interesting to note that each judge in India receives an average of 1,350 cases, whereas his colleague in the US only has to deal with 388 instances[5]. Hence, promoting and enhancing a technology-driven dispute resolution procedure, as a result, not only seems promising for lawyers but also increases the effectiveness of the Indian legal system.

III. LEGAL FRAMEWORK OF ODR IN INDIA

A number of relevant laws address the Alternative Dispute Resolution (ADR) and technological aspects of Online Dispute Resolution (ODR). The Arbitration and Conciliation Act, of 1996 provides a detailed mechanism related to Alternative Dispute Resolution in India. Section 89 Code of Civil Procedure, 1908, provides that the court has the authority to subject the parties to all ADR procedures, not just arbitration, but other mechanisms such as conciliation, judicial settlement, mediation, or Lok Adalat.

The Legal Services Authorities Act of 1987 governs Lok Adalat in India. The Commercial Courts Act, of 2015 also brought pre-litigation mediation to India[6]. Before starting a lawsuit, the parties should think about starting mediation unless the situation calls for immediate temporary relief. According to Section 442 of the Companies Act, 2013, the Central Government is required to maintain a group of professionals known as the "Mediation and Conciliation Panel." As a result of the statute, parties to proceedings before the National Company Law Tribunal (NCLT) or National Company Law Appellate Tribunal (NCLAT), and occasionally even the central government, are now able to ask for the issue to be directed to mediation. After the formation of "Consumer Mediation Cells" in each district, consumers are given access to widespread mediation under section 74 of the Consumer Protection Act of 2019. Additionally, the Consumer Protection Act (E-Commerce) Rules, 2020, which require e-commerce entities to create internal grievance redressal mechanisms, laid the groundwork for ODR.

5 Bhaven Shah (Online Dispute Resolution: A possible cure to the virus plaguing the justice deliver system?) https://www.barandbench.com/columns/online-dispute-resolution-a-possible-cure-to-the-virus-plaguing-thejustice-delivery-system

6 Section 12A of the Commercial Courts Act, 2015

The Information and Technology Act, of 2000 also applies to ODR's technical components. The same can be inferred from reading sections- 4 & 5 which acknowledge electronic records and signatures.

IV. RECOMPENCES OF ONLINE DISPUTE RESOLUTION

1. ODR is a generally non-formal, adaptable, and creative method of resolving disputes that are not constrained by rigid standards of procedure and proof. This could give the parties the opportunity to create or take part in a process that can be tailored to their requirements and promotes a cooperative rather than a combative approach.
2. ODR may lower litigation expenses, which is crucial for both corporate parties looking to control costs and individuals who might not otherwise be able to pay the cost of litigation. All parties typically share in the costs of the procedure or the payment made to the neutral evaluator, giving them an equal stake in the result and a sense of ownership.

ODR may be the best option, especially for low-cost, high-volume transactions, because it frequently allows for a timely, cost-effective, and efficient resolution of problems where the amounts in dispute are insufficient to justify the cost of ameetingbased mediation (e.g. consumer disputes)[7].

ODR also allows for a more cost-effective resolution of disputes when the parties are separated by a significant geographical distance and the amount in dispute precludes the cost of travel.

When there are sensitivities between the parties that may be exacerbated by being in the same room, ODR may be appropriate (e.g. matrimonial disputes).

3. Parties who would be unable to attend an in-person meeting owing to a serious impairment may be able to participate in ODR.
4. ODR is subject to the application of the Access to Information Act and of the Privacy Act when the federal government is a party and is confidential (unless the parties agree otherwise). The procedure is appropriate when the parties feel that confidentiality is important or necessary, which is frequently the case. Parties who use DR mechanisms typically do so on the understanding that they can freely discuss issues in the expectation that they won't be disclosed, either publicly or to a court[8].

V. ONLINE DISPUTE RESOLUTION (ODR) IN E-COMMERCE

The COVID-19 pandemic's physical restrictions have caused the Indian e-commerce market to flourish exponentially. People's reliance on e-commerce and the growth of

7 Setia Putra. (2014). Legal Protection for Consumers in Buying and Selling Transactions Through E-Commerce, Journal of Legal Studies, Vol 4 No 2. 290

8 Richard Laren; Jon B. Sanderson, Innovative Dispute Resolution - The Alternative, (Thomson Canada Ltd.), 1994, p. 3-3.

online transactions have brought attention to the necessity for strong regulation to safeguard consumer rights in this industry.

The Consumer Protection (E-Commerce) Rules, 2020 (Rules) were recently notified by the Ministry of Consumer Affairs, Food, and Public Distribution to govern e-commerce in India. The Rules stipulate the following two conditions in order to make e-commerce safer for consumers: first, that each e-commerce firm integrates proper grievance redressal systems; and second, that they take part in the national consumer helpline programme of the central government. The first is a prerequisite, whilst the second is still optional.

The e-commerce sector is still implementing these compliances even though the rules went into effect on July 24, 2020. The Confederation of Indian Industries (CII) and the Federation of Indian Chambers of Commerce & Industry (FCCI) wrote to the ministry in August 2020 requesting extra time to abide by the rules.

The Central Government is consistently working to create a safer e-commerce sector for consumers. In order to create a safer e-commerce sector for consumers, Information and communication technology (ICT) is used to increase consumer grievance redressal accessibility, effectiveness, and cost-effectiveness. ICT will make it simple to comply with the rules overall.

In such a scenario, Online Dispute Resolution comes to the rescue. ODR can assist in building platforms that allow e-commerce businesses to track down and address customer complaints in a time-efficient manner. ODR methods and platforms, particularly for e-commerce platforms, have recently become the most advocated form of dispute resolution in several nations.

VI. ONLINE DISPUTE RESOLUTION (ODR) AS THE FUTURE OF DISPUTER ESOLUTION MECHANISM

Due to the aftermath of the COVID-19 pandemic, we are now compelled to acknowledge the shortcomings of the established dispute resolution process and search for alternatives. ODR is well known for offering rapid and affordable dispute resolution. E-commerce is one of the industry's best suited for the successful implementation of ODR due to the nature of the business. In E-commerce, buyers and sellers are generally located in different geographical locations and a high frequency of low-value online transactions exists.

ODR is based on alternative dispute resolution (ADR) techniques, such as negotiation, mediation, and arbitration, and uses technology to speed up the process. When compared to ADR, technology is an extra element in ODR. In fact, technology is sometimes referred to as ODR's fourth partner, joining the disputing parties and the conflict resolution expert[9].

9 Fisher, R., Ury, W. and Patton, B. (1991). Getting to Yes: negotiating Agreement Without Giving In. Second Edition. New York: Penguin Books, at 100

ODR allows for simple and flexible communication between the parties without requiring their physical presence by using basic technologies like SMS, e-mails, and video conferencing capabilities. When ODR is at a more advanced stage, it can develop tools that use artificial intelligence and machine learning to help parties better plan their course of action and reduce disagreements.

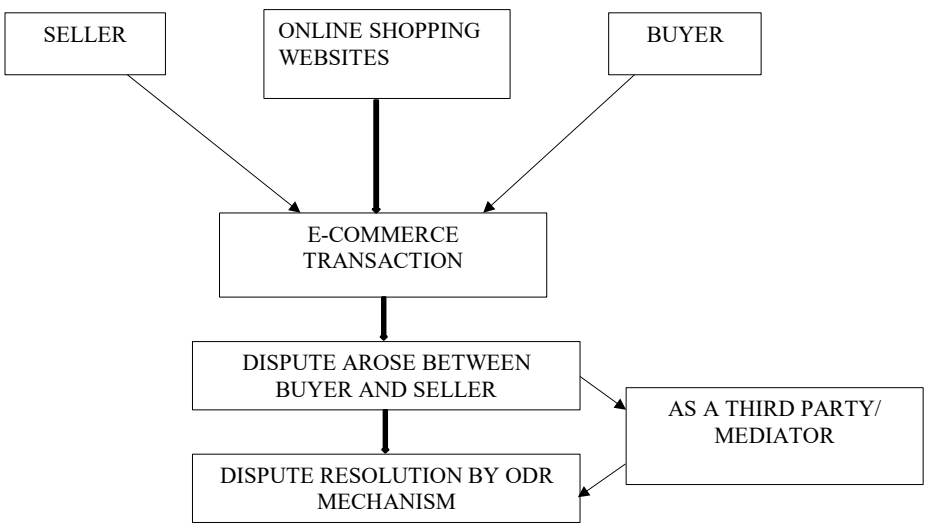
- **Explaining the ODR process through an illustration**

Satyartha Legal Pvt. Ltd., an Indian company that sells online courses for lawyers worldwide, has a dispute with a client from a different nation. Both parties have chosen online dispute resolution (ODR) as a means of resolving their conflict, and they have chosen online

arbitration, one of the ODR mechanisms. As a result, since the parties are engaging in online arbitration, they will communicate via email to discuss and choose the applicable law before signing an arbitration agreement online. Next, they will choose the server's physical location where the arbitration will be conducted online, as well as the location where the arbitrator will sign the arbitrator's award. So, this is how the online dispute resolution process functions.

ONLINE DISPUTE RESOLUTION (ODR) IN ONLINE SHOPPING

ODR PROCESS IN ONLINE SHOPPING:-



The diagram above shows how the ODR team settles disputes arising from e-commerce that is facilitated by a marketplace or e-commerce involving parties, such as sellers and purchasers.

1. The interaction between buyers and sellers on online marketplaces or shopping sites.
2. Engaging in online transactions for buying and selling that result in a contract for a sale and purchase between parties.

3. A dispute arose in the sale and purchase of goods. For example, the buyer raised an issue that the product shown by the seller on the website is not similar to the product he received.
4. The ODR team (being the third party), would ask the buyer to provide the photo, video, receipt number of the purchase and other necessary evidence required to proceed further.
5. Then the evidence provided by the buyer will now be reviewed by the ODR team.
6. Finally, a conclusive decision which is amicably accepted by the parties shall be delivered.

• **SNAPDEAL**

Using the pandemic-related disruption as the catalyst, Snapdeal started employing "Online Dispute Resolution" (ODR) to make resolutions via technology, simple, and quick.

To make this possible, Snapdeal hired SAMA, an expert in online dispute resolution (ODR), who uses technology and a network of highly qualified people to settle disputes more quickly and affordably.

In order to address pending customer complaints, Snapdeal started a test operation with "Sama Suljhao Manch". The pilot's results demonstrate how technology and procedures may be used to speed up projects and ensure that everyone involved benefits.

The study included over 240 instances in which customers indicated an interest in learning more about a reconciliation process. A thorough conflict resolution was reached in roughly 130 of these cases, resulting in a 54% success rate. The "Sama Suljhao Manch" resolved cases that ordinarily take up to three years to resolve in just 15 days!

Through the use of a platform for online mediation services and the assistance of a qualified neutral conciliator, the ODR process managed to bring both parties to the negotiating table. Under the Indian Arbitration and Conciliation Act, of 1996, the conciliator was given the authority to act as a conciliator and convinced the parties to come to binding agreements. In this approach, Sama was able to promptly and amicably settle a number of customer concerns.

VII. LIMITATIONS OF USING THE ODR MECHANISM

1. To participate in an ODR Process, all participants would need to have the necessary technologies. Parties without sufficient technology could be hindered or unable to engage fully.
2. Because the participants are not present in the same room and frequently have all of their discussions in writing, ODR is a less intimate method of resolving disputes.

3. In an ODR procedure, parties with language barriers and/or written communication issues may be at a disadvantage.
4. ODR cannot set legal precedents because it is a non-binding practice that only occurs during the negotiation or mediation phase. However, if adjudication occurs at the end of the ODR Process, a new legal standard can be established.

VIII. CONCLUSION

The use of information and communication technology should be leveraged going forward to make consumer grievance redressal more affordable, effective, and accessible as information and communication technology will make following the rules much easier. This is because the government plans to establish a safe and secure e-commerce market in India. ODR can assist e-commerce businesses in developing a platform where consumer complaints can be heard and resolved at an early stage. ODR platforms and methods are currently thought to be the most popular means of resolving business disputes, particularly for e-commerce platforms. Therefore, I think the government should consider creating an ODR platform for e-commerce companies in India. This platform could be designed along the same lines as European ODR platforms, under which all E-Commerce Companies in the European Union are required to provide a link to the platform of the website which is easily accessible. Consumers are given the choice of resolving their complaints on that platform directly with the seller or by submitting a complaint to one of the ODR bodies listed there. If the parties are unable to resolve their dispute through ODR, the consumers are advised to seek relief from traditional dispute resolution bodies. If this method is put into place in India in the near future, it is certain that the judiciary's backlog of commercial matters will drop significantly and that it will have more time to devote to pressing national issues.

Significance of Legalframework and Jurisprudence of Ancient India Incontemporary Times

*Dr. Vijayshree Dubey Pandey**

INTRODUCTION

India is a country with a rich history and culture. Its pre – historic legal system is no exception. India's legalsystem has a history of more than 5,000 years, and it evolved over time to become premiere comprehensive legalsystems world-wide. Legalframework and jurisprudence of EarlyIndia hadsubstantialpart in forming modern Indian legislative structure. The legal-framework and jurisprudence of EarlyIndia solely relied on group oflegalcodes and texts, including the Manusmriti, Arthashastra, and Yajnavalkya Smriti. They guided towardslegaland social behavior and were used by judges to make decisions in legalcases.

The legalsystem was systematized into two core categories: civil law and criminal law. Civil law dealt with disputes between individuals or groups, for e.g., property disputes, inheritance issues, and marriage and family matters. Criminal law, On the contrary, dealt with offenses against society, for e.g., theft, assault, and murder[1].

The legalsystem was hierarchical, with the king or ruler at the top. The king was considered the ultimate authority in legalmatters and had to ensure that the legalsystem was properly administered. Below the king were the judges and other legal administrators, accountable for interpreting and enforcing the law.

The legalsystem also recognized significance of arbitration and mediation in resolving disputes. Judges would often encourage parties to settle their disputes through these methods[2], rather than going to court. This helped to reduce the burden on the legalsystem and allowed disputes to be resolved more quickly.

Overall, the legal-framework and jurisprudence of PrimevalIndia was a complex and sophisticated system that had a substantial place in maintaining social-order and

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1 *Pre-historic and old Indian Law: Meaning & Relevancy,* (11:05:2023) https:// www.tutorialspoint.com/Pre-historic and old-Indian-law-meaning-and-relevancy.

2 Ibid.

resolving disputes in Ancient India. Its influence can still be seen in modern legal-systems across the world.

BACKGROUND

The legal-framework and jurisprudence of EarlyIndiahas been rooted in the Vedas, the oldest religious texts on earth. The Vedas were written around 1500-1000 BCE, and they contain a vast amount of knowledge on various subjects, including law. The Rigveda, one of the four Vedas, has references to various legalconcepts, for e.g., property rights, inheritance, and dispute resolution[3].

Democratic Set Up of Ancient India:

India has a rich history of democratic systems that date back to ancient times. In fact, the world's first republic, the Lichchhavi Republic, was established in India in the 6th century BCE. Here are a few examples of democratic setups in ancient India:

1. **Republics:** The Lichchhavi Republic and the Malla Republics are two prominent examples of ancient Indian republics. These republics had democratic systems where decisions were made by a council of elected representatives[4].
2. **Sabhas and Samitis:** Sabhas and Samitis were assemblies that played a crucial part in the governance of ancient India. These assemblies were composed of elected representatives who discussed and debated various issues before taking decisions.
3. **Panchayats:** Panchayats were village councils that played a vital role in local governance. These councils were composed of five members who were elected by the villagers. Panchayats were responsible for resolving disputes, maintaining law and order, and managing village affairs[5].
4. **Jana-Parishads:** Jana-Parishads were democratic assemblies that existed in ancient India. These assemblies were composed of representatives from various communities and played a vital role in decision-making.
5. **Buddhist Sanghas:** The Buddhist Sanghas were democratic assemblies that played a crucial part in the governance of Buddhist communities. These assemblies were composed of monks and laypeople and were responsible for making decisions related to the welfare of the community[6].

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3 Shivaraj S. Huchhanavar, *The Leg.al system in Pre-historic and old India, (30.04.2023),* https://www.leg.alservicesindia.com/article/1391/The-Leg.al-system-in-Pre-historic and old-India.html.

4 Monidipa Dey, *MATTER OF DEMOCRACY: ANCIENT INDIA HAD FUNCTIONING REPUBLICS*, (02:05:2023), https://thedailyguardian.com/matter-of-democracy-ancient-india-had-functioning-republics/.

5 Steve Muhlberger, Democracy in Ancient India, (05.05.2023), https://www.infinityfoundation.com/mandala/h_es/h_es_muhlb_democra_frameset.htm.

6 Ibid.

India had a rich tradition of democratic setups that emphasized significance of elected representatives, assemblies, and councils in decision-making processes. These democratic systems played a vital role in shaping the political, social, and cultural landscape of ancient India.

The Concept of Right and Duty in Old Indian Jurisprudence:

In ancient Indian jurisprudence, the concept of right and duty was considered to be an integral part of the legal system. The ancient Indian texts, such as the Vedas, the Upanishads, and the Dharmashastras, provide insights into this concept. Here are a few key points about the concept of right and duty in old Indian jurisprudence:

1. **Dharma:** The concept of dharma played a crucial role in the ancient Indian legal system. Dharma was understood as the natural law that governed the universe and provided a moral framework for individuals and society. Dharma emphasized significance of fulfilling one's duties and obligations towards others[7].
2. **Rights and Duties:**Rights as well as duties have a closed link in ancient Indian jurisprudence. The texts emphasized that all people have defined rights and privileges, E.g.,Life, property, and freedom, however abovementioned rights are accompanied by corresponding duties and responsibilities towards others[8].
3. **Karma:**Doctrine and principles of Karma are directly related to rights and suties. Karma referred to the idea that every action had consequences, and individuals were responsible to face the inferences of their actions. Thus, People have an obligation to function in such a manner where they follow right path of dharma and stay away from wrongful results.
4. **Social Order:** The ancient Indian legal system emphasized significance of maintaining social order and harmony. This meant that individuals had a duty to respect the rights and dignity of others, and to act in a way that promoted the well-being of society as a whole[9].

Theprinciple of right and duty played a significant role in ancient Indian jurisprudence, emphasizing significance of fulfilling one's obligations towards others and maintaining social harmony.

Legal System in Vedic Period:

The legalsystem in Vedic period (1500 BCE - 600 BCE)[10] of oldIndia relied on a set of principles and practices that were outlined in the Vedas, the oldest sacred texts of Hinduism. The Vedic jurisprudence is majorly concerned about maintaining social order and resolving disputes between individuals and groups in a peaceful manner.

7 Wendy Doniger & J. Duncan M. Derrett, The concept of duty in ancient Indian jurisprudence: The problem of ascertainment, (09.05.2023), https://philpapers.org/rec/DERTCO-6.

8 Ibid.

9 Supra 7.

10 Ibid.

The Vedic jurisprudence of law was hierarchical in nature, with the king or ruler at the top. The king was considered the ultimate authority in legalmatters and had beenaccountable for safeguarding that the legalsystem was properly administered. Below the king were the Brahmins, accountable tointerpret and enforce the law.The legalsystem recognized significance offinding peaceful solutions, for e.g., negotiation and mediation. Disputes between individuals and groups were often settled through the intervention of a neutral third party or through a process of arbitration[11].

The Vedic legalsystem also recognized significance of restitution in resolving disputes. Compensation or restitution was often practiced in resolving disputes between individuals or groups. For example, if one person caused harm to another, they were required to provide compensation or restitution to the injured party.The legalsystem also placed a great deal of importance of dharma, or moral duty. Individuals were expected to act according to dharma, which was seen as a way of maintaining social order and harmony.

Overall, the legalsystem in Vedic period of ancient India was a complex and sophisticated system that had a significant place inmaintaining social order and resolving disputes in a peaceful manner. Its influence can still be seen in modern legalsystems around the world[12].

The legal framework and jurisprudence of ancient India was based on Dharma, which means "righteousness" or "law." Dharma was the foundation of the Legal-framework of India, and it maintained its place as a most important principle of life including governance, economy, and society. The legal-framework of India was separated into two categories: secular law and religious law[13]. The legal-framework and jurisprudence of ancient India has had a profound effect over the development of modern legalsystems, not only in India but also in other nations.

Some of the most important aspects in which the legal-framework and jurisprudence of oldIndia has influenced current times include:

1. **Legal Codes and Principles:** The legal-framework and jurisprudence of early India was known for its comprehensive and detailed legalcodes and principles. These codes and principles have provided a foundation for modern legalsystems, including the Indian Constitution and various laws and regulations. Mostlegalconcepts and principles, for e.g., the rule of law, due process, and natural justice, continue to influence modern legalthinking and practice[14].

11 Ibid.

12 Bandana Saikia, *The Indian Leg.al History- from the times of Origin of State to the English East India Company - PART-1 (ancient)* (05.05.2023), https://www.thelawbug.com/the-indian-leg.al-history-from-the-times-of/.

13 Ibid.

14 Utsav Mandal, *Pre-historic and old Judicial System,* (30.04.2023), https://leg.alserviceindia.com/leg.al/article-7176-Pre-historic and old-judicial-system.html

2. **Dispute Resolution:**The legal-framework and jurisprudence of pre-historic India placed a strong emphasis on ADR mechanisms, for e.g., mediation and arbitration. These methods of dispute resolution have gained significant importance in modern times due to their efficiency and cost-effectiveness, and are often preferred over traditional court proceedings[15].
3. **Human Rights:**Ancient Indian legal texts, for e.g., the Manusmriti and Arthashastra, emphasized on protecting human rights as well as dignity. These ideologiesareprotected in the modern Indian Constitution and have played a key role in shaping modern human rights law around the world[16].
4. **Environmental Law:**Ancientlegaltexts also recognized significance of environmental protection and sustainable development. These principles have influenced modern environmental law and policy, and have played a key role in promoting sustainable development[17].

Significance of Legal-framework and jurisprudence of Ancient India in Modern Times:

1. **Codification of Laws:**One of the significant contributions of the legal-framework and jurisprudence of Ancient India is the codification of laws. The legal-framework and jurisprudence of Ancient had a comprehensive system of laws that were codified in various texts, for e.g., the Manusmriti, the Yajnavalkya Smriti, and the Arthashastra. These transcriptsgaveguiding principles for various aspects of life, for e.g., property rights, criminal law, family law, and contract law.The codification of laws was a revolutionary concept in ancienttimes, and it laid the foundation for modern legalsystems. The legal-framework of India has been able to maintain its relevance over the centuries because of the codification of laws[18].
2. **Legal Pluralism:**The legal-framework and jurisprudence of India was based on legalpluralism. Legalpluralism means that there were multiple legalsystems coexisting in the society, for e.g., secular law and religious law. This allowed for a diverse legal system that could accommodate the needs of various communities[19]. Legal pluralism is still relevant in modern times, and many countries have adopted a similar approach. The Legal framework of India recognizes itsdiversity and ensures suitable legal solutions for various communities.
3. **Dispute Resolution:**The legal framework and jurisprudence of Ancient India had a sophisticated system for dispute resolution. It had multiple mediumsto resolve disputes, for e.g., the Panchayat system, which was a community-

15 *Brief History of Law of India,* (05.05.2023) http://www.barcouncilofindia.org/about/about-the-leg.al-profession/leg.al-education-in-the-united-kingdom/.

16 Ibid.

17 Ibid.

18 Supra 14.

19 Supra 15.

based system of justice[20]. The Panchayat system was rooted on principles of mediation and conciliation, and it provided a quick and efficient way to resolve disputes.The system of Panchayat is very famous and active in almost all areas of India, this system has also been accepted as a valid way for dispute resolution. The Legal framework of India has also recognized the significance of mediation and conciliation, and it has included these rules in its legal framework.

4. **Emphasis on Justice and Equity:**The legal framework and jurisprudence of Early Indiaplaced a significant emphasis on justice and equity. The concept of Dharma, which was the foundation of the Legal framework of India, was based on the principles of justice, equity, and fairness. The Legal framework of India recognized significance of treating everyone equally, regardless of their social status or background.The legal framework and jurisprudence of oldenIndia, as reflected in texts for e.g., the Manusmriti, Arthashastra, and Yajnavalkya Smriti, was an important contribution to the development of legal systems worldwide.
5. **Emphasis on justice and fairness:** The legal-framework and jurisprudence of Ancient India placed great emphasis on justice and fairness. The texts emphasize that the law should be applied equally to all, regardless of social status or wealth. The concept of dharma (righteousness) was central to the legalsystem, and judges were expected to base their decisions on it.
6. **Detailed Legal Codes:**The legal-framework and jurisprudence of Ancient India had detailed legalcodes that provided for multiple topics, including civil, criminal, and commercial law. These codes provided a framework for resolving disputes and maintaining social order[21].
7. **Use of Arbitration and Mediation:**The legalframework and jurisprudence of Ancient India recognizedsignificance of arbitration and mediation in resolving disputes. Judges would often encourage parties to settle their disputes through these methods, rather than going to court.
8. **Protection of property rights:** The legalframework and jurisprudence of Ancient India placed great importance on property rights. The texts recognized the right to own property and provided legalprotections for property owners[22].
9. **Influence on Modern LegalSystems:**The jurisprudence of Ancient India has had a significant influence on modern legalsystems. E.g., concept of habeas corpus, which is central to modern legalsystems, is a apart ofAncient Indian law. The focus on justice, fairness and equality which were the most significant

20 Ibid.

21 *From The Pre-historic and oldto The Modern*, (30.04.2023), https://www.outlookindia.com/website/story/from-the-Pre-historic and old-to-the-modern/264730.

22 Ibid.

pillars of old Indian jurisprudence are still prevalent and are being practiced without fail. The Constitution of India ensures all these principles.[23]

Women's Rights[24]:

The legalframework and jurisprudence of Ancient India recognized significance of women's rights. The legalstatus of women in Ancient India varied depending on the era and region. Rights of women were very vast and heavily guarded in the legalframework and jurisprudence of Ancient India.

1. **Property Rights:** Women in Ancient India had the right to inherit property, both from their fathers and husbands. In few instances, women could also receiveassets from other family members, for e.g., brothers or uncles[25].
2. **Marriage and Divorce:** Ancient Indian law recognized the power of women to choose their own husbands and to seek divorce in certain circumstances, for e.g., abandonment or cruelty.
3. **Education:** Women in Ancient India had access to education, particularly in the areas of literature, music, and dance. Some women also received formal education in fields for e.g., medicine and law[26].
4. **Protection from Abuse:**Ancient Indian legaltexts, for e.g., the Manusmriti, emphasized significance of protecting women from abuse and violence. Punishments for crimes for e.g., rape and domestic violence were severe, including fines, imprisonment, and even death[27].

Legalframework and Jurisprudence of Ancient India and Globalization

The legalframework and jurisprudence of Ancient India hashad a significant status towardsthe growth of modern legalsystems and has had an impact on globalization. Here are some ways through whichlegalframework and jurisprudence of ancient India has influenced globalization[28]:

1. **Legal Education:** The legalframework and jurisprudence of Ancient India has inspired many modern law schools around the world. Doctrines of righteousness, fairness, and human rights that were emphasized in the legalframework and

23 Constitution of India, Part III and IV .

24 Sima M. Živuloviæ, *Women and their leg.al position in India from 500 B.C.E. to 1772 C.E.,* (02.05.2023)https://ius.bg.ac.rs/wp-content/uploads/2021/09/%C5%BDivulovi%C4%87-Sima-Women-and-their-leg.al-position-in-India-in-the-Classical-Hindu-law-period.pdf.

25 Supra 18.

26 Priya Darshini,*PROPRIETARY RIGHTS OF WOMEN IN PRE-HISTORIC AND OLD INDIA (600 B.C. – 100 A.D.),* (02.05.2023) Proceedings of the Indian History Congress, Vol. 73 (2012), pp. 132-143 (12 pages) https://www.jstor.org/stable/44156199.

27 Ibid.

28 Professor Srikrishna Deva Rao, *Law, Justice and Globalisation,* (01.05.2023), https://glslawjournal.in/index.php/glslawjournal/article/download/36/46/.

jurisprudence of earlyIndia are applicable today, and are taught in many law schools as part of legaleducation.

2. **Arbitration and Mediation:** The legalframework and jurisprudence of Ancient Indiarecognized significance of arbitration and mediation in resolving disputes. Today, these methods of dispute resolution are widely used in international business transactions, and have become an important part of the global legalsystem[29].
3. **Protection of Intellectual Property:** The legalframework and jurisprudence of Ancient India placed great importance on protecting intellectual property. This has become an important issue in the global economy, as companies and individuals seek to protect their inventions, trademarks, and other forms of intellectual property from infringement[30].
4. **Global Legal Harmonization:** The principles of justice and fairness that were emphasized in the legalframework and jurisprudence of oldIndia have helped to shape the global legalsystem. The UNas well as other international-organizations have implemented many of these principles in their efforts to promote global legalharmonization[31].

Overall, the legalframework and jurisprudence of Ancient India has had a significant impact on globalization, particularly in the areas of legaleducation, dispute resolution, intellectual property protection, and legalharmonization. Its enduring principles of justice, fairness, and human rights continue to influence modern legalsystems around the world.

Important of Ancient Indian Laws in Development of Current Human Rights:

Below mentioned topics are few of the examples of contribution of India's jurisprudence in development of universal law[32]:

1. **Equality Before the Law:**The legal-framework and jurisprudence of Ancient India emphasizedsignificance of equality before the law. Manusmriti, says that "the law is the same for all, whether he be a king or a subject."[33]

29 Akanksha_Negi*Effects of Globalization on Leg.al Profession in India*, (01.05.2023), https://www.leg.alserviceindia.com/leg.al/article-4503-effects-of-globalization-on-leg.al-profession-in-india.html.

30 Ibid.

31 Harsimran Singh,*India: Globalisation of Leg.al Services (...And Indian Perspective),* (01.05.2023), https://www.mondaq.com/india/management/696680/globalisation-of-leg.al-services-and-indian-perspective

32 By Mr. Justice S. S. Dhavan, The Indian Judicial System,A Historical Survey, Part A: Judicial System in Pre-historic and old India, (01.05.2023), https://www.allahabadhighcourt.in/event/TheIndianJudicialSystem_SSDhavan.html.

33 Supra 26.

2. **Protection of Personal Freedom:** The legalframework as well aslegal philosophy of ancient India recognizedsignificance of personal freedom. The Arthashastra, for example, prohibited torture and other forms of cruel and inhumane treatment. This principle is reflected in modern human rights treaties and conventions, which prohibit torture and other forms of cruel, inhuman, or degrading treatment or punishment[34].
3. **Protection of Property Rights:** The legal-framework and legal philosophy of Ancient India placed great importance on property rights. The Manusmriti recognized the right to own property and provided legalprotections for property owners. This principle is reflected in modern human rights instruments, which recognize the right of ownership and the privilege to relish the profits of one's labor[35].
4. **Protection of Women's Rights:**The legal-framework and legal philosophy of Ancient India recognizedsignificance of women's rights. The Yajnavalkya Smriti, for example, provided legalprotections for women and recognized their privilege tosucceed property. This principle is reflected in modern human rights instruments, which recognize significance of gender equality and the empowerment of women[36].

The legalframework and legal philosophy of ancient India has contributed towards the growth of current human rights principles in many important ways[37].

Judicial System of Ancient India:

The judiciary in EarlyIndia was a significantconstituent of the legalsystem and was responsible for interpreting and enforcing the law. The judiciary in EarlyIndia consisted of various courts and judges who were accountable for resolving disputes and administering justice.[38]

The judiciary in Ancient India was hierarchical in nature, with the king or ruler at the top. The king was considered the ultimate authority in legalmatters and was responsible for appointing judges and administering justice. Below the king were the Brahmins, who had the responsibility to interpret and implement the legal principles and doctrines. They had the duty to guide the king towards true path.[39]

The legalsystem in ancient India recognized significance of solving the problems peacefully,for e.g., negotiation, mediation, and arbitration. Disputes between individuals

34 Ibid.

35 Supra 25.

36 Supra 20.

37 Supra 1.

38 Suparswa Chakraborty, *Judiciary in Pre-historic and old India,* (04.05.2023), https://www.iilsindia.com/blogs/judiciary-in-Pre-historic and old-india/.

39 *CONCEPT OF JUSTICE AND LAW IN PRE-HISTORIC AND OLD IN INDIA,* (04.05.2023), https://www.lawtool.net/post/concept-of-justice-and-law-in-Pre-historic and old-in-india.

and groups were often settled through the intervention of a neutral third party or through a process of arbitration. In cases where disputes could not be resolved through negotiation or mediation, they were referred to the courts for resolution.[40]

The courts in Ancient India were of several types, including village courts, district courts, and royal courts. Villages have courts or Panchayats who were accountable to solve the disputes with proper care locally, these bodies have a presiding officer (Village-head). Next were the courts at district level who looked after resolving disputes at the regional level and were presided over by a district judge. Royal courts were accountable to solve disputes at the highest level and were presided over by the king or his appointed judges[41].

The judges in Ancient India were required to have a thorough understanding of the law and were expected to be impartial in their judgments. All the judicial officers had been chosen on account of knowledge, experience, and moral character. They were expected to administer justice in a fair and equitable manner and to uphold the principles of dharma, or moral duty[42].

Overall, the judiciary in Ancient India had a significant place inmaintaining social order and administering justice. Its influence can still be seen in modern legalsystems around the world.

Application of Principles of Legalframework and jurisprudence of Ancient India in Modern World – Pros and Cons:

The principles of legal-framework and jurisprudence of Ancient Indian system, which has been flourished through thousands of years, have been the foundation of India's legalsystem for centuries. Such doctrines are resulted from many sources, including the Vedas, Upanishads, Smritis, and other religious and philosophical texts. Some of the main principles of legalframework and jurisprudence of Ancient India include Dharma, Karma, Nyaya, and Satya.

When these rules or doctrines are applied in modern times, they may result into something useful or not. Some of the advantages and disadvantages[43] are as such:

Pros:

1. **Preservation of Cultural Heritage:** These doctrines when applied now a days can save the rich Indian-cultural heritage, that may be beneficial in promoting cultural diversity and tolerance[44].

40 Ibid.

41 Supra 32.

42 Supra 33.

43 Rakesh Singh Bhadoria, *Pre-historic and old Judicial System Of India- Satayamev Jayate*, (05.05.2023), https://www.linkedin.com/pulse/Pre-historic and old-judicial-system-india-satayamev-jayate-rakesh-singh-bhadoria.

44 *Criminal justice system in India,* (05.05.2023), https://blog.ipleaders.in/criminal-justice-system-in-india/.

2. **Promotion of Ethics and Morality:**Ancient Indian legalprinciples are based on ethical and moral principles, for e.g., truthfulness, nonviolence, and fairness. By applying these principles, individuals and complete social structure be encouraged to act ethically and morally[45].
3. **Increased Focus on Mediation and Negotiation:**Ancient Indian legalprinciples emphasize mediation and negotiation to resolving disputes. This can reduce the burden on the courts and lead to faster and more amicable resolutions[46].

Cons:

1. **Potential for Discrimination:**Ancient Indian legalprinciples might be developed in a period where social norms and values were different. Applying these principles in modern times without appropriate modifications may lead to discrimination against certain groups.
2. **Lack of Clarity:** Some of the principles of legalframework and jurisprudence of Ancient India may not be clear or may be subject to multiple interpretations. This can lead to confusion and inconsistencies in legalrulings.
3. **Inadequate Protection of Individual Rights:**Few legal doctrines might fail to secure the rights of individuals, particularly those of women and marginalized communities[47].

In conclusion, while the application of principles of legalframework and jurisprudence of Ancient India in modern world can be beneficial in certain aspects, these doctrines must be used appropriately and with modifications to reflect the changing times and values. Careful consideration and evaluation of their relevance and applicability is required before implementing them in modern legalsystems[48].

Cases Where Courts Applied Principles of Dharma:

India has a rich legal heritage that dates back thousands of years. Ancient Indian laws, including the Manusmriti, the Arthashastra, and the Vedas, have influenced the development of modern Indian law. In some cases, Indian courts have applied principles of Ancient Indian laws in their judgments. Dharma is a fundamental concept in Hinduism, Buddhism, Jainism, and Sikhism, and refers to the moral and ethical principles that govern an individual's conduct and duties. In India, courts have sometimes applied principles of dharma in their judgments, particularly in cases involving family disputes, inheritance, and other matters related to personal law[49].

45 Rene David & John E.C. Brierley, *MAJOR LEG.AL SYSTEMS IN THE WORLD TODAY,* (05.05.2023), https://lawfaculty.du.ac.in/files/course_material/Old_Course_Material/I%20Term%20Jurisprudence-I%20(Leg.al%20Method)%20July%202016.pdf.

46 Ibid.

47 Ibid.

48 Supra 3.

49 *THE "DHARMA" JURISPUDENCE OF THE SUPREME COURT,* (05.05.2023), http://racolbleg.al.com/the-dharma-jurispudence-of-the-supreme-court/.

Here are a few Case-laws where the concept of Dhara was used by the Courts:

In Githa Hariharan *v.* Reserve Bank of India (1999)[50], the Indian Apex Court established the fact that Dharma, which emphasizes the responsibility of a son to look after his aged parents, is applicable to both sons and daughters. The court ruled that daughters have an equal obligation to take care of their parents in their old age.

In Lila Gupta *v.*Laxmi Narain[51], the Delhi High Court used the doctrine of dharma in a dispute between a widow and her deceased husband's brother over property rights. The court decided that the widow had a right to inherit her husband's property, and that it was her dharma to do so.

In Mohd. Ahmed Khan *v.* Shah Bano Beg.um (1985)[52], the Indian Apex Court applied the code of Dharma in a landmark judgment that recognized Muslim women's right to get maintenance from husbands after divorce. It was decided by the court that the Quranic injunction of the husband's duty to maintain his divorced wife was based on the principle of dharma, and was therefore applicable to all Indian citizens, regardless of their religion.

In Raghunath Prasad *v.* Deputy Commissioner of Partabgarh[53], the Privy Council used the doctrine of dharma in a dispute over the right to worship at a temple. According to Court the right to worship at a temple was a matter of dharma, and that it was the duty of the temple authorities to allow access to all devotees, regardless of their caste or social status.

In Ram Sharan Autyanuprasi*v.* State of Bihar[54], the Indian Apex Court applied the doctrine of "lex talionis" or "an eye for an eye" as outlined in the Manusmriti. The court decided that in cases of murder, the death penalty was an appropriate punishment.

In State of Gujarat *v.* Mirzapur Moti KureshiKassabJamat (2005)[55], Indian Supreme Courtdependedupon the Arthashastra to establish legality of the slaughter of animals. The court held that the Arthashastra allowed for the slaughter of animals for food, but prohibited the killing of cows and other sacred animals.

In Durga Prasad *v.* Deep Chand (1954)[56], Indian Apex Courtapplied the doctrine of "pious obligation" as outlined in the Hindu law books. The court decided that a son had a moral obligation to pay his father's debts, even if he was not legally bound to do so.

In Anand Behari Lal *v.* Din Dayal and Ors. (1958)[57], Indian Apex Courtused the rule of "pious obligation" to determine the legality of a will. It was decided that a Hindu

50 (1999) 2 SCC 228.

51 1978 AIR 1351, 1978 SCR (3) 922.

52 1985 (1) SCALE 767; 1985 (3) SCR 844; 1985 (2) SCC 556; AIR 1985 SC 945.

53 (1930) 32 BOMLR 129.

54 1989 AIR 549, 1988 SCR Supl. (3) 870.

55 (2005) 8 SCC 534.

56 1954 AIR 75, 1954 SCR 360.

57 (1946) 48 BOMLR 293.

could not disinherit his sons without a just cause, as it was the sons' pious obligation to perform their father's funeral rites.

These are just a few examples of how Indian courts have applied principles of Ancient Indian laws in their judgments. The use of Ancient Indian laws as a source of legalauthority reflects the country's rich legaland cultural heritage, and highlights significance of tradition and continuity to grow the legal-framework of India.The application of dharma as a guiding principle in the Legalframework of India reflects the country's rich cultural and religious heritage, and highlights significance of moral and ethical values in the administration of justice.

How Can We Use Ancient LegalJurisprudence of in Contemporary India:

Ancient Indian legaljurisprudence, especially the rules of Vedas, the Upanishads, the Manusmriti, and the Arthashastra, are useful in modern times to address contemporary legalchallenges. Following few measures can be taken to implement these rules[58]:

1. **Alternative Dispute Resolution (ADR):** ADR has been prevalent in India since Ancient times. The panchayat system, which is still in use in many parts of rural India, is an example of ADR. This system involves the resolution of disputes through a group of five elders or respected members of the community. The principles of ADR can be used to resolve modern-day disputes in a more efficient and cost-effective manner[59].
2. **Environmental Law:** Idea ofsaving the nature can be found invAtharva Veda, which emphasizes significance of preserving nature. The Manusmriti also outlines the Human responsibilities towards the environment. These principles may be useful in development ofa modern environmental laws and regulations.
3. **Intellectual Property Rights:** Intellectual property can be traced back to Ancient India. The concept of "shreshthi," which mentions the owner of a creative work, can be found in the Manusmriti. The Patents Act, 1970, which is the primary legislation governing patents in India, also recognizes the concept of traditional knowledge[60].
4. **Human Rights:** The human rights' doctrine can be traced back to the Upanishads, which emphasize the inherent dignity of every human being. The Manusmriti also lays down principles of justice and equality. Ancient Indian legaljurisprudence can provide valuable insights and guidance in developing modern legal-frameworks that are more aligned with the values and principles of the Indian society[61].

58 *Study of Dharma in The Light of Hindu Jurisprudence,* (05.05.2023), https://lawbhoomi.com/study-of-dharma-in-the-light-of-hindu-jurisprudence/.

59 Imran Mohd. Khan, ALTERNATIVE MODES OF ACCESS TO JUSTICE, (05.05.2023), https://ujala.uk.gov.in/files/ch10_2.pdf.

60 Ibid.

61 Supra 3.

CONCLUSION

The Ancient legalsystem of India played a significant role in shaping the modern legalsystem of the country. It had a profound impact on various aspects of modern Indian law, for e.g., civil and criminal law, property law, and family law.

One of the most important contributions of legal-framework and jurisprudence of Ancient India is the concept of rule of law, which refers to the principle that all individuals and institutions are subject to the law and accountable to the same set of rules. This concept was enshrined in the legal-framework and jurisprudence of Ancient India through the use of various legalcodes and texts, for e.g., the Manu Smriti, the Yajnavalkya Smriti, and the Arthashastra.

The legal-framework and jurisprudence of Ancient India also recognized significance of individual rights and freedoms, for e.g., the right to life, liberty, and property. This emphasis on individual rights and freedoms is reflected in the modern Indian Constitution, which guarantees fundamental rights to all citizens.

Another important contribution of the legal-framework and jurisprudence of Ancient India is the concept of alternative dispute resolution, which includes methods for e.g., mediation, arbitration, and conciliation. These methods are increasingly being used in modern legalsystems as an alternative to traditional litigation.

Finally, the legal-framework and jurisprudence of Ancient India also recognized significance of social justice and equality. This is reflected in various legalcodes and texts that sought to protect the rights of marginalized and disadvantaged communities, for e.g., women, children, and the lower castes.

The legal framework and jurisprudence of ancient India have had a significant impact on contemporary times. Many legal concepts and principles developed in ancient India have been incorporated into modern legal systems and have played a crucial role in shaping contemporary laws.For example, the concept of Dharma, which refers to ethical and moral principles that govern human behavior, has influenced modern legal systems' approach to justice and fairness. Similarly, the concept of Ahimsa, or non-violence, has influenced contemporary laws on human rights and animal welfare.

The ancient Indian legal system also placed a significant emphasis on mediation and arbitration as a means of resolving disputes, an approach that is gaining popularity in modern legal systems as an alternative to traditional litigation.Additionally, the ancient Indian legal system's emphasis on individual rights and freedoms has influenced modern legal systems' development and protection of human rights and civil liberties.

One of the most significant contributions of ancient Indian jurisprudence is the concept of Dharma. Dharma refers to ethical and moral principles that govern human behavior and actions. It was seen as the foundation of justice and fairness, and the legal system was designed to uphold these principles. This concept has influenced modern legal systems in many ways. For example, the idea of natural justice and fairness in legal proceedings is based on the principle of Dharma.

Another important contribution of ancient Indian jurisprudence is the concept of Ahimsa or non-violence. This principle has had a profound impact on contemporary times, particularly in the area of human rights and animal welfare. The concept of Ahimsa is based on the belief that all living beings are interconnected and that causing harm to one being ultimately harms all beings. This principle has been instrumental in the development of laws protecting animals and has also influenced human rights laws.

The ancient Indian legal system also placed a significant emphasis on mediation and arbitration as a means of resolving disputes. This approach is gaining popularity in modern legal systems as an alternative to traditional litigation. Mediation and arbitration offer a more collaborative and cooperative approach to dispute resolution, which can lead to more effective and efficient outcomes. This approach is particularly useful in cases where the parties involved are willing to work together to find a solution.

Another important contribution of ancient Indian jurisprudence is the emphasis on individual rights and freedoms. The legal system recognized significance of individual autonomy and the need to protect individual rights. This emphasis has influenced modern legal systems' development and protection of human rights and civil liberties. Many of the principles of individual rights and freedoms that are enshrined in modern legal systems are rooted in ancient Indian legal principles.

Furthermore, ancient Indian jurisprudence recognized significance of social justice and equality. The legal system was designed to ensure that all individuals were treated fairly and that the law applied equally to all. This principle has had a significant impact on contemporary times, particularly in the area of civil rights and social justice. The idea that the law should apply equally to all individuals, regardless of their social or economic status, is a fundamental principle of modern legal systems.

Finally, the ancient Indian legal system recognized significance of education and knowledge. The legal system was open to all individuals, regardless of their background or social status. This emphasis on education and knowledge has had a lasting impact on contemporary times, particularly in the area of legal education. Today, legal education is widely accessible, and individuals from all walks of life can study and practice law.

In conclusion, the legal framework and jurisprudence of ancient India have had a profound impact on contemporary times. From the concept of Dharma to the emphasis on individual rights and freedoms, these legal principles have influenced modern legal systems worldwide and continue to be relevant today. The ancient Indian legal system recognized significance of justice, fairness, and equality, and these principles continue to be the foundation of modern legal systems. As we continue to face new legal challenges, we can look to the past for guidance and inspiration. The legal principles of ancient India offer valuable insights into how we can create a more just and fair society.

The jurisprudence of Indian legal system had a very advanced approach towards every possible aspect of life. It did not differentiate between a king or a common

man. Every individual whether king, queen, minister or an ordinary individual had a respectable place in society and the society was more focused on duties and responsibilities to be performed. These duties were linked with their rights. In conclusion, the Ancient legal system of India has had a profound influence on the development of modern Indian law, and its principles and values continue to shape the legal landscape of the country today. Its emphasis on the rule of law, individual rights and freedoms, alternative dispute resolution, and social justice make it relevant even in the modern world. In summary, the legal-framework and jurisprudence of Ancient India has had a significant impact on modern legal thinking and practice. Its principles and codes have provided a foundation for modern legal systems, and its emphasis on alternative dispute resolution, human rights, and environmental protection continue to influence modern law and policy.

Emerging Trends in Competition Law and Economics in India: Insights and Implications

Prof. Anuradha Jain & Dr. Narender Kumar**

ABSTRACT

Competition law and economics have become increasingly important considerations in the Indian economy. This study is an attempt to analyze the various emerging trends in this field, how the implications of these trends affect the Indian economy, and to what extent they are beneficial to the country in the long run. Part I deals with the concept of competition law and economics, including its purpose, scope, and the laws governing this field in India. Part II examines the constitutional jurisprudence underlying competition law and economics to achieve economic development. Part III examines the recent trends in the industry, including the use of artificial intelligence, focusing on changes in the market structure, corporate practices, and the influence of foreign companies. Part IV investigates the implications of these trends on the Indian economy, exploring topics such as price control, consumer protection, and market entry barriers with the help of relevant case laws. Part V concludes with a summary of the key findings from the analysis, highlighting the potential benefits and challenges posed by the trends. It will also provide recommendations for policymakers and suggest some possible solutions for addressing any issues identified. This research is expected to be useful for policymakers, economists, competition lawyers, and companies operating in India, as it provides useful insights into the current state of competition law and economics in the country.

Keywords: *Artificial Intelligence, Abuse of Dominant Position, Cartels, Competition Law, Economics, Market Power, India.*

1. INTRODUCTION

Competition law and economics in India is a relatively new field of study that is gaining traction in recent years (Rey, P., 1997). India's competition law regime has undergone major changes in recent years (Arun, T. G., 2004). The Competition Commission of India (hereinafter 'CCI') was established in 2002 to promote competition in the Indian market and protect consumer rights (Jain, A., 2011). It has taken various

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initiatives to ensure a competitive environment and to promote economic growth. It has introduced various measures, such as the notification of agreements, predatory pricing regulations, and merger control regulations (Carayannis, E. G., & Popescu, D., 2005). These have had a significant impact on the functioning of the Indian economy, and have helped to ensure a fair and competitive market (Devi, B., & Gangal, N., 2020).

The commission has also been at the forefront of introducing innovative measures to increase competition in India. For instance, the CCI has introduced the concept of 'market-based regulation, which provides for a more nuanced approach to competition policy (Gouri, G., 2020). This approach relies heavily on market forces to determine the appropriate level of competition and allows the commission to intervene only when necessary. In addition, it has adopted many policies to protect consumer rights and ensure fair competition (Klein, B., &Leffler, K. B., 1981). For example, the CCI has introduced the concept of 'collective dominance', which requires large firms to share the benefits of their dominance with smaller firms. Furthermore, the CCI has also taken various steps to ensure compliance with the competition law, including the imposition of penalties for non-compliance. This market-based regulation has allowed the CCI to intervene more effectively and to ensure fair competition and led to increased economic growth and higher levels of consumer welfare (Roberts, S., 2004).

Moreover, the implications of these developments for Indian competition law and economics are worth considering. First, the increased competition has led to some changes in the Indian competition landscape, including the emergence of new players, the emergence of new business models, and many more (Huong, N. N. B. T., 2023). This shows the important connection between these two areas for promoting fair competition, preventing anti-competitive practices, and protecting consumers in any country. In the case of India, the importance of competition law and economics is even more significant due to the country's rapidly growing economy, large population, and diverse markets.By focusing on these two areas, we can identify and address anti-competitive practices that could harm consumers, limit innovation, and stifle economic growth. It can also help to create a level playing field for businesses of all sizes and promote healthy competition in various sectors, including e-commerce, healthcare, and telecommunications.Additionally, effective competition law and economic framework can enable India to attract more foreign investment and enhance its position as a global economic power. Therefore, it is essential to focus on emerging trends in competition law and economics in India to ensure that the country remains competitive, innovative, and prosperous in the long run (COLOMO, P. I., 2023).

1.1 Literature Review

In an advanced competition jurisdiction, the incorporation of economic theory and sophisticated data interpretation are now seen as essential for defining the market and consumer harm, and decisions based on economic evidence may have differed if seen from a holistic welfare perspective or a strict consumer welfare aspect. In several

of the examples, a rapid study of competition poses the risk of distorting both market dynamics and competitiveness (Gouri, G., 2016), which draws boundaries between legal and economic analysis in competition law which investigates the strength of economic analysis in some vertical restraint cases (Kathuria, V. 2022). Such analysis is mainly done by using relevant information or big data for business benefits (Bennett, M., & Collins, P., 2010), and based on economic evidence may have differed if seen from a holistic welfare perspective or a strict consumer welfare aspect. It is also noticed that the road to a strong competition regime is mainly influenced by various features including economic factors which play a significant role in developinga competitive environment (Mehta, P. S. (Ed.) 2012).In the present study, the author examined numerous studies which directly or indirectly relatedto both areas i.e. competition law and economics, and also raised many issues, and also examine the emerging trends in competition law and economics in India, what the insights and implications associated with it, with special references to the new Competition (Amendment) Act, 2023. This makes the study unique and relevant for all stakeholders and requires it to be examined in detail.

1.2 Constitutional Dimension on Competition Law and Economics in India

The Preamble of the Indian Constitution lays down the foundational principles that guide the Indian State and emphasizes the importance of securing justice, equality, and liberty for all citizens, and promoting the welfare of the people (Panigrahi, S. K., & Panda, S. A., 2023). These principles are closely linked to competition law and economics in India for promoting economic welfare, ensuring a level playing field for businesses, and protecting consumers from anti-competitive practices. By enforcing competition law, the government can prevent market distortions, promote innovation, and ensure that economic growth benefits all citizens, in line with the principles of the Preamble (Gouri, G., 2023).It can also help to minimize inequalities in the economy and promote social justice, which is a key objective of the Constitution of India, which can create a more level playing field for all market participants, promoting economic opportunities and reducing economic disparities (Zhao, L., 2023).

Therefore, the Preamble of the Indian Constitution and competition law & economics are closely interconnected for securing justice, equality, and the welfare of the people. Article 14 of the Indian Constitution guarantees the right to equality before the law and equal protection of the law to all citizens. In the context of competition law and economics, this means that all market participants, regardless of their size or influence, must be treated equally under the law, which aims to create a level playing field for businesses, preventing anti-competitive practices that could harm small businesses and consumers. By enforcing competition law, the government can ensure that all market participants, from large corporations to small startups, are subject to the same rules and regulations, promoting fair competition and equal economic opportunities (Singh, A., 2002). Furthermore, it can also promote consumer protection, by ensuring that all citizens have access to high-quality goods and services at fair prices, regardless of their socioeconomic status. Which is a means to achieve the

constitutional objective of securing equality before the law and equal protection of the law for all citizens (Zheng, K., & Snyder, F., 2023).

Article 19(1)(g) of the Indian Constitution guarantees the right to practice any profession, occupation, or trade. This right is closely linked to promoting fair competition and creating a level playing field for businesses, enabling them to compete freely and fairly without any undue advantage. It ensures that no single entity or group dominates the market, creating an environment where all market participants can compete fairly, which promotes the right to practice any profession, occupation, or trade as enshrined in Article 19(1)(g). This can prevent anti-competitive practices that could harm small businesses and consumers, maintaining a competitive market environment that promotes economic opportunities and protects the right to practice any profession, occupation, or trade,and create a level playing field for businesses (Gillis, M., 2023).

In addition, Article 38 states that the State shall strive to promote the welfare of the people by securing social order and justice which is closely linked to competition law and economics in India. This can help to reduce economic disparities and minimize inequalities in the economy, in line with the principles of social justice protected under Article 38.Article 39 preserves the principles of social and economic justice, emphasizing the need to promote the welfare of the people by securing a social order in which justice, economic, and political, shall inform all institutions of national life, and by implementing the antitrust law, the government can confirm that all market participants, regardless of their size or influence, are subject to the same rules and regulations, promoting fair competition and equal economic opportunities as predicted under Article 39. Hence, both are providing a means to achieve the constitutional objectives of promoting social and economic justice and securing the welfare of the people by creating a level playing field for businesses and protecting consumers from monopolistic behavior.Furthermore, Article 39(b) emphasizes the need for a fair distribution of material resources among the community to subserve the common good, and Article 39(c) aims to ensure that the economic system's operation does not result in the concentration of wealth and production means to the common detriment. These constitutional provisions provide a strong foundation for competition law in India, which targets to generate a level playing field for companies and discourage adverse practices (Mudgal, M. A. S., &Rathore, J. S., 2023).

To support the above-mentioned jurisprudence, Article 301 guarantees freedom of trade, commerce, and intercourse throughout the territory of India, which is subject to certain restrictions imposed by the state and Parliament to ensure public interest accordingly (Rajadhyaksha, N., &Misra, P., 2023).And, the antitrust law ensures that trade and commerce are conducted in a fair and competitive environment, to achieve the constitutional objective of encouraging the free flow of trade and commerce in India, as intendedfor achieving the constitutional objective of promoting economic unity and integration through the free flow of trade and commerce.Article 304 also provides for the power of the State legislature to impose restrictions on the freedom of trade, commerce, and intercourse within the State, and this is also subject to certain circumstances including the requirement that the restrictions imposed should

not discriminate against goods and services from other states, and that they should be necessary to protect the public interest (Krishna, G., 2023).

Furthermore, to the above-mentioned Constitutional provisions, the Indian government has implemented various policies to promote competition and economic growth in the country, which are closely related to competition law & economics in India (.Kohli, A., 2006). Some of the key government policies that are aimed at promoting competition and economic growth include;

- The National Competition Policy: It was introduced in 2011, to promote competition in all sectors of the economy, enhance consumer welfare, and ensure a level playing field for all market participants (Singh, V. K., 2011)
- The Make in India initiative: Itfocuses to promote domestic manufacturing and attract foreign investment, creating jobs, and promoting economic growth in the country (Nam, C. W., & Steinhoff, P., 2018).
- The Digital India initiative: Ittargets to transform India into a digitally empowered society and economy, promoting innovation and growth in the digital sector (Agrawal, A., et. al, 2022).
- The Startup India initiative: It intends to encourage entrepreneurship and innovation, providing support and incentives to startups and small businesses in the country (Tiwari, A., et. al, 2021).

All these policies are closely related withthe purpose to support fair competition, and to ensure that these policies are implemented effectively, promoting fair competition and equal economic opportunities in all sectors of the economy.Overall, the constitutional dimensions related to competition law & economics wish to generate a level playing field for businesses, promote healthy competition, and ensure that economic growth benefits all citizens, in line with the principles of social justice enshrined in the Indian Constitution.

2. OVERVIEW OF COMPETITION LAW AND ECONOMICS IN INDIA

Competition law and economics in India play a significant role in promoting economic benefits and creating a level playing field for businesses (Dobbs, R., et. al 2015). The Competition Act, of 2002, is the primary legislation governing competition law, and prohibits anti-competitive agreements, abuse of dominant position, and regulates mergers and acquisitions that could harm competition in the market and is supported by the principles of economics (.Dhall, V., 2006). Economic analysis is used to understand the impact of anti-competitive practices on the market, consumers, and the economy (Kapoor, A., 2016). CCI is the primary enforcement agency for competition law in Indiawhich investigates and penalizes anti-competitive practices and promotes competition advocacy. Both fields have significant implications for businesses, consumers, and economic development (Bhattacharjea, A., et. al, 2019).

2.1 Historical Development of competition law and Economics in India

Competition law and economics in India have a relatively short history, dating back to the 1990s when the Indian economy was liberalized, and economic reforms were initiated (Rudolph, L. I., & Rudolph, S. H., 2001). The Monopolies and Restrictive Trade Practices Act (hereinafter 'MRTP') 1969 was the primary legislation governing competition at the time. However, the MRTP Act was criticized for being ineffective and outdated, leading to the enactment of the Competition Act, of 2002. Which was a significant development in the history of competition law in India. It replaced the MRTP Act and introduced a modern framework for regulating competition in the Indian market. The act established the CCI as the primary enforcement agency for competition law in India (Bhattacharjea, A., 2008).

Over the years, both fields have evolved, and accordingly, the commission issued guidelines and regulations to provide clarity on various aspects of competition law. It has also been active in investigating and penalizing anti-competitive practices, including cartels, abuse of dominant positions, and mergers and acquisitions that could harm competition.Indian judiciary has also played a significant role in the development of competition law with several landmark judgments shaping the interpretation and application of the antitrust law in India. The apex court has also been active in promoting competition advocacy, emphasizing the importance of competition in promoting economic growth and consumer welfare (Maican, O. H., 2021).

2.2 A Birdseye view of the Competition Act, 2002

The Competition Act, of 2002 is the primary legislation governing and promoting the competition law by preventing adverse practices and also regulates mergers and acquisitions that could harm competition in the market.The CCI being a primary enforcement agency is responsible and accountable for its implementations and also imposes penalties for its violations. The Director General (hereinafter 'DG') and other officials also assist in the enforcement process (Shapiro, D., 2012). It also promotes competition advocacy and regulates mergers and acquisitions that could harm competition in the market. It deals with the establishment of the Competition Appellate Tribunal (COMPAT) to hear appeals against the orders of the CCI. However, the COMPAT was abolished in 2017, and appeals against the orders of the CCI are now heard by the National Company Law Appellate Tribunal (hereinafter 'NCLAT') (Sultania, N., & Jain, P., 2020).Overall, this Act is a crucial piece of legislation thatprevents the concentration of economic power and protects consumer interests in shaping the development of competition law and economics in the nation.The key provisions of the Indian Competition Act, of 2002, include;

- Anti-competitive agreements: The act prohibits anti-competitive agreements between enterprises, including horizontal and vertical agreements under sections 3 (3) and (4) read with sections 19 (1) and (3) of the Act to determine AAEC in India, which is mainly based upon 'rule of reason' and 'rule of per se' respectively (Ashat, S., 2014), (Kathuria, V. 2022).

- Abuse of dominant position: The act prohibits enterprises from abusing their dominant position in the market, including by imposing unfair conditions or limiting production, etc. under section 4 read with section 19 (1) and (4) of the Act to fix AAEC in India(Verma, P., 2018).
- Regulation of combinations: The act regulates mergers, acquisitions, and amalgamations that could harm competition in the market under sections 5 and 6 read with sections 29, 30, and 31 of the Act. Here, it also needs to notice that the requirements under section 6 are mandatory in their nature under the Act (Goel, S., 2014).
- Competition Advocacy: The act provides for the promotion of competition advocacy under section 49 of the Act including thedissemination of information for the benefits of competition and the prevention of anti-competitive practices (Batra, I., &Kumari, S., 2015).
- Penalties for violations: The act provides for penalties under section 27 of the Act for violations of competition law, including fines and imprisonment (Bhattacharjea, A., & De, O., 2021).
- Establishment of the CCI: The act establishes the CCI under section 7 of the Act as the primary enforcement agency for competition law in India, with the power to investigate and penalize anti-competitive practices, regulate mergers and acquisitions, and promote competition advocacy(Ghosh, S., & Ross, T. W., 2008).

Additionally, it is seen that the commission may take into account additional elements such as "social responsibility," "social costs," "development criteria," and "any other factor" when establishing a firm's status. This merely serves to highlight some challenges in classifying cartels and aggressive competitor activity(Deng, X., &Xu, Y., 2017).

To support this, India implemented the "Leniency Programme" in 2009namely the CCI (Lesser Penalty) Regulation of 2009 and Regulation No. 1 of 2017 for principal accomplices and confessors to offer crucial evidence to the commission, are frequently used to identify, enforce and resolve cartel-related problems, which is mainly based on several considerations, including the Competition Law Authority's "prima facie" opinion, the "Principle of Natural Justice," the "Validity of Subordinate Legislation," and a recent modification on information confidentiality (Kumar, N., 2022).

2.3 Role of the Competition Commission of India (CCI)

The commission plays a significant role in promoting and ensuringhealthy competition by encouraging innovation and consumer welfare. It is also empowered to investigate and penalize companies that engage in anti-competitive practices, and can also impose fines up to 10% of a company's turnover for up to three years and order divestitures or modifications to agreements that restrict competition. It also plays a role in approving mergers and acquisitions that may have an impact on competition.Itfurther evaluates the likely effects of the transaction on competition and can approve it, subject to certain conditions, or prohibit it altogether. Overall, it is an important regulatory

body that ensures a level playing field for businesses and promotes competition for the benefit of consumers. Moreover, recently it has also proactive actions including investigating anti-competitive practices in both traditional and digital sectors, softening cartel-related penalties for small and medium-sized enterprises, and increasing focus on tackling gun-jumping. Furthermore, it has taken a more nuanced approach to imposing penalties on companies in the aftermath of the COVID-19 pandemic, recognizing the adverse impact on Indian MSMEs. These actions demonstrate the CCI's commitment to promoting fair competition and consumer welfare while also considering the unique challenges faced by businesses in today's economic climate (Barmi, S. S. S., 2013).

2.4 Significance of the Competition (Amendment) Act, 2023 in dealing with growing competition in India

It is noticed that the current state of competition in India is influenced by several factors, including the presence of diverse industries, regional differences in human capacity and economic output, and the regulatory framework established by the CCI, whichshows animportant role in encouragingbusiness economics. The competitiveness of individual situations also plays a crucial role in the overall progress of competition in India. Western and southern states tend to be more competitive than northern and eastern ones, with factors such as political stability and industrial development contributing to this difference.And, it is predicted India's strong growth in 2023 due to healthy domestic drivers, including an improved private sector balance sheet, corporate deleveraging, high tax collections, strong consumer demand, and many more. Still, India is likely to face challenges such as high inflation, aggressive monetary policies by advanced economies causing a global slowdown, and an uncertain labor market due to the pandemic. It is also noticed that India's GDP grew by 6.3% Year-Over-Year (YoY) in Q2 FY23, with gross fixed capital investment and private consumption remaining robust. However, government spending contracted, and the manufacturing and mining sectors saw a contraction of –4.3% and –2.8% YoY, respectively. The COVID-19 pandemic has led to an economic contraction of 7.3% in FY21, and growth in FY22-23 is expected to be between 7.5% and 12.5%. The informal sector employs the vast majority of India's labor force and has been particularly affected bya significant impact on poor and vulnerable households. The government has responded with swift and comprehensive measures, including a national lockdown, social protection measures, and financial support for small and medium enterprises. To fully recover from the pandemic, India must focus on reducing inequality and implementing growth-oriented reforms.Additionally, the COVID-19 pandemic has posed significant challenges to competition in India. The pandemic has disrupted supply chains, reduced demand, and affected the labor market, leading to a contraction in economic activity. The pandemic has also highlighted the need for better social protection measures and more resilient supply chains.

Additionally, the growing trends including the growth of e-commerce, increased foreign investment, and the emergence of new digital business models, etc. have also led to challenges, such as allegations of anti-competitive practices by large players,

concerns about data privacy, and the impact on traditional brick-and-mortar businesses.This has led to a concentration of economic power and opportunities in certain regions, leading to imbalances and disparities.To deal with such issues, India has made significant progress in promoting competition through the new Competition (Amendment) Act 2023 (Advocates V.A., 2023).

This Act is a step towards modifying the competition policy to keep up with the changing times and emerging trends in the economy, especially in the e-commerce sector. The act aims to promote competition, create a level playing field, and strike a balance between fostering innovation and promoting competition. This act introduces new tools in the CCI's arsenal, addressing challenges in the e-commerce sector, increasing scrutiny of mergers and acquisitions, promoting healthy competition, safeguarding consumer interests, and investigating anti-competitive practices and abuse of dominance. It also deals with the use of natural justice principles in competition cases, the promotion of competition through fostering innovation, and the establishment of a special division within the commissionto address challenges in the e-commerce sector. The act enhances penalties for making false statements or suppressing material information, and the net for antitrust enforcement has been widened to include facilitators and hubs, even nonparticipants. The updated merger control regime requires transactions with a value above Rs 2,000 crore to seek CCI approval if the target entity has a substantial business in India. It further introduces a "Green channel" or automatic approval for certain categories of combinations not likely to harm competition. The standard for "Control" has been diluted from "decisive influence" to "material influence."

While this new Act, is a step in the right direction towards promoting fair competition and protecting consumer interests, there are some limitations to the act.Firstly, the act only covers mergers and acquisitions above a certain value threshold, which means smaller transactions may still go unchecked. This could potentially lead to anti-competitive behavior going unnoticed and unchecked.Secondly, the act's "Green channel" provision, while designed to expedite approval for certain combinations, could potentially be misused. The criteria for determining which combinations qualify for automatic approval may not be clear and could lead to abuse.Thirdly, the act's diluted standard for "control" could potentially lead to confusion and lack of clarity in determining which transactions require approval. This could lead to inconsistent enforcement and potential legal challenges. In addition, there are still some areas where it seems less effective or fails to cover exhaustively including the issues relating to data protection, cryptocurrency, and BRICS expansion (Ministry of Law And Justice(Legislative Department), 2023).

3. EMERGING TRENDS IN COMPETITION LAW IN INDIA

Several emerging trends in competition law are shaping the future of competition policy and enforcement. One trend is the increased focus on digital markets and the impact of technology on competition. Where the commission has been actively investigating anti-competitive practices in the digital sector, including online platforms

and e-commerce companies. The commission is also working on developing guidelines for data privacy and competition in the digital space.Another trend is the growing importance of intellectual property rights (IPR) and their impact on competition. The CCI has been taking a more nuanced approach to IPR, recognizing that while IPRs can promote innovation, they can also be used to create barriers to entry and restrict competition.A third trend is the increased use of economic analysis in competition law enforcement and many more. The commission has been using economic analysis to better understand market dynamics and assess the impact of mergers and acquisitions on competition.Finally, there is a growing trend towards international cooperation in competition law enforcement, and the authority has been working closely with other competition authorities around the world to share information, coordinate investigations, and develop best practices.Overall, these emerging trends reflect the changing nature of competition in India and the need for a dynamic and adaptive competition policy framework (Capobianco, A., Davies, J., & Ennis, S. F. 2014).

3.1 Intellectual Property Rights (IPR) and Competition Law

There are several emerging trends at the intersection of intellectual property rights (IPR) and competition law in India. One trend where IPR can be used is to create barriers to entry and restrict competition. As a result, the commission has been taking a more nuanced approach to IPR, balancing the need to promote innovation with the need to protect competition.Another trend is the increased use of economic analysis in competition law enforcement. Economic analysis can help to better understand market dynamics and assess the impact of IPR on competition. The CCI has been using economic analysis to evaluate practices such as patent pooling, licensing, and standard-setting.A third trend is the development of guidelines for the licensing of IPR. The CCI has been working on guidelines for the licensing of standard-essential patents (SEPs), which are essential to the functioning of a particular industry. The guidelines aim to strike a balance between the need to protect IPR and the need to promote competition.Finally, there is a growing trend towards international cooperation in the enforcement of IPR and competition law. The CCI has been working with other competition authorities around the world to share information, coordinate investigations, and develop best practices.Overall, these emerging trends reflect the need for a dynamic and adaptive approach to the intersection of IPR and competition law in India (Ganslandt, M., 2007).

3.2 E-commerce and its Implications on competition law

E-commerce has had a significant impact on competition law in India, with the rapid growth of online platforms and marketplaces creating new challenges for competition regulators. One of the key issues is the dominance of certain e-commerce players, which can create barriers to entry and limit competition.In response, the CCI has taken a more active role in regulating e-commerce, investigating allegations of anti-competitive practices such as predatory pricing, exclusive agreements, and preferential

treatment of certain sellers. It has also been working on developing guidelines for e-commerce, which will provide clarity on issues such as pricing, data privacy, and consumer protection. In addition, it has been actively involved in investigating cases of abuse of dominance in the e-commerce marketplace, online taxi aggregation, and online search sectors.The next issue is the role of data in e-commerce and its implications for competition. Here, e-commerce companies collect vast amounts of data on consumer behavior and preferences, which can give them an advantage over competitors. The CCI has been working on developing guidelines for data privacy and competition in the digital space to address these concerns.Finally, there is the issue of cross-border e-commerce and the challenges it poses for competition law enforcement. And, accordingly, ithas been working on developing international cooperation mechanisms to address these challenges, including sharing information and coordinating investigations with other competition authorities around the world.Overall, e-commerce has presented new challenges and opportunities for competition law in India. By promoting fair competition and protecting consumer welfare, India can ensure that e-commerce continues to drive innovation and growth in the economy (Shaw, R., 2021).

3.3 Abuse of dominance and anti-competitive agreements

Abuse of dominance is a significant concern under the Competition Act 2002 in India. Dominance refers to a position of strength that enables an enterprise to operate independently of competitive forces or to affect its competitors or consumers in its favor. The CCI has the power to investigate and take action against any enterprise that abuses its dominant position.Section 19(4) of the Act empowers the CCI to inquire into any alleged abuse of dominant position by an enterprise either on its motion or on receipt of a complaint. It may direct the Director General (hereinafter 'DG') to investigate the matter and submit a report. The DG has powers similar to those of a civil court, including the power to summon and examine witnesses, require the production of documents, and conduct searches. Based on the report submitted, the commission may proceed against the enterprise if it finds that the enterprise is abusing its dominant positionand may impose penalties, such as fines, or issue directions to cease such conduct (Majumdar, P. K., 2014).

Some examples of abuse of dominance under the Act include predatory pricing, refusal to deal, tie-in arrangements, and exclusive supply agreements. Predatory pricing is when a dominant enterprise sets prices below cost to drive competitors out of the market. Refusal to deal is when a dominant enterprise refuses to supply goods or services to a competitor, customer, or supplier. Tie-in arrangements are when a dominant enterprise requires a customer to purchase one product to obtain another product, and exclusive supply agreements are when a dominant enterprise requires a customer to purchase all of its requirements for a product from the enterprise.It has been active in investigating and taking action against abuse of dominance in various sectors, including e-commerce, telecommunications, and pharmaceuticals, and ensuring that dominant enterprises do not abuse their position to harm competition and consumers (Raju, K. D., 2014).

Recently a case study involving abuse of dominance where CCI investigated the matter relating to the e-commerce giants Amazon and Flipkart. The investigation was launched in January 2020 following an allegation of anti-competitive practices by the Delhi VyaparMahasangh, a group of traders dealing in smartphones belonging to Micro, Small, and Medium Enterprises (Bamb A. (2021). And, it has identified potentially anti-competitive practices related to exclusive arrangements for smartphone launches, preferred sellers in the market, deep discounting practices, and preferential listing or promotion of private labels.Another recent case study is the investigation by the CCI into Google's alleged abuse of dominance in the mobile operating system market whichfound that Google had abused its dominant position by forcing device manufacturers to pre-install Google's search engine and other apps on Android devices. The CCI imposed a fine of INR 13.4 billion on Google for this anti-competitive behavior. This clearly shows the CCI's proactive commitment to promoting fair competition and protecting consumer welfare by investigating and taking action against abuse of dominance in various sectors.

In addition, the Act also prohibits anti-competitive agreements under section 3 read with sections 19 (1) & (3),which refer to any agreement for goods or services that has an appreciable adverse effect on competition in India and are void. The Act defines two types of anti-competitive agreements: horizontal and vertical. Horizontal agreements involve parties in the same line of production, while vertical agreements involve parties at different levels of the production or distribution chain. Examples of anti-competitive agreements include agreements that determine prices, limit or control output, share or divide markets, or engage in bid-rigging or collusive bidding. And, the CCI is responsible for determining whether an agreement has an appreciable adverse effect on competition by refereeing section 19 (3) of the Act. This relates to the powers of the CCI to investigate anti-competitive agreements. This section empowers the CCI to initiate an inquiry into any alleged contravention of the provisions related to anti-competitive agreements, either on its motion or on receipt of a complaint. The CCI may direct the DG to start an investigation and submit its findings (Section 26 (1) & (2)) of the Act. The DG has powers similar to those of a civil court, including the power to summon and examine witnesses, require the production of documents, and conduct searches. Based on its report, the CCI may decide to proceed against the parties involved in the anti-competitive agreement. However, agreements that increase efficiency and provide benefits to consumers are exempted from this prohibition. Additionally, agreements that impose reasonable restrictions as guaranteed under Intellectual Property laws are not considered anti-competitive (Saini, J. S., & Kumar, N., 2020).

3.4 Merger Control and competition law

As India continues to grow as one of the fastest developing economies in the world, its lawmakers and regulators are keeping a close eye on how mergers and acquisitions affect competition within the country. With stricter regulations being implemented for companies looking to merge, it's important for businesses to understand how

these laws impact their operations are covered under sections 5 and 6 of the Act. On June 1, 2011, the Competition Act, 2002 (as amended) (the "Competition Act"merger)'s control provisions went into force. In its evaluation of the more than nine hundred merger notices that havebeen received so far, the commission has issued various orders accordingly. It is also clearly stated that in the merger control framework, parties to a proposed combination are required to notify the CCI of the deal if the de minimisrequirements and the thresholds outlined in Section 5 of the Competition Act are surpassed.To obtain approval from the CCI, parties to a merger are required to notify the Commission in Form I. The notification must be accompanied by a prescribed fee and must contain detailed information about the enterprises involved in the merger, as well as the terms and conditions of the merger.Once a notification is filed, the CCI has a period of 60 days within which to assess the merger and decide whether or not to approve it. In making its decision, the CCI will take into account factors such as whether the merger would result in a monopoly or oligopoly, and whether it would lead to increased prices or decreased choices for consumers (Mukherjee, S., & Hake, D., 2022).

The merger control regime in India is a suspensory one, but without its permission, no notifiable combination may be completed (wholly or partially). If the transaction is completed without CCI permission, a penalty will be assessed, and the transaction may even be deemed null and void.Further, foreign-to-foreign transactions that take place when the relevant business is based outside of India and have no direct or indirect presence there typically lack local linkage and are not therefore reportable. In essence, parties will only be deemed to have a local nexus and the transaction would then be subject to notification if they exceed the de minimis thresholds and the thresholds under Section 5 of the Competition Act. The CCI has made it clear that notifications are required for foreign-to-foreign transactions that result in the indirect acquisition of an entity in India (Nathani, S., &Chhabra, G., 2015).

The jurisdictional thresholds for assets and turnover that are used to determine whether a transaction is required to be reported are outlined in Section 5 of the Competition Act. It should be observed that eight independent tests must be evaluated to determine involving worldwide and Indian assets and turnover at (a) collective level, (b) competing companies level in the event of competitor takeover, and (c) straight transaction entity level (Ghosh, S., & Ross, T. W. 2008).

Merger control is the process where the CCI review and approve mergers and acquisitions. It has the power to block or impose conditions on mergers that they believe would be detrimental to competition in India.The act requires that all mergers and acquisitions that meet certain thresholds must be notified to the competition authorities (Harle, N., Ombregt, P., & Cool, K., 2012). The notification must be made before the transaction is completed.There are several factors that the competition authorities will take into account when assessing a merger or acquisition, including:

- The nature and extent of the market share held by the merging parties
- The degree of market concentration

- Whether the merger would create or enhance market power
- Whether the merger would lead to a reduction in choices for consumers
- Whether the merger would result in higher prices for consumers; and
- Whether the merger would reduce innovation or quality etc.

In addition, the Act also prohibits such agreements entered by enterprises that result in the acquisition of an appreciable degree of control over another enterprise.

3.5 Public interest considerations in competition law

Competition law is a set of legal provisions that seek to ensure fair competition and protect the interests of consumers, and accordingly designed to promote economic efficiency, innovation,and consumer welfare, by protecting small businesses, promoting employment opportunities, and protecting the environment. It also seeks to promote efficiency, productivity, and economic growth. As part of this, it includes provisions on public interest considerations under this law. It also includes ensuring that consumers have access to a wide variety of goods and services at competitive prices, as well as protecting small businesses from being taken over by larger ones. Thus, it is important for competition law in India to take into account public interest considerations while formulating regulations (Gouri, G., 2020).

3.6 Market Definition and market power

This Act defines the concept of market and market power and provides the government with the necessary regulatory tools to ensure that businesses do not abuse their dominant positions. It further provides remedies for any violations of the rules laid down in this act, and to create a level playing field for all players in the market, thus ensuring that no single player can gain an unfair advantage over its competitors. Market definition and market power under the Act are essential elements of fair competition in India, as they help to ensure that businesses do not abuse their dominant position in any particular market (Shroff, R., &Ambast, A., 2012).

Market definition and market power are two important concepts that are addressed under the Act. The term 'market' refers to the scope of activity or goods and services that are considered to be part of a particular market, and is used to determine whether a company has an unfair advantage over its competitors by controlling prices or restricting output. It is used to identify the relevant product and geographic markets in which a firm operates, while 'market power' is used to measure the strength of a firm's position in the market. Understanding these two concepts is essential for determining whether a firm has an unfair advantage over its competitors or is engaging in anti-competitive practices. In other words, it can be stated that a market consists of all buyers and sellers in the same geographical area, which shows the ability of a company or group to control prices, production, or other aspects of the market. This law also provides guidelines on how to determine whether a company has too much control over the market and can be considered as an anti-competitive practice (Kotler, P., 1972).

4. IMPLICATIONS OF EMERGING TRENDS IN COMPETITION LAW AND ECONOMICS IN INDIA

India's stable economy, business-friendly reforms, digital competitiveness, and massive consumer market make it an attractive destination for foreign investment. Effective competition law and enforcement, along with competition-based economic reform, promote consumer welfare and economic growth while making markets more competitive.The CCI plays a crucial role in promoting competition and challenging public restraints to ensure a more competitive marketplace that fosters innovation and growth.

These emerging trends in competition law and economics in India contribute to a more competitive marketplace that can encourage more foreign investment in India's economy. However, policymakers must ensure that there is no undue emphasis on economic analysis over the promotion of competition and that conflicts between regulatory agencies are addressed.Overall, these trends offer both challenges and opportunities for businesses and consumers in India. The increased competition will lead to more innovation, better products and services, and lower prices, benefiting consumers. Simultaneously, it will challenge businesses to be more innovative and efficient. However, businesses will also face increased scrutiny from regulatory agencies, which may create additional compliance costs (Rey, P., 1997).

5. CONCLUSION AND SUGGESTIONS

This study proved verysignificant forbusinesses and consumers alike, and the Competition (Amendment) Act, of 2023 has introduced key changes aimed at regulating mergers and acquisitions, promoting competition, and safeguarding consumer interests. The act has widened the net for antitrust enforcement to include facilitators and hubs, even nonparticipants. The updated merger control regime, green channel, increased penalty standard control, decisive influence, etc. seek to ensure fair competition in the Indian market, promote innovation and entrepreneurship, and protect the interests of consumers. But, at the same time, there are still various subject matters which require more attention and regulation including data protection and cryptocurrency, and many more.

As the Indian economy continues to grow, it is imperative to have a robust competition law regime that promotes a level playing field for all market players. The insights and implications of these emerging trends in competition law and economics in India are thus crucial for businesses and policymakers to understand and navigate effectively (Kumari, R. et. al, 2023).

Based on emerging trends in competition law and economics, there are several key suggestions for new competition policy in India;

- Need to modify the competition policy at the micro and macro level
- Strong need for data protection, and cryptocurrency regulation
- Need to specify the uniform platform to deal with BRICS expansion if any

- Need to promote sustainability and competition to create a level playing field, and strike a balance between fostering innovation and promoting competition.

In the end, the author observed that for ensuring an effective enforcement mechanism and economic development, mere government participation would not be sufficient, and requires a conscious contribution of consumers, competitors, and other stakeholders to meet the upcoming challenges.

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Transparency in Judicial Process vis-à-vis Judicial Independence in India

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"All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous judiciary."

Andrew Jackson

ABSTRACT

Independence of judiciary is essential for achieving the main objective of providing access to justice of every kind to the general public which is the basic structure of the Constitution of India. At the international and national level, various legal provisions have provided revealing a distinctive notion in favour of independence of the judiciaryin addition to various landmark judgements recommending collegium system for demarcating independence of judiciary in India. The validity of the National Judicial Appointment Commission Act, 2014, was also challenged in order to bring in forth again finally the Collegium system. However, additionally,as democratic culturedemands transparency and accountability in the judicial process of judiciary especially at the time of appointment and transfer of the judges,this collegium system also calls for the same because it has been facing challengessince the beginning due to its non-transparency,nepotism orfavouritism. Thus, this system needs to be reformed by adding transparency and fairness so that independence of judiciary could not be jeopardized by nepotism ornon-transparency.

Keywords: *Appointment of Judges, Collegium, Independence of Judiciary, Judicial Process, Nepotism, Transparency.*

INTRODUCTION

Independence of judiciarywarrants the rule of law along withrecognitionand implementation of human rights and also the affluence and secureness of the social

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order.[1] Factually, justice's accountability has a vivacious constituent known as its independence, because a judiciary without actually having independence, capability, translucency orintegrity would not be proficient of giving any justification of itself."[2] The accountability of the judicial organ of the nation is increased with the transparency in the judicial procedurewhich resultantly enhances the trust of community in the administration of justice. Hence, an independent and transparent judiciary is sine qua non of a constitutional democratic society.

Even though, in India, there is no legal provision expressly provided in the Constitution however,it hasindependence ofJudiciary and rule of law[3]as its fundamental features which can never be annulled even by making amendments as has been provided in an observation by the Hon'ble Apex Court in the landmark case of **S.P. Gupta v. Union of India**.[4] Thus, the framers of India's Constitution dealt with only two aspects; first, the guarantee of fundamental rights and secondly, an independent judiciary with maximum and identical idealism.[5]

The simple meaning of the Independence of judiciary is the authority of preserving the rule of law and sustaining efficaciouscheck and authority over the functionality of the Administrationwithout any kind of external impact and anxiety.[6] Basically,

1 S. Anderson, Philip. (1998). FOREWORD to Symposium, Judicial Independence and Accountability, 61 Law & Contemp. Probs. 1, 2; G. Breyer, Stephen. (Summer 1998). Comment, Liberty, Prosperity, and a StrongJudicialInstitution, 61 Law & Contemp. Probs. 3; see also Shah, K. T.(Apr.-Oct. 1990).CONSTITUENTAssembly Debates, vol. VIII, 218-19; preamble to UN Basic Principles on the Independence of the Judiciary; para. I of the Draft Universal Declaration on the Independence of the Justice, reprintedin CIJL Bulletin. No. 25-26, at 17, 39; Low Ofoyeku, Abimbola A. O. Suing Judges 3 (1993);THEFederalist, No.78, at 505 (Alexander Hamilton); Cox, Archibald. (1996). THE Independence of Judiciary: History and Purposes,21 U. Dayton L. Re v. 565,566; cf.G. Rosenberg, N. (1992).JUDICIALIndependence and the Reality of Political Power,54 REV. OF POL. 369, 398.

2 Law Report No. 195- Chapter III. Judicial Accountability and Limitations on Judicial Independence. Advocate Khoj. Retrieved from[Advocate Khoj]

3 Mudbidri, Ishan Arun. *and Tiwari, Ayush.* (2021, October 2). Independence of the Indian judiciary: as demonstrated in relevant rulings. Ipleaders. Retrieved from[Blog Ipleaders]

4 AIR 1962 SC 149.

5 Austin, Granville. The Indian Constitution: Cornerstone of A Nation. 26, 164; Singh, Mahendra P. (1997).CONSTITUTIONALITY of Market Economy, in Singh, M.P. et. Al. eds.. Legal Dimensions of Market Economy 1; Seervai, H.M. (4th ed. 1991-96).CONSTITUTIONAL Law of India. 2482, 2944.

6 CIJL. (Apr.-Oct. 1990).SIRACUSA Draft Principles on the Independence of the Judiciary, Bulletin No. 25-26, at 59, which read:
"Independence of the judiciary means (1) that everyjudge is free to decide mattersbefore him in accordance with his assessment of the facts and his understandingof the law without any improper influences, inducements, or pressures, direct orindirect, from any quarter or for any reason, and (2) that the judiciary isindependent of the executive and legislature, and has jurisdiction, directly or byway of review, over all issues of a judicial nature." Art 2; (Apr.-Oct. 1990) U.N. Basic Principles on the Independence of the Judiciary, paras. 1-7

theindependence of individual judges also includes independence from theirjudicial superiors and colleagues."[7]It was believed by the Constitution drafters that everything had been done by them for securing the independence of the judicial organ of the Government and they also expected that those who were under an obligation to work according to the Constitution would make its operation successful.[8]

However, the transparency in the judicial process of appointment of judgesto the High Courts and the Apex Court whichgoes conjointly with its independence,is asubtle and contentiousmatternowadays and has been a subject matter of good amount of controversy.[9]

STATEMENT OF PROBLEM

From time to time the Legislative organ has amended the Constitution including the provision regarding the appointment and transfer of judgesin order to curtail the independence of judiciary. Appointment of judges and their transfer form one court to another by Collegiumis very significant aspect to keep the judiciary free from the political influence of every kind. If the National Judicial Appointment Commission

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andDraft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), paras. 2-8, reprinted in CIJL Bulletin No. 25-26, at 17, 38. For some other relevantliterature, Polden, Pat. (1996).JUDICIAL Independence and Executive Responsibilities: The LordChancellors Department and the Country Court Judges, 25 Anglo-Am. L. Rev. 133;; Rosenberg, supra note 3, at 377; Stephen G. Breyer, (1996). JUDICIAL Independence in the United States, 40 St. Louis U. L.J. 989; Koenig, Dorean M. (1996). INDEPENDENCE of the Judiciary in Civil Cases and Executive Branch Interference in the UnitedStates: Violations of International Standards Involving Prisoners and Other Designed Groups,21 U. DAYTON L. REV. 719, 722.

7 Shetreet, Shimon. (1985).JUDICIAL Independence: New Conceptual Dimensions and Contemporary Challenges, in Shetreet, Shimon.&Deschanes, Jules.Eds..JUDICIALIndependence: The Contemporary Debate 598.

8 Prasad, Dr. Rajendra. President of the Constituent Assembly and later President of India. (1949, November 29).CONSTITUENT Assembly Debates speech to the Constituent Assembly of India preceding the motion to adopt the Constitution, in 11 498. Dr. Rajendra Prasad continued:

A democratic Constitution has been prepared by us. However, for the successful working of democratic institutions, the willingness of those who have to work for respecting the view-points of others is required along with their capacity to make compromises and accommodate others. A number of things are done by convention, which are possible to be written in the Constitution. Let me hope that those capacities shall be shown and those conventions shall be developed.

9 Lubet. (1998, Summer).ACCOUNTABILITY and Independence are not mutually exclusive; most often we can have both. at 65; M. Shane, Peter. Intrabranch Accountability in State Government and the Constitutional Requirement of Judicial Independence, 61 Law & Contemp. Probs. 21,54; generally, Symposium, Judicial Independence and Accountability, 61 Law & Contemp. Probs. (conducting an in-depth examination of the interplay between judicial independence and accountability).

Act, 2014 was allowed to be enacted and implemented then the independence of judiciary would have been in danger thereby bringing the administration of justice at termination permanently which is the basic structure of the Constitution. However, since the very beginning, the voice has been raised against Collegium mechanism on the ground of lack of transparency, nepotism and appointment of corrupt judges along with breach of seniority, the redressal of which to some extent was provided through the introduction of Memorandum of Procedure whichcould not be implemented on regular basis due to lack of consensus between the Supreme Court and the Government.

OBJECTIVES OF STUDY

- To make a thorough investigation of the legal steps taken at the international and national level and their impact on the appointment of judges through Collegium System in India.
- To make anin-depth study of the issues regarding the judicial process of appointment and transfer of judges along with its transparency, essential for the independence of judiciaryand to suggest the measures to bring transparency and accountability in the system in order to make it more efficient and freer from all the loopholes.

REVIEW OF LITERATURE

Singh, M. P. in his paper entitled **Securing the Independence of the Judiciary-The Indian Experience** provides that judicial tenure, appointment and transfer must be beyond the control of the executiveorgan of the nation. There should not be the transfer of judges without their consent. In case of transfer of judges, this power must be utilized by a collegial framework or at the minimum, bypersons more than one of judiciary.So, in this work focus has been given particularly upon the factors for ensuring the independence of judiciary from the clutches of the executive and legislature.

Shiva. Rao. B in the **Framing of India's Constitution** covers in majority the procedure for the appointment and transfer of judges that ought to be fair. It also analyses and highlights the lacunas and shortcomings in the procedure which need to be removed in order to make it moretransparent and freer from shortcomings and objections against the Collegium system.

The **Manual on Independence, Impartiality and Integrity of Justice** provided by the **CEELI Institute**[10] has been developed by the group of Network judges who has put significant efforts into developing an Addendum to the Manual, which compiles relevant decisions and jurisprudence of international and European courts regarding

10 CEELI Institute-Advancing the Rule of law. (2022, August).MANUAL on Independence, Impartiality and Integrity of Justice- A Thematic Compilation of International Standards, Policies and Best Practices. International Narcotics & Law Enforcement. Retrieved from [CEELI Institute]

issues of judicial independence, impartiality and integrity in order to continue the work to promote them.

RESEARCH METHODOLOGY

The present work depends heavily on the provisions of United Nations Charter, Universal Declaration of Human Rights and various Covenants at the international level along with Constitution Law, Law Commission of India Reports and Reports of other Legal Bodies constituted by Government of India from time to time at national level and important works of modern jurists who contributed a lot towards the evolution and growth of literature on the jurisprudence of independence and accountability of judiciary. This paper studies a number of amendments made for the curtailment of the independence of judiciaryalong with various legal initiatives taken regarding the concept of Collegium for the appointment of judges and their transfer.It also highlights the shortcomings in the collegium system in the form of the lack of transparency, nepotism etc. along with other shortcomings so as to suggest their eradicationin order to make this system more influential.

INTERNATIONAL PERSPECTIVE OF INDEPENDENCE OF THE JUDICIARY

The notion of Independence of Judiciary was established by United Nations Charter, the Universal Declaration of Human Rights and by the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights among other documents of the human rights. Additionally, the General Assembly of the United Nations ratified the Fundamental Principles on the Independence of the Judiciary on November 29, 1985 and then these principles were accepted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders on December 13, 1985. United Nations General Assembly also accepted specifically the Bangalore Principles of Judicial Conduct from 2002 among a number of United Nations standards.

In this way, there wasdevelopment of various international documents along with the Organization and Administration of Justice in every Country and other fundamental principles for providing help to the Participant States in their obligation and initiatives in the direction of providing security and promotion of independence of the judiciary by considering this concept seriously, respecting and making it,basic part of their national legislation. This law of land of different nations should be brought in the consideration of judges, lawyers, members of the administrativeand the lawmaking organs of the Government.[11]

NATIONAL PERCEPTION OF INDEPENDENCE OF JUDICIARY

Independence of a judiciary is also the cornerstone and elementary component of the Indian Constitution under Article 50.[12] A number of other provisions are part of

11 Mudbidri, Ishan Arun. & Tiwari, Ayush. (2021, October 2).INDEPENDENCE of the Indian judiciary: As Demonstrated in Relevant Rulings. Ipleaders. Retrieved from [Blog Ipleaders]

12 Chapter six. Judiciary. NCERT.

the Constitution which provide power and authority to the Indian judiciary. The Constitution of India divided the power and authority among three organs of Government –executive, legislature and judiciary under the Doctrine of Separation of Power. It is a portion of the fundamental structure of the Constitution, although not again specifically mentioned.Article 121 provides that there can be no deliberations in Parliament regarding the demeanour of any judicial officer of the Supreme Court or of a High Court while performing his obligationsbutonly upon a motion to presenta report to the President pleading for the elimination of the Judge as hereinafter provided. Under Article 211, the State legislatures cannot discuss the character and performance of a judge of the Supreme Court or High Court. The judges of the Supreme Court and High court have also been provided guarantee of secured tenure. Additionally, the remunerationsof the judicial officersare securedas not being based uponpleasure of the Governmentand cannot be changed to their detriment but only in extreme financial emergency (Article 125(2)). It is also anaspect contributing towards the independence of the judges. Power of Judicial Review under Article 12 as well as penalising for the contempt of Supreme Court under Article 129 and of High Court under Article 215 add to independence of Indian Judiciary.

Furthermore, the appointments and removal of the judicial officers of Supreme Court and High Courts in that order are provided under Article 124 and Article 217 of the Constitution of India. Incidental matters are provided under Articles 125 to 129 regarding Supreme Court judges and under Articles 218 to 221 and 223 to 224A in respect of High Court judges. The constitutional provisions regarding the transfer of judges from one High Court of one State to another are also covered under Article 222 along with the subordinate judiciary under Articles 233 to 237.[13] Thus, evidently the independence of the judiciary has been ensured by the Indian Constitution through a number of measures though not provided expressly in the form of Collegium system.[14]

However, on the other hand, the initiatives to impair the outlines for a separate and an independent judiciary through the abrogation of its powers have also been made side by side through a number of Constitutional amendments made in the national law by the Parliament.[15]

CONSTITUTIONAL AMENDMENTS[16] TO EVADE THE JUDICIARY

The Nineth Schedule was added in the Indian Constitution by making the 1st Amendment, 1951 in order to defend laws covered under it from its review by the

13 National Commission of India. (2001, September 26). A Consultation Paper on Superior Judiciary to review the working of the Constitution. Vigyan Bhawan Annexe, New Delhi—11001.

14 Supra Note 12.

15 Viswanathan, Rukmani. R.The Judiciary versus the Legislature - Forever and Ever. Legal Service India. Retrieved from [Legal Service India]

16 Retrieved from[Constitutional Amendments]

judiciary. Thetotal compensation provided in the place of compulsory acquisition of privately owned property wasalso keptout of the review of the judiciary by the 4th Amendment, 1955. After that, some appointments of district judges in State of Uttar Pradesh were legalized by the 20th Amendment, 1966which were pronouncedas invalid by the Apex Court. The authority of the Parliament to amend either portion of the Constitution including fundamental rights was confirmed by 24th Amendment, 1971 in order to overrule theverdictof the Apex Court in I.C. Golak Nath and others v. State of Punjab.[17] Then 25th Amendment, 1971 provided that thelegislation formulated to implement the Directive Principles under Article 39 (b) or (c), cannot be called into question on account of violating the rights assured under Articles 14, 19 and 31 correspondingly. Then 30th Amendment of 1972 limited the right of an individual to have access to the Appellate Court.Likewise, 38th Amendment, 1975 barred judicial review of proclamations made by the President during emergency. The 39th Amendment, 1975 put the controversiesregardingpoll of the President, Vice-President, Prime Minister and Speaker far away from the array of judicial review. After that came the 42nd Amendment, 1976 restricting the powers of the judiciary by prohibiting the judicial remedy under Article 32 through providing predominance to Directive Principles of the State Policy over Fundamental Rights. Amendment was also made in Article 368 by it forkeeping out the interrogation of any additional Constitutional amendments needed to be made.Furthermore, 42nd Constitutional Amendment, 1976 by making wide-ranging Tribunalization in India and subsequently adding Part XIV-A to the Constitution abrogated the powers of High Courts forprobing into mattershandled by the Tribunals under the pretext of speedy justice.In the same direction, the setting up of Rent Tribunals by the States to oust the jurisdiction of each and every court other than the Apex Court under Article 136 of the Constitution was provided by the 75th Amendment, 1994. Furthermore, by this amendment the Tamil Nadu Reservation Act,1994 providing 69% reservation was put in the Ninth Schedule by the Parliament for protectingit from the review of the judiciary.

Then 93rd Amendment, 2005 came to overrule the Supreme Court's decision in P.A. Inamdar & Others v. State of Maharashtra & Others,[18] under which reservation in unaided private professional educational institutes was declared unconstitutional. After that, by the 99th Amendment, 2014, there wasconstitution of the National Judicial Commission in order to appoint the judges to the higher judiciary in place of Collegium System.

PROGRESSION OF COLLEGIUM SYSTEM

However, in India since the Constitution mandates that consultation with the Chief Justice of India is essential for appointments of the Judges, the collegium system developed for theappointment of judges in the Supreme Court or the promotion of judges of the High Court to the Supreme Court and promotion of judges of High Courts as Chief Justices. The collegium of the Supreme Court is comprised ofthe

17 AIR 1967SC 1643.

18 AIR 2005 SC 3226.

Chief Justice of India along with five senior-most judges. The Collegium is not anancient system and three verdicts of the Apex Court recognized as Judges Case, are accountable for its survival.

In 1981, in the first case of **S.P. Gupta v. Union of India**,[19] it was said by the Supreme Court that there should not be the monopoly of the Chief Justice on the appointment of judges and it was also pointed out that there should also be a roleof Government in it andthere should be formation of Collegium. The Court meant that consultinghighly senior judges was obligatory.

In the second case, in 1993, there was a petition filed by **the Supreme Court Advocates on Record Association** in which the Supreme Courtwith nine-judges,overruling its previous verdict, said that there should be preference given to theviewpoint of the Chief Justice over the other peoplein the process of appointment and transfer of judges.

And then in 1998, in the third case, there was **presidential reference**[20] to the Apex Court asking for the connotation of the consultation under Articles 124, 217, and 222 of the Constitution. The Supreme Courtheld that the consultation process would not consist only the Chief Justice of India asits part. Consequently, the size of the collegium was enlarged by the Apex court and it was made anassemblage offive judges.This system of appointment of collegiums continued for almost 15 years but it was not considered constitutionally authorized as legitimacy of this mechanism summoned firm scepticisms.

DISCUSSION AND FINDINGS

Resultantly in 2008, when the recommendation was given by Parliamentary Standing Committee on Law & Justice for the fragmentation of the current process for the appointments and transfers to be made of the Apex Court and High Court Judges, the Law Ministry gave their assent for the review of the fifteen years old system.[21] As Law Minister, H.R. Bhardwaj was of the opinion and he also told Hindustan Times that Collegium system had failed and its decision on appointments and transfers lacked transparency and courts were not able to get judges on merit. Then, it was recommended by Dr. E. M. Sudarsana Natchiappan, Member of Parliament and the Chairman of the Department Related Parliament Standing Committee on Personnel, Public Grievances, Law and Justice, in its twenty eighth report firstly, to do away with the Collegium system for the lack of transparency in the appointments of Judges and secondly, to constitute an Empowered Committee comprising representatives of the Judiciary, the Executive and Parliament which was also recommended by him in the Judges (Inquiry) Bill, 2006. He also recommended for the sake of transparency, to put up the recommendations on the web site regarding the identification of the persons to be appointed as Judges. Apart from it, Law Commission of India in its

19 AIR 1982 SC 149.

20 In re Presidential Reference, AIR 1999 SC 17.

21 The Hindustan Times. (2008, October 20).

214th Report also, recommended to enact a regulation restoring the predominance of the Chief Justice of India and the authority of Executive in the making of appointments.

In this way, an amendment was projected to the Constitution for the appointment of the judges on the recommendation of Judicial Appointments Commission in order to remove all the concerns. Basically, the aim of the Judicial Appointments Commission was the replacement of the collegium system with a more formal body comprising of Chief Justice of India, two senior Apex Court Judges in addition to the Union Law Minister, the Law Secretary as its convenor and two persons of eminence nominated by a 'collegium' including the Prime Minister, the Chief Justice of India and the Leader of Opposition. Thus, in August 2013, the Bill was introduced in the Rajya Sabha which sought to provide anexpressive role to the executive and judiciary in order to broad base the appointment process and make it more participatory for ensuring greater transparency and objectivity in the appointments to higher judiciary. Bill was passed by both of the houses and the Commission was established (Lok Sabha on August 13, 2014 and Rajya Sabha on August 14, 2022 by 99th Amendment Act, 2014). On December 31, 2014 the National Judicial Appointments Commission (NJAC) Act, 2014 was given the assent by the President, Pranab Mukherjee.Consequently, in the Indian Constitution, Article 124 A, B and C were added. Whereas Clause A and B described the National Judicial Appointments Commission, Article 124 C gave authority enough for authorizing the Parliament for the formulation ofcontemporarylegislations forthe regulation of the process of appointments of judges.[22] However, this Act was meant for replacing the Collegium system, due to which appointment process had come to a grinding halt.

Resultantly, the validity of the National Judicial Appointment Commission Act, 2014 was challenged by filing Public Interest Litigations in the Apex Court by the Supreme Court **Advocates-on-Record Association (SCAORA)** and a number of legal bodies and advocates. But when the Public Interest Litigation was being heard by the Supreme Court, the Act got notified by the Government on April 13, 2015. In that case, it was held that primacy of judiciary and limited role of the Executive in appointment of judicial officers is significant segment of the elementary composition of the Constitution. It was also concluded in the judgment that new scheme had damaged the basic structure of the Constitution under which primacy in the appointment of judges had to be with the judiciary. Article 124A and 124C were held to be un-constitutional and the National Judicial Appointment Commission Act, 2014 was held to be struck down and the pre-existing scheme of appointment of judge stood revived but it was not made functional because on October 16, 2015 the matter was listed for consideration of the surviving issue of criticisms as to working of pre-existing system. The Bench held that it was willing to take suggestions in order to improve the collegiums system for appointment of judges.

22 Malik, Nitika. (2023, March 16). REFORM that You may Preserve: Rethinking the Judicial Appointments Conundrum. Ipleaders Blog. Retrieved from [Blog Ipleaders]

Then on November 3, 2015, again in a writ petition by Supreme Court Advocates-on-Record Association and Another,[23] case was fixed for hearing in order to consider the incorporation of additional appropriate measures for improving working of 'Collegium System.' On December 16, 2015, Supreme Court directed the Centre to prepare a Memorandum of Procedure on the basis of a series of guidelines to be followed by the Centre while preparing it in the form of Eligibility criteria, Transparency in the appointment process, Secretariat, Complaints and Miscellaneous in order to ensure transparency in the appointment of higher judiciary. Then collegiums system was declared functional on November 19, 2015 which again came to standstill.[24]

After that in 2016, the Law Ministry was asked by the Supreme Courtfor the amendment of the Memorandum of Procedure, a significantportion of the collegium system to be presented before the Supreme Court. However, no amendment was made in the Memorandum of Procedure. Then on it, it was said by the Supreme Court that when the collegium in its sagacity or in the dearth of it, as supposed,developed the Memorandum of Procedure, there would be nohither and thither that was to occur.[25]

However, on November 11, 2016 a Bench which was headed by Chief Justice TS Thakur was told by Attorney General Mukul Rohtagi that forty-three recommendations had been returned to the Collegium for reconsideration as shortcomings in the proposals were noticed by the Government. This was perhaps the first time such a large number of proposals were returned for reconsideration by the Government. Mr. Rohtagi also clarified that the response of the Supreme Court Collegium comprised of five members presided over by the Chief Justice of India was being awaited to the revised Memorandum of Procedure sent to it on August 2. On it, on October 28, the Centre was directed by the Bench to clear its Collegium proposals without waiting for the finalisation of the new Memorandum of Procedure because due to the delay in clearing the Collegium recommendations, vacancy in the country stood at over 40 percent. The Bench also said that the Government had seemed to be determined to have the entire judicial system locked. The secretary was also threatened to be summoned by the Bench who was responsible for processing of the proposals but on the pleading of Attorney General for posting the Public Interest Litigation for hearing after the Diwali break, it changed its mind.[26]

However, the petition for reviewing the judgement in the '**Supreme Court Advocates-on-Record Association and Another v. Union of India**'[27] was dismissed by the Supreme

23 Supreme Court Advocates-on-Record Association and Another v. Union of India, decided on December 16, 2015.

24 Prepare Procedure. (2015, December 16).SC to Centre on Judges' Appointment. The Tribune.

25 Yadawa, Surendra Kumar. (2023, March 12).UNDERSTANDING The Friction Between Executive and Judiciary and Why Collegium Needs More Transparency. Outlook in India. Retrieved from [Outlook India]

26 The Tribune. (2016, November 11).APPOINTMENT of Judges: Centre Rejects 43 Recommendations to SC Collegiums.

27 (2016) 5 SCC 1.

Court on basis of an "excessivemoratorium of 9,071 days in filing the petition in the absence of any reasonableclarification on October 17, 2019.[28]

Thereafter, the names of the suggested magistrates for their appointment by a High Court commencedarriving the Governmentjustnext to approved by the Chief Justice of India and the Supreme Court collegium. The objections could also be raised and clarification could be sought by the Government in respect of the choices of the Collegium however reiteration of the same names by the collegium made the Government bound for them to be appointed as judges. Till date, the Judicial officers of the higher judiciary are being appointed alone by the collegium system as only after determining their names by the collegium, the role of Government begins. Even in case of elevation of a lawyer as a judge of High Court or the Supreme Court, the Government's role is restricted in the wholeprocedure to getting an investigationdone by the Intelligence Bureau.

However, side by side, sometimes there are delays made at the time of making the appointments, particularlywhen the Government is supposed to be not pleased with some judges who are recommended for appointment by the collegium. On this, sometimes anguish has been expressed by the Supreme Court judges over such delays.

However factually, first, since the very beginning even till now, collegium system itself has to face criticism for being opaque, marred with casteism and nepotism,[29] absence of any official mechanism or secretariat, without any prescribed norms in respect of eligibility criteria, or even the selection process, without appropriate public knowledge regarding procedure and venue and decisions in the meetings as well as without official minutes of the proceedings of a collegium. Even it is criticised for generally not to provide any information to lawyers about their names being considered for elevation as a judge.

Secondly, the debate keeps getting upoccasionallyregardingalleged biasness in theprocedure of appointing judges in the Apex Court and High Courts, which is alsotermedas 'Uncle Heritage' in the Judicial organwhich means that people in close relationships are expected to be chosen as judges as there are numerouspersons whose associates are previouslypositioned from top to bottom in the judiciary. Hence, the Collegium system has been questioned and often termed as 'unconstitutional' from time to time.

Resultantly, the year of 2018 again observed one of such unpleasantconfrontations when a letter was written by Law minister Ravi Shankar Prasad to the Chief Justice of India, Deepak Mishra for keeping apart the recommendation of Supreme Court for the appointment of two judges to the Top Court. The proposal of Collegium was

28 The IndianExpress. (2022, October 8).DEBATE over the Collegium system: How are SC and HC Judges Appointed? Retrieved from [The Indian Express]

29 Pal, Atul. (2023, June 5).THE Contest Over the Collegium System in India. *South Asia at LSE' Blog.Retrieved from*[LSE Blog]

sent back by the Government for promoting Uttarakhand Chief Justice K.M Joseph to the Apex Court for review.[30]

After that, in 2022, the Centre had again expressed 'strong reservations', asking the Supreme Court to reconsider twenty files related to the appointment of High Court judges. However, the Supreme Court responded citing delays by the Centre in approving appointments without mentioning its reservations; it argued that the Government of the day had no right to delay the process of appointments made by the Collegium. Then the latest debate was reopened by the Law Minister of India, Kiren Rijiju by whom the Collegium system was criticized for lack of transparency, loopholes and non-accountability. He, on November 25, termed the wholeprocedure of selecting the judicial officers by Collegium as "non-native" to the Constitution as it was notstatedanywhere in the Constitution. He repeated that the collegium had been formulated by the Supreme Court on the ground of its peculiarthoughtfulness and orders,so it should be rejected and the Court should not take up the task of appointing judges by itself.

Additionally, with the Parliament again introducing the National Judicial Appointments Commission Bill, 2022 to get rid of the procedure of selection of judges by Collegium System, a new chapter of disagreement between the Judiciary and the Executive became imminent.[31]In this way, thetug of war between the Government and the judicial organ over the selection of judges gotintensified.

After that, a writ petition for reconsidering the collegium system of judicial appointments to the Supreme Court and the High Courts was agreed to be listed in due course by Chief Justice of India, D.Y. Chandrachud. The claims which were made in the writ petition, are concerning the transparency and openness of process of judicial appointments,the announcement of vacancies and invitation of applications from "all eligible and eager" to join the Bench as well as the permission to the general public to raise their voice against the candidates.[32]On the other hand, the Supreme Court in a petition on September 26, 2023 blamed the Centre for sitting on seventyproposals for selection and transfer of High Court judges. In this way,after a pause of seven months, the Government and judiciary seem to be moved towardsan additional round of disputeregarding appointment of judges.[33]

CONCLUSION AND RECOMMENDATIONS

Hence, in the light of the current situation the collegium system for the appointment

30 Sherstra, Naman. (2021, February, 4).WAYSto Counter Conflicts between Executive, and Judiciary. Ipleaders. Retrieved from[Blog Ipleaders]

31 Supra Note 29.

32 The Tribune. (2022, November 17).SUPREME Court agrees to list petition against Collegium system- Law Minister Kiren Rijiju had also criticised Collegium system under which judges appoint judges.Retrieved from[The Tribune]

33 Prakash, Satya. (2023, September, 26).JUDICIAL appointments: Supreme Court Flags Delay by Centre on Names sent by Collegium- Asks Attorney General to get Matter Resolved. The Tribune. Retrieved from [The Tribune]

and elevation of judges, is being objected and is receiving harsh criticism due to non-transparency as well as alleged nepotism, seniority breach and nomination of corrupt judges as well as for its makeshift, varying, and non-transparent style of workingresulting into worries about the independence of the judiciary and the objectivity in the procedure. The procedure is usually cloaked with confidentiality with inadequate data obtainable to the community in respect of the norms fixed to make selection, the names of the candidates under consideration as well as the explanations for the ultimate decision. In this way, questions about the fairness of the procedure arose due to this dearth of transparency and in turn led to accusations of party-political influence and favouritism.[34]Moreover, due to lack of objective norms and argumentation over senior status violation for the appointment of judges, judiciary has been facing the issues of impediment in judicial appointments recommended by it.

However, it isalso evidently clear that despite of all oppositions, appointment and transfer of judges by Collegium is inevitable to keep the independence of judiciary intact which is basic structure of the Constitution and is based upon the Separation of powers among three pillars of the State which itself is again fundamental to our parliamentary democracy. Furthermore, with steady decline in the status of legislature and the executive in the country, only the judiciary has emerged as the most credible and durable repository of the power of the State. That is why the collegium system hasalways been preferred over the National Judicial Appointment Commission because itoverthrows the authority of the executive over the Judiciary.[35]

Basically, this is only due to the Constitution makers' visualization of an independent and free judiciary, the largest democracy in the world among all its hardships has been able to espouse and efficiently operate its Constitution. In this way, judiciary is now the only ray of hope for the Indians to get the good governance and to establish rule of law in the nation in the real sense which through its power of judicial review has been performing its role fairly well since independence and has been able to do its duties and responsibilities on expected lines.

Thus, at the last, it can be summed up that Constitution drafters' magnificent idea of an independent and fair social order grounded upon the rule of law can only be realized through the prominent role played by the judiciary which it can only perform when it is independent and un-influenced by the other organs of Government. Thus, preservation, protection and promotion of the independence of judiciary is the dire need of the age. Judiciary being a self-regulatinginstitute puts its predominance while performing the functions ofjudicial appointments.

Hence, independence of the judiciary is much required butno doubt, not by imposing itself on the other wings of the Government. Furthermore, it is also true that the independence of judiciary should never be endangered bypartisanship or nepotism.[36]As

34 Malik, Nitika. (2023, March 16).REFORM that You may Preserve: Rethinking the Judicial Appointments Conundrum. Ipleaders Blog. Retrieved from[Blog Ipleaders]

35 Supra Note 29.

36 Shukla, Prakhar. (2022, March 3).TRANSPARENCY and Independence of Judiciary- A Critique. Blog- Know Law. Retrieved from[Blog- Know Law]

the judicial independence of courts *can only survivethrough public trustworthiness reposed in the institution which can be achieved through the transparency,fairness and accountability in the functionality and procedure of appointments as well as transfer of judges made by the Collegium system.*

Resultantly, the Collegiumsystem now calls for some crucialmodificationsto be made in itfor keeping a delicate balance between its independence and accountability in order to ensure thetransparency, un-biasness and independence of the judiciary thereby togain trust of the community in the justice delivery system. In this way, un-questionably, transparency in the judicial process along with accountability is indispensable counterbalance to the judicial independence.[37]Thus, more transparency, more public reasoning in this process is much needed. It is also to be hoped that the light of reason will illuminate the way for the appointment of India's first openly gay judge.[38] *In order to achieve this objective, the following measures have been recommended.*

RECOMMENDATIONS

1) There must be assurance of dignified constitutional status to the independence of judiciary by making expressconstitutional provisions regarding appointments and transfer of judges by Collegium system.Similar to executive and the legislature, the composition and powers should be equally provided to the judiciaryin the Constitution and amongst those powers, collegium system should be given a prominent place, eliminating all the loopholes in it.
2) For the achievement of the objective of making the procedure of judicial appointments by the Collegium system transparent, fair and responsive to the needs of people,the Memorandum of Procedure, a document jointly framed by the Government and Judiciary for judicial appointments in 1999, and reconsidered in 2015, needs to be deliberated upon and finalised which was stalled for a long time due to lack of consensus between the Supreme Court and the Government. Itwill not only ensure cooperation but also act as a healthy precedent.[39]
3) The apparatus of appointment is also required to be standardized by the judiciary with two vital movements explicitly; increasing transparency and constructing transparent selection norms. Firstly, in order to ensure the appointment of lone diligent, determined, and efficacious judges to higher positions in the judiciary, an important initiative should be made to produce unbiased canons *with* five predetermined merit criteria i.e., academic competence, character attributes, the capacity for compassion and justice, relational aptitudes,

37 Law Report No. 195- Chapter III. JUDICIAL Accountability and Limitations on Judicial Independence. Advocate Khoj.Retrieved from[Advocate Khoj]

38 Express Web Desk. (2021, November 16).WHO is Saurabh Kirpal, The Openly Gay Senior Advocate Recommended by SC Collegium? The Indian Express. Retrieved from[The Indian Express]

39 Supra Note 29.

and efficacy. Secondly, it must make public its recommendations and its "reasoned response" to Government objections on all names. It means the appointments of judges must be kept under the Public Scanning System by getting the names of the candidates being considered as well as the causes for the concluding decision published.

4) The procedure of appointment and transfer of judges must be more comprehensive and advice-giving, with larger participation and augmented deliberation with civic organizations, legal professionals and members of the community.[40]

5) Transfer ofjudges without their consentshould not be legalized and must be under the authority of the Collegial body ofjudiciary but under no circumstance such authority should be with theexecutive.

If such measures are taken then the objective of independent and transparent judiciary will be achieved in the real sense. As it has also been said by the Hon'ble Prime Minister, Narendra Modi ji at the inaugural session of International Lawyers Conference hosted by the Bar Council of India on September 23, 2023,"India needs anaccountable,transparent, strongand independent judiciary asIndian judiciary has always upheld rule of law."[41]

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40 Supra Note 34.

41 Roy, Debayan. (2023, September 23).INDIANeeds a Strong, Independent Judiciary; Indian judiciary has Always Upheld Rule of Law: PM Narendra Modi. Bar and Branch. Retrieved from [Bar and Bench]

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30. AIR 1967 SC 1643.
31. AIR 1982 SC 149.
32. AIR 2005 SC 3226.

Deconstruction of Trans-Gender Identity

Latha A Sardar & Dr. Aarti Tyagi***

ABSTRACT

Gender identity is a continuous process. The perspective of Gender Identity is twofold, the one opinion states that Gender Identity is the inner feeling of belongingness to the sex assigned to them at the time of birth and the other opinion that gender identity is a societal concept and perspective of how one person is bestowed with rights and duties which is almost fixed in the society in the form of recognition of Binary Gender. Both versions are complementary and consistent with one another. The societal idea about Gender and Sex have undergone lot of changes in the present scenario. The objective of the paper is to find out the various forms of gender and sex. To analyse the required steps to deconstruct the Gender Identity and Sexual Orientation. All the countries of the world recognise these two concepts. The Indian judiciary effort to recognise Gender Identity and Sexual Orientation. The role of law in providing recognition to the variations in the Gender Recognition and Sex Recognition. The legal steps in providing recognition to them. It is not only important to deconstruct the Gender Identity but the legal acknowledgement also forms equal importance.

Keywords: *Gender Identity, Sexual Orientation, Sexual Identity, Gender reconstruction, LGBTQ+ Identity.*

OBJECTIVE OF STUDY

- Deconstruction of gender identity is the main issue focussed is focussed in this paper.
- Main focussed area in this article is binary genders of the society in comparison with the Trans community.
- Right to privacy is an essential area where the deconstruction of transgender identity is discussed.
- To understand the legal provisions on the privacy rights of transgender persons to deconstruct the transgender identity.
- To know about the problems faced by transgender persons in exercising their right to privacy in National as well as International laws.

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1. INTRODUCTION

The right to privacy of human beings is a topic that needs discussion in the case of transgender persons in India. Transgender persons have to struggle to get the rights especially the right to privacy because of many discrimination, negligence on the part of the law as well as on the part of society, and harassment on various levels. Whereas the right to privacy is the basic human right provided in the Indian constitution under Article 21 which states the Right to life and personal liberty. Article 21 of the Indian constitution also guarantees the right to privacy, the right to get recognition by the law, freedom to choose any person as a life partner. The third gender was the recognition given to the transgender community in the year 2014 by the supreme court of India. Now these transgender people are recognized with fundamental rights. Now they have the right o privacy in all matters related to and connected with them. The right o privacy of the transgender community includes the right to hide medical history, the right to hide health conditions, right to non-disclosure of surgeries carried by them to identify themselves in society. In India Transgender Persons Protection of Rights Act 2019 helps to get their identity under Indian law without being affected by their right to privacy. The right to privacy applies to the trans community it can be extended to the right to health, the right to separate rooms for their health check-ups, right to restrooms without affecting their rights affected. But the life of trans persons is not easy despite these legal protections they face bullying, harassment from society, proof for gender identification, non-recognition for the gender that they have chosen for themselves, asking frequent questions about their genetics. Indeed transgender life was a battle in the past and in the present it is full of struggle. A lot of efforts are needed to provide an inclusive society for them.

2. MEANING AND DEFINITION OF TRANSGENDER

The term transgender means a person whose gender does not match the sex assigned to him at the time of his/ her birth. It does not mean trans women, or trans men but includes all variants.

The American Psychological Association provides the definition,

"Transgender is an umbrella term for persons whose gender identity, gender expression, or behaviour does not conform to that typically associated with the sex to which they were assigned at birth. Gender identity refers to a person's internal sense of being male, female, or something else; gender expression refers to the way a person communicates gender identity to others through behaviour, clothing, hairstyles, voice, or body characteristics."[1]

The World Professional Association for Transgender Health (WPATH) defines

"Transgender people have a gender identity that differs from the sex they were assigned at the time of birth. Some transgender people who desire medical assistance

1 American Psychological Association, 2020) [1], American Psychological Association. (2020). 'This is a Thriving, Diverse Community': APA Transgender Guidelines Support Trans Individuals. Retrieved from https://www.apa.org/topics/lgbt/transgender

to transition from one sex to another identify as transsexual. Transgender, often shortened as trans, is also an umbrella term..."[2]

The Transgender Persons (Protection of Rights) Act, 2019.

Section 2(c): a transgender person is defined as someone whose gender does not match the gender assigned at birth, including trans-men, trans-women, and persons with intersex variations.[3]

3. RIGHT TO PRIVACY – LEGAL PROVISIONS FOR TRANSGENDER RIGHT TO PRIVACY TO DECONSTRUCT GENDER IDENTITY

CONSTITUTION OF INDIA

Art 21 of the constitution of India grants the right to life and personal liberty. Article 21 was considered an umbrella provision to include newly emerged fields into it. In Puttaswamy v. Union of India,[4] the right to privacy of the individual is considered part of the right to life.

CRIMINAL LAW PROVISIONS

Section 354C[5] Voyeurism means the personal acts of individuals must be kept secret. Without the consent of that person such acts are not to be disclosed. If anybody is found doing such an act then it is an offence under section 354 of Indian penal code 1860. Such a section is also applicable to transgender persons and their right to privacy is protected and safeguarded by this provision.[6]

TRANSGENDER PERSONS ACT 2019

This Act prohibits the violation of the right to privacy of transgender persons. It protects the interests of transgender persons by not disclosing their identity proof. Section 5 of the act states that the identity of transgender persons is disclosed only with the consent of the person or otherwise it should be disclosed only in the interest of law. So there by the law protects the privacy of transgender persons. The act also makes it mandatory for the transgender to get self-identity but with self-declaration and not by the report of the medical officer. It is also working with the benefit to protect the self-respect and self-esteem of transgender persons.[7]

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2 World Professional Association for Transgender Health, 2012, [2], World Professional Association for Transgender Health. (2012). Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People. Retrieved from https://www.wpath.org/publications/soc-standards-of-care

3 The Transgender Persons (Protection of Rights) Act, 2019. Retrieved from http://legislative.gov.in/sites/default/files/A2019-40.pdf

4 AIR 2017 SC 4161

5 Indian Penal Code 1860

6 Section 354C of IPC,1860

7 Transgender Persons (Protection of Rights) Act, 2019

REGULATION 2002 OF THE INDIAN MEDICAL COUNCIL

The right to health and right to privacy both are protected under The Indian Medical Council (Professional Conduct, Etiquette And Ethics) Regulation 2002. The health of the individual is of utmost importance. The transgender was rejected medical help in the past but under this regulation, they can claim the medical help as a matter of right. The regulation also speaks about privacy rights regarding disclosure of their identity without their will while claiming medical help.[8]

THE SEXUAL HARASSMENT AT WORKPLACE

The right to privacy[9] is assured to transgender persons under this legislation. This act is mainly used to prohibit some unwelcomed behaviour which affects their privacy and reputation in employment or any workplace of women but this act is been made applicable to the transgender community also. This act protects women and trans women and a safe atmosphere in the workplace.[10]

FREE AND COMPULSORY EDUCATION

Every child must be given equality in accessing education benefits.[11] Education in India from 6-14 years is been made free and compulsory. Education plays a very important role in the life of the child. The schools play a very responsible role in maintaining the privacy of transgender students in India. It ensures that the child when in school must be honoured, respected and looked at with dignity. The right to education means the right to education with dignity and without harassment. If anybody is found doing these acts such a person will be considered as the offender of violation of the right to privacy of student transgender.[12]

The right to privacy is recognized in the Article 21 of the Indian constitution as a fundamental right. These laws are now applicable to the trans community also because they are also recognized as the third gender in India. The right to privacy means the right of individuals to be looked at with respect and honour from all perspectives. The assurance of the right to privacy of transgender persons is the first step in providing for an inclusive society.

4. DECONSTRUCTION OF GENDER IDENTITY IN INTERNATIONAL LAW

The legal provisions in international law contain a lot of provisions which are applied to the transgender community to protect the right to privacy. The Trans group often suffers from a lot of harassment, disrespect and marginalization.

Some of the provisions in the international instruments are,

8 Indian Medical Council (Professional Conduct, Etiquette, and Ethics) Regulations, 2002

9 The Sexual Harassment of Women At Workplace, 2013

10 Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

11 The Right of Children to Free And Compulsory Education Act, 2009

12 Right of Children to Free and Compulsory Education Act, 2009

DECLARATION ON HUMAN RIGHTS

This was the first declaration[13] of the United Nations in the assurance of basic human rights throughout the world. In Article 12 of the declaration it states that,

"No one shall be subjected to arbitrary interference with his privacy" which means that it is the basic human element to get such right and protection for such right.

CIVIL AND POLITICAL RIGHTS COVENANT

Article 17 of the Convention[14] assures "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." And this provision was made applicable in many instances to transgender women.

YOGYAKARTA PRINCIPLES

In Principle 18 of Yogyakarta principles, the right to privacy was recognized for transgender persons.

ELIMINATION OF DESCRIMINATION IN ALL FORMS AGAINST WOMEN

This Convention[15] was enacted to protect women from discrimination, harassment and attack on their privacy rights. This convention provides for the protection of the health of transgender persons also as well as the protection of the right to privacy in this convention. This Convention helps in the achieveing Sustainable Goals to provide gender equality. This can be one of the main goals amongst the 17 goals of Sustainable Development.

CONVENTION ON THE PROTECTION OF FUNDAMENTAL FREEDOMS.

The third-gender community can be benefited from this convention. Article 8 of the Convention[16] speaks about the right to privacy rights of human beings such provision was made applicable in various international as well as national cases of transgender persons.

INTER-AMERICAN CONVENTION

In this convention[17], states have been given instructions to protect and respect the human right and privacy rights of transgender persons. It has submitted its report on "sexual orientation, gender identity and Expression" which specifically speaks about the health, privacy and other human rights which are essential to lead a dignified life for transgender persons.

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13 United Nations Declaration on Human Rights 1948

14 International Covenant on Civiland Political rights 1966

15 The Convention on the Elimination of All Forms of Descrimination Against Women 1979

16 European Convention on the Protection of Human Rights and Fundamental Freedoms.

17 Inter-American Convention on Human Rights

COUNCIL ON HUMAN RIGHTS

This human rights council has reported that the right to privacy must be protected whether one intends to disclose gender identity or not[18]. the right to privacy is required to be protected whether it is online or offline dealings. This resolution was taken in the title "the right to privacy in the digital age."

5. BARRIERS OF TRANSGENDER PERSONS IN ACHIEVING RIGHT TO PRIVACY TO DECONSTRUCT GENDER IDENTITY

The life of a transgender person is not an easy task. These community people will suffer from all perspectives for centuries together. Recently they have been given the status of THIRD GENDER. Now also transgender persons are suffering from various issues. Some of them can be solved by the legal framework but many to be solved by changing the mentality of the people of society. It is a very complicated and not easy task from centuries together. To solve the issue one has to understand the real hurdles in this regard.

The Indian judiciary developed a lot of changes. But still, the problems and issues are faced by these sexual communities. Some of them are,

HARASSMENT AND SOCIAL STIGMA

The trans community face harassment at all levels of their life. Some are harassed at employment, health care centres, educational institutions, near households and on the roads. This type of discrimination and harassment is at all stages but the result would be seen on their right to privacy and other human rights. Their right was continuously affected by putting a lot of questioning, bullying about their dress, culture, habits, and appearances and torturing, and violence being carried against them in society.

LACK OF LEGAL PROTECTION UNDER ONE ROOF

The transgender community lacks legal protection under one common law. The judicial interpretations indicate that the law applicable to binary genders of society will be made applicable to the third gender in society. No particular legislation is protecting the right to privacy of transgender persons in India. One has to interpret various laws to protect the trans community.

HEALTH CARE SERVICES

Transgender persons suffer a lot because of poor health care conditions. They are forbidden in history to access health care facilities. But currently, they are also struggling to get medical help in case of need. It is because of these conditions they suffer from various diseases like cancer, BP, High blood pressure, AIDS etc. These instances provide us with the understanding the right to privacy is not available in health care services also.

18 United Nations Human Rights Council

SOCIAL STIGMA

The trans community also feel social stigma and hesitates to lead their life in society. They even hesitate to express their appearance amongst the society members. They feel this stigma in twofold methods. One is the societal perspective of existence as male, female, or trans person and the other battle is that the transgender person is fighting with oneself as there are hormonal behaviours change.

VIOLENCE IN THE TRANS COMMUNITY

Transgender persons feel insure because of the attack on their privacy rights. They are the highest community that faces violence in India. It is because of the reason that the harassment on them never reported and executed against the offenders.

LACK OF RECOGNITION

The trans community face identity issues also. The law provides that they can now declare among themselves that they belong to which community. But to access all the services they have to provide identity which many of them are lacking. To provide comprehensive protection to transgender with the assurance of privacy rights the effort must be from the society as we as from legal initiatives.

6. WAY FORWARD

To bring change in the life of transgender persons and to deconstruct gender identity is to provide a lot of private securities and guarantee that right in the legal framework. Some of the steps have to be undertaken by the government as well as non-government organisations. They are

AWARENESS

Education is the only way to create awareness about the transgender identity, their legal status and the importance of recognition of transgender persons. One has to be educated to accept their behaviours, privacy and their relationships. One has to focus on social media platforms, seminars and workshops to create effective legal awareness.

REFORM THROUGH LEGAL PROVISIONS

The law is considered a tool for social change in India. Laws can protect the rights of transgender persons. They can also protect life, health, human right and other essential fields of transgender life. Law agencies must provide awareness programmes to create a balanced society without discrimination. This can provide information to society about their existence, needs, and identity issues and by it saves the trans community from unnecessary entry into privacy rights.

PRIVATE PLACES

An effort must be made to provide private spaces for the trans community. Such as changing rooms, washrooms, health care wards etc without their being attached to

their rights. Such actions by the government will boost the ideology among the society which will in turn boost the removal of cultural barriers.

ASSURANCE OF PRIVACY LAWS

The advocates of the law must stress the strengthening of privacy laws for the trans community. Such laws must protect health conditions, identity, and personal surgery information uniformly. The protecting privacy law must also provide counselling sessions, free legal help and access to police in case of emergency.

GOVERNMENT COLLABORATIONS

They must increase collaborations with transgender organisations. These collaborations can help in understanding the problems faced by their community at large. These initiatives will help in monitoring the violations and justice can be met easily in this community. The offender of human rights violations can be punished very easily.

7. CONCLUSION

The approach to providing the legal backbone for the right to privacy of transgender persons to deconstruct gender identity needs a multifarious approach. The reforms in the law in this respect are the need of the hour in India. The educational background must be strengthened at all levels. The government must focus on the legal awareness of their rights, liabilities and securities in society. The legal framework must be so strong as to provide for deterrent punishment stringent laws and initiatives. The government as well as private healthcare establishments must provide the proper healthcare facilities to transgender community people. proper health care services can be provided when the medical council make it mandatory in the medical courses to learn about transgender health and a proper syllabus must be framed for their proper medical study. To create a healthy society it is required that the transgender community must be treated as part of society.

Mob Lynching: Human Rights Perspective

Aman Singh & Dr. R.K. Singh***

ABSTRACT

According to Dr. SK Kapoor, "Human Rights are regarded as those fundamental and inalienable rights which are essential for life as human being.These rights are possessed by every human being irrespective of his or her nationality, race, religion, sex etc. simply because he or she is a human being."[1]In order to describe and define the powers of Indian citizens, the framers of the Indian Constitution were careful to include the ideas of human rights, ethics, fairness, and reasonableness in their document. By providing each Indian citizen with the fundamental rights necessary for survival the founding fathers aimed to empower every citizen of India. However, throughout time, the sociological context has evolved, and regrettably the incidences of violent, caste conflicts, intergroup hostilities, and even gender discrimination have increased. Mob lynching is one such instance in which a person was killed by the mob without giving him a chance to speak up for himself or stand trial in court. This research paper provides a detailed analysis of mob lynching, the criminal threat to humanity posed by this criminal act, and its various aspects from either an Indian legal and judicial perspective or, from a global level. As it is a threat to humanityas whole.

Keywords: *Lynching, humanity, Unlawful, preventive measures, Religion, Caste, Mob*

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I. INTRODUCTION

The rule of law is the foundation of democracy in every democratic nation. "The rule of law can prevail only if people and institutions respect and follow the laws." This is protected under Article 21 of the Indian Constitution, which states that no one's life or freedom may be taken away from them without following certain procedures.In the case of ***National Human Rights Commission v. State of Gujarat***

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1 SK Kapoor, International Law and Human Rights (19th edn, Central Law Agency 2014) 806

and others[2], Hon'ble the Apex Court observed as under: "Communal harmony is the hallmark of a democracy. No religion teaches hatred. If in the name of religion, people are killed, that is essentially a slur and blot on the society governed by the rule of law. The Constitution of India, in its Preamble refers to secularism. Religious fanatics really do not belong to any religion, they are no better than terrorists who kill innocent people for no rhyme or reason in a society which as noted above is governed by the rule of law."[3]

The word "mob" in English refers to an unruly or chaotic crowd. The term "lynching" can be regarded as an American-Latin term that signifies "imposition of the death penalty without due process of law". The term "lynch" initially appeared during the American Revolution and was used to describe a law known as "Lynch Law", which allows for punishment to be meted out without a trial or other due process."Mob lynching is violence by a crowd which results in the killing or maiming of a person or persons charged with or suspected of a crime. Lynching is an extrajudicial punishment to the accused or suspected person by the crowd or informal group without having any legal authority. In India, lynching and mob violence generally replicate internal tensions between several racial communities. As mob lynching is similar to ordinary murder so other criteria are necessary to define what lynching is. There could be two presumptions regarding lynching. First, there must be legal evidence of a person's illegal death. Second, there must be evidence of group participation in the killing under the strategy of service to justice, race, or tradition"[4].The Oxford Dictionary defines the term mob lynching as an action of assassination of an alleged criminal person by having no legal sanction or without following due process. In olden period, such types of acts were involving stoning of an individual to award him demise. Sometimes on mere suspicion or believing on rumour, mob used kill a suspicious offender without considering any evidence or witnesses. Like rape or murder it is also measured as a heinous offence by and against the human beings. "The crowd filling in as 'judge, jury, and killer' would complete their unconstrained or prearranged demonstration of murdering with total exemption and with no fear of law."[5]

Former President Hon'ble Mr. Pranabh Mukherjee viewed on the increasing events of lynching's, he said on July 1, 2017 that when "mob frenzy becomes so high and irrational, uncontrollable, people have to pause and reflect and be proactively vigilant to save the basic tenets of our country. The country to stand up against the rising trend of mob lynchings, stressing that the frenzy needed to be curbed"[6]. But because

2 [2009] 6 SCC 342

3 National Human Rights Commission v. State of Gujarat and others[2009] 6 SCC 342

4 Meenu Yadav, 'Mob lynching in India upcoming challenges before legislature a critical analysis' <https://shodhganga.inflibnet.ac.in/simple-search?query=Mob-lynching&go=> accessed 1 November 2022

5 Lynch, 'Oxford Learner's Dictionaries' <https://www.oxfordlearnersdictionaries.com/us/> accessed 1 November 2022

6 Dr. M Asad Malik, 'Government, Governance, Lynching and Rule of Law' (LiveLaw.com) <https://www.livelaw.in/government-governance-lynching-rule-law/>accessed 1 November 2022

of too remote possibilities of punishment the criminals feel free and habitually violates the rules and regulations established by law and it becomes very common for them to challenge the law and order. If administration wants to protect every individual's human right and establish the rule of law in the society, it should prosecute and punish the criminals; otherwise, it would be difficult to get any reasonable rule of law in the country.

II. OBJECTIVE OF THE STUDY

- To critically examine the problem of mob lynching and related laws prevailing in India.
- To critically examine the IPC, CRPC and other law passed by the various state government related to mob lynching.

III. SCOPE OF THE STUDY

This research focused on identifying the reasons, study of recent incidents and impact of lynching on Indian society. It critically examines the incidents of mob lynching in India in a comprehensive way. This study is limited to the recent incidences of mob-lynching occurred in last 20 years.

IV. STATEMENT OF PROBLEM

The legislative, along with the executive and judicial branches of government, is responsible for creating national laws. We lack the necessary legal framework to effectively control mob lynching instances. All states have received varied instructions and orders from the Hon'ble Supreme Court to stop mob lynchings. Only three states, however, currently have the Anti-Lynching bill passed.

V. HYPOTHESIS

National legislation such as the Constitution of India, the Indian Penal Code and The Protection of Human Rights Act, 1993 can be linked with the lynching offences. Lynching incidents are often reported in accordance with section 302, section 307, section 324, section 147, and other provisions of the Indian Penal Code. Sections of the Indian Penal Code such as Sections 153A, 153B, 295A, and 295B are regarded as the country's hate crime laws. People or a mob implicated in the same offence in the same act "may be tried jointly," according to Section 223(a) of the Code of Criminal Procedure, 1973. However, these provisions have not been proven effective to deliver justice so far. There is a need of separate law to deal with such incidents.

VI. RESEARCH METHODOLOGY

Research methodology followed by researcher is purely doctrinal method. The research is based on the authoritative texts. The sources for completion of this paper will be both primary and secondary. Primary Sources includes the study and analyses of periodicals, reports, newspaper, bylaws, notification, paper presented in conferences, rules and regulations, administrative orders, recommendation and guidelines of

honourable Supreme Court and various landmark judgments. Secondary Sources are research papers, texts books, websites, treaties, and commentaries on statues etc.

Historical background, Recent Incidents and Reasons

The genesis of the particular word "lynch" is difficult to understand, but it seems developed during the Revolution in America. "The term 'lynching' or 'lynching law' has been derived its name from the two American citizens known as Charles Lynch and William Lynch who were from Virginia city. During 1782, Charles Lynch had written that the 'Loyalist' or 'Tories' who were supporters of the British side developed Lynching Law especially for the 'Negroes' to deal with them according to their will. Lynching in the United States has a long shocking history. "Lynchings took place in the United States both before and after the American Civil War, most commonly in Southern states and Western frontier settlements and most frequently in the late 19th century. They were often performed by self-appointed commissions, mobs, or vigilantes as a form of punishment for presumed criminal offences"[7]. "From 1883 to 1941 there were 4,467 victims of lynching. Of these, 4,027 were male, and 99 females. 341 were of unknown gender, but are assumed to be likely male. In terms of ethnicity; 3,265 were black, 1,082 were white, 71 were Mexican or of Mexican descent, 38 were American Indian, ten were Chinese, and one was Japanese."[8]

Lynching in India might be a result of internal pressures amongst ethnic networks. Religious violence results from a study of the texts and the human condition. Religious violence committed against members of the public, cultural icons, religious institutions, and religious leaders or other authorities. It could be brought on by an individual driven by psychological issues that a group of people have as a means of expressing and dominating their social, cultural, national, or communal identity. Religious violence occasionally results from the numerous faiths practised by members of a varied community. Due of their high level of emotion, people frequently act violently. Religious violence may result from political, social, and intellectualdifferences.

Godhra Riots, Gujarat (2002)-On the morning of February 27, 2002, Coach S6 of the Sabarmati Express was set on fire, killing 59 of the passengers who were riding in it. At that moment, the train had just arrived in Gujarat's Godhra station. There were 10 children and 27 women among the victims. 48 other passengers on the train sustained injuries.

Lynching of Khairlanji (2006)-The lynching of Khairlanji in 2006 is the most notable instance of mob violence in India. This mob violence was the dominant Kunbi rank, and the lone survivor had to fight for equity for 10 years.

7 Lauren Gambino, 'Jim Crow lynchings more widespread than previously thought' The Guardian(London,10 February 2015) 3

8 Charles Seguin and David Rigby 'National Crimes: A New National Data Set of Lynchings in the United States, 1883 to 1941' (2019)

Lynching of Mohammed Akhlaq (2015)- The exceptionally secured feature of Mohammed Akhlaq's lynching on 28th Sep. 2015 in Dadri,[9] where an old Muslim person was killed merely on supposed utilization, possession and consuming of meat.

Lynching of Chatra, Jharkhand (2016)- The killing of two Muslim persons by mob violence having business of animal dairy dealers at Chatra, Jharkhand in 2016 by supposed bovine vigilantes. Both were slaughtered believing on the information of carrying cows yet the genuine narrative was quite different as both were carrying some oxygen cylinder, meanwhile a crowed reached there and made allegations of having beef in their truck and killed them by hanging on a tree.

Lynching of Junaid Khan (2017)-In the month of June 2017, an unpleasant occurrence involving a passenger named Junaid Khan occurred in a train. He was travelling with his two brothers, who had just returned from Delhi where they had spent the Eid holiday with family. They had a minor argument with another passenger about their seats during the trip, but it quickly escalated into a major altercation and turned into teasing. The members of that group began to refer to them as meat eaters when a portion of a packet of non-vegetarian hamburger was discovered in Junaid's pocket. In the meantime, an attacker using a blade-like weapon assaulted them and wounded them with multiple wounds. After some time, Junaid gave up due to his severe wounds.

Lynching of Alwar, Rajasthan- A Muslim man named, Pehlu Khan, aged 55 years who was a dairy owner was badly beaten by a cow security vigilante horde over the supposed updates on ox-like carrying. Later on, after investigation the police give a clean chit on all the recognized charged.

Palghar Lynching, Maharashtra (2020)- Three persons including two saints and one driver of the van were killed by the mob on midnight of 16 April 2020 by alleging child lifters, there were three police officers on the duty but they could not stop the mob and all the three persons were brutally beaten up by the crowed until their death. 115 persons including 9 minors were arrested for the heinous crime; the matter is pending and justice is still awaited.[10]

Reasons Responsible for Mob Lynching-There are so many reasons of mob lynching such as robbery, child lifting, cow protection, inter-caste marriage, rape, casteism, anti-nationalist, class conflict and political reason. Some of them are discussed below-

- **Religious Violence-**Violence committed in the name of religion has a long history in India, and the so-called religious people's blood has been used to write that history. Religious hostility between Hindus and Muslims is particularly obvious for a number of reasons. Hindus and Muslims have frequently been targets of strict cruelty in India, although non-believers, Christians, and Sikhs

9 A Vatsa, Dadri: Mob kills man, (Indian Express, 25 Dec 2015)<http://indianexpress.com/article/india/india-others/next-door-to-delhi-mob-kills-50-year-old-injuresson-over-rumours-they-ate-beef> accessed 1 November 2022

10 The Times of India (Delhi, 18 April 2020)

have also occasionally been victims of savagery. There has also been a history of clashes between Muslims and Parsis.

- **Fake and Hate News-** "Messages warning of renewed mob violence hit social media recently as New Delhi reeled from the worst violence it has seen in over a decade, with riots that left at least 50 people dead and 300 injured. Police went to the sites of reported conflict to conduct their own investigations and temporarily shut down multiple Delhi metro stations following the reports of street clashes and people shouting in trains". It was a long night, and we did everything possible to ensure there were no flare-ups based on this false information, said by Delhi Police spokesman MS Randhawa."In 2013, the Muzaffarnagar riots in the northern state of Uttar Pradesh, which left over 60 dead and thousands displaced, were triggered by a fake video circulating on social media, which was rumoured to depict a Muslim mob brutally murdering a Hindu youth".
- **Political Ignorance-**Although mob lynching is on the rise, the political class continued to act as quiet observers. The human rights activists feel that there are just a few politicians hiding behind the curtain or nodding their tacit rise of crowd brutality. Additionally, they have created their political career by inciting violence against the vulnerable group, where the public believes they are strong and empowered.
- **Cow Protection/Vigilante-** Government has privilege to make any law regarding the control or regulation of cow slaughter house or to make any regulation relating to any trade of milk producing and State shall protect to secure the religious feelings. "Attacks on Muslims related to cow slaughter or smuggling rumours have increased. In March 2016, two Muslims were killed and hanged in the tribal state of Jharkhand after being accused of smuggling cows"[11].
- **Rumours of child lifting-**The rumours of child-lifting in are leading to violent incidents similar to mob lynchings The National Security Act (NSA) has been recommended by the Uttar Pradesh police to be imposed on those responsible for upsetting peace and order by circulating rumours about kidnapping, attacking, and lynching strangers on the grounds that they were involved in such a crime.
- **Inter - Religious Marriage-**Whenever inter religious marriage takes place in the society various conflicts also arises, social institutions and their leaders like members of Khap- Panchayats, Padri of Church or Maulvi of a Masjid becomes active and pronounce 'Orders' or 'Fatwa' even against the law of the land or resulting in violence. Another topic that is popular right now is "Love Jihad", in which Muslim men are accused of seducing Hindu women into marriage in order to increase their population, or diminish Hindu honour in

11 A Vatsa, Dadri: Mob kills man, (Indian Express, 25 Dec 2015) <http://indianexpress.com/article/india/india-others/next-door-to-delhi-mob-kills-50-year-old-injuresson-over-rumours-they-ate-beef> accessed 1 November 2022

society. It is also claimed that after marriage, women become victims of human trafficking and are sold to other nations to be used as prostitutes or even killed and their body parts. Even though some of the mentioned claims may not be accurate but can lead to violence or mob lynchings and sabotage relations between two communities in society.

- **Inter-cast Marriage and Honour Killing-** The concept of inter cast marriage is not new in the Indian society even after various conflicts and challenges it is not a barrier for the couples who don't care of such ridicules religious beliefs. But the so-called leaders of the society never accept such changes. These killings have been expanding for the most part in town zones like Haryana, Punjab and western Uttar Pradesh.
- **In effectiveness of responsible state agencies-**The government has a number of policy alternatives to handle this scenario, but they are failed to curb such incidents because state administrative agencies doesn't take any proactive steps to stop mob lynchings from happening.
- **Complications and delay in criminal-justice system-**Courts play a crucial role in society by protecting people's rights and liberties in addition to resolving disputes between parties. Without a functioning judicial system that can uphold rights in a timely and reasonable manner while also fostering public trust in the administration of justice, the rule of law cannot exist.

Social and Economic Impact of Lynching

No country, especially one that is developing like India, can afford to take hate crimes for granted. Only when there is proper cooperation, harmony, and fraternity among its inhabitants can a society advance. "Communal harmony is the hallmark of a democracy. The Constitution of India, in its Preamble refers to secularism. Religious fanatics are' no better than terrorists who kill innocent for no rhyme or reason in a society which as noted above is governed by the rule of law."[12] The old adage "United we stand, divided we fall"[13] has a point. Only when all communities coexist peacefully and with compassion can good social order be sustained. India has to advance in many areas, including literacy, the economy, health, and others, and this can only be done when there are suitable living and working conditions for everyone. "A right is conferred on a person by the rule of law and if he seeks a remedy through the process meant for establishing the rule of law and it is denied to him, it would never subserve the cause of real justice."[14] "The Rule of Law reflects a man's sense of order and justice. There can be no Government without order; there can be no order without law."[15] It is true that hate crimes have an impact on both the victims

12 *National Human Rights Commission v. State of Gujrat and others* [2009] 6 SCC 342

13 Winston Churchill, University of Rochester, (London, June 16, 1941)< https://www.nationalchurchillmuseum.org/the-old-lion-1941.html> accessed 15 November 2022

14 *Krishna Sradha v. State of Andhra Pradesh* [2017] 4 SCC 516

15 *Cardamom Marketing Corporation v. State of Kerala* [2017] 5 SCC 255

and the economy. In India, mob violence or lynching generally reflect internal disputes between various racial communities. There are various impact and effects of mob lynching on society.

Economic Perspective

- This impacts both remote and household speculation along these lines unfavourably influencing sovereign appraisals. Numerous International offices cautioned India against crowd lynching occurrences.
- It straightforwardly hampers inner movement which thus influences the economy.
- Large assets conveyed to handle such threats actuates additional weight on state exchequer.
- These episodes would prompt the specific conveyance of speculation which may affect provincial equalization.

Societal Perspective

- By this way harmony of society and the possibility of unanimity in assorted variety
- It clearly indicates environment of majority v/s minority
- It disturbs standing, class/category and collective contempt.
- It builds the degree of household strife and consequent military rules.
- Such acts show loss of resilience in the public arena and individuals are being influenced by feelings, partialities, and so forth.

International Perspective on Mob-lynching

In the 19th century, the term "lynching" became popular across the United States, refers to mobs and vigilante organisations that act without legal authority to punish suspected criminals. There are so many countries that have tried to pass the anti-lynching bill and made efforts to prevent these incidents. The Universal Declaration of Human Rights (UDHR) is responsible for providing the guidelines to countries in terms of retaining proper quality considerations across the human rights management process.

The United Kingdom (Human Rights Act, 1998)- The Human Rights Act of the United Kingdom was approved by the monarch on 9th November 1998, and it became law on 2nd October 2000. Its main objective was to amend law to reflect the rights enshrined in the European Convention on Human Rights. The fundamental liberties and rights to which all British people are entitled are outlined in the Human Rights Act of 1998. All public authorities, courts, police and entities participating in public activities must respect and preserve human rights.

The United States of America- The House and Senate have failed to pass anti-lynching legislation since 1900. But Illinois senator Bobby Rush, a Democrat, signed

the Jim Emmett till Anti Lynching Bill on 26thFebruary 2020. This bill updates the Justice for Lynching Victims Act. With the new law, lynching is now considered a hate crime perpetrated by a group of people as opposed to a single individual. According to Chapter 13 of Title 18 of the United States Code, "Whoever conspires with another person to violate section 245, 247, or 249 of this chapter or section 901 of the Civil Rights Act of 1968 must be punished for a maximum term of imprisonment not less than 10 years."

South Africa (Combating of Hate Crimes and Hate Speech Bill, 2018)- All indirect unfair discrimination that is motivated by a person's race, gender, sex, ethnic or social origin, age, religion, belief, culture, language, or place of birth is prohibited by the Bill of Rights. The Prevention and Combating of Hate Crimes and Hate Speech Bill was created with the primary objective of making hate crimes and hate speech crimes and establishing procedures for their detection, prosecution, and punishment.

Nigeria (Anti-Jungle Justice and Other Related Offence Bill, 2015)- InAfrican continent, mob lynching is not a new phenomenon and Nigeria isn't the first country in Africa to attempt to pass anti-lynching legislation. The Nigerian National Assembly enacted a bill to safeguarding Nigerians against lynching, mob action, extrajudicial killings, and other similar crimes.

Virginia (The Anti-Lynching Law, 1928)- This bill was a significant advance in Virginia's attempts to reduce racial violence. Sen. Harry Flood Byrd Sr. of Virginia signed the nation's first anti-lynching law on 14thMarch 1928, designating lynching as a specific instance of public misconduct. Surprisingly, though, no white person has ever faced legal charges for lynching an African-American.

Legislative Measure in India

Legislature is an official authority that is responsible for framing laws and regulations related to social, political and economic aspects that exist across an organization. Legislatures play a huge role in building the primary legal support structure that is available for supporting social causes such as controlling the incidences of mob lynching.

Constitutional Provisions- Constitutional provisions are the set of norms and standards that are to be used for building a more relevant and compatible form of operating principles for the selected regions and dimensions. The constitution contains suitable clauses that pertain to advancing equality in society and that also have an impact on improved outreach to stop bad things like mob lynchings. There is no discrimination against Indian citizens based on their religion, colour, caste, sex, or place of birth, according to Article 15 of the Indian Constitution, which also addresses equality before the law and equal protection of the laws.Every person has a right to life and personal liberty under Article 21 of the Indian Constitution, and the Indian court has occasionally played a significant role in expanding its jurisdiction and comprehensively redefining the rights of "person" through its rulings.

The Codeof Criminal Procedure, 1973- The section 144 of Criminal Procedure Code is an important act related to the incidences of mob lynching. It came in to existence

in the year 1973 to retain harmony and peace across incidences that may result in to rioting. The executive magistrate of a particular area is provided with additional powers to disintegrate any rioting possibility such as gathering of four or more individuals in a particular region. The basic abilities and considerations that are attached to this section are a direct control mechanism for restricting mob lynching incidences.[16] This section is also suitable for controlling the main aspects of mob lynching by limiting the availability of a mob. Group or gathering of people from certain groups is in majority of cases the reason for occurrence of mob lynching.[17] Section 144 is also helpful in building a clearer form of operating segmentation within the incidences if mob lynching. The practices for mob lynching are stuffed with promoting peace across a particular region. The instructions for not practicing any gathering are linked to undertake supportive actions for the anti-mob culture and improve the design fundamentals throughout the process.[18] Under Section 223 (a) of the Code of Criminal Procedure, the members of the unlawful assembly who have committed the crime of mob lynching can be charged and tried together as they commit the same offence in the same course of transaction.

Indian Penal Code, 1860- According to Section 141 of the Indian Penal Code, a gathering of five or more people is considered an unlawful assembly if its members share the following similar goals:

1. To intimidate the Central Government, any State Government, Parliament, the State Legislature, or any public servant acting in their official capacity by using criminal force or making a criminal force display.
2. To oppose any legal procedure or any law's enforcement.
3. To engage in criminal trespass, mischief, or another offence.
4. Using criminal force to seize property or deny someone else the use of water, a right-of-way, or other things that they have in their possession.
5. By using or showing criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

A group of people (five or more) who want to lynch someone based on inaccurate or fraudulent information or some similar reason is considered an unlawful assembly because their goal is against the law. In Section 146 of the Indian Penal Code, riots are mentioned, while Section 147 describes the two-year penalty. These two provisions apply to a mob that lynches someone because the mob (which is an unlawful assembly) employs force and violence with the victim's death as their shared objective. Section 153-A of the Indian Penal Code talks about inciting animosity between diverse groups based on things like race, religion, place of birth, residence, language, and other

16 N Jassal and Chhibber, India in 2018: crises of institutional legitimacy and gender,(Asian Survey 2018)

17 Prakash Singh v Union of India [2006] 8 SCC 1

18 KS Kusuma, Media, technology and protest: an Indian experience (Language in India, 2018) 18

things, as well as acting in a way that thwarts efforts to uphold harmony. This Section applies to mob lynchings, which are acts of violence committed by a violent mob of a different community or religion against a member of a different group or religion simply because the victim does not adhere to that community's or religion's beliefs or has committed an act that offends that community or religion. When a mob lynching occurs, Section 295-A, B has a say in the situation as well. This offence, which carries a maximum three-year jail penalty, refers to actions and remarks made by the accused with the aim to outrage a group's religious sensibilities.Sections 300, 302, and 307 of the Indian Penal Code are applicable if a group of people lynch someone, as well as if they do so with the intent to inflict serious bodily harm sufficient to kill the victim in all likelihood and under all circumstances because the attackers use sufficient force or they know the victim will die as a result of the harm they inflict.

State Laws- The State laws are also very important because they have a direct connection to incidents like mob lynchings. A few states, like as Rajasthan, West Bengal, and others, have also stated a desire to enact legislation to put an end to lynching. The state government of Rajasthan issued a bill against it in August 2019 because the majority of lynching incidents were being reported there.When drafting laws against mob lynching, the West Bengal government largely followed the Supreme Court of India's ruling in the case of ***Tehseen Poonawala v. Union of India***[19]***.***

Major Issues Faced by the Indian Legislature

The incidents of mob lynching provide a number of problems and challenges for Indian legislation. The majority of mob lynching incidents in India are motivated by religious feelings, therefore it only takes a minor spark to start a big chain of events. Several significant elements that are connected to the problems and complexities of the rules and laws pertaining to mob lynching. Below is a thorough analysis of these characteristics:

- **Inequality in Indian society**- One of the key elements that encourages events like mob lynchings is social inequality. It brings about divisions among their separate responsibilities and feeds hate among the people.
- **Hate news-**Hate news has the potential to increase the frequency and severity of incidents like mob lynchings. This kind of information is spread with the intention of harming a certain community or group as severely as possible. Therefore, it encourages social unrest by inciting intergroup conflict.
- **Delay in justice-**The problems that have a direct impact on the criminal-justice system is policy reforms and delay in justice. People who are going through difficult circumstances lose faith in the justice system, which causes a disassociation with the system.

19 AIR [2018] SC 3354

- **Insufficient research-**Legal characteristics that are based on insufficient research/ facts and study are likely to have a less authentic design, making them unsuitable for producing the desired results.
- **Limited attention to the impacted groups-** The negatively impacted groups are left exposed and feel like there has been misbehaviour throughout the process due to the lack of attention given to them.

Judicial Approach

The Supreme Court of India is considered as the guardian of the fundamental rights of the citizens as well as of the Constitution itself, so being the supreme authority in judicial matters and the defender of ordinary people's rights. Nowadays, the cases of mob violence are being increased rapidly in the society and the right to life is under threat, but it is the judiciary which has undertaken all the responsibility on its own shoulders and performing its duty with honesty and accountability. The Supreme Court instructed the police to file a FIR under Section 153A of the Indian Penal Code and other similar laws against anyone who engage in such activities. "What is the need for a different enactment when the current law's provisions aren't being carried out properly? You are essentially not tending to anything by passing a law."[20] The Supreme Court of India has requested the Central and State governments to adopt a robust law to prevent mob lynching and to take preventative steps to stop the transmission of information through web-based networking media platforms that might incite a crowd to lynch.

Tehseen S. Poonawala v. Union of India[21] was recently decided by the Supreme Court and others on 30th July 2018, declaring that the fear of the law deters wrongdoings in a civilised society, and therefore instructing the Parliament of India to pass an unusual statute forbidding lynching. The Court condemned lynchings in crowds across the country, saying that it is the responsibility of both the federal and state governments to prevent, remedy, and treat lynchings. Court directed theCentre and states governments to take serious steps to prevent lynchings. It was also stated that "Wrongdoing knows no religion and neither the culprit nor the injured individual can be seen through the viewpoint of race, position, class or religion."[22] The Court additionally included that, "State has the essential obligation to cultivate a common, pluralistic and multi-social request to permit free play of thoughts and convictions and conjunction of commonly opposing points of view. Despise violations must be stopped from developing in any way before they bring about a rule of fear."[23] The Court additionally maintained the forces of the law requirement organizations and included that, "It is the obligation of the law implementation offices and the examiners

20 Lynching, (Firstpost.com)<https://www.firstpost.com/india/supreme-courts-order-on-mob-lynching-is-strong-but-new-law-will-be-useless-as-long-as-existing-rules-arent-implemented-4759151.html> accessed 5 November 2022

21 AIR [2018] SC 3354

22 Tehseen S. Poonawala v. Union of India AIR [2018] SC 3354

23 Tehseen S. Poonawala v. Union of India AIR [2018] SC 3354

to bring the charged people under the watchful eye of the law arbitrating specialists, who, with their natural preparing and feeling of equity, scrutinize the materials expedited record, observe the arrangements of law and pass the judgment."[24]

The Supreme Court has issued far-reaching regulations to limit vandalism by warring crowds in ***Kodungallur Film Society v. Union of India and Ors***[25]**.** During the "Padmavat" unrest, the PIL was documented in the context of unbridled destruction perpetrated by Karni-Sena members. The main request in the PIL was for the Central and State governments to immediately follow the regulations set forth by the Court in this case.

In ***State of Andhra Pradeshv. Destruction of Public and Private Properties case***[26], hon'ble court held that"No one has the privilege to become self-designate watchman of the law and coercively oversee their elucidation of the law and others, particularly not with vicious methods. Horde savagery runs against the very centre of our built-up lawful standards since it signals bedlam and rebellion and the State must secure its residents against the illicit and unforgivable demonstrations of such gatherings"[27].

The Supreme Court's eleven-point prescription for ending mob lynching is as follows[28]**:** The Supreme Court condemned incidents of crowd lynching around the country and requested Parliament to pass legislation to address the wrongdoing, which jeopardises the rule of law and the social fabric of the country. The top court suggested a number of categories, including preventative, healing, and correctional advancements, to manage the wrongdoing:

1. The state governments will designate senior police in each region to take preventative actions in the event of lynchings or other forms of crowd violence.
2. The state governments will quickly identify the locations, subdivisions, and towns where lynchings and mob violence have occurred in the recent past.
3. Any difficulties with inter-region co-appointment will be brought to the attention of the DGP in order to develop a mechanism for dealing with lynching and mob brutality.
4. Every police will be responsible for scattering a throng, which, as he would like to believe, tends to produce viciousness under the pretext of vigilantism or whatever else.
5. The states and the central government should announce via radio, television, and other forms of media, including official websites, that lynching and mob violence will not be tolerated if actual results are achieved.

24 Tehseen S. Poonawala v. Union of India AIR [2018] SC 3354

25 CWP No.330 of[2018]

26 [2009] 5 SCC 212

27 State of Andhra Pradesh v. Destruction of Public and Private Properties [2009] 5 SCC 212

28 Mob-Lynching, Hindustantimes <https://www.hindustantimes.com/india-news/to-end-mob-lynching-supreme-court-gives-an-11-point-prescription/story-pdknxkMYd3R27nSniP.HTML> accessed 5 November 2022

6. Put a halt to the spread of dangerous and irresponsible communications, recordings, and other materials on various internet networking platforms. File a police report under the appropriate laws against those who distribute such messages.
7. Ensure that the relatives of the persons in issue are not provoked in any way.
8. A lynching/horde brutality harmed individual recompense conspiracy would be put up by state governments.
9. Cases of lynching and horde viciousness will be explicitly attempted by assigned court/quick track courts reserved for that reason in each area. The preliminary will ideally be finished up inside a half year.
10. To set a harsh model in instances of horde viciousness and lynching, the preliminary court should commonly grant greatest endless supply of the blamed individual.
11. If it is discovered that a cop or an official of the area organization has neglected to satisfy his obligation, it will be considered as a demonstration of conscious carelessness.

CONCLUSION

Because life is so valuable, the modern state has a duty to safeguard its citizens lives. The state is tasked for ensuring the lives of many people, according to Article 21 of the Indian Constitution. However, the legislature is put to the test by the increasing number of mob lynching incidents and other violent crimes. The country's customary law is insufficient to handle such offences. Lynching is depending upon the behaviour of society and it is being accepted. There are no role of religion, caste, race, belief, or group of people. Any time there is an instance of honour killings, hate crimes, witch hunts, or mob lynching, we want specific legislation to deal with them. These crimes, however, are all murders. When we talk about the laws, which can curb these violent activities, we have a lot but not a specific law on this particular issue."As per data, Muslims, who account for 14.8% of India's population, have been victims of 60% of hate crimes, Christians 2% of the population in 14% of cases, and Hindus 79.8% of the population in 14% of cases".[29] Manipur, Rajasthan, and West Bengal have all enacted legislation that includes the majority of the Supreme Court's directives. Lynching is defined as an act of mob violence motivated by religion, caste, sex, birthplace, language, dietary practises, sexual orientation, political affiliation, or ethnicity, according to these statutes. The statutes of the three states, however, are not similar.

SUGGESTIONS

- **Separate Legislation-**A new separate legislation will establish responsibility for those working to maintain law and order. The public will be scared off

29 Mahtab Alam, 'Why do mob lynching still continue Unabated', (the wire.in) <https://thewire.in/communalism/mob-cow-lynching-vigilante>accessed on 5 November 2022

and discouraged from assuming control of the law. If a mob lynching puts someone's life or property in danger, the culprits will be severely punished and made to pay compensation.

- **Severe punishment-** A mob lynching is a murder committed by the mob without due process being followed. As a result, the penalty should be severe and the offence should not be subject to bail.
- **Fixing Accountability of officers-**The nodal officer's main responsibility is to investigate reports of mob lynchings and take appropriate action. Police who remain silent while observing will be disciplined and tried in the same way as the accused.
- **Control over fake or hate news-**Social media platforms need to be held accountable, routinely supervised, and subject to unbiased investigations free from political interference and pressure. For individuals who promote false information and hate speech, there should be rigorous punishment guidelines.
- **Specialised courts & Speedy trial-** There are numerous courts such as criminal, family, civil, and labour. Because mob lynching is such a terrible crime, it should be tried in a specialised court with a streamlined process.This issue should be resolved as soon as possible, as numerous witnesses and victims have withdrawn or changed their testimony. It is a legal principle that "justice delayed is justice denied".
- **Social Awareness-**There should be planned social awareness and literacy campaign programmes at every level in colleges, schools, and institutions with the assistance of the administration and NGO's due to the increase in mob lynching instances.

In researcher opinion there is no single solution to this problem of mob lynching. Some structural reforms are mandatory, along with region wise action plan need to be prepared with the ground realities, with help of local communities. State legislatures should be held accountable for more than just passing laws with severe penalties. State legislatures must remain actively involved in the matter. Their engagement should include a thorough discussion of the budgetary needs of the police and courts as well as ongoing accountability of the state government for every illegal lynching that takes place in the state.

Appointment of Arbitratorsby State or its Instrumentalities in India: A Controversy under Arbitration & Conciliation Act, 1996

Mr. Ashwini Garg & Dr. Pallavi Bajpai***

ABSTRACT

Independence and impartiality of arbitrator are essential requisites of any arbitration hearings. Notwithstanding any agreement between the parties, non-independence and non-impartiality of arbitrator may disqualifyhim from conducting the proceedings. In contracts involving State or its instrumentalities, wherever both parties could appoint respective arbitrators, the advantage derived by each party in appointing an arbitratorgets offsetby the similar capacityof the other party. But, incases where State or its instrumentalities have an exclusive right to maintain list of arbitrators containing the names of their serving /former employees, from which other party can nominate an arbitrator, therewill always be an element of superiorityover that party,in deciding the course of dispute resolution in their favour. Fundamentally, the party who has a stake in the result or decision of the dispute must not have the sole authority to finalize arbitrators, directly or indirectly,as it is in direct contravention to principle of natural justice "nemo judex in causa sua". Though the judiciary in India have contributed significantly to mold the concept of independence and impartiality,a lot more needs to be done proactively, to rest controversies and encourage participation of global companies in government tenders.

Keyword: *Former employee Arbitrator, serving employee arbitrator, non-independence, non-impartiality.*

INTRODUCTION

Most arbitration statutes confirm the parties' autonomy to select 'their' arbitrators, either directly or indirectly. However, there is also a fundamental requirement of independence and impartiality for such arbitrators[1], as his roles and responsibilities compel him to put aside partisan interests so that he can perform his adjudicatory role, in a fair and transparent manner.

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1 Gary B. Born, International Commercial Arbitration, (Kluwer Law International, 3rd edn., 2020)

The government companies and public sector undertakings have standard general conditions of contract (GCC), with provisions mandating other contractual party to compulsorily nominate arbitrators from panel comprising of their employees or former employees or other persons known to the organizations. The contractors in their eagerness to get contracts from the government, statutory or public sector organizations, consent to arbitration agreements that provide forserving /former employee arbitrators. But, when dispute do emerge in the future, contractors choose to litigate, to appoint an "independent" arbitrator, as they subsequently object to the idea of arbitration by such arbitrators. The number of lawsuits seeking the appointment of a neutral arbitrator is evidence of this issue.[2]

The amendment Act 2015 introduced several changes to the Arbitration & Conciliation Act 1996 by amendment of Section 12 and introduction of fifth &seventh Schedule. Seventh Schedule of Arbitration & Conciliation Act 1996lists the relationships between the arbitrators and the parties or counsels, which are expressly barred under Section 12 (5) of the Act. One such relationship highlighted is that of employer and employee between party to the dispute and the arbitrator. Apart from this, the Act nowhere explicitly lay down any guidelines regarding the nomination of former employees as arbitrators.

The courthas so far dealt with three categories of cases. The first, where an employee (senior official) himself is designated as an arbitrator, with authority to nominate any other person as a sole arbitrator. In the second category, the employee (senior official)is not to serve as an arbitrator himself but is permitted to appoint any other person of his choice as a sole arbitrator. Finally in the third category, the employee (senior official) is empowered or authorized to send list of arbitrators to the contractual party to nominate from this panel, which shall be subsequently appointed by him.The panel may consist of employee / former employee.

The courtwhile dealing with the first category in TRF limited v. Energo engineering projects limited[3] where the managing director is the named sole arbitrator, concluded that, "once the arbitrator has lost their eligibility due to the prescription of Section 12(5) of the Act, he also cannot nominate another person as an arbitrator, as it is impossible under the law for someone who is statutorily ineligible to nominate some other." This is a similar concept as that of building, which cannot exist without a plinth, as once the infrastructure fails, the superstructure is inevitably going to fail as well.

While elaborating on the second category in Perkins eastman architects DPC and another v. HSCC (India) limited[4] where concerns were raised only on the capacity of chief managing director as an appointing authority of Arbitrator, the court held thatif only one party has the authority to select the sole arbitrator, that party's selection will invariably be to tilt the resolution of the dispute in his favour. Thus, it is now settled that an employee (senior official) authorized to appoint any person of his choice as a sole arbitrator, irrespective of him being also eligible to be appointed as an arbitrator as per the contract, is expressly barred to do so under Section 12 (5) of the Act.

2 Indian Oil Corp. Ltd. v. Raja Transport (P) Ltd., (2009) 8 SCC 520.

3 TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377

While dealing with third category in Central organization for railway electrificationv.M/s ECI-SPIC-SMO-MCML (JV) A Joint venture company[5], the question before the court was whether the general manager after becoming ineligible to be appointed as an arbitrator by operation of law, is likewise unqualified to propose a three-member arbitrator panel also.The court ruled that in cases where both parties may choose their own arbitrators, the advantage one party could obtain from doing so would be offset by the other party having equal discretion.Itcannot therefore be said that the employee (senior official) has becomeineligible to nominate the arbitrator.However, in Union of India v. M/s Tantia constructions limited[6], when the question came before the Supreme court, about the eligibility of an employee (general manager), who forwarded the panel of twonames each of existing and former employees and requested the opposite party to nominate two names out of the said panel, the court upheld the decision of Calcutta High courtfor appointment of the two Judges of the same High court as nominee arbitrator on the ground that such employees are covered under categories of the seventh Schedule of the Act of 1996. Later,the courtalso while perusing the three-Judge Bench decision in Central organization for Railway electrification v. M/s ECI-SPIC-SMO-MCML (JV) A Joint venture company[7], prima facie disagreed with it for the basic reason that,"once the appointing authority itself is incapacitated from referring the matter to arbitration, it does not then follow that notwithstanding this, yet appointments may be valid depending on the facts of the case." Accordingly, they have requested to constitute a larger Bench to investigate the correctness of this judgment. It is now pending before Supreme court for formalizing rule of law, in such matter.

Moreover, the legitimacy of arbitration agreements that require a party to select an arbitrator from a panel comprising of former employees of the State or its instrumentalities, also faces an ongoing challenge. Thus, when this question about the former employee came before the Supreme court in Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Limited[8],the courtheld that the seventh Scheduledoes not cover such persons, nor such persons are covered under red or orange list of IBA guidelines,thus they cannot be treated as ineligible to act as arbitrators.Interestingly, laterin Hindustan steel works construction limited v. Union of India & Ors.[9], the Hon'ble High court at Patna ruled that,"the goal of the amendment to Section 12 of the Act was to ensure that the arbitrator appointed is independent and can carry out his duties without interference, on the question of whether a panel of retired railway

4 Perkins Eastman Architects DPC and another v. HSCC (India) Limited, 2019 S.C.C. Online SC 1517

5 Central Organisation for Railway electrification v. M/s Eci Spic Smo Mcml (JV) A Joint Venture company, Civil Appeal No. 9486-9487 of 2019

6 Union of India v. M/s Tantia Constructions Limited, SLP No. 12670/2020

7 Ibid

8 Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665

9 Hindustan Steel Works Construction Limited v. Union of India & Ors., Request case no.16 of 2017, High Court of Patna

officers would serve as impartial arbitrators."Relying heavily on the earlier decision of the Supreme court of India in M/s. Voestalpine Schienen GMHB v. Delhi metro rail corporation ltd.[10], the courtdid not approve of the panel.

Going forward, in Afcons infrastructure limited v. Ircon international limited[11], SMS ltd. v. Rail vikas nigam ltd.[12], and in BVSR-KVR (Joint Venture) vs. Rail vikas nigam ltd.[13], the Hon'ble Delhi High court replaced the existing panel of retired railway officers appointed to serve as railway arbitrators with a broad-based arbitration panel, ruling that "although the appointment of an formeremployee as an arbitrator did not fall under the strictures of Section 12 (5) of the Act, read with the seventh Schedule to the Act, it did unquestionably cause concerns (whether justified or not) in the minds of the other party, and it was therefore essential." Thus, court's interpretation of this issue is also not firm, and due to an apparent conflict with the pious principle of impartiality in arbitration, such appointments have remained debatable because doing so would inevitably lead to a presumption of bias in favour of the party with which they had previously been affiliated.

This paper is an attempt to analyse the entire situation and provide a meaningful solution to the contentious issue of appointment of arbitrators in the matter related to contracts of State and its instrumentalities, within the broad framework of law and ethics.

ANALYSIS

Party Autonomy

The ability of the parties to design their contractual relationship the way they see as mutually acceptable is known as party autonomy.[14] Further, a crucial component of party autonomy in arbitration is the ability to select the arbiter, which distinguishes it from court litigation, where the judge cannot be chosen by the parties to the dispute. Section 10 (1) of Arbitration and Conciliation Act 1996, provides that, "parties are free to determine the number of arbitrators, subject to the condition that their number should not be an even number". Under such circumstances the parties normally decide the number of arbitrators as one or three. However, while deciding the number of arbitrators, it is important to fix the numbers based on the total value of claim, as more the number of arbitrators more are the expenses to be borne, in the form of fee paid to arbitrator for the services rendered. Accordingly, if the total value of claims ishigh, it is worthwhile to keep provision of three arbitrators against a sole arbitrator, asit is believed that three arbitrators are more likely to produce an informed, accurate,

10 Ibid

11 Afcons Infrastructure Limited v. Ircon International Limited,ARB.P. 21 of 2017, (High Court of Delhi)

12 SMS Ltd. v. Rail Vikas Nigam Ltd., 2020 (2) ARBLR 376 (Delhi)

13 BVSR-KVR (Joint venture) v. Rail Vikas Nigam Ltd., 2020 (1) ARBLR 580 (Delhi)

14 Abdulhay, S., Corruption in International Trade and Commercial Arbitration, 159 (London: United Kingdom: Kluwer Law International, 2004)

and balanced award than a sole arbitrator, and therefore the likelihood of an outlandish or extreme outcome is reduced.

Prior to the appointment of an arbitrator, it is customary for the appointing party and its counsel to do a reasonable degree of due diligence on that person's professional background, scholarly output, and the previous issued arbitral awards, that he or she has rendered in other cases. It is logical that based on such investigation and when given a chance, the party will prefer an arbitrator who is likely to decide the issues in their favour.[15]Professor Paulsson had argued that,"parties exercise their right of unilateral appointment with the overriding objective of winning in view, which results in speculation about ways and means to shape a favorable tribunal, or at least to avoid a tribunal favorable to the other side".

The arbitrators being an adjudication services provider, their professional success and income depends on future arbitral appointments. As a result, it is possible that some arbitrators have a natural desire to win over the appointing party and/or its counsel. This will almost certainly conflict with the arbitrator's obligation to all parties to the arbitration to decide the case fairly and objectively.[16]Such arbitrators will inevitably gain the confidence of the party dealing with numerous disputes of the same or similar nature, ultimately resulting in his reappointment. This will create a conflict of interest, raise concerns about the tribunal's independence and impartiality, and may even justify the appearance of bias.

Independence and Impartiality

Every person has a right to a fair trial by an unbiased jury, which is also reflected in Article 6 (1) of the European convention on human rights. The necessity of impartiality is a based on the principle of natural justice.[17]An identical right is also prescribed in the Universal declaration of human rights[18], as well as the International covenant on civil and political rights[19].

Following Article 12 of UNCITRAL model law, Section 12 of Arbitration & Conciliation Act 1996 also uses two words 'independence' and 'impartiality' disjunctively as 'independence' or 'impartiality', in the context of role of an arbitrator in arbitration proceedings. There is no internationally accepted definition either of 'independence' or of 'impartiality'. That is why these expressions are frequently considered as synonyms and used interchangeably. There has been a move towards using these terms as a tool for evaluating the possibility of bias, either real or apparent.

15 Christoph Müller and Antonio Rigozzi,New Developments in International Commercial Arbitration 2013 12(Schulthess Juristische Medien AG, Zurich Basel Geneva, 2013)

16 Christoph Müller and Antonio Rigozzi, New Developments in International Commercial Arbitration 2013 12(Schulthess Juristische Medien AG, Zurich Basel Geneva, 2013)

17 Andrew Tweeddale & Keren Tweeddale, Arbitration of commercial disputes 639 (Oxford University Press, 1st edn reprint, 2007)

18 The Universal Declaration of Human Rights 1948, Article 10

19 The International Covenant on Civil and Political Rights 1976, Article 14.1

While impartiality is more of a mental condition that will inevitably be subjective, independence is a situation of fact or law that can be verified objectively. While impartiality is necessary to ensure that justice is done,independence is necessary to ensure that justice is seen to be done.[20] Literally, independence is the absence of dependence. ***Independence is defined asthe absence of any relationship between the arbitrator and a party or parties***, or between the arbitrator and the subject matter of disputes, which would render him inappropriate to decide between those parties on that dispute.[21]Independence describes the relationship between the parties and the arbitrator and denotes any past or present interactions on a personal, social, or professional level.[22]

The test of independence, in contrast to the test of impartiality, is an objective one because previous business or financial links are simple to ascertain. Therefore, ***independence mandates that there should not be any such current or historical dependent relationship between the parties and the arbitrators***, since this could affect or at the very least appear to affect the arbitrator's independence of judgement.[23] Psychological dependence may depend on the circumstances as well. For instance, when an arbitrator is regularly nominated by one party, the fee received from such regular appointments will contribute to his major source of income. In such a situation his 'independence 'may not be dependable.[24]

The main goal of the impartiality and independence requirements is to guarantee the arbitrator's objectivity and fairness. This impartiality will give the parties the required assurance that the arbitrator will decide the issues in dispute solely based on the pertinent facts and in accordance with the applicable legislation.[25]

Guidelines of International Bar Association (IBA)

The IBA has created non-binding standards that seem to achieve the correct balance regarding conflicts of interest in international commercial arbitration. They were most recently updated in 2014, incorporating improvements and clarifications made since their initial publication in 2004.[26] They are split into two sections; the first section

20 Indu Malhotra, O.P Malhotra on The Law & Practice of Arbitration & Conciliation 714 (Thomson Reuters, New Delhi, 3rd edn.,2014)

21 Sir Michael J. Mustill and Stewart C Boyd, Commercial Arbitration 96 (Butterworths, 2ndedn., 2001)

22 W.M Tupman, "Challenge and Disqualification of Arbitrators in International commercial Arbitration" 38 ICLQAJ 29 (1989).

23 Indu Malhotra, O.P Malhotra on The Law & Practice of Arbitration & Conciliation 711 (Thomson Reuters, New Delhi, 3rd edn.,2014)

24 Mauro Rubino-Sammartano, International Arbitration law and Practice, 330 (Juris Publishing Inc., USA, 2ndedn.,2000)

25 Christoph Müller and Antonio Rigozzi, New Developments in International Commercial Arbitration 2013 12 (Schulthess Juristische Medien AG, Zurich Basel Geneva, 2013)

26 Nigel Blackaby & Constantine Partasides, et.al, Redfern and Hunter on International Arbitration 255 (Oxford University Press, 6thedn., 2015)

contains the general requirements for objectivity, independence, and disclosure, while the second section contains specific examples of how the general principles are put into practice. The second section explains a non-exhaustive list of situations that are grouped into various groups based on the hues of traffic lights.

'Partiality' is defined by the IBA ethics as favouring one of the parties or having preconceived notions about the issue at hand. It doesn't directly address bias against a party or explain what it means to be biased in connection to the dispute's main issue. Relationships between an arbitrator and one of the parties or someone intimately associated with one of the parties give rise to 'dependence'.[27] This source claims that having ongoing, ***substantial social or professional contacts with a party*** or a possible key witness may be one of the things that could give rise to justified worries about an arbitrator's objectivity or independence.[28]

A prospective arbitrator is required by Article 4.2 of the IBA Rules of ethics for international arbitration to disclose any direct or indirect past or present business relationships, including any prior appointment as an arbitrator, with any party to the dispute, any party's representative, or any person who may be a key witness in the arbitration. The responsibility of disclosure is applicable regardless of the extent of any current relationships, but only if any previous relationships had a significant bearing on the arbitrator's professional or business affairs.[29]

The Supreme court of United Kingdom in Jivraj v. Hashwani[30] has observed that, "the primary goal of appointing an arbitrator is the impartial resolution of disputes between the parties in accordance with the terms of the agreement, and although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."Similarly, Cour de cassation, France, in a landmark judgment in the case of Consorts Ury,[31] stressed that,"irrespectiveof the source of the authority, an independent mind is important to the exercise of judicial authority, and it is also one of the fundamental characteristics of an arbitrator."

The IBA guidelines of 2014, which serve as the point of reference and establish that there must be a balance between the principle of party autonomy and the tribunal's independence, stipulate the arbitrator's duty to be unbiased and impartial as a soft law rule.

27 International Bar Association, Ethics for International Arbitrators § 3.1

28 International Bar Association, Ethics for International Arbitrators § 3.2 - 3.5

29 Indu Malhotra, O.P Malhotra on The Law & Practice of Arbitration & Conciliation 707 (Thomson Reuters, New Delhi, 3rd edn.,2014)

30 Jivraj v. Hashwani, (2011) UKSC 40

31 Fouchard, Gaillard, Goldman on International Commercial Arbitration 575 (Emmanuel Gaillard & John Savage eds., 1999)

Arbitration Bias & Indian Jurisprudence

Arbitration & Conciliation Act, 1996

The Arbitration and Conciliation Act, 1996 is the specific piece of legislation that puts the concept of bias into practise by defining the criteria of disclosure, the objective degree of prejudice, and the grounds for challenging its provisions, primarily in Sections 12 to 14.

In India, prior to 2015, only about 40% of the cases pertaining to conflict of interests, referred to the IBA guidelines.[32] At that time the test for neutrality was set out in Section 12(3) of the Arbitration and conciliation Act 1996, which providedthat "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality…". However, the Act does not stipulate any additional terms to define the "circumstances" that give rise to "justifiable doubts." In the context of contracts with State entities naming specific persons / designations (any employee or associated with that entity) as potential arbitrators, the scope of this provision was tested in the Supreme court on India, and it was determined by a series of decisions that it was valid and enforceable.

The position in the context of arbitration bias began to change after 2008, when in BSNL v Motorola India[33], the Courtfor the first time condemned the practice of permitting clauses in the arbitration agreement that stipulated that there will be no opposition to any appointment of arbitrator who is a government employee, has dealt with any issue in the past that the agreement relates to, or that he has expressed his opinions on all or some of the issues in dispute while performing his duties as a government employee. Having regard to the emphasis on independence and impartiality,the Court in Union of India v. Singh Builders Syndicate[34], observed that statutory bodies and government corporations should consider eliminating arbitration clauses that protect serving officers and promote arbitration professionalism.

Later Apex court, in its land mark ruling in Indian Oil Corp. Ltd. v. Raja Transport (P) Ltd.[35], carved out a first-ever exception in cases where,"the arbitrator was the decision-making or dealing authority with regard to the subject contract or if he is a direct subordinate (as opposed to an officer of a lower rank in another department) of the officer whose decision is the subject of the dispute."This court later employed this exception in Denel proprietaryltd. v. Govt. of India, ministry of defence[36], and Bipromasz bipron trading SA v. Bharat electronics ltd.[37], to select an independent arbitrator in accordance with Section 11, in place of an employee of the government

32 The IBA Arbitration Guidelines and Rules Subcommittee, Report on the reception of the IBA arbitration soft law products (International Bar Association, 2016).

33 BSNL v. Motorola India, (2008) 7 SCC 431

34 Union of India v. Singh Builders Syndicate, (2009) ALL SCR 1025

35 Ibid

36 Denel Propreitory Ltd. v. Govt. of India, Ministry of Defence, AIR 2012 SC 817.

37 Bipromasz Bipron Trading SA v. Bharat Electronics Ltd., (2012) 6 SCC 384

company, as per the arbitration agreement.

Section 12 of Arbitration and Conciliation Act, 1996 was amended by Arbitration and Conciliation (Amendment) Act, 2015, with the objective to induce neutrality of arbitrators, viz., their independence and impartiality. The grounds that may give rise to legitimate doubts of this kind are listed in the fifth Scheduleto the Act. The seventh Schedule further lists the situations that would trigger the requirements of Subsection (5) of Section 12 and render null and void any prior agreement to the contrary. The Entry 1 through 19 in the fifth Schedule corresponds to the aforementioned entries in the seventh Schedule also for the purpose of the arbitrator's disclosure, as such disclosure would be deficientand the parties would be at a disadvantage, unless the proposed arbitrator made a written disclosure of his involvement.[38]The entries in the fifth and seventh Schedules was drawn, in particular, from the red and orange lists of the IBA guidelines.

Entry 1 of the seventh Schedule prohibits the appointment of arbitrators when they are employees, consultants, advisors, or have any other past or present business relationships with a party. As a result, in several cases after applying Entry 1 of the seventh Schedule, the court automatically disqualified the arbitrator, making him ineligible to arbitrate. Similarly, as stated in Entry 22 of the fifth Schedule, "the arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties." Recently in a case[39] before Supreme court of United Kingdom, the issue to decide before the court wasabout thefailure of an arbitrator to disclose his appointment in two other arbitration proceedings, on an overlapping subject matter. The Court stated that,"repeat appointments on the same or overlapping subject matter may give rise to an appearance of bias."

Entry 31 of the fifth Schedule provides that, "the arbitrator had been associated within the past three years in a professional capacity, such as a former employee or partner, with a party or an affiliate of one of the parties," could raise justification as to his eligibility. In Government of Haryana PWD Haryana (B and R) branch v. G.F. toll road private limited and others[40], the court held that since the nominee arbitrator left the State's employment more than ten years ago, there is no cause for concern,as longer the interval of time between the event relied on as demonstrating a risk of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

Section 18 of Arbitration and Conciliation Act 1996 & Principle of Natural Justice

The UNCITRAL model law's Article 18 is mirrored in Section 18 of the Arbitration and Conciliation Act of 1996. Section 18 provides that, "the parties shall be treated

38 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd., (2019) SCC OnLine SC 1517

39 Halliburton Co v. Chubb Bermuda Insurance Ltd., (2020) UKSC 48

40 Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road Private Limited and Others, (2019) 3 SCC 505

with equality and each partyshall be given a full opportunity to present his case." Therefore, even if the parties to the arbitration agreement made the commitment to arbitrate, it is the law's mandate that they be treated equally and given every opportunity to state their case, failing which there can be no justice.

All judicial and administrative authorities must adhere to the principles of natural justice when conducting proceedings before them.[41] In the case of D.C.Saxena v. State of Haryana,[42] it was held that the principles of natural justice must be followed,even if the statute is silent on the subject.

Indian Contract Act, 1872

Standard contracts are those that are written by one party and signed by other party without any changes or modifications. Standard contracts have the benefit of being preprinted in a uniform format, but they are effectively "take it or leave it" agreements that do not allow for negotiation. Such agreements are however criticized for eliminating the weaker party's leverage in negotiations and creating several opportunities for exploitation. Courts have intervened in situations by invalidating an unfair and unreasonable contract or clause in a contract where the negotiating power of the parties was unequal by examining the wording of the contract in relation to the bargaining capabilities of the parties.[43]

Apart from this, the court have also clarified that,in today's complex world of large corporations with their extensive infrastructural organizations where the State has been entering in almost every branch of industry and commerce through its instrumentalities and agencies,even though a waiver under Section 63 of the Contract Act, 1872 is taken from one of the parties, such a waiver may not be given effect if it is contrary to the public interest.[44]

The Law Commission of India

On the issue of necessity and desirability of impartial and independent arbitrators the matter was considered by the Law Commission[45]. According to the Commission, "it would be inconsistent to say that party autonomy can be exercised in complete disregard of these principles, even if the same had been agreed upon prior to the parties' disputes arising, since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of the arbitral tribunal's constitution. Regardless of the parties' apparent agreement, there are certain

41 Indu Ramchandra Bharwani v. UOI,(1988) 4 SCC 1

42 D.C. Saxena v. State of Haryana, AIR 1987 SC 1463

43 Life Insurance Corporation of India v. Consumer Education and Research Centre, 1995 SCC (5) 482; Central Inland Transport Corporation Limited v. Brojo Nath Ganguly, AIR 1986 SC 1571

44 All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487

45 Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996 (August 2014)

baseline degrees of independence and impartiality that should be demanded of the arbitral process. *Even if the parties consented to it, a reasonable law cannot, for example, permit the appointment of an arbitrator who is himself a party to the dispute or who is hired by (or otherwise dependent upon) one side."*

The Commission believed that there cannot be a distinction made between State and non-State parties, and the idea of party autonomy cannot be taken too far and be interpreted as negating the necessity of having independent and impartial arbiters to settle conflicts. "*The duty to appoint an impartial and independent arbitrator is actually made more difficult when the State is the party making the appointment, and the right to natural justice cannot be said to have been waived solely on the basis of a "prior" agreement made between the parties at the time of the contract and prior to the occurrence of the disputes."*

These opinions of the Commission have also been discussed by the Supreme courtin its judgment in Voestapline Schienen Gmbh v. Delhi metro rail corporationltd.[46], and Bharat broadband network limited v. United telecoms limited[47].

CONCLUSION

Arbitration offers a quick and efficient commercial dispute resolution mechanism,in contrast to court proceedings, which can take years to resolve issues between the parties. Accordingly, the tenders of government have standard commercial contractual conditions including clause of arbitration agreement,which is the foundation of every arbitration proceeding. The arbitration clause provides for appointment of sole or three arbitrators from panelcomprising of serving / former employees, based on the claim raised at the time of the dispute. The reason for considering such employees as arbitrator on the panel is on account of the techno commercial complexities of such contracts, which require relevant experience and domain knowledge of this field. Therefore, former employees of the government department, having pristine career and experience at senior positions are best suited for appointment as an arbitrator, in such disputes.

Now considering that there is no room for negotiationsin such standard contractual conditions as contractor is forced to sign on the dotted lines, the fundamental principle of party autonomy for the contractor is disregarded at the very first instance. However, it is also true to the great extent that government cannot allow window for negotiation of contractual conditional, so as to customize each contract as per the requirement of contractor, as this may unnecessarily delay all government projects on account of internal approvals. Further different contractual conditions from one contractor to other will create operational difficulties for the department itself. Thus, it may be concluded that there is little room for improvement on this aspect.

However, doubts as to independence or impartiality of an arbitrator are justifiable in the mind of contractor, when the arbitrator bears past or present relationship with

46 Ibid

47 Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5 SCC 755

the government company and there are no clear-cut departmental guidelines or rules and regulations, about how these former employees are appointed. The former employees are normally appointed on the department panel, immediately on their superannuation, which are inhibited or restrained to some extent by Entry 31 fifth Schedule of Arbitration and Conciliation Act 1996. Owing to the fact that arbitral work is a significant part of the arbitrator's professional practice, usually the arbitratoracquires financial interest and strives to continue on this panel by avoiding anyadverse action against the department. Further due to lack of any guidelines, such employees continue to remain in panel on the departmental whims and fancies, primarily based on their closeness to some senior officials or based on the number of disputes they have decided in favour of the department. Apart from this, same arbitratorsare sometime appointedin the similar or overlapping subject matter or disputes having same parties and they are likely to acquire reasonable bias in such disputes. Such arbitratorsare neither disqualified from serving as arbitrators under seventh Schedule of the Arbitration and Conciliation Act 1996, nor the red list of the IBA rules. However, this situation is somewhat constrained by Entry 22, fifth Schedule, which leaves a lot of leeway for interpretation and the potential to later annul the arbitration proceedings in accordance with Section 34 of the Act.

The time has now come to make a good imprint on the global business community in order to foster an arbitration-friendly atmosphere in this nation. In addition, as the Law Commission noted in its report, huge responsibilities lies on the shoulder of the government or public sector entitiesto ensure independence and impartiality contracts, where they are one of the disputing parties having the power to appoint the arbitrator.[48]

Thus it may be fairly concluded that though, the party autonomy is the fundamental principle in any arbitration agreement under which the parties are free to choose the arbitrators, the arbitration clause cannot be allowed to supersede the rules of justice and impartiality in court.[49]Notwithstanding there are some exceptional circumstances where party autonomy may be respected, that arises in family or other arbitrations, where the parties have utmost trust in the arbitrator, even though there are objectively valid reasons to have doubts about the independence and impartiality of the arbitrator in question.[50]

SUGGESTIONS

Given the gradual shift in judicial precedents from "circumstances that give rise to justifiable doubts as to the existence of independence or impartiality" to an "apprehension of bias" in the arbitrator, it might be interesting to see if there is a purposeful interpretation of the provisions by the courts of the law, or an amendment of the statute, to disqualify former employees from serving as arbitrators in the near

48 Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Limited

49 Perkins Eastman Architects DPC & Anr v. HSCC (India) Ltd, AIR 2020 SC 59; Proddatur Cable TV Digi Services v. SITI Cables Network Ltd., (2020) SCC Online Del 350

50 Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755

future.However, in order to put all such controversies at restfor such dispute resolution, the authors suggest following improvements in the arbitration methodology of government–

(a) Guidelines and selection criteria should be laid down for appointment of arbitrators on the departmental panel. Application received for appointment from potential arbitrators should be strictly scrutinized based on his aptitude, experience and past performance.

(b) No 'serving employee' should be considered for appointment as an arbitrator and 'former employees' should be allowed for such appointment only after lapse of 3-years, from the date of leaving the employment.

(c) The appointment of arbitratorin the departmental panelshould be on a fixed tenure basis for say 5-10 years or till some prescribed age limit, whichever is earlier, so that he can perform his duty as an impartial arbitrator, without any obligation to please the department.

(d) Multiple appointment of arbitrator in the same or overlapping subject matter or having same parties should be strictly prohibited.

(e) Panel of arbitrators should be made broad-based by involving former employees from other government companies as well as experienced and eminent engineers from private sector,as it is now known that there are many private companies which are as big as any government companies, having large pool of persons with relevant knowledge and experience.

(f) Contractor should be given full freedom to nominate arbitrators from the entire panel, instead of offering names of some selected persons, so as to offset the sole discretion of State or its instrumentalities on the appointment of arbitrators.

A Model Research Plan to Find Out the Efficacy of the Victim Compensation Scheme in Tripura and West-Bengal in Special Reference to Women Victim of Crime

Dr. Bibhabasu Misra & Dr. Paramita Dhar Chakraborty***

ABSTRACT

From time immemorial, Criminal law, as a base, continues to be present in all types of legal systems existing in our world. Previously criminal law was very harsh and the difference of law and morality was very thin. The main aim of the criminal law was to create deterrence, and create fear in the mind of the prospective criminals. In all ancient criminal law, a fair amount of compensation used to be given to the victim of crime or their legal heirs to restore the victim's status before the occurrence of crime. As for example, in ancient Arab, a person who have committed murder could avoid the liability by paying blood money to the relatives of the victim. However the society was often very harsh to women accused of crime like adultery. The accused women of crime like adultery were stoned to death or subjected to various ordeals. In Ramayana, we observe that "Seeta" was subjected to the ordeal of fire to prove her purity. Gradually criminal law has become reformative in nature and the attitude of the society towards women also changed. Now, through Criminal Procedure Code, various Victim Compensation Schemes are enacted to compensate the victims of crime. The Author(s) urge that women as a special class deserve a separate Victim Compensation Scheme. In ancient time, if the offender was not caught, as for example in case of theft, then the whole city collectively used to provide compensation to the victim. Thus the victim Compensation Scheme, solely dedicated to the women should reflect the collective responsibility of the society, state towards women victims of crime.

Keywords: *Women, Special class, Criminal Procedure Code, Victim Compensation Scheme, Feminism.*

INTRODUCTION

Women in India are considered to be a special class, as per the Article 15(3) of the Indian Constitution. State is under duty to make beneficial legal provision for women

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along with children in India. Thus curving out a separate strata for women victim of crime and mapping their satisfaction level under the Tripura Victim Compensation Scheme 2018 and West-Bengal Victim Compensation Scheme is worthy of an honest effort. We can note that satisfaction of the Human being till now can be mapped by Money only. In absence of any other important yardstick, it is assumed that happiness will be measured by the amount of money only. Thus we can assume that, Compensation received by victims under the Schedule of the Victim Compensation Scheme of Tripura 2018 and West-Bengal Victim Compensation Schemeare hundredpercent.

The Victim Compensation Schemes are inspired by the section 357 A of the Criminal Procedure Code. The Judges are given the discretion whether to provide compensation or not, to the victim.

Minimum amount of Compensation provided in the Victim Compensation Scheme 2018 (Tripura)

Serial No.	Description of Injuries/Loss	Quantum of Compensation
1.	Acid Attack	3 Lakh.
2.	Rape	3 Lakh.
3.	Sexual Assault other than Rape	50 Thousands.
4.	Loss of Foetus	50 Thousands.

Minimum amount of Compensation provided in the Victim Compensation Scheme 2017(West-Bengal).

Serial No.	Description of Injuries/Loss	Quantum of Compensation
1.	Acid Attack	3 Lakh.
2.	Rape	3 Lakh.
3.	Sexual Assault other than Rape	50 Thousands.
4.	Loss of Foetus	50 Thousands.

(Only Women Specific Examples were considered)

To map the satisfaction level, one can identify some parameters like pendency of the trial for more than five years, immediate intervention by the State to provide monetary,medical help, as for example, for victims of Acid attack, Rape etc. The social,economic back ground of the victim of crime isalso important.

Some Gap Identified In the Victim Compensation Scheme, Tripura and West-Bengal

Section 7, clause IV of the Tripura Victim Compensation Scheme, 2018 provides that District Legal service Authority will immediately provide First – aid or other helps to a victim of crime if a senior Police officer (Not less than the rank of Police Officer in-charge) or a Magistrate of the area provide a bona-fide certificate.

One can add that, Government Medical Officer of a particular area, where crime is committed should also be given this power to certify the condition of a victim of crime. The Doctor is better equipped to understand the nature and gravity of the injury be it physical or mental. The Victim of the Crime will be more confident to disclose the injury to the doctor or a lady doctor.

Section 2(d) of the Victim compensation Scheme 2018, Tripura provide the definition of "Dependent" means any spouse, dependent children up to age of 21 years(Including legally adopted children) and dependent parents.

Thus it seems that, unmarried couple are excluded from the ambit of the Victim Compensation Scheme. We all know that, Section 2f of the Protection of Women from Domestic Violence Act, 2005 mention about "Relationship in the nature of Marriage"[1]. Thus even a spouse who is not strictly married, should get the benefit of the Victim Compensation Scheme. The children out of such association should be protected up to the age of 21.If the children are differently able, they should be treated as dependent (If they are not married/maintained by a spouse/partner) for their whole life and State should act as parenspatriae(The ultimate guardian). "Dependent parents" as defined under section 2d of the Victim compensation Scheme 2018, seems to be including single father or mother of children. Children out of living together partners should be protected by these Victim Compensation Schemes. As Crime committed against a person is nothing but an attack against the Society. Again the "Dependent" should not mean an individual who lackeconomic strength,butit should also mean the physical or mental infirmity too. As for example, Parents of old age or Senior Citizen are dependant without doubt.[2]

We can realize that, the socio-economic status of Tripura is not similar to the Metropolitan Cities like Bombay, Delhi, Calcutta, but in the era of cheap audio-visual communication, quick transport system, the cultures, traditions, customs, economy are mingling with each other and the value system is also changing everywhere. Thus a socio-legal impact study of the Victim Compensation Schemes onwomen victims of crime inone or two areas of the Country may be relevant for other parts of the Country also.

Now, we can examine the West-Bengal Victim Compensation Scheme 2017, framed under section 357A of the Criminal Procedure Code. Under section 3 of the Scheme, there is an arrangement of Victim Compensation fund. Section 4 of the Scheme provides that during trial, a victim of crime may make an application to the district and State legal authority for compensation. This is an improvement over the previous Victim Compensation Scheme of 2012, where victim had to wait for the conclusion of the trial to get the compensation. Section 7(a), (b),(c) of the Scheme provides that, if the applicant has failed to inform the Police, other body, or persons considered by the district and state legal service authority to be appropriate for the purpose about the circumstances giving rise to the loss or injury; the application will be rejected.

The victim of rape and acid attack may be so physically and psychologically affected that they may be not able to inform the concerned authority within reasonable period of time. Sometime family members of the victim are not supportive enough to her as to enable her to get justice. Evidences to prove the crime are lost for these delays.

1 See CRLJ 2017 March 2017 VOL 123, Part-1407 Journal 60.

2 See Maintenance and Welfare of Parents and Senior Citizens Act for contextual reading. Though it is gender neutral Act, but it provides protection to the women too.

The family members of the victim feel shame and suppress the incident of crime altogether. The government doctor of the area should have been mentioned expressly in the section 7 of the scheme as an authority, because the victim of rape, acid attack would have felt more confident to disclose the ordeal to the doctor, or a lady doctor than a police.

The sermon of the scheme that compensation received from any source like insurance or central schemes, ex-gratia etc. will be considered as compensation under the scheme.[3]

This is unreasonable, because the money required to compensate the physical and psychological loss suffered under the acid attack or rape are huge and continue for an indefinitely long period of time.

Separate Victim Compensation Scheme dedicated to the Women[4]

Honourable Supreme Court of India, in W.P.(C) no. 565/2012 titled NipunSaxena v Union of India, opined that, it would be appropriate for National Legal Service Authority to appoint a committee to prepare rules for Victim Compensation Scheme for sexual offences and acid attack. The report drafted by the National Legal Service Authority was submitted to the Supreme Court 24.04.2018.

The State of Tripura Enacted the Tripura Compensation Scheme for Women Victims/ Survivors of Sexual Assault/other Crime, 2018.

Section 2 (b) of the Scheme provides "Dependent" includes husband, father, mother, grandparents, unmarried daughter and minor children of the victim as determined by the State Legal Service Authority or District Legal Services Authority on the basis of the report of the Sub-Divisional Magistrate of the concerned area/Station House officer/Investigating Officer or on the basis of material placed on record by the dependents by way of affidavit or on its own enquiry.

The recent changes initiated about the status of the married couple in family laws,the partners in relationships or partners in the relationship in the nature of marriage should have been declared as "Dependent".[5] Physically and mentally challenged son/daughters should have been included as "Dependent".

Section 2(g) of the "Women Victim Compensation Fund" means a fund segregated for disbursement for Women victim out of State Victim Compensation Fund and Central Fund.

Section 2 (i) of the Scheme provides that "injury" means any harm caused to body or mind of a female.

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3 See section 6 of the West- Bengal victim Compensation Scheme 2017. Section 357(3) of the Criminal Procedure provides that: - When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

4 See https://wed.nic.in visited on 5/1/2023.

5 See section 2f of the Protection of Women from Domestic Violence Act,2005.

The Schedule Applicable To Women Victim of Crime" under the scheme, much enhanced compensations are provided to the women victims. As for example, for victim of rape, compensation should be between 4 to 7 lakh.

Section 13 of the Scheme provides that, under sub-section (3) of the 357A of the Criminal Procedure Code, the State Legal Services Authority, in proper cause, may institute proceedings before the competent court of law for recovery of the compensation granted to the victim or her dependents(s) **from person(s) responsible for causing loss or injury as a result of the crime committed by him/her**. The amount so recovered shall be deposited in Woman Victim Compensation Fund.

Here, the legislature recognises that even women may be the perpetrator of the crime. Thus we can say that, throughout our country, the separate "Women victim Compensation Scheme" may be initiated.

Any effort to ameliorate and enhance the status of the women victims ofcrime is incompletewithout the study of feminist theories. Generally there are at least four feminist theories.

A. Liberal Feminism.

B. Cultural Feminism.

C. Radical Feminism.

D. Post-Modern Feminism.

In India, generally **Liberal feminist th**eory is prevalent. Under these theory women wantequality with men in the society and legal field. We can see that Article 14 to Article 18 of the Indian Constitution provides equality by prohibition of the inequality and through the positive discrimination. The unequal treatment is based on reasonable classification and the object to be achieved. Thus unequal wages paid to Men and Women for same work is struck down by the Equal Remuneration Act.[6] Jurist like Robin West propounded this theory.

The Cultural feminism stress out the emotional bondage among women and other family members. The differences of women and Men are seen in a positive manner. Women act as a bridge among the Human race. Carol Gilligan is one of the famous jurists who propounded the cultural feminism and mapped the different psychic-growth in a male and female child. Thus women need special treatments from the society and State.

The Radical feminist sees the difference between men and women in a negative manner. According to them, the special feminine characters hold them back in a race of development and enjoyment. Thus ameliorative amendments and actions can over-come these hard-ship.

We can say that, there are various strands of Cultural and Radical feminism in India:- as for example, The Protection of Women from Domestic Violence Act, 2005, The Sexual Harassment of Women At Work place Act(Prevention, Prohibition and

6 Inspired by the Article 39 and 15(1) of the Indian Constitution.

Redressal Act, 2013, The Medical Termination of Pregnancy Act etc. These legislations are ameliorative in nature and also increase the value, status of women in India.

Post-modern feminism strikes at any kind of stereotyping of women. This theory opposes any kind of domination, disadvantage, stereotyping of women[7], administered by the patriarchy. Postmodern feminists say that, women serve men and other family members only because they know that it is the only way they are going to be valued by the other family members. It is an expectance from women in the family and the society. As for example, *section 2(c) of the Indecent Representation of Women (Prohibition) Act 1986 says:- " Indecent representation of women means the depiction in any manner of the figure of a woman ,her form or body or any part thereof in such a way as to have effect of being indecent, derogatory to denigrating women or is likely to deprave, corrupt or injure the public morality or moral".*

This legal provision fails to prevent some underlying derogatory messages, sexist view of the State. As for example, if an advertisement in television shows, women getting value from the family members for washing their clothes then of course it is derogatory and obscene for the status of women.

The feminist theories open our mind to the alternative viewpoints of women and it adds to the diversity of the society.

Nobody is born criminal. The environment, the peers, the treatment received from the parents, family, society, the lack of education, employment, poverty, the absence of preventive vigil from the parents, school, society, state, lack of deterrence,ample opportunity turn an individual into a criminal.Women are no exception. There are movements that, people are demanding; if perpetrator of the crime are women; there should not be any special treatment given by the State. Women should not be treated always as a victim rather than the perpetrator. As for example, if the Women are guilty of the "Adultery", they should be punished equally as Men. But there is a huge cost in these types of viewpoint and interpretation.[8] Apart from some mighty sophisticated women, if we examine the National Crime Record Bureau, the data provides the picture of the horrific crimes perpetrated against women in the whole India. Due to thegaps in the drafting of legal provisions, the law can be interpreted

7 Even now in every household in India, when guests come, little girls are expected to eat later with the womenfolk after the guests are served.

8 See section 497 of the Indian Penal Code related to adultery, which was struck down by the Apex Court in the case of Joseph Shine v Union of India (27th September,2018) .(https://indiankanoon.org visited on 1/1/2023).**Erstwhile section 497 of the Indian Penal Code:-** Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

in women friendly manner or in a gender neutral manner[9] or against the interest of the women.

We can examine some provisions of the Indian Penal Code. Section 85 of the Indian Penal Code provides for the liability of a person intoxicated against his will. Under this section the person will not be liable for any offence committed by him or her. Section 86 of the Indian Penal Code provides liability of a person who is intoxicated voluntarily. The person will be liable for an offence under this section as a sober person.

Now we examine the section 375 of the Indian Penal Code, defining "Rape".

Fifthly: - With her consent when, at the time of giving such consent, by reason of **unsoundness of mind** or **intoxication**or the administration by him personally or through another of any stupefying[10] or unwholesome substance, she is unable to understand the nature and consequence of that to which she gives consent.

Now the question is, whether the Man will be liable for rape if the woman is involuntarily intoxicated or for both; voluntary and involuntary intoxication?

One line of argument is, since a statute is read as a whole, and as per harmonious construction of all provisions of a code (All provisions of the code are supplementary and complimentary to each other) the liability of rape will cause from both voluntary and involuntary intoxication of the woman. This is of course a women friendly/ feminist interpretation.

The second line of counter argument is, since the word intoxication is in company of other words in the clause fifthly, section 375 of the Indian Penal Code, the intoxication means only the involuntary intoxication. The previous word unsoundness of mind will only mean the legal insanity[11]. Penal laws are interpreted strictly, thus the liability of the subject will always be strictly construed to protect the liberty of the subject. The legislator if wanted to include both types of voluntary and involuntary intoxication; for fixing the liability of rape; they would have expressed both the concept through clear words, as per the section of the 85 and 86 of the Indian Penal Code. This is a literal interpretation.

Section 375 of the Indian Penal Code, fourthly:- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believe herself to be lawfully married.

Thus, the protection is given to the married women only. Legislators have imposed their value to the women folk of India, who include widow, unmarried etc.

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9 See section 326A and 326B of the Indian Penal Code. Both the sections can be interpreted in gender neutral manner. Any person can be the perpetrator of the crime of causing grievous Hurt by use of acid etc.or voluntary throwing or attemptingto throw acid. But the available data shows men aregenerally the offender. Any exception proves the rule.

10 A state of insensibility, stupor.

11 See section 84 of the Indian Penal Code. Here the ingredients are the person does not know the nature of the act and what he is doing is contrary to the law.

Though it is argued that, in the modern era, women may be the perpetrator of crime like male, but if available data are analysed, (As for example NCRB) the sheer number of women victim of crime are astonishing. Many offences committed against women are not reported. As for example, Honour killing of a woman by her own family to prevent her right to choose her partner, is hardly reported. Thus numbers of murder committed against women are not reflected in the NCRB data.

Conclusion/Action Plan: - Some data related to Women victim of Crimes, who received compensation or in the process of getting it, has to be identified from 2018- 2023(As proposed). The Data can be collected from the relevant Court, or District Legal service Authority, State Legal Service Authority. Then we measure it with the compensations mentioned under the Schedule of the Victim Compensation Scheme, 2018, Tripura[12]. We take in all the parameters mentioned above to calculate satisfaction level. Gradually, we derive and calculate satisfaction level of the Women victim of Crime. As for example, cases conducted for more than Five Years in Courts, we may say that, satisfaction level of the Women victim of Crime is Zero. Because these cases are evidently not frivolous and it is the failure of State machinery to provide speedy justice as enshrined under the Article 21 of the Indian Constitution. If a woman victim of rape gets 1 Lac as compensation, we can calculate the satisfaction level is (1 Lac Divided by 3 Lac X 100) Equal to 33.33%[13]. Now we can take a random sample of 100 women victim of Crime, supposedly representing the universe and calculate their satisfaction level, holding that compensation provided in the Victim Compensation Scheme as 100%. Thus through a Pie- Chart, we can identify the satisfaction level of the Women victim of Crime in all the States and Union territories in India where Victim Compensation Schemes are in existence and application.

Thus the efficacy of the Scheme will be tested and desired improvements can be made.

12 Or West- Bengal Victim Compensation Scheme.

13 3 Lakh as a hundred percent satisfaction level, for victim of rape under the Victim Compensation Scheme.

To Study Consumer Behavior Towards OTT Platforms in Special Reference to National Capital Region

Mr. Omesh Chadha & Ms. Shivani Shukla***

ABSTRACT

Today's era is digitalized era. Study to entertainment everything is now available online. Now, information & products are only fingers away. Digitalization has drastically changed the use of work & content we consume. Due to the pandemic situation, OTT platforms are now more demanding. People are now more using the Internet for entertainment, shopping, study & Knowledge. This OTT platform has changed the trends of the new dawn. Given idea to shrink the whole world closely & bring the entire world together. Over the top (OTT) is a film and television content that is provided via the Internet as opposed to the traditional means of a cable or satellite provider. The sampling methodology which is used to conduct this survey is convenience sampling & descriptive research is used as the type of Research Design.

Keywords: *Digital Media, Entertainment, Indian Perspective, OTT, Subscribers, Viewers.*

INTRODUCTION

Digitalization has changed the perspective of the users. Technological advancement, availability of devices, and accessible network increased the users of OTT platforms that easily give better & good services via the Internet. When we compare the Indian users with the other countries' users, we concluded that India has the second-largest OTT users after the United States of America & it is estimated that it will reach the value of 178 billion by the end of 2025. According to the FICCI (Federation of Indian chamber of commerce & industry) report, in 2022, users using OTT platforms are 40-45 billion.

The word "OTT" or "over-the-top" refers to delivering content or services over an infrastructure not controlled by the supplier of content. Initially, it was used for audio and video distribution. Still, later the word was extended to embrace any service or information on the OTT platforms. in the past, The rapid development of

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users occurs swiftly via OTT platforms worldwide Internet connectivity has made digital media devices increasingly supported. The fact that the OTT sector will be the face of the media and entertainments industry over the next few years is not a second guess. According to a study by Allied Market Research on the OTT Service Market, the global OTT market has significant growth potential, with CAGR of 16.7 percent. The Indian OTT sector remains in its emerging phase of growth compared with the global market. However, the tremendous rise of Indian audiences consuming video material makes the subcontinent a growing OTT market. The Indian OTT business is anticipated to have Rs 11,977 cr by 2024, as forecasted by Price water house Coopers (PwC) in its research entitled "Global Entertainment & Media Outlook 2019-2024 (Outlook)." These quick growths have given creators/owners of content a good chance and have given them greater visibility on the digital consumer journey and advertising and businesses. This helps the platforms to generate substantial income and reduce their losses. It becomes essential to comprehend the participants of the industry and the audience that they serve on this journey of profitability. The paper examines the developments in the Indian M&E market of several OTT platforms and highlights the content, use and income models and other key criteria. In addition, via video analytics and measurement, it also analyses the content strategy of these brands on YouTube. The study gathers in the concluding section the results achieved by thorough consumer research that examines customer preferences and consumption patterns. It provides a comprehensive study of parameters, including subscription behavior, content and genre, devices used, frequency and consumer opportunities, and much more.

LITERATURE REVIEW

Woo, K.S.and Fock,H.K. (1999) reported that online services are successful based on various characteristics, such as network coverage & transmission efficiency. Following study of numerous scenarios Net studies and their applications in the direction of India show that Indians now embrace diverse forms of online media platforms for streaming.

Clients Carey, J. receives the latest technology according to perceived ideals, expectations and standards. (1995).. Carey. Carey, J. (2004). (2004). High end possession Home theatre TVs discourages OTT services when adopted by OTT. Home theatre TV. Customers who wish to take action against the various dangers, which are ready to accept the OTT service (short battery life, small displays, and content rights) that is compliant with OTT services, and who are suspicious about various Threats that may impair the success of the VoD service. Early adopters of new products are also OTT service providers, and moreover, the mainstream customers have shown their desire to future use of the Hyers, K VoD services (1999).

Ponnumani (2022) has stated that pandemic is one major reason behind the growth of OTT usage. With the start of pandemic online usage was aggravated tremendously resulting in usage of many areas/ OTT was the area which gained an upper edge for entertainment and its use rose tremendously.

Begum (2018) opined that In India, people choose video services based on local content and price is equally important factor. Price plays an important role when people choose the video services in India. Amazon prime gained an upper edge as it is also associated with prime membership for the Amazon application.

Dasgupta (2019) stated that millennial consumers have different understanding and acceptance towards OTT. The entertainment they seek is based on the modern thought process they possess. Generation gap plays an important role in choosing the content they watch. Many OTT organizations now have understood the needs of millennials and have designed the content accordingly.

Gangwar (2020) advanced technology and quality of content is a major reason behind growth of OTT in India. The customers initially when comparing the content with films they watched and the satisfaction they wanted after watching, more or less same or even more than that was achieved when watching the online content. This resulted in giving the content more on advanced technology by the producers who offered the content on OTT platforms.

Agshin. (2022) on their study on user gratification towards OTT platform in covid times have stated that there was 140 percent upward thrust in streaming in India. They have suggested to reduce again the subscription cost of OTT platforms and give importance for content creation which will result in customer satisfaction.

Sant (2019) has opined that there are various factors leading to adoption of OTT services among millennial consumers. Entertainment is one of the prime most emerging factors, the ideology and thought process of millennials is fed with the same entertainment serials and movies which ignite the millennials. Social media ideology and the things which are on OTT are quite correlated.

Lee (2018) have studied and opined the factors influencing online subscription, stating the significance relationship between cost and cable TV. The impact is on how consumers do watch entertainment and explore different ways that cable TV or streaming services are used.

(PWC,2019) the study analysed that the Indian market is growing enormous in respect of OTT platforms. Compared to the other developing countries the reason for that growth is increasing the use of Internet & broadband connections.

(IAMAI, 2019). According to today's situation, we can't imagine our life without the Internet. The worldwide population is using the Internet, so we can say that India is the second-largest internet user country after china. As per the data, at the end of 2019, India had 451 million internets active users & it is assumed that by the end of 2023, it will achieve 666.4 million.

(Kant, 2019). The government's Digital India initiative aims to increase individual adoption of digital payment systems. The challenge is to put policies to improve internet security to protect against online and cyber fraud.

(Li, 2015). Nowadays, the Internet is a business perspective sector and a whole marketplace run because of various OTT platforms or service providers.

(Begum, 2018). The study analysed that the most important reason to adopt OTT Platforms by the Indians is the easy availability of the content; data revealed that 74% of the viewers are using original content & 26%rst of them are using international dubbing content.

ICFAI (2019) report on "Transition of Consumer towards Video Streaming Industry: A comparative analysis of Netflix and Amazon Prime." mentioned that Content is said to be the king when it comes to on-demand video streaming channels and Netflix has slight edge over others in terms of content. Hot star seems to be 10 considerable choices because of the content it offers at affordable prices. Mann et al., (2015) in report "Digital Video & the connected consumer" notified that with 50% of Smartphone app users aged between 18-24 years, the OTT media platforms are targeting a younger demographic.

Khanna (2016) in his report "A study on factors Affecting Subscription rates of Netflix in India: An Empirical Approach" stated that Indian consumers are more inclined to watch free content online rather than pay a fee for the same. Low subscription of Netflix is due to the non availability of regional and local TV shows and movies

(QureshMoochhala, 2018). Netflix entered India in 2016 to expand globally. Netflix India's low subscription cost was the author's focus. Netflix should come up with a better pricing strategy as India has high income parity; content enrichment with more regional content to engage more customers; smartphone focused, designing subscription plans specifically for app targeting non-metro based audience; more payment options in addition to credit cards as debit cards are highly penetrating the market and e-wallets are rising; and smartphone focused (Virender Khanna, 2017).

IDENTIFIED VARIABLES: PROFILES & USE FACILITY

We discover that technology has evolved steadily nowadays, and that presents their obstacles, in particular for older generations that have not developed to utilize many of these new streaming possibilities. Some people say many clients are out. Today when it becomes too complicated, the new possibilities for streaming online media aren't being tested because it is difficult to achieve a reduction in the gap. In order to attract more people, more likely than difficult to use, the older generation are to accept a new application. This type of user is more likely to have a better answer. Research has proven the important association between buying and acquiring various OTT platforms, buying media, and buying added perks on OTT platforms.

OTT video platforms have an odd challenge, especially in a market like India. There is still a very immature concept of a paid membership on the market such that most people still confine the platform to free material or a limited free time offer. Most of the responders believed they would be free instead of enjoying these forums. However, when funds are used to visit these sites, respondents hesitate to pay slightly for specific sites. The OTT platforms, therefore, compete with each other, but also others in the media. In this respect, As a consequence, advertising in OTT networks should teach the population that they pay for their views on OTT, but pay for TVs, as compared to OTT platforms, for what they don't watch television. Some consumers

are more drawn to free OTT than to paid platforms, since they perceive OTT as an additional channel for entertainment. This will change if the consumer feels that the OTT platform is not supplemental but that the consumer's Perspective of the cost of payment will shift. Customers must be aware that OTT's platform replaces their TV viewing, because consumers may see exactly what they want and pay for what they are watching in particular. In the future, this approach could lead to lower TV usage in terms of the consumer investment in entertainment spending but more successful viewing of OTT channels.

METHODOLOGY

Following are the objectives of the study:

1) To Understand the customer preference towards OTT Platforms.
2) To find the factors affecting customer preference towards OTT Platforms.

A survey was carried out online by sharing the Google Forms pattern questionnaire for this study. The survey included: For several days, it was mostly distributed via intraplatform messages like Whatsapp. The total number of responses was ultimately 120. The sample survey gathered primary data and was not likely to sample. Better said, the researchers have conducted convenience sampling since it delivers more trustworthy data and an easy interpretation of it. The platforms with a certain rating according to the ratings of the participants were assessed. The independence of attributes such as the platforms usually utilized in the last three months and the content type consumed on the OTT platforms of the responding parties were tested in the chi-square test. The participants' age, sex and family revenues were some essential demographic factors. Outreaches included age and monthly family income as independent parameters for the analysis of regressive data against dependent variables such as the purpose of OTT platforms, the number of screening payments per month, the platform used for accessing content, consumption reasons, and the preference for substantial correlations in content.

On the other hand, the association between respondents' age and the type of content consumed was established and, on the other hand, the association between the OTT platforms and the most popular material (Table 1).

Table 1: Demographic analysis.

Age	Frequency	Percentage
0-13	0	0%
14-20	14	11.66667%
21-30	94	78.33333%
30-40	7	5.833333%
Above 40	5	4.166667%
Total	120	100%

Application of the Garret's Ranking Technique

(Table 2-4)

S.No.	Percent position	Calculated Value	Garret Value
1	100(1-0.5)/5	10	75
2	100(2-0.5)/5	30	60
3	100(3-0.5)/5	50	50
4	100(4-0.5)/5	70	40
5	100(5-0.5)/5	90	26

Table 3: Percent positions and Garret values.

Interpretation

The Garret rankings were determined using the proper Garret formula for ranking. Using Garret rankings, the garret Value was computed.Ã,Â Ã,Â

Formula; Percent Position= 100(Rating no.-0.5)/No. of OTT Platforms.

OTT Platform	Rating 1	Rating 2	Rating 3	Rating 4	Rating 5	Total	Average	Rank
Netflix	3975	1560	900	480	286	7201	60.00833	2nd
Amazon Prime	2850	2400	450	680	416	6796	56.63333	3rd
You Tube	5175	1260	200	200	546	7381	61.50833	1st
Voot	888	1440	2150	1080	364	5922	49.35	5th
MX Player	1875	1200	2350	360	494	6279	52.325	4th

Table 4. Calculated table.

Interpretation

YouTube is preferred over Netflix and Amazon as top 3 OTT platforms.

Hence, there is preference among respondents to choose OTT Platforms to watch contents.

Chi- Square Test

(Table 5-7)

OTT Platform	Original/Exclusive content	Movies	Sports	News	Tv Shows	Total
Netflix	2	26	3	3	1	35
YouTube	14	26	3	2	1	46
Mx Player	3	1	2	1	1	8
Voot	1	1	1	1	1	5
Amazon Prime	5	12	2	1	1	21
Total	27	67	7	5	9	115

Table 5. Observed value table.

OTT Platform	Original/Exclusive content	Movies	Sports	News	Tv Shows	Total
Netflix	8.2173913	20.3913043	2.13043478	1.52173913	2.73913043	35
YouTube	10.8	26.8	2.8	2.3	3.6	46.3
Mx Player	1.87826087	4.66086957	0.48695652	0.34782609	0.62608696	8
Voot	1.17391304	2.91304348	0.30434783	0.2173913	0.39130435	5
Amazon	4.93043478	12.2347826	1.27826087	0.91304348	1.64347826	21
Total	27	67	7	5	9	115

Table 6. Expected value table.

Observed (O)	Expected (E)	(O-E)	(O-E) ^2	(O-E) ^2/E
3	8.21739	-5.21739	27.22117	3.312629
15	10.8	4.2	17.64	1.633333
3	1.87826	1.121739	1.258299	0.669928
1	1.17391	-0.17391	0.030246	0.025765
5	4.93043	0.069565	0.004839	0.000982
26	20.3913	5.608696	31.45747	1.54269
26	26.8	-0.8	0.64	0.023881
2	4.66087	-2.66087	7.080227	1.519079
1	2.91304	-1.91304	3.659735	1.256327
12	12.2348	-0.23478	0.055123	0.004505
2	2.13043	-0.13043	0.017013	0.007986
2	2.8	-0.8	0.64	0.228571
1	0.48696	0.513043	0.263214	0.540528
1	0.30435	0.695652	0.483932	1.590062
1	1.27826	-0.27826	0.077429	0.060574

1	1.52174	-0.52174	0.272212	0.178882
1	2.3	-1.3	1.69	0.734783
1	0.34783	0.652174	0.425331	1.222826
1	0.21739	0.782609	0.612476	2.817391
1	0.91304	0.086957	0.007561	0.008282
3	2.73913	0.26087	0.068053	0.024845
2	3.6	-1.6	2.56	0.711111
1	0.62609	0.373913	0.139811	0.223309
1	0.3913	0.608696	0.37051	0.94686
2	1.64348	0.356522	0.127108	0.077341

Table 7. Calculation.

Thus, total sum of (O-E) ^2/E = 19.3624688186136, d.f= (r-1) (c-1)= 4x4=16.

For d.f= 16 and Chi Square value 19.362, The P-Value is .250339. So, the result is not significant at $p < .05$.

Hence, we can say, the Original/Exclusive contents are independent to OTT platforms.

FINDINGS OF THE STUDY

YouTube is first with the output received (Table 3), then Netflix and Amazon Prime respectively in the second and third positions. The fourth was MX Player, Sony Liv in fifth place, followed by Voot, Zee 5, Hoichoi and BIGFlix in order to secure the tenth place together with Ditto TV.

The chi-square value (Table 4) was 22.45, while the freedom degree was 16. The essential number from the distribution table in chi-square, nevertheless, was 26.29.

The crucial value for chi-square proved to be higher than the estimated value given the frequencies of attributes observed and expected. Consequently, the investigator has to reject the null hypothesis and infer that the qualities are mutually dependent. This means that the type of content consumed depends on the platforms via which it is streamed. It often happens that, even if their content does not please viewers and vice versa, branded platforms acquire more subscriptions and users.

The regression analysis (Table 5) shows that, contrary to the correspondence between other attribute values, the platforms utilized for accessing material have a substantial link with the respondent's demographics, age, and income. The correlation coefficient

for respondent age and access platforms resulted in 'r' where r = 0 and the value for revenue and access platforms have turned into - r = 0.98.

The range between -1 and +1 for 'r.' Thus, the proximity of the r values with respect to the stated field is plainly visible. This illustrates that mobile phones and smartphones are utilized to access these contents among all inexpensive devices on Thus, total sum of (O-E) ^2/E = 19.3624688186136, d.f= (r-1) (c-1)= 4x4=16.

For d.f= 16 and Chi Square value 19.362, The P-Value is .250339. So, the result is not significant at p < .05.

Hence, we can say, the Original/Exclusive contents are independent to OTT platforms.

The coefficient of correlation for the distribution of age and kind of content (Table 6) resulted in r = - 0.24 demonstrating the linear weal relationship. This demonstrates that viewers of any age group are not limited to particular content restrictions. The privilege to multiple screening in inexpensive pay packages does not exist with such content constraints. The correspondence coefficient for OTT Platform and Content Type distribution (Table 7) resulted in r = + 0, 74 demonstrating a strong linear relation. The OTT brand and the content genre therefore have a good relationship with the viewers.

LIMITATIONS

Research is a never-ending process, and every research has some restrictions as well. The biggest restriction was the collection of data from the same region since the time for carrying out this study was quite restricted, although we obtained more samples, there is plenty of potential for new qualities.. There is another major reason why most of the review was not available. There needs to be a larger sample size and geography to make sense for any business choice. The more data-driven and current studies that apply in the same region the more social science practices would not give decision-makers more validity.

CONCLUSION

There will be a very bright future for OTT platforms and increased video consumption every day of the internet and mobile entertainment. In this study, we talk about the profiles and preferences of users. It is hard to say that OTT platforms will replace traditional TV systems with a lot of investment in OTT platforms. Indian consumers are much more likely to experience the pricing strategy of the OTT platforms in India. The main source of energy for the OTT platforms was the Internet as many telecoms companies are struggling to compete with their database plans in India due to jio, but the cost of OTT platforms remains identical. The millennium is the most important thing about data consumption. OTT platforms always seek a way of producing more attractive, unavailable content. The biggest issue is that every OTT platform has no financial capacity, especially OTT platforms and devices for new and small OTT platforms, to produce more video content for a new generation. Due to foreign content and video on request, the millennium is attracted to the OTT

platforms. The emergence of JIO and the free provision of 4G services greatly assist in the development of OTT platforms. Media and entertainment have established a new home for online streaming. The answer is that everyone in my study knows about OTT platforms, and some of them use cable and DTH as an alternative.

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Plea Bargaining in Indian Legal System

*Parag**

ABSTRACT

Plea bargaining was introduced as a revolutionary tool in the criminal justice system in our country to tackle the backlog of cases which are burdening the judiciary. Implemented in 2006 through the Criminal Amendment Act, it aims to expedite the process. This article analyzes the implementation of plea bargaining in India, including its provisions and judicial interpretations. It also examines the concept of Plea Bargaining in America, drawing insights to improve the Indian system. By focusing on the Indian context while considering successful practices from the US, this article explores the potential of plea bargaining to address the challenges faced by the Indian judiciary.

Keywords: *Plea Bargaining, Indian Criminal Justice System, Backlog of Cases, Implementation and Provisions, American Mode.*

INTRODUCTION

According to the present condition in the Indian courts the pendency of cases is one if the major concern. The latest figure reveals that the condition In India with respect to pendency of cases is very pathetic According to the latest report which is available not less than 3 crore cases are pending in the court and many cases are pending for more than 20 years. The Hon'ble Chief Justice of India has also shown his concern with respect to the huge pendency of cases. We all know about the maxim "Justice delayed is Justice denied" and delivering justice after a long time is not justice in the real sense. There are a lot of cases having a very long trail and one the famous cases is *Assn. Of Victims of Uphaar Tragedy v. Union of India (Uoi) And Ors*.[1] in which the court has given justice after 18 years of trail and even the main accused of the case are not held accountable and the other one is *Union Carbide Corporation v. Union Of India*[2] i.e. Bhopal gas leak tragedy case of 1984 in which the real culprit was still not punished. The Indian legislature while taking into consideration the problem of pendency of cases has come up with a solution to tackle this problem and the solution

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1 2003 ACJ 1631

2 1992 AIR 248

came from the doctrine of Plea Bargaining. The Code of Criminal Procedure, 1973 was amended and a new chapter that is chapter 21A was instituted by 2005th Amendment Act which contains the doctrine of plea bargaining in the Indian criminal justice system.

HISTORICAL BACKGROUND OF PLEA BARGAINING

The legal researchers generally considered the beginning of plea bargaining in the 19th century, but the origin of plea bargaining can be traced back from the origin of confession laws. The first appearance of plea bargaining in US can be witnessed just after the Civil War Despite relying on the precedents that provides prohibition for offering benefits in exchange for a guilty plea, several courts rejected the concept of plea bargaining and allowed parties to withdraw their statements. However, in reality, these decisions by the appellate courts did not prevent plea bargaining from prevailing in the justice delivery system. Corruption in the 19th and 20th centuries helped sustain the concept of plea bargaining. If we focus on the time period from 1908 to 1916 in America, we can observe that there is rise in conviction from 50% to 72% by the concept of Plea Bargaining. Although the rate conviction by plea bargaining increased rapidly in the early 20th century but the higher courts are in denial mode to approve this doctrine. Ineffective justice delivery systems and prolonged criminal cases were the reasons behind the emergence of plea bargaining. Plea bargaining not only provides relief to accused individuals who have been incarcerated for many years due to trial delays but also offers an effective remedy to victims by swiftly resolving criminal cases

In US around 95% of conviction is only by the concept of plea bargaining which can also be called as negotiated plea. If we focus on England and Wales we can notice that 92% of convictions are done through plea bargaining But in the British court the rate of conviction through plea bargaining is very high as only 14.3% cases go for trial the remaining cases are dealt in accordance with the concept of plea bargaining[3].

In the case of *Bradley v. United States*[4] the Supreme Court of America upheld the practice of plea bargaining in 1970. This practice of plea bargaining is also adopted in other common law and civil law jurisdictions.

THE PLEA BARGAINING MODEL IN UNITED STATES OF AMERICA

The United States can be regarded as the country which brings into existence the doctrine of plea bargaining. The Plea Bargaining in United States is applicable almost to all sorts of crimes and around 90% of the cases in United States of America are resolved by plea bargaining[5]. It is very interesting to note that there is very less

3 Abhas Kshetrapal (2013). "A Deviation From The Former Adversarial Trial: The Concept of Plea Bargaining And Its Contemporary Relevance." "Bba. Llb (Hons) Project, National Law University, Jodhpur."

4 410 U.S. 605 (1973

5 Judge Peter J. Messitte, "Plea Bargaining in Various Criminal Justice Systems" "(Montevideo, Uruguay)"

rules concerned with plea bargaining in state as well as in federal level in US. America does not limit the cases which can be resolved by plea bargaining from a smaller crime up to the serious one all the crimes can come within the ambit of plea bargaining in America. The important thing is that the plea of guilt must be voluntary and intelligent. This means that the person who is defendant should understand that what he is doing by plea bargaining and what are the consequences of acceptance of Plea Bargaining deal. The plea bargaining should not involve physical coercion or any type of force which result into harm to person. If we focus on the practice in the court we can note that there are rules which should be followed while accepting the guilty plea. One such rule is that the defendant has to state clearly on the record of court that he understands giving up the right to trial.

When it comes to the negotiation of pleas, there are no specific rules that dictate how it should be done. While both the prosecutor and the defense attorney are expected to adhere to a general ethical code of conduct, it is worth noting that the plea itself is often widely worded and does not explicitly mention bargaining. As a result, the prosecutor holds significant power in the plea bargaining process, allowing them the authority to dismiss a case entirely or offer alternative sentencing options. It is important to clarify the distinction between plea bargaining and an abbreviated trial, as these terms are often confused. In an abbreviated trial, the accused individual willingly pleads guilty to the offense they have committed. The judge after this considers all the evidences on record, including the plea of guilt, and subsequently provides the defendant with a reduced sentence. One key difference is that in an abbreviated trial, the law disallow for negotiation between the prosecution and the defense regarding the charges. The criminal procedure code specifies the reduction in sentence that may be granted for a guilty plea, and the defendant waives their right to a full trial.[6].

TYPES OF PLEA BARGAINING

There are commonly four types of Plea Bargaining which are as follows-[7]

1. Charge bargaining- The Charge Bargaining is one of the most used form of bargaining in the criminal justice system. In this type of plea bargaining there is a negotiation involved of a specific charge faced by the defendant. In this type of plea bargaining in return to plea of guilt a lesser charge is framed against the defendant that result in the lesser punishment to the defendant. In this plea bargaining the severe charge is bargain for a lesser one. There is an exchange of concession by both the parties.
2. Sentence bargaining- This type of bargaining relates to the consensus of Plea of guilt between the parties for the stated charges. In this type of bargaining a lighter sentence is given to the defendant and in this type of bargaining the

6 Hans Sachs, "Introducing Plea Bargaining in Post-Conflict Legal Systems" (2014), "INPROL Research Memorandum"

7 S. Rai, Law relating to Plea bargaining (2007)

defendant has to face trial and prove his case but it is provided that defendant has an opportunity for a lighter sentence. This process is mainly introduced in India where the accused with the consensus of both the parties on either side work for a lesser sentence than prescribed for that offense.

3. Fact Bargaining- The Fact Bargaining is the least used negotiation and it involves an admission of facts which are substantial to the case. This bargaining provides for eliminating the need to prove the case by the prosecution on certain fact and in response to this an agreement was done which result into non disclosure of certain other facts.
4. Counts bargaining- In Counts bargaining the defendant pleads guilty to a set of multiple charges which are originally framed.[8]

THE CONCEPT OF PLEA BARGAINING IN INDIA

In 2005, Criminal Procedure Code, 1973 was amended and it includes the provisions for plea bargaining. A new chapter, Chapter 21A, was added, which outlines the procedure to be followed in "Plea Bargaining". The sections 265A to 265L of Code of Criminal Procedure, 1973 contain the fundamental provisions for the application of plea bargaining.

The Law Commission of India pointed out the requirement of inclusion of Plea Bargaining in the Criminal Procedure Code, 1973 in its 142nd, 154th, and 177th reports. The 154th report specifically recommended the incorporation of a new Chapter 21A in the Code of Criminal Procedure (CRPC). This report referred to the 142nd report, which discussed the successful implementation of this doctrine in the United States.

The law commission of India is of view that initially plea bargaining should apply only as an experiment for offenses which are punishable for 7 years or less but it includes offenses which falls under Section 320 of the code. The recommendation by Law Commission also emphasized about habitual offenders, those accused of serious socio-economic offenses, and individuals accused of offenses against women and children should not be eligible for plea bargaining.

The recommendation of Law Commission of India in its 154th report was supported by the Law Commission India in its 177th report. In 2000, the Committee on Reforms of the Criminal Justice System, chaired by Dr. Malimath, stated in its report that the successful implementation of the doctrine of plea bargaining in the US serves as evidence that it is an effective measure for the disposal of pending cases in the courts and the delivery of justice at right time.[9]

8 K. V. K. Santhy, "Plea Bargaining in US and Indian Criminal Law: Confessions for Concessions," 2013 ILR.

9 Plea Bargaining – A New Concept" (accessed on [1 June 2023), available at www.upslsa.up.nic.in.

PROVISIONS OF PLEA BARGAINING IN CODE OF CRIMINAL PROCEDURE, 1973[10]

1. Section to 265A of the Code of Criminal Procedure, 1973 provides that the Concept of plea bargaining is applicable only to the accused who is punishable with imprisonment which is less than or equal to 7 years and the clause 2 of the same section gives power to the central government to provides Punishment for offences. The plea bargaining is not applicable where the offence is of such nature which affect the social economic condition of a country, and also if the offences are committed against women or a child who is below the 14 years of age. As far as the offences involving the social and economic condition of a country are concerned the central government by notification will determine.
2. Section 265B of the Criminal Procedure Code, 1973 deals with application process for plea bargaining. According to this section, an individual accused of an offense has the right to file an application for plea bargaining. In this application, the accused is required to provide a description of the case and accompany it with an affidavit. The affidavit states that the accused has willingly chosen to submit this application under the specified section, and that they have a clear understanding of the nature and potential punishment associated with the offense. Additionally, the accused must declare in the affidavit that they have not previously been convicted of the same offense by a court.

   Once the court receives the application for plea bargaining, it issues a notice to the public prosecutor and sets a date for the appearance of the accused. On the designated date, when the accused appears before the court, the court conducts an examination of the accused privately, known as an "in-camera" hearing. During this examination, the court ensures that the accused has filed the application voluntarily and of their own free will.

   Once the court is satisfied with the voluntary nature of the application, it grants a suitable amount of time to the accused, public prosecutor, and the complainant to work towards reaching a mutually agreeable resolution of the case. This process may involve considering options such as providing compensation to the victim, with the ultimate aim of achieving a satisfactory disposition of the case.
3. Section 265C provides for the Guidelines which should be followed for mutually satisfactory disposition of the case. If the case is such which is instituted on the police report then the court shall issue noticed to the public Prosecutor, Investigation officer and victim and the accused of the case to participate in a meeting of mutually satisfactory disposition of the case. It is the duty of the code to ensure that the whole process is done voluntarily. If the case is instituted otherwise then on a police report then it is the duty of the court to issue notice to the accused and victim of the case to work on a mutually satisfactory

10 Code of Criminal Procedure, 1973

disposition of a case and in this also it is the duty of the court to ensure that the whole process should be completed voluntarily by the parties.

4. Section to 265D provides for the submission of mutually satisfactory disposition agreement before the court. The court shall prepare the report of that mutually satisfactory disposition which shall be signed by the judge and all other parties who participated in the meeting and there can be situation in which there is no such disposition which has been workout between the parties then the court shall record such observation as per the provisions of Code of Criminal Procedure, 1973.
5. Section 265E provides for the disposal of the case and it provides that after the mutually satisfactory disposition the court shall dispose of this case in following manner. The court in the disposal of the case award compensation to the victim as per the mutually satisfactory agreement under Section 265D and hear the parties on the point of quantum of punishment. The court can release the accused on ground of good Conduct under section 360. The court can also provide half of the sentence to the accused of offences for which the minimum punishment is provided. If the court finds that the accused is not covered under the above provisions then the court can sentence the accused to the 1/4 of the punishment provided for the offence.
6. Section 265F provides there the court shall deliver its judgment in an open court and the judgment shall be signed by the presiding officer of the court. The judgment shall be delivered in accordance with the mutually satisfactory disposition agreed by the parties under section to 265E.
7. Section 265G provides that after the judgment has been passed by the court no appeal is allowed against it. The only remedy is to file special leave petition under article 136 and writ petition which can be filed under article 226 and 227 of the Indian constitution.
8. Section-265H provides that court has power with the respect to the trial or other matters provided under the provision of the code of Criminal Procedure, 1973 with respect to the discharging of function under the chapter of Plea bargaining.
9. Section 265I provides that the period of the detention which is undergone by the accused should be set off against the sentence of imprisonment which is awarded by the court to the accused. The provision of section 428 will apply in respect to the set off of the period of detention.
10. Section 265J is a saving clause which provides that the provisions of this chapter is a saving clause. This section provides that provision of this chapter shall have an overriding effect on inconsistent provisions in Code of Criminal Procedure, 1973.
11. Section 265K provides that any statement or fact which are provided by the accused in plea bargaining application cannot be used for any other purposes other than bargaining. This means that the information shared by the accused

during the plea bargaining process should not be utilized or brought up in any other legal proceedings or investigations. The section ensures that the statements made by the accused are confined to the plea bargaining process and are not admissible as evidence in unrelated matters.

12. Section 265L provides that this chapter shall not apply to the child or juvenile {defined in the Juvenile Justice (care and protection of children) Act, 2000}.

JUDICIAL DECISIONS

While the concept of plea bargaining has faced discontentment from the Supreme Court in the past, it is important to note that the court's displeasure does not pertain to the current model of bargaining in existence in India. The Supreme Court has deliberated on numerous cases involving the concept of plea bargaining. Some notable cases where plea bargaining has been discussed by the Hon'ble Supreme Court include the following:-

In *Murlidhar Meghraj Loya vs. State of Maharashtra*[11], Justice Krishna Iyer expressed his concern regarding an agreement between the parties and highlighted that criminal law in India does not currently encompass the concept of plea bargaining. However, Justice Krishna Iyer also expressed favored view towards plea bargaining and supported the concept and asked to be taken seriously by the legal community. This indicates that the judge recognized the potential benefits and effectiveness of plea bargaining, suggesting that it should be deliberated upon by legal experts and practitioners.

1. In *Kachhia Patel Shantilal Koderlal v. State of Gujarat and Anr*[12], the Hona'ble Supreme Court rendered a judgment declaring plea bargaining as unconstitutional. The court expressed concerns that implementing plea bargaining in India could potentially lead to rampant corruption. The court's decision highlighted the potential risks associated with plea bargaining, emphasizing the need to safeguard against any negative implications it could have on the judicial system and the overall integrity of the legal process.
2. In *State of Uttar Pradesh v. Chandrika*[13], the court overturned the order of the High Court that allowed for plea bargaining. The Supreme Court reminded the High Court that the concept of plea bargaining is not recognized in the criminal justice system of India. This decision reaffirmed the stance that plea bargaining, as a legal practice, is not currently accepted or implemented within the Indian criminal justice system.

Over time, the concept of plea bargaining has made its way into the Indian legal system, eliciting varied opinions from the jurist. In *State of Gujarat v. Natwar Harchanji Thakor*[14], the Hon'ble Gujarat High Court made an observation regarding the objective

11 1977 SCR (1) 1

12 Special Leave Petition (Criminal) 3774 of 1999

13 Special Leave Petition (Criminal) 3774 of 1999

14 2005 CriLJ 2957

of the law, emphasizing that it aims to provide affordable, efficient, and expeditious justice by resolving disputes, including criminal cases. This acknowledgment opens up the possibility of incorporating a new dimension in judicial reforms to enhance effective delivery of justice. It highlights the need to explore alternative methods, such as plea bargaining, to streamline the legal process and achieve the goal of efficient dispute resolution.

In the case of *Pardeep Gupta v. State*[15], the High Court made an observation that rejecting plea bargaining by trial court seemed to overlook the Chapter 21A of the Code of Criminal Procedure, 1973. The High Court emphasized that the court should have considered the fact that the offense under Section 120B of the Indian Penal Code (IPC) is punishable with less than 7 years of imprisonment. The court highlighted that when assessing a plea bargaining request, the court should take into account the accused's role and the nature of the offense committed. In this particular case a direction is given by the High Court to the trial court to reexamine the accused application for bargaining, considering the provisions of the Code of Criminal Procedure, 1973. The directive aimed to ensure that the trial court would properly evaluate the plea bargaining application and consider the relevant legal provisions in determining its viability.

CONCLUSION

A careful analysis of plea bargaining in India reveals that the Indian judiciary plays a more active role compared to its counterpart in the United States. In India, the judiciary takes an active stance, whereas in the United States, the judiciary tends to be more passive. Additionally, in the plea bargaining in India, the victim has the power to discontinue with the terms of the bargain, whereas in the US, the victim's ability to discontinue with the terms is limited. It is important to acknowledge that there are several shortcomings in plea bargaining system in India that need to be addressed in order to enhance its efficiency.

However, it is not feasible or advisable to completely adopt the American concept of plea bargaining in India, as conditions and contexts of two countries differ significantly. Instead, there is an opportunity to learn from other countries and identify the loopholes that need to be addressed to make plea bargaining more effective in the Indian context. The judiciary should encourage the implementation of plea bargaining laws in India, as without active support from the judiciary, such laws cannot become a widely accepted remedy for the people. Plea bargaining should be given due importance and practiced regularly to truly benefit from its potential. Addressing the issue of pending cases in India, plea bargaining appears to be the most viable solution and is the need of the hour. It presents an opportunity to expedite the justice delivery system and alleviate the burden of pending cases.

15 Criminal Misc. Bail Application No. 27278 of 2021

Anticipatory Bail and Criminal Justice System in India

Mr. Parvinder & Dr. Ramveer Singh***

ABSTRACT

Anticipatory bail, as the name suggests is a kind of approval for a person for stopping his or her arrest anticipated. It is just a kind of preventing the relief which was not originally included in the criminal procedure. There must be a necessity in granting the bail which arises through few influential people and require them to create a kind of offensive accusation. There has been a lot of grounds on which basis holding that the person is accused of an offence. The very purpose of this is to create a kind of freedom for the prisoner to come back and make the best of its use.It is not for a fixed period and can be extendedif the trial runs. There won't be any kind of prohibition from the side of the law in order to bring it within a short period of time only. Court has brought the case judgements based on the cases held back-to-back in the case of aggressions and individual indecent behaviour. It depends on the conduct and behaviour of the accused. If the behaviour goes rude then serious action will be taken against the person. An ordinary anticipatory bail won't be a blanket or a covering for a fugitive. ***(Shekar, 2002).***

It will never become a kind of claim a protection shield for committing offences and claiming the relief for indefinite protection from the arrest of the fugitive. It has been seen that an arrest is sought in relation to a specific reason, and it can't be unrelated to an incident. When an anticipatory bail does not have any kind of manner limit or It will never become a kind of claim a protection shield for committing offences and claiming the relief for indefinite protection from the arrest of the fugitive. It has been seen that an arrest is sought in relation to a specific reason, and it can't be unrelated to case to the concerned court who has given the anticipatory bail for the direction under section 439. ***(High Court case 1992).***

Keywords: *FIR., Anticipatory Bail, Bailable, Non Bailable.*

INTRODUCTION

According to section 438 a person who is expecting to be arrested can be granted an anticipatory bail for offence which are non bailable and prior to an FIR being lodged. When a person is arrested, they must apply for a regular bail or interim bail which

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depends on the situation. It is the direction to release the person on bail before the arrest.

There are certain conditions which are imposed by the court while granting the anticipatory bail. The conditions are as follows: -

- The individual makes herself or himself being very much accessible for questioning by the police officer when and required. They must present themselves for each work they do.
- That individual must provide the local police station with their current residence address, native address, and phone number.***(livelaw.in)***
- The court needs to get the feeling that theapplicant requires to be given an anticipatory bail or not. He or she must be valid for it and further there needs to be more importantly the approval from the government for doing with the process. The conditions in which the direction is going in the right path then there can be fact of the particular case which will be of very important fact and also there has to be a condition that has been closed and a promise has to be send in which there has been if any person is arrested by an officer in charge of a police station on such accusation which is prepared either at the time of arrest or at any time while in the custody of such officer to give bail shall be released and if a magistrate taking the cognizance of the case, then another non bailablewarrant will be propagated against the applicant and for this another interim judgement has to be passed. The court of session or high court grants anticipatory after considering the following factors which are very important. ***(dspace.cusat)***

RESEARCH METHODOLOGY

For the purpose of this research paper, we purposed to adopt doctrinal research paper methodology. The work is carried out by devising necessary and appropriate research tool to collect data from various law sources, for example various book, articles, reports, case laws, journals and website have been referred for the same purpose.

The nature and gravity of the complaints made including but not limited to whether the accusation is made based onpersonal vendetta and only to injure or harass the applicant.

There has to be confirmed guarantee that the person who has applied can withhold the trial and there won't be any issues in the further trials that has been following him. He should not leave the veranda of the court without the permission of the high court.

Difference between Regular Bail and Anticipatory Bail

This bail is essential nowadays when influential persons may involve their opponents, in false and frivolous criminal issues to either damage their image or to get them arrested for some time.

There is no need for a FIR to be filed against a person to make an application for anticipatory bail. When a person anticipates the reasonable grounds that exist for his arrest, he will be able to apply for anticipatory bail even before lodging an FIR.

A person has the right to apply for anticipatory bail even after lodging an FIR but only before the arrest is made. Once a person is arrested, it is compulsory to move an application for regular bail.

On the other hand, regular bail is bail that is granted by the Court to a person after he has been arrested. When any kind of person has committed an offence which will make them arrest and accused must be send to jail.

How to get Regular Bail?

In order to apply for bail either in case of a bailable or a non-bailable offense, the accused will have to submit an application for bail in the court. The court will then send the summons to the other party and will fix a date for the hearing. On the date of the hearing, the court will hear arguments from both sides and would give a decision based on the facts and circumstances of the case.

When a person has an apprehension of an arrest for a criminal offense, he or she may file an application for anticipatory bail with the help of a criminal lawyer. The lawyer will file the anticipatory bail application in the requisite court having the authority to adjudge the criminal matter along with a vakalatnama. The court will then notify a public prosecutor about the anticipatory bail application and would ask him to file objections if any. Thereafter, the court will appoint a date of hearing and after hearing the final arguments of both the parties would give a judgment based on the facts and circumstances of the case.

Bail may be cancelled on the following grounds as per various judgments given by the Indian courts:

1. When the person is seen to be found misusing the bail and also the evidence during the investigation process.
2. When the person on bail is indulged in serious offense.
3. During he has been found to misuse the freedom that has been granted to him.
4. If the life of the criminal has been put in danger and also further problem has been created and problems has been created.

The anticipatory bail can also be cancelled before the regular bail is granted. There are certain instances which needs to be carried for it.

CASE LAWS

Learned Senior Counsel for the applicant has relied upon the judgment of the Patna High Court in the case of Anirudh Prasad @ Sadhu Yadav vs. The State of Bihar[1] dated 22, May 2006 wherein the Patna High Court had earlier granted anticipatory bail to

1 2006 (2) PLJR 676

the applicant till the submission of police report. Later whenthe charge sheet was filed against him, he moved secondanticipatorybailapplicationfor granting him anticipatory bail till the conclusion of trial. The prayer was turned down by Patna High Court, but the Apex Court did not agree to the same and directed the Patna High Court to consider the bail application of the applicant afresh. The Patna High Court found that the power to grant anticipatory bail does not come to an end by mere submission of charge sheet against the applicant. After considering the merits of the case anticipatory bail was granted to the applicant by the Patna High Court till the conclusion of trial.

Aasu v. the State of Rajasthan (2017)[2], The Court has given a judgment that all the bail claims will be arranged in something like seven days of their recording, for this situation every one of the 4 denounced for this situation are reserved under Segment 302 and Area 34 of the Indian Punitive Code. The lower court allowed anticipatory bail for the wide range of various co-denounced. The solicitor in the moment case likewise recorded an application for anticipatory bail which was not settled for quite a while.

The first judgment is in the case of Establishment, decided by Doddakalegowda, J.[3] In the said case relying on the judgment of the Supreme Court in Kiran Devi v. State[4], it was contended for the State that no anticipatory bail could be granted in a case in which the petitioner seeking anticipatory bail is alleged to have committed an offence of murder. The learned Judge rejected the contention holding that the said judgment decided by a two Judge Bench of the Supreme Court was contrary to the ratio of the decision in the case of Gurbaksh Singh v. State[5], decided by a Constitution Bench. This case was decided on 12-5-1988. Thereafter, in the case of V. S. Norti v. State of Karnataka, on behalf of the State once again the same objection was raised in a petition under S. 438 of the Code. Navadgi, J. who decided this case, took the view that in the case of Kiran Devi, the Supreme Court had laid down the law to the effect that no anticipatory bail could be granted in a petition presented under S. 438 of the Code if the offence alleged to have been committed by the petitioner was murder and that being a very directive authorisation which has been in the course that there has been direct authorisation and proposition in the anticipatory bail.

Petitioner's counsel also placed reliance on Full Bench decision of Calcutta High Court in the case of Shamim Ahmed and Ors. v. State and Ors. reported as 2003 (4) RCR (Criminal) 211 wherein also it was held that even after charge-sheet is filed and cognizance is taken by the Court, petition for anticipatory bail under Section 438(1) of the Code is maintainable. Similarly, in the case of Natturasu and Ors. v. The State reported as 1998 Crl. L. J.1762 (1), it was held that High Court has power to grant anticipatory bail even after filing of charge-sheet and issuing of warrant. It was

2 Criminal appeal No. 511 of 20017

3 ILR 1988 KAR 1613, 1989 (3) KarLJ 236.

4 1988 SCC (Cri) 106

5 1980 AIR 1632, 1980 SCR (3) 383

observed that mere issuance of warrant on taking cognizance would not affect power under Section 438 of the Code to grant anticipatory bail. Even in the case of Bharat Chaudhary (supra) cited by learned Counsel for CBI, Hon'ble Apex Court held that petition for anticipatory bail under Section 438 of the Code is maintainable even after filing of charge-sheet by the police. Thus, on this aspect, it can be safely concluded that the instant petitions under Section 438 of the Code are maintainable, notwithstanding the filing of charge-sheets or reports by the CBI under Section 173 of the Code.

CONCLUSION

The correctness of an order granting a bail are considered by the superior court that comes aside by the maintenance of what is called as the material facts that has been considered as the crucial element and the cancellation of the terms of study that which brings in the most crucial elements of the court grants that it did not materialise the facts of what is called as the material facts. It is also there that anticipatory bail can be given by the High court or the court of sessions only can be done. It can be applying at different from the most of its kind in the issue of the period of the bail. A person who is been arrested can apply in the court of session or high court forgetting to be released on bail. The power to grant bail in the lower court is above their authority and they require special approval for it.

In order to apply for bail either in case of a bailable or a non-bailable offense, the accused will have to submit an application for bail in the court. The court will then send the summons to the other party and will fix a date for the hearing. On the date of the hearing, the court will hear arguments from both sides and would give a decision based on the facts and circumstances of the case.

Anticipatory bail is not a license of misusing the freedom which is given to a citizen but properly using the opportunity which is hand overed to them. It has been seen that there are no defects which has been caused by a citizen and it has to be seen that they are not being a threat to the nation or the state. The person on bail should be under the control of the law and that he or she not get into heinous activities and put others in in endanger.

There won't be any kind of prohibition from the side of the law in order to bring it within a short period of time only. Court has brought the case judgements based on the cases held back-to-back in the case of aggressions and individual indecent behaviour. It depends on the conduct and behaviour of the accused.

There are certain conditions under which they are approved anticipatory bail. The conditions are: -

1. The nature and gravity of the accusations.
2. The charge levelled against the applicant intends to harm or humiliate him by having him detained.

If the high court doesn't issue a custodial order where he has cancelled and rejected the application for the bail that has been received by the officer in charge of the

station to arrest the person who has applied without a certain warrant according to the application submitted and a seven-day notice has to be submitted to the prosecutor and then the application is only approved or refused after addressing it.***(livelaw.in)***

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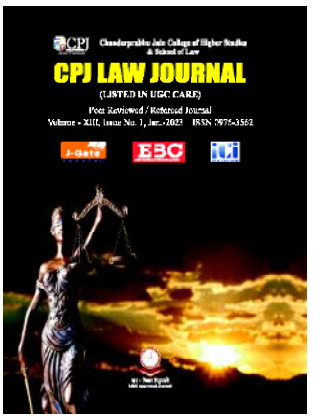

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