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IILS LAW REVIEW

INDIAN INSTITUTE OF LEGAL STUDIES
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ABOUT IILS

The Indian Institute of Legal Studies established in the year 2010 has evolved into a unique system of imparting legal education not only in North Bengal but also as an emerging education and Research Centre in the SAARC region with the establishment of the Centre for SAARC on Environment Study & Research. Acknowledged as one of the best law colleges in India, IILS is nestled in the cradle of the quaint Himalayas and picturesque surroundings assimilating nature and education, a combination which is a rarity in itself. IILS is an institute that promotes holistic study in Law in the form of short-term courses, field work, experiential learning, Clinical legal classes in addition to the regular undergraduate course. Post Graduate courses and Research Centre are already functional, which will mature into doctrinal courses.

The Institution takes pride in hosting workshops for police officers of North Bengal on Human Rights and Cyber Crimes, where the institute was privileged to have the presence of eminent police officers and scholars from different corners of the country. The Bureau of Police Research & Development, Ministry of Home Affairs, Government of India had approved the organising of a vertical interaction course for IPS officers on Criminal Justice Delivery System which was witnessed by the gracious presence of the Hon'ble Judges of the Supreme Court of India and the various High Courts.

The Institution has been organising a series of National and International Seminars, Conferences, Symposiums, Workshops and Inter and Intra Moot Court competitions. The Institute had started with organising a national seminar on the "Civil Justice Delivery System". Today, it has reached the peak of organising international seminars with the SAARC Law Summit & Conclave being the blooming one.

Presently, the world is facing health crises due to the emergence of a pandemic caused by COVID-19 virus and physical gatherings have been completely stopped, especially in schools, colleges and universities since the past almost 24 months with only a few months of physical classes. But even during this pandemic, the Indian Institute of Legal Studies was the first of its kind in this region that has undertaken the initiative of conducting online classes for the students of both UG and PG

courses and has been conducting them effectively since its very beginning to reach out to the students through online teaching- learning mechanism from the very initial period of lockdown. Also, the college has successfully conducted internal examinations through online mode so that the continuous evaluation of students does not come to a halt.

The Institution's vital location, its active participation in imparting knowledge and molding its students into sensible and responsible individuals has brought to its credit to serve as the nucleus for education in the North Bengal region. The emphasis in academic development with its adoption of inter-disciplinary and practical approaches has aided its students to gain a deeper understanding of the learning process and value for education. Additionally, it has not merely laid the importance for the value and the need to be educated individuals, or to serve as efficient lawyers, but more essentially, to be reborn as socially viable and responsible beings to construct appropriate mechanisms for building a better society for the coming future.

MESSAGE FROM THE PATRON

SHRI JOYJIT CHOUDHURY

Founder Chairman

Indian Institute of Legal Studies

It's been quite some time that I have used my prerogative for penning in a few lines under the Caption "From the desk of the Chairman." The Pandemic has probably changed the preferred and known rules in education and it is disheartening to see the once buzzing campuses filled with vibrant and youthful energy being bereft of the exuberance that existed.

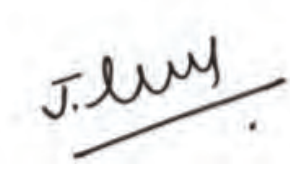
If we take a look at the history of the Corona Virus, it originated sometime in the middle of December, 2019 in China at a live seafood market and then spread to the Wuhan area. Gradually, it spread to Italy, U.S.A., Europe and other countries of the world. The affected countries have been called to take immediate steps to detect, treat and reduce the further spread of the virus to save lives of the people. Presently the COVID-19 is no more confined to China, Italy or U.S.A. It has become a global issue. The economic impact has had devastating and cascading effect world-wide with closure of business entities, rampant job loss coupled with non-existent economic activities putting the lives and the livelihood of a large section of the world's population in peril.

The poor vulnerable daily wage earners and migrant workers are the ones who are worst affected. Concrete measures must be adopted by the governments to provide this section of the population with sustainability incomes or else the world shall witness an increase in the pre-existing inequalities. The Governments must strengthen social protection and livelihood, reorient public finance to augment human capabilities, introduce measures to limit bankruptcies and create new sources of job creation.

To my view, the Pandemic has caused a dramatic and perceived change in the socio-economic structure of the entire world. Millions of wage-earners in the United States have been bugged of leaving their current employment and demanding higher wages and they have chosen to be unemployed if wages are not commensurate with their expectations. This is probably the outcome as to how the pandemic has led to increased inequality and unequal income distribution amongst different classes. According to Oxfam's "The inequality virus" report in the Indian context, India's billionaires increased their wealth by 35 percent while 25 per cent of the population earned just Rs. 3000 as income per month. The unforeseen and unpredictable nature of the mutant waves have caused immense distortions in the labour market which has exposed the migrant labourers to the destitution of low incomes at their native places or starvation at their outstation job sites.

Research based data shall illuminate us about the devastation caused by cyclical mutant waves in the times to come but in the meantime, we have no choice other than to maintain status quo till the pandemic subsides. It is heartening to see that in spite of closure of many educational institutions, the editorial team has put in their honest efforts to publish the journal in such antagonizing and unprecedented times. I sincerely laud and appreciate their endeavors in making this happen.

Wish everybody good luck & health.



JOYJIT CHOUDHURY

MESSAGE FROM EDITOR IN CHIEF

It gives us utmost pleasure to announce that the IILS Law Review is a bi-annual (erstwhile annual) from its current edition, Volume 8 Issue I. It is a peer reviewed journal acclaimed for original ideas and academic honesty. The institutional motto of our journal is the creation and dissemination of knowledge.

This Volume puts together a wide range of important contemporary socio-legal issues relevant to both national and international laws. Our journal promotes and encourages the authors to contribute to the existing knowledge bank by focusing on interdisciplinary research both original and enticing in nature.

However, the limitation we have in our current issue has been the inability to place the journal thematically amidst pandemic. We shall strive to present the journal on theme/ sub theme basis in the near future.

The Editorial Board would like to extend thanks to the College Authority for providing congenial ambience and required provisions and to the Reviewers and to the Authors for contributing towards the knowledge production process.

Legal scholarship is very vital to the continued relationship of law and society. It sheds light on particular issues, creating dialogue between scholars' lawyers, judges and policy makers, causing us to think more critically. Writing also gives voices to the oppressed, and by speaking out against injustice, we create ripples in the fabric of society. It leads to shifts in legislative policy, making our leaders and entrepreneurs aware of the pulse of the people. The only way for a society is to progress by entertaining contrasting perspectives, each holding the other accountable. My ultimate vision is that of a society where we are free to have different views and one where we constantly challenge ourselves to accept new ideas.

The IILS Law Review from its very inception in 2014 has worked to push the boundaries of academic literature, garnering literature from students, academicians and legal professionals with a vision of providing fora to academicians, professionals and students alike to express their views on various dimensions of the law as it stands and the law, as it ought to be. The IILS Law Review has sought to sustain and support legal excellence through its continued standards of publication.

I am extremely proud to present the Eighth Volume (Vol. 8, Issue No. 1/2022) of the IILS Law Review. I thank the Hon'ble Chairman of the Institute, the Editorial Advisory Board, the authors of the articles and the teachers who were involved in this process. A lot of hard work, intellectual discussions, and free exchange of ideas contributed to this Journal. My hope for the IILS Law Review is that it should always seek to achieve newer and greater heights and keep the spirit of legal skepticism alive.

Looking forward on Behalf of the Board of Editors,

Prof. Dr. Ganesh Ji Tiwari Editor in Chief
Principal Indian Institute of Legal Studies

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PROMOTING FAIRNESS IN CONSUMER CONTRACTS: UNFAIR CONTRACTS UNDER CONSUMER PROTECTION ACT

Dr. Anandkumar R Shindhe[1] *and Dr. Vikas Trivedi*[2]

Abstract:

Freedom of contract is arguably one of the most valued aspects of individual liberty. Free Consent is one of the essential prerequisites for a valid contract, and the agreements entered into by the consumers are no exception. Generally, once the contracts are entered into, the terms ought to be respected by the parties. However, this understanding misses the market realities of the real world. The perfect market doesn't exist, and the contracting parties aren't on equal footing in most contracts. Consumer contracts- banking, insurance, real estate, transportation, courier services, etc. all employ standard form contracts. In most cases, the consumer does not go through the terms and conditions before entering into contracts. In such a scenario, it becomes necessary to protect the consumer from unfair terms which affect their interest.

The modern era has brought meaningful choices to the consumer concerning products and services, which have nuances and technicalities. The manufacturer, service provider, and seller try to protect their interest and avoid liabilities by incorporating one-sided terms and conditions in agreements to the detriment of the consumers. The consumer being the weaker party, is at the receiving end in such contracts. The Consumer Protection Act, 2019 has tried to address this issue by defining the term *Unfair Contract* in this new legislation. This research paper aims to study the nature and scope of unfair contracts. It also traces the interpretation of unfair contracts from the judicial lens.

Keywords: Unfair Contract, Consumer Protection.

Introduction:

The modern-day markets provide a plethora of goods and services. With the advent of electronic commerce and growing international trade, the choices on offer for consumers of varied goods and

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services is ever increasing. These developments also bring with them challenges like never before. The manufacturer, service provider, and seller try to protect their interest and avoid liabilities by incorporating one-sided terms and conditions in agreements to the detriment of the consumers. Consumer contracts-banking, insurance, real estate, transportation, courier services, etc. employ standard forms contracts. In most cases, the consumer does not go through the terms and conditions before entering into contracts. The consumer being the weaker party is at the receiving end in such contracts. The Consumer Protection Act, 2019 has tried to address this issue by defining the term *Unfair Contract*s in this new legislation.

The inclusion of the provision of unfair contracts is significant as it lays down the foundation of regulation of unfair contracts in India. To date, there was no provision in the laws dealing with contracts, such as the Indian Contract Act 1872, the Sale of Goods Act 1930, the Specific Relief Act 1963, or any other legislation. The need for a provision on unfair contracts has been reflected in the Law Commission Reports and by the High Courts and the Supreme Court as well.

The modern era is known as thereof contracts and contracts on governance. No doubt laws provide a policy framework for various kinds of business transactions, but the reality is also that it fails to provide the minute details of each and every transaction. Hence the state has provided the freedom to the citizens to govern their relation by their own terms and conditions contracts, particularly in the business transaction. But this freedom of contract without proper regulations would lead to misuse by the dominant players of the market. India, even after 75 years of independence, has failed to legislate proper regulations to curb the unfair terms and unfair contracts. The Law Commission made significant reports on unfair contracts and made suitable suggestions, but these were not implemented due to various reasons. One of the major reasons for the non-implementation is the international contracts and international investments. According to the legislators, passing of any law regulating the terms may create impediments in attracting international contracts and investment from foreign countries. But at the same time, we should also need to be aware of the legislations governing unfair terms and unfair contracts in other developed countries such as the U.S.A., UK, Canada, Australia and others. It is very appreciable that at least through the consumer protection act 2019, India has begun its journey towards regulating and unfair contracts and unfair terms.

Literature Review:

The *Unfair Contract Terms Directive (Directive 93/13/EEC)* of Europe has resulted in an increased number of litigations particularly in the financial service sector, which leads to a question of whether defining and incorporating the provisions within the law to protect consumer interest will lead to increase in the number of litigations.[3] There is another viewpoint that suggests that the passing of specific regulations has compelled many players from different economic sectors to amend the terms of contracts used in regular dealings.[4] It is also debated how far it is valid to accept the assumption that the consumers are rational and perfectly able to understand the consequence of their dealing.[5] Further, there is a need to do the analysis of consumer terms and conditions in online service transactions.[6]

Freedom of Contract:

Freedom to enter into a contract is arguably a very valued aspect of a person's liberty in a civilized society. The freedom of contracts has two facets attached to it. One is to enter into contracts freely, and the other is to be assured freedom from interference once agreements are entered into. It is imperative that people shall have the liberty to enter into contracts on free will and once they are entered into, due effect shall be given and there shall be no interference thereafter.

Free consent is one of the essential prerequisites for valid contracts, and the agreements entered into by the consumers are no exception. Traditionally, it has been a general norm that the courts shouldn't interfere in their freedom of contract once the parties mutually agree on their rights and duties. Any interference by the court into the terms negotiated and agreed upon by the parties will erode the free will of the parties concerned and mustn't be encouraged. Therefore, the court was supposed to perform the performing interpretation function only. The distinction between a total

[3] Reich, N. and Micklitz, H.W., 2014. The court and sleeping beauty: the revival of the Unfair Contract Terms Directive (UCTD). *Common market law review*, *51*(3).
[4] Bright, S., 2000. Winning the battle against unfair contract terms. *Legal Studies*, *20*(3), pp.331-352.
[5] Faure, M.G. and Luth, H.A., 2011. Behavioural economics in unfair contract terms. *Journal of Consumer Policy*, *34*(3), pp.337-358.
[6] Loos, M. and Luzak, J., 2016. Wanted: a bigger stick. On unfair terms in consumer contracts with online service providers. *Journal of consumer policy*, *39*(1), pp.63-90.

lack of consent and attended consent is real and must always be kept in mind. It is only in those cases where the tainted consent has been obtained or procured from one of the parties that the contract at his instance could be voidable and may be set aside.[7]

The freedom of contract presumes the existence of *equal parties,* which is hardly present in most cases. This holds true even more in consumer contracts. The gap between parties contracting in a consumer contract concerning bargaining power, information about various products and services, product usages, price, add-on benefits, etc., is even more significant. Thus, the power equation is very asymmetric between the parties. Although the terms contracted need to be respected, courts will fail in their duties if they remain mute spectators to the unfairness in the consumer contracts.

Standard Form of Contracts:

The standard form of contracts has become common in the modern technological world. They are part and parcel of every business community and used to regulate the obligations arising out of commercial transactions. These Standard form contracts are typically used to supply goods and services to consumers in many industries, including Real Estate, Banking, Insurance, telecommunications, finance, domestic building, gyms, motor vehicles, travel, utilities, and many more. *Consensus ad idem* is the fundamental principle behind the formation of a valid contract which unfortunately has very little importance in the standard form of contract as the parties to the contract or not having effective negotiation and bargaining during the formation of the contract. Thus, bargaining and negotiation have their effect on the rights and abilities of the parties. The party in the dominant position will try to avoid all his liabilities by incorporating terms such as unfair, and the weaker party is left at the mercy. No doubt utility of standard form of contracts cannot be denied as there are larger industries such as insurance companies, telecommunication companies, etc., who are not in a position to negotiate with each and every customer they deal with, but this does not mean that the business communities misuse their dominant position and incorporate on the terms within the standard form of contract.

It is essential to reflect on how the transactions take place in the real world. The weaker party is just offered a form to sign with printed conditions to sign and return, thus leaving him without too many options. It is how the consent for unfair terms in a contract is obtained. Later on, when the

[7] Smt. Kiran Bala Asthana v. Bhaire Prasad Srivastava, AIR 1982 All 242.

said occasion occurs, he is reminded of the signed declaration, and thus, the consent, hardly an informed one, is put to effect.

Unfair Contract

The instances of unfair terms in a consumer contract have often landed at the doorsteps of courts to adjudicate. The agreement, though, has been contracted with the free consent of the parties, but the same has often been challenged on the ground of reasonableness. The apex court has been into this adjudicatory role many times, and it has in a plethora of judgments set aside unconscionable terms.

The problem facing both parties eventually is that since the law isn't codified as to unfairness in contractual terms, it leads to a lot of uncertainty. Incorporating unfair contracts in the legislative text will surely go a long way in furthering clarity and certainty.

As regards the business environment too, clearly laid down rules regarding unfair contracts are an essential prerequisite for greater ease of doing business. The economic activities have been expanded to a great level, and thus, the said incorporation in the new Act is a step in the right direction. This shall lead to a conducive business environment by ensuring the ease of doing business with a level playing field between contracting parties.

Law Commission on Unfair Contracts:

There are at least two law commission reports dealing with unfair contracts; the first report is law commission report number 103 passed in the year 1984 under the chairmanship of Justice KK Mathew. In this 103rd report, the law commission was concerned with standard forms of contract and their average. According to the law commission, the process of industrialization and standardization in large scale production also simultaneously led to the development of standardization in business transactions giving birth to a standard form of contracts. These standard forms of contracts have their own benefit but at the same time, it has many limitations also. The standard form of contracts negates the very fundamental principle of formation of a contract, contracts are formed based on discussion and negotiation between the parties to the contract, whereas in the standard form of contract there is no scope for bargaining or negotiation between

the parties.[8] The party who is in need of goods or services has to give his consent or leave the transaction. Large scale business concerns get expert advice and introduce terms and conditions in the printed form which are most favourable to themselves. These clauses contained wide exclusion and exemption from obligations avoiding liabilities on the business enterprise. In the absence of proper regulations regulating unfair terms in contracts, the standard form of contract is provided under the edge to the business regulators. The law commission also took into consideration the experience of the United Kingdom and various legal principles followed by it to preserve the freedom of contract, these principles are: A) that there should be reasonable notice to the other party of the conditions; B) that the notice should be contemporaries with the contract; C) that there should be no fundamental breach of the contract; D) that the contract should be strictly construed as against the bigger organization and in favour of the weaker party and E) that the terms of the contract should not be unreasonable on the face of it.

The 103rd law commission report contains several examples of case laws in which the big business entities have avoided their liabilities on the basis of the standard form of contract. For example, an airline avoided its liability of paying compensation amount to the dependents of plane crash victims on the ground that the ticket carried a clause which exempted the obligations of the airlines in cases where the plane crash is proved to be due to the negligence of pilot or the staff. The Calcutta High Court while dealing with this case held that the provisions of the Indian Contract Act, 1872 or the Indian Carriage by Air Act 1934 are not made applicable as there was a term avoiding liability of the airlines.[9] In several other cases, courts in India tried to rescue the weaker party from a contract through the provisions of Sections 16, 23 of the Indian Contract Act, 1872, which proved to be successful but not in all circumstances. For example, the Madras High Court was able to set aside an unfair term which enabled the laundry service provider to make only 50% of the loss suffered by the customer. In another case, Karnataka High Court held that a term unreasonable which limited the liability of the service provider to only eight times the cost of cleaning of the garment.[10]

[8] LAW COMMISSION OF INDIA 103RD REPORT ON UNFAIR CONTRACT TERMS (1984), https://lawcommissionofindia.nic.in/101-169/Report103.pdf (last visited Sept 05, 2021).
[9] *Id.,*
[10] *Id.,*

Ultimately, the law commission made a suggestion to incorporate a specific provision (Section 67A) in the Indian Contract Act, 1872 by inserting a new chapter. According to this section in cases of unconscionable terms found in a contract, the court may refuse to enforce the contract or the part of it.[11] But this suggestion was not implemented by the government of India.

Later in the year 2006 law commission of India looking at the developments taking place in different countries with respect to unfair terms of the contract initiated the S.U.O. Moto studied again on unfair terms in contracts and submitted the 199th report titled the Unfair (Procedural and Substantive) Terms in Contract. The main highlight of this report is the consideration of unfair terms of the contract by separating the 'procedural unfairness' and the 'substantive unfairness.'[12] Here the meaning of procedural unfairness is associated with the way in which the unfair terms are incorporated within the contract, and substantive and fairness means the result of the incorporation of unfair terms within the contract which makes the contract either one-sided, harsh or oppressive and unconscionable.

The law commission made a clear observation in its report that there is no general statutory provision in the Indian contract act 1872 or the sale of goods act 1930 by which the court can give relief to the consumer/weaker party by holding terms in the contract as void on the ground of being their unreasonable or unconscionable or unfair. An effort was made to study the concept of public policy which is recognized under section 23 of the Contract Act and to explore the possibilities of whether a contract can be considered void on the basis of unfair terms.

The Law Commission was concerned with a specific question that whether the term 'public policy' under Section 23 covers unconscionability and is there a possibility of striking down unconscionable bargains. The Supreme Court in *Gherulal v. Mahadeodas*[13], and in *Central Inland Water Transport Corporation*[14] had expressed its opinion on the term 'public policy', according to it, 'public policy' is an elusive concept, it is described as an untrustworthy guide, of variable quality, and like an unruly horse. The concept of what is for the public good or in the public interest or what would be injurious or lawful to the public good or the public interest has varied from time

[11] *Id.,*
[12] LAW COMMISSION OF INDIA 199 THE REPORT ON UNFAIR (PROCEDURAL & SUBSTANTIVE) TERMS IN CONTRACT, (2006). https://lawcommissionofindia.nic.in/reports/rep199.pdf (last visited Sept 05, 2021).
[13] Gherulal v. Mahadeodas, AIR 1959 SC 781.
[14] Central Inland Water v. Brojo Nath Ganguly & Anr, AIR 1986 SC 1571.

to time. Looking at the various possibilities of using the concept of public policy to regulate unfair terms, the law commission ultimately concluded that section 23 is not a possible solution to the problems created by the unfair terms in the contract.[15]Similar efforts were made to see whether sections 14, 16, 17, 27 and 28 of the Indian Contract Act could provide a possible solution which again proved to be ineffective in regulating and unfair terms. From the provisions of the Act, the Law Commission also explore the possibilities of the then-existing MRTP Act 1969, The Consumer Protection Act 1986, Code of Civil Procedure 1908, Sale of Goods Act 1930, Competition Act 2002, the Specific Relief Act 1963, Industrial Disputes Act, 1947 and various other legislations to regulate and unfair terms in the contract but failed to find any effective solution and concluded that the existing laws are not sufficient to meet the problems of contemporary India.[16] Further, the law commission also made observation of the decision of the Supreme Court in *E.P. Royappa v. State of Tamil Nadu & Anr.*[17], in which the court held that unconscionability of the term in a contract would amount to arbitrariness.

The International Experience:

It is essential to look into how the issue of unfairness in contracts has been dealt with internationally. The courts in the U.K. have dealt with the problem with the doctrine of fundamental breach. The rationale is that if the terms are such as to allow one of the parties to be exempted from the very performance of the foundational feature of the contract itself, it shall render the agreement meaningless in its entirety. It can be reasonably assumed that this could never have been the intention of the parties, and therefore it makes sense for it to be negated completely.

In the U.K., The Unfair Contract Terms Act, 1977 was followed by the Unfair Terms in Consumer Contracts Regulations, 1999. The regulation was to give effect to the European Union Directive.

The cardinal principle is that a standard form contract by its very nature is one where the consumer doesn't have an option of negotiation. It contains pre-determined terms drafted by the dominating party. Many a time, the terms included causing a significant imbalance in the rights of the other party. There cannot be a thumb rule for determining 'unfairness.' It needs to be decided on a case-

[15] Supra Note 6, 199th LCI Report.
[16] Supra Note 6, 199th LCI Report.
[17] E.P. Royappa v. State of Tamil Nadu & Anr, AIR 1974 SC 555.

to-case basis as per each case's facts, surrounding circumstances, and factual matrix. It is also vital to reflect the attributes on offer by standardized contracts. A lot of time is saved through these, which has a definite effect on cutting down the administrative costs, which otherwise would have been passed on to the consumers only. Thus, they do save both parties from the inconvenience and hassles of individual negotiations. The aspect of "signing what everyone else has signed" does provide a cushion to the customers in a way.

Unfair Contracts: Few Decided Cases

In *Lufthansa German Airlines v. Dr R Bhaskaran*[18], a couple availed the services of an airline company. They were offered special discounted tickets. However, they weren't informed about the conditions that were to govern the 'excursion fare.' Accordingly, their request was turned down by the airline company. Aggrieved by the said rejection, the consumer couple approached the consumer commission. The NCDRC, in its judgment, held that as the terms and conditions for the special discounted tickets weren't made known to the couple, they aren't binding. It emphasized that the contract between the parties must disclose terms specifically.

In *Tip Top Drycleaners v. Sunil Kumar*[19], where the terms and conditions were being mentioned on the back of the acknowledged receipt, the commission again leaned in favour of the consumer. It stated that consent obtained in this mode isn't fair, and nobody reads the conditions when they are at the back of the receipt.

There have been many cases in the insurance sector as well. Many times, the exclusion clauses aren't brought to the notice of the policyholder to the detriment of the consumer. In *National Insurance Company v. Shri D P Jain*[20], the NCDRC had held that the insurance company could not be allowed to outrightly deny a claim when the terms of an exclusion clause weren't disclosed to the other party.

In *IREO Grace Realtech Pvt. Ltd. v. Abhishek Khanna and Ors.*[21], the Supreme Court held that incorporating one-sided and unreasonable clauses in apartment buyers' agreements constitutes an unfair trade practice. In this case, a developer who had obtained a license from the Department of

[18] Revision Petition No. 3617 of 2007.
[19] Revision Petition No. 1328 of 2003.
[20] Revision Petition No. 186/2007.
[21] IREO Grace Realtech Pvt. Ltd. v. Abhishek Khanna and Ors. AIR 2021 SC 437.

Town and Country Planning to develop multiple towers comprising 1356 apartments had failed to hand over the possession of the constructed apartments within the stipulated time. Further, clause 44 of the agreement between the developer and the buyers clearly stated that the buyers have minimal right to terminate the contract and seek a refund. The buyers, aggrieved by this, filed a consumer complaint claiming a refund of the amount. Justice D Y Chandrachud, while delivering judgment, upheld the provisions of consumer Act 2019 and stated that no doubt the consumer Act 2019 defines an unfair contract, but this was implicit within the consumer Act 1986.

Way back in 1995, the Supreme Court of India in *L.I.C. of India and Ors v. Consumer Education & Research Centre and Ors*[22] has held that the authorities in the field of insurance owe a public duty to evolve policies with reasonable and just terms and conditions accessible to all segments of society for insuring the lives of eligible persons. The terms and conditions of the contract should be conformable to the Preamble, fundamental rights, and the directive principles of the Constitution. The terms and conditions of extending benefits only to the salaried class working in the government sector and firms are held unconstitutional and observe that the policies with terms and conditions accessible and beneficial to all segments are only valid. Further, the court observed that if unreasonable or unfair terms are found, then the bargaining power of the contracting party must be looked at. In many instances, there is no negotiation between the parties to the contract as the buyer, who is considered a weaker party, is left with no choice; he has to accept the agreement or reject the contract. There is no or minimal scope for negotiation between the parties. In such situations, the benefit of one-sided terms should not be availed by the dominant party of the contract.

Transparency of terms in Consumer Contracts:

The level of transparency in terms of contract determines the level of fairness in consumer contracts.[23] In the United Kingdom, the level of transparency uses a test of reasonableness to determine the level of fairness of contract terms. Terms of contract contributing to a significant imbalance in rights and obligations to the detriment of consumers are fundamentally considered

[22] L.I.C. of India and Ors v. Consumer Education & Research Centre and Ors. AIR 1995 SC 1811.
[23] Chris Willett, *THE FUNCTIONS OF TRANSPARENCY IN REGULATING CONTRACT TERMS: UK AND AUSTRALIAN APPROACHES*, 60 355–385 (2011).

as unfair terms.[24] Remediating the consumer dispute involving unfair terms by judicial means will only provide satisfaction to the immediate consumer but this does not provide any limitation on the business community from incorporating unfair terms in their business contracts. Specific legislation discouraging the incorporation of unfair terms in the business contracts will be far more effective in limiting unfair terms in consumer contracts.[25] The Indian government by incorporating and defining the term 'unfair contract' has laid a foundation that in future is going to provide guidance to the business community and also to the judiciary in demarcating contracts with unfair terms. It is also observed that artificial intelligence can be effectively used by the government to identify potential unfair clauses in online contracts which could provide better tools to consumers in the process of decision making.[26]

One more significant question which arises is that after the identification of the unfair terms in a consumer contract, whether the entire transaction is to be set aside or only the unfair term is to be set aside. There is a need to fix this problem. There are possible solutions such as application of the doctrine of severability, the doctrine of part performance, etc., but instead of these, the judiciary should try to provide alternative terms as a replacement of the unfair term or apply the principle of minimal to tolerable term, according to which the unfair term should be broken into different parts and those parts which are fair can be accepted and the unfair part can be discarded.[27]

Test of Reasonableness:

Lord Denning is considered as the person who propounded the test of reasonableness or fairness of a clause in a contract, which is one of the testing stones for the terms and conditions incorporated in the contract. In the absence of consumer legislation and guidelines, the courts used to determine the reasonableness of terms of the contract through this test. In India also the Supreme Court applied this test in *Central Inland Water Transport Corporation Limited and Ors. v. Brojo Nath Ganguly and Ors*.[28] and the court observed that "*validity of provisions shall not be challenged unless it was arbitrary and unreasonable under the provisions of law.*" The question, in this case, was regarding the termination of a permanent employee. The service agreement had a clause that

[24] *Id.,*
[25] S. Bright, *Winning the battle against unfair contract terms*, 20 LEG. STUD. 331–352 (2000).
[26] M. LIPPI ET AL., AUTOMATED DETECTION OF UNFAIR CLAUSES IN ONLINE CONSUMER CONTRACTS (2017).
[27] O. Ben-Shahar, *Fixing unfair contracts*, 63 STANFORD LAW REV. 869–906 (2011).
[28] Central Inland Water v. Brojo Nath Ganguly & Anr, AIR 1986 SC 1571.

enabled the Central Inland Water Transport Corporation to terminate the service of a permanent employee by giving him three months' notice in writing or to pay him the equivalent of three months of basic pay and clearness allowance. The court applying the test of reasonableness held that the clause of termination in service contract is both arbitrary and unreasonable and it ignores principles of natural justice and is violative of Article 14 of the Constitution of India. Though this case was related to the service agreement, they took into consideration the vulnerable position of a consumer who is made to accept or leave a contract of adhesion as there is no scope for bargaining.

Further, the Supreme Court in *Delhi Transport Corporation v. D.T.C. Mazdoor Corporation*[29]upheld its decision in the *central inland water transport corporation* case and held that termination of a permanent employee by issuing a month's notice or the salary without assigning any reason was arbitrary, fair and just and unreasonable. It is also opposed to public policy and thereby void under the law.

In *Punjab State Electricity Board Ltd. v. Zora Singh and Ors.*[30] the Supreme Court held that the failure of the electricity board to supply electricity to consumers even after the deposit of requisite money amounts to unjust enrichment of the board and is unreasonable. The electricity board is a statutory authority, within the meaning of 'State' as defined by Article 12 of the Constitution. Thus, it is the obligation of the board to fulfil the test of reasonableness as envisioned under Article 14 of the Constitution and protect the consumer interest.

Consumer Protection Act, 2019: Unfair Contracts

The Consumer Protection Act, 2019 defines an 'unfair contract' under section 2(46). The definition is an inclusive definition and identifies a few basic tenements, such as a) requiring excessive security deposits, b) imposing a penalty on consumer, c) refusing early repayments, d) unilateral termination of the contract, e) assignment of the contract without consent, and f) imposing unreasonable charges;[31]

[29] Delhi Transport Corporation v. D.T.C. Mazdoor Corporation, AIR 1991 SC 101.
[30] Punjab State Electricity Board Ltd. v. Zora Singh and Ors, AIR 2006 SC 182.
[31]The Consumer Protection Act, 2019, Section 2(46), No. 35, Act of Parliament, 2019 (India).

Even though the definition is relatively new, let us look into the existing judicial decision on the basic tenements of this definition.

As per the definition of the term unfair contract, requiring excessive security deposit is considered unfair. In *Ferro Alloys Corpn. Ltd. v. A.P. State Electricity Board and Ors*.[32] the Supreme Court stated that the object of the consumption deposit was to ensure proper payment with reference to electricity supply; there was nothing arbitrary or unjustifiable. The purpose is to ensure that the consumer guarantees the timely payment of the charges of electricity consumption, but it should be in proportion to the monthly consumption.

In *Sanjay Kumar Joshi v. Municipal Board,*[33] the Supreme Court reversed the National Commission decision and held that a buyer of a plot in an auction sale is a consumer. In this case, the municipal board had put a plot for public auction, to which Sanjay Kumar Joshi made the highest bid and deposited the 25% of the sale consideration. But before making payment of the remaining amount he came to know that there was a suit pending over the land; hence property could not be transferred in his name immediately. Knowing this, the buyer claimed back the deposit amount, which was denied by the Municipal Board. The Supreme Court held that forfeiture of the security deposit and the bid amount was unsustainable in law and directed to refund the alleged amount with interest.

The Reserve Bank of India had issued a circular in the year 2007 abolishing foreclosure charges or prepayment penalties on home loans across the banking system to bring uniformity.[34] It is usual practice in consumer credit that whenever a consumer repays the loan before time, he is made to pay the penalty for the pre-closure of the loan. This is made apart from the common interest which the financial institutions are charging. As per the consumer act, 2019, collection of pre-closure charges will now be considered unfair terms and a violation of consumer's rights.

The unfair terms in consumer contract regulation 1999 of the United Kingdom are limited because these regulations do not apply to insurance contracts. In cases of an insurance contract, the consumer is under the obligation of making proper disclosures at the time of formation of the

[32] Ferro Alloys Corpn. Ltd. v. A.P. State Electricity Board and Ors, AIR 1993 SC 2005.
[33] Sanjay Kumar Joshi v. Municipal Board, (2015) 12 SCC 709.
[34] Devendra Surana v. Bank of Baroda and Ors. (2019) 1 WBLR (Cal) 202.

insurance contract and also timely disclosure of the events as stipulated in the insurance contract, by allowing the consumer of an insurance contract to raise his voice stating that the obligations under insurance or amounting to unfair would lead to increasing the burden on the insurance companies. Thus, it is evident that unfair terms of regulation are not made applicable to insurance contracts. Considering a similar situation of unfair contract as defined by the Consumer Act 2019, there is a lack of limitation within the definition. Apart from the inclusive definition of unfair terms, there is a need to determine the limitation on the nature and scope of grounds that can be raised under the umbrella of unfair contracts.

Conclusion:

There is no doubt that the inclusion of unfair contracts in the new legislation is a laudable step. All these years, in the absence of a specific provision on unfair contracts, the scope of remedies available to the consumers were very limited. Even in the cases of proved unfair terms, the non-enforceability of the term was the maximum remedy granted. This in no way restricted the practice of the business community from incorporating unfair terms in their regular business contracts. With the incorporation of the definition of unfair contracts within the provisions of the consumer act, it secures the consumer interest. It also provides guidelines to the business community as to what kind of terms it can incorporate within the business contracts. Similarly, the language of the definition of unfair contract would provide the judiciary with the required guidelines in the adjudicatory processes. This will surely be a game-changer in consumer jurisprudence.

AN ANALYSIS OF INDIA'S LEGAL FRAMEWORK TO COMBAT CUSTODIAL TORTURE WITH SPECIAL REFERENCE TO INTERNATIONAL LAW ON PROHIBITION AGAINST TORTURE

Farah Hayat[1] and Dr. Momin Noorjahan Shamim Ahmed[2]

Abstract

India has a long history of cases of custodial torture due to the unreasonable, unjustified and brutal use of force by law enforcement agencies. This has been taken notice of by the Hon'ble Apex Court of the country as well and compensation has been granted to the victims of torture or their dependents from time to time. But there hasn't been any uniform law to deal with such cases and to punish the perpetrators of such a crime, and so punishments of the public servants involved in such crimes have been far and few between. Many a time the municipal laws themselves provide a haven to such public servants from initiation of prosecution proceedings due to the "requirement of prior sanction before proceeding against a public servant". India is a signatory to the Convention against Torture and so there is a reasonable expectation that it shall prevent such cases of torture, especially when the prohibition of torture has been recognized as a peremptory norm of general international law (jus cogens). But as India has not ratified the Convention and in the absence of an enabling law, India is failing in fulfilling its duty, considering the rise in cases of custodial torture. Through this paper, the researchers have studied the application of international law for the prevention of torture in the domestic realm, the loopholes in our municipal laws that make it difficult to control custodial torture and how far there is a need for separate legislation to punish such acts of torture. Accordingly, the researchers have made suitable suggestions at the end of the paper.

Keywords: State Responsibility, International Law, *Jus Cogens*, Prevention of Custodial Torture, Prevention of Torture Bill.

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1. Introduction

"Torture is a delicate, dangerous and deceptive thing… The strong will resist and the weak will say anything to end the pain."

- Ulpian, Roman Jurist AD 221- 22

On January 6th, 1941, the then President of the USA, Franklin Delano Roosevelt, outlined in his State of the Union Address, the idea of four freedoms which find expression in the Preamble to the Universal Declaration of Human Rights, 1948 (hereinafter, "UDHR"). These were "freedom of speech and expression, freedom of every person to worship God in his own way, freedom from want and freedom from fear". Custodial torture represents the antithesis to that very freedom from fear.

The issue of custodial torture is nothing less than anathema to a democratic country like India and even then, this issue has been prevalent for decades, rather even since pre-independence. In the recent past, this problem has gained a considerable amount of attention from the international legal community as well. The police, which is a functionary of the State whose *raison d'etre* is the protection of the common man, is often what the common man is most scared of. India's record in this field is dismal. A very recent example of police brutality was seen during the mass protests all over the country against the National Register of Citizens (hereinafter, "NRC") exercise and the Citizenship Amendment Act, 2019 (hereinafter, "CAA") where even students, children and senior citizens were brutally lathi-charged and arbitrarily arrested.

Torture is a weapon often used by the police in India during the stage of the investigation to extract information or confession, although many prisoners locked up in jails awaiting trial or under trial face torture as well, though not from the police. One cannot find the definition of 'torture' in the Constitution or in any other domestic law. The Prevention of Torture Bill, 2018 does provide a definition but the Bill hasn't been enacted yet. Article 21 of the Constitution, guarantees the right to life and personal liberty which implicitly includes a life of dignity and respect and that indirectly also includes within its ambit the assurance of a life that is free from fear and torture by law enforcement personnel. The Constitution has also provided for judicial remedies under Article 32 and 226 to be exercised by the Supreme Court and the various High Courts respectively, whenever a victim whose fundamental rights (under Article 32) or any other rights (under Article 226) have

been violated and he moves the court asking for redress. A victim of custodial torture can also move the court under these provisions.[3] But as it will be analyzed in this paper that these judicial remedies by way of writs are not enough. Moreover, due to the absence of legislation specifically prohibiting acts of torture, mental or physical or both, at the hands of public servants, specifically law enforcement personnel, perpetrators of this crime flourish. The causes behind such a vacuum in domestic law and its consequences, the insufficiency of currently available measures against arbitrary and unreasonable brutal torture and the reasons why India is failing in fulfilling its international duty to prevent acts of torture shall be studied in this paper in detail.

2. Definition of Torture and its Prohibition under International Law

History is witness, that torture has been used as a means to curb political dissent in countries with totalitarian regimes. But it's also true that even in nations that take pride in following a democratic system and being strict adherents of rule of law, torture has often been resorted to by functionaries of the State to maintain peace, or in the fight against terrorism or internal conflicts or in the name of national security. Many a time human rights violations including subjection to torture and extrajudicial killings are committed by police officers or the special force personnel without the knowledge of the government which are the consequence of abuse of their powers or sometimes a manifestation of hatred or cruelty. It was observed by Prof. M.P. Koojimans, the Special Rapporteur for matters relating to torture by the UN Commission on Human Rights, in his report of 1987, that torture is a deeply rooted evil and no society is totally immune from it no matter what its political system be.[4]Torture by State functionaries is a problem that is not only threatening basic human rights of people in India but has reached global proportions and the international community as a whole agree that cruel or inhuman treatment in all its forms, is the antithesis to basic respect and human dignity because it is not necessary that torture always has to be physical, as it could also be mental or psychological and hence a plethora of international human rights instruments condemn any act of torture.[5]

[3] M.K. SINHA, IMPLEMENTATION OF BASIC HUMAN RIGHTS, 224 (1 ed. LexisNexis 2013).
[4] UN Commission on Human Rights, Doc. E/CN .4/1987/13, 23.
[5] David Claridge, *Know Thine Enemy: Understanding State Terrorism*, P.I.O.O.M. NEWSLETTER, (Winter 1999/2000).

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 (hereinafter, "UN Convention against Torture")[6] defines 'torture' as:

"Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

However, the definition is restrictive in the sense that torture inflicted out of negligence is excluded. The torture inflicted out of incidental or lawful sanction has also been excluded which may be interpreted as "torture in accordance with the law to be no torture".[7]

The non-derogable character of certain fundamental rights is no longer a doctrinal trend; it finds its place in treaties relating to international protection of human rights at universal, regional and national levels. As far as international and regional instruments are concerned, prohibiting the subjection of anyone to "torture or to cruel, inhuman or degrading treatment or punishment", there is a specific prohibition of the same under Article 5 of UDHR, Article 7 of the International Covenant on Civil and Political Rights, 1966 (hereinafter, "ICCPR"), Article 2 and 4 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (hereinafter, "Convention against Torture"), Article 3 of the Geneva Conventions, Article 5 of the Code of Conduct for Law Enforcement Officials- Adopted by General Assembly resolution 34/169 of 17 December 1979. Regionally, Article 3 of the European Convention on Human Rights, 1950 (hereinafter, "ECHR"), Article 5 of the African Charter on Human and Peoples' Rights, 1981 (hereinafter, "ACHPR") and Article 5 of the American Convention on Human Rights, 1969 (hereinafter, "ACHR") also specifically prohibit subjection to acts of torture.

3. India and the International Convention against Torture

[6]The Convention deals with protection against torture and other cruel, inhuman or degrading treatment or punishment but for the purpose of this paper, references have been drawn from the Convention with focus on protection against torture.

[7] Mohd. Yousuf Bhat, *Menace of Torture: Prohibition in International Law*, 67(3) INDIAN JOURNAL OF POLITICAL SCIENCE 554 (2006).

India signed the Convention against Torture in the year 1997. But for the provisions of a Convention to become legally enforceable in the domestic realm, it must be incorporated as part of domestic law through enabling legislation which is often followed by the procedure of ratification. This is a key characteristic under the dualist model of domestic application of international law that India follows. But India has yet not ratified the Convention and the enabling law, in this case, the Prevention of Torture Bill, 2018[8] is still pending enactment. The Law Commission had in its 273rd report recommended that India must ratify the UN Convention against Torture and the central government had forwarded a copy of the 2018 Bill to all the states and union territories seeking their opinions on the same.[9] The central government is yet to receive responses from all States. Former Law Minister of India, Dr Ashwani Kumar had even filed a petition in the Supreme Court to exercise its "nudge" or "suggestive" jurisdiction to direct the Central government to enact a suitable stand-alone, comprehensive legislation against custodial torture as it has directed in the case of mob violence/lynching vide its judgment 17th July 2018.[10] Governments have cited as a reason from time to time that ratifying the Convention will open India to greater scrutiny on the international plane. Internal Security expert Ajai Sahni termed the Convention against Torture as 'political' and 'discriminatory' and said that "the structure and burden of work on India's police force would make it difficult to operate under one more level of scrutiny"[11]. He believes that:

"As it is, there are multiple mechanisms in place that keep in check the police force and even scrutinize it over human rights issues. Another level of scrutiny will make it difficult for the police force to operate."[12]

On the contrary, perhaps another level of scrutiny is exactly what the Indian police needs as the multiple mechanisms already in place to keep a check on the police force have not really been very

[8] The Prevention of Torture Bill, 2018, Bill 57 of 2018, (Sept. 30, 2021, 11:00 AM) http://164.100.47.4/billstexts/lsbilltexts/asintroduced/4166LS%20AS%20INTRO.pdf .

[9] Azaan Javaid, States, *UTs yet to reply on ratifying UN convention against torture*, HINDUSTAN TIMES (Apr. 8, 2018), (Sept. 30, 2021, 11:05 AM) https://www.hindustantimes.com/india-news/states-uts-yet-to-reply-on-ratifying-un-convention-against-torture/story-hsJNbwM2znbfzZ4UECfd6J.html.

[10] Dr. Ashwini Kumar v. Union Of India, Miscellaneous Application No. 2560 of 2018 in Writ Petition (Civil) No. 738 of 2016.

[11] *Supra* note 7.

[12] *Id.*

helpful. Members of the police force or the special force who do not resort to unreasonable violence under any circumstance have nothing to fear anyway even if their actions are scrutinized. Also, the courts in India have started to shift their approach in domestic application of international law from a strict dualist approach to a somewhat monist approach with Indian courts referring to international conventions that India has not signed or has signed but not ratified yet, simply to protect the basic human rights of the people. This can be seen in various recent judgments of the courts. While recognizing the transgender as a third gender, the *National Legal Services Authority v. Union of India*,[13]the Supreme Court exclaimed that in the absence of legislation that is contrary to international law, the courts in India must respect the rules of international law. In the case of *Jeeja Ghosh v. Union of India*,[14] the Supreme Court invoked provisions of the Vienna Convention on the Law of Treaties, 1963 and said that:

"The Vienna Convention on the Law of Treaties, 1963 requires India's internal legislation to comply with international commitments" Further, Article 27 states that a *"State party… may not invoke the provisions of its internal law as justification for its failure to perform a treaty."*

Thus, although enactment of an enabling provision providing applicability to the provisions of the Convention against Torture to put a reign on incidents of custodial torture would be most apt, meanwhile the provisions of the Convention against Torture could directly be applied in cases of custodial brutality. Moreover, this is a very crucial observation as far as the objective of this study is concerned which is to make it a requirement for the Indian legislature to comply with its international commitments and make necessary amendments in the Unlawful Activities (Prevention) Act, 1967 (hereinafter, "UAPA") and the Armed Forces (Special Powers) Act, 1958 (hereinafter, "AFSPA") and other similarly placed anti-terror laws to make them soft enough to not cause human right violations while keeping them stringent enough to be in a position to protect national security and punish those who have posed a threat to it.

4. Prohibition of Torture Has been Recognized to Have the Character of *Jus Cogens* by the International Community

[13] (2014) 5 SCC 438.
[14] (2016) 7 SCC 761.

It has been observed that human rights treaties have the character of *jus cogens.*[15] In its 1986 and 1987 reports, Koojimans asserted that the prohibition of torture, as an *erga omnes* obligation, could be considered "*to belong to the rules of jus cogens*", the violation of which entailed "*the responsibility of the State towards the international community as a whole*". He also reiterated that the prohibition of torture "*could be considered to belong to the rules of jus cogens, since it is an international obligation of essential importance for safeguarding the human being from which no derogation is possible.*"[16]

The prohibition of torture is a part of customary international law[17] As such, the prohibition may be enforced against a State even if it has not ratified any of the relevant treaties, and the prohibition is not subject to derogation, even in times of war or emergency.[18] Article 53 of the Vienna Convention on the Law of Treaties from which *jus cogens* flows, has a deep impact on national and customary law.[19] Since the prohibition of torture has attained *jus cogens* status, it binds all states whether they have signed instruments such as the Torture Convention or not.[20] The recognition by the International Court of Justice of the prohibition of torture has been explicit and unambiguous. The Court, in the *Belgium v. Senegal* case, stated unequivocally that in its "*opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens)*".[21] The International Tribunal for the Former Yugoslavia, in its Trial Chamber, had, already in 1998, determined that the prohibition of torture was a norm of *jus cogens*.[22] A month later, in *Prosecutor v. Furundžija*, the Tribunal's Trial Chamber confirmed that "*because of ... the values it protects*", the prohibition of torture "*has evolved into a peremptory norm or jus*

[15] Egon Schwelb, *Some International Aspects of Jus Cogens*, 61 AMERICAN JOURNAL OF INTERNATIONAL LAW 946-975 (1967).
[16] *Supra* note 3 at 13-15.
[17] Law Commission of India, *273rd Report on Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation*, LAW COMMISSION OF INDIA, para 1.19 (Oct. 1, 2021, 12:25 PM)
http://lawcommissionofindia.nic.in/reports/Report273.pdf.
[18] *Id*., para 2.4.
[19] Wet, Erika, de, *The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law*, 15 EJIL 97-121 (2004).
[20] See: Prosecutor v. Furundzija [1998] ICTY 3, 10 December 1998, paragraphs 147-157.
[21] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422, at p. 457, para. 99.
[22] Prosecutor V. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga", No. IT-96-21-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 16 November 1998, Judicial Reports 1998, para. 454.

cogens".[23] Those Trial Chamber judgments have been confirmed by the Appeals Chamber of the Tribunal.[24]

In addition to the jurisprudence of the International Court of Justice and the International Tribunal for the Former Yugoslavia, regional courts and other bodies have also recognized the peremptory status of the prohibition of torture. The Inter American Court of Human Rights has consistently held that the prohibition of torture is a norm of *jus cogens*. In *Espinoza Gonzáles v. Peru*, for example, the Court made the observation that even under the most difficult circumstances, such as war, the threat of war or even in the fight against terrorism, the prohibition of torture is absolute and non-derogable and this prohibition is part of international *jus cogens*.[25]

The first reference to the prohibition of torture as *jus cogens* in the inter-American system was in a detailed separate opinion of Judge Cançado Trindade in *Blake v. Guatemala*.[26] There, Judge Cançado Trindade noted that the prohibition of the practice of torture *"pave[s] the way for us to enter into the terra nova of the international jus cogens".*[27] The Court itself recognized the prohibition of torture as *jus cogens* in 2000, in *Bámaca-Velásquez v. Guatemala.*[28] This position has been reiterated and confirmed in many subsequent judgments of the Inter-American Court.[29]This consistent jurisprudence has been affirmed by the Inter-American Commission on Human Rights in, for example, *Ortiz Hernandez v. Venezuela.*[30]

As the Inter-American Court, the European Court of Human Rights has also been unequivocal in recognizing the *jus cogens* character of the prohibition against torture. In *Al-Adsani v. the United*

[23] Prosecutor v. Anto Furundžija, No. IT-95-17/1, Judgment, International Tribunal for the Former Yugoslavia, 10 December 1998, Judicial Reports 1998, paras. 153-156.
[24] Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Deli and Esad Landžo (aka "Zenga"), No. IT-96-21-A, Judgment, Appeals Chamber, International Tribunal for the Former Yugoslavia, 20 February 2001, para. 172, in particular footnote 225.
[25] Espinoza Gonzáles v. Perú, Judgment (Preliminary objections, merits, reparations and costs), Inter-American Court of Human Rights, 20 November 2014, Series C, No. 289, para. 141.
[26] Blake v. Guatemala, Judgment (Merits), Inter-American Court of Human Rights, 24 January 1998, Series C, No. 36, separate opinion of Judge Cançado Trindade.
[27] *Id.,* para. 15.
[28] Bámaca-Velásquez v. Guatemala, Judgment (Merits), Inter-American Court of Human Rights, 25 November 2000, Series C, No. 70, para. 25.
[29] See, e.g., Mendoza et al. v. Argentina, Judgment (Preliminary objections, merits and reparations), Inter-American Court of Human Rights, 14 May 2013, Series C, No. 260, para. 199.
[30] Johan Alexis Ortiz Hernández v. Venezuela, Case 12.270, Report of the Inter-American Commission on Human Rights, Report No. 2/15 of 29 January 2015, para. 212.

Kingdom[31], a case often referred to as authority for the view that there are no exceptions to immunity even for *jus cogens* violations, the Court, having surveyed international practice, *"accepts, on the basis of [that practice], that the prohibition of torture has achieved the status of a peremptory norm in international law"*.[32] Similarly, in *Jones v. the United Kingdom*[33], the Court proceeded from the assumption that the prohibition of torture is *Jus Cogens* and upheld, in all material respects, the *Al-Adsani case*.[34] The African Commission on Human and Peoples' Rights has likewise recognized, in *Mohammed Abdullah Saleh al-Asad v. Djibouti*[35], the prohibition of torture as a norm of *jus cogens*.[36]

As the International Court of Justice held, torture is prohibited in practically all national legislation.[37] There is, in addition to legislation, widespread treaty practice on the prohibition of torture as a non-derogable obligation. The Convention against Torture, which has 165 State parties, prohibits torture and obliges States parties to take measures to prevent torture.[38] Article 2 of the Convention against Torture provides that *"[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture",* emphasizing the non-derogability of the prohibition.[39]

5. Use of Torture by State Functionaries in India and Loopholes in our Domestic Laws that Facilitate such Torture

5.1 Cases of Custodial Torture and Custodial Deaths

Apart from the police, there are several other governmental authorities also, like the CRPF, BSF, the State Armed Police, Intelligence Agencies like the Intelligence Bureau RAW, which have the power to detain a person and to interrogate him in connection with the investigation of offences.

[31] AL-Adsani v. United Kingdom (2002) 34 EHRR 273.
[32] Al-Adsani v. the United Kingdom, No. 35763/91, Judgment, Grand Chamber, European Court of Human Rights, 21 November 2001, ECHR 2001-XI, para. 61.
[33] Jones and Others v. The United Kingdom App Nos. 34356/06 and 40528/06 (ECtHR, 14 January 2014).
[34] Jones and Others v. the United Kingdom, No. 34356/06 and 40528/06, Judgment, European Court of Human Rights, 14 January 2014, ECHR 2014, especially paras. 205 -215.
[35] Al-Asad v. Djibouti (Communication No. 383/10) [2014] ACHPR 1.
[36] Mohammed Abdullah Saleh al-Asad v. the Republic of Djibouti, Communication 383/10, Decision of April-May 2014, para. 179 ("The prohibition of torture is a *jus cogens* rule of international law").
[37] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422, at p. 457, para. 99.
[38] Convention against Torture, arts. 1 and 2, para. 1, and arts. 4 and 5.
[39] *Id.,* art. 2, para. 2.

There are instances of torture and death in custody of these authorities as well. Due to the excessive powers are given to the police and the security forces under various counter-terrorism laws in India, many times human rights are grossly violated of people in terror-struck areas and especially those 'suspected of terrorist activities. A number of Supreme Court judgments and human rights organisations like Amnesty International and others have brought out such cases of violations of human rights by the security forces. The National Human Rights Commission has also thrown light on some cases such as the Bijbehara incident in Kashmir.[40]

Abuse of the provisions of the Unlawful Activities (Prevention) Act, 1967(UAPA) and the Armed Forces (Special Powers) Act, 1958(AFSPA) by law enforcement personnel is common news now. The Extra- Judicial Execution Victim Families Association, Manipur (hereinafter, "EEVFAM"), with Neena Ningombam as secretary, had appealed to the Supreme Court for an independent probe into the 1528 extra-judicial killings in Manipur.[41] The Supreme Court has on a number of instances warned policemen to refrain from using excessive force or torture or indulge in 'fake encounters', there has not been a reduction in the number of such cases which are reported in the media day after day. There is the Assam fake encounter case of 1994[42], Patribhal fake encounter case of 2000[43], Machil fake encounter case of 2010[44] and the Shopian encounter case of 2018.[45]But many of the cases go unreported due to fear of the police and the army forces.

There is a long list of cases of police brutality in India. In June 2017 Manjula Shetye, a woman inmate succumbed to the injuries inflicted upon her in a prison in Mumbai, allegedly by the prison

[40] DR. K.M. MATHUR, CRIME, HUMAN RIGHTS AND NATIONAL SECURITY 208 (Gyan Publishing House, 1996).

[41] Editorial, *Ending Impunity under AFSPA,* THE HINDU (July 11, 2018), (Oct. 01, 2021. 12:50 PM) *https://www.thehindu.com/opinion/editorial/Ending-impunity-under-AFSPA/article14481676.ece* .

[42]Bikash Singh, *7 army men, including a Major General, given life sentence by Army court for fake encounter,* THE ECONOMIC TIMES (Oct. 15, 2018), (Oct. 02, 2021, 11:33 AM) https://economictimes.indiatimes.com/news/defence/7-armymen-including-a-major-general-given-life-sentence-by-army-court-for-fake-encounter/articleshow/66206498.cms?from=mdr .

[43] M. Saleem Pandit*, Army to court martial five officers in Pathribal fake encounter case*, THE TIMES OF INDIA (June 29, 2012), (Oct. 02, 2021, 11:34 AM) https://timesofindia.indiatimes.com/india/Army-to-court-martial-five-officers-in-Pathribal-fake-encounter-case/articleshow/14502836.cms .

[44] Ajit Kumar Dubey, *Machil fake encounter case: Military court suspends life sentence to five Army personnel*, INDIA TODAY (July 26, 2017), (Oct. 02, 2021, 11:35 AM) https://www.indiatoday.in/mail-today/story/machhil-fake-encounter-case-armed-forces-tribunal-kashmir-1026287-2017-07-26 .

[45] Peerzada Ashiq, *AFSPA mandate exceeded in Shopian encounter: Army probe*, THE HINDU (Sept. 18, 2020), (Oct. 02, 11:36 AM) https://www.thehindu.com/news/national/shopian-encounter-army-finds-prima-facie-evidence-against-troops-initiates-proceedings-under-army-act/article32640707.ece.

staff after raping her. Nevertheless, no reforms are in sight as yet in the direction of curbing ill-treatment and torture by the police.[46]

In April 2020, a student from a Central Government University located in New Delhi was arrested for allegedly causing public disorder by blocking roads and giving inflammatory speeches, and was charged under the UAPA. She was denied bail on the ground that "there existed evidence *prima facie* of causing conspiracy" to deny bail under section 43D(5) of UAPA, and was inconsiderate of the fact that she was pregnant at that time and while the COVID-19 Pandemic has been on a rise.[47] She was eventually granted bail around 2 months later on humanitarian grounds.[48] This is not torture by the police, but denial of bail in such cases is no less than mental torture.

Another case of custodial torture of a father and son in Sattankulam, Tamil Nadu caught the attention of the media in July 2020 in which they were beaten up brutally for simply not complying with the direction of police of closing their shop as per the lockdown guidelines. A case in which a mere warning would have been enough actually led to the deaths of the father-son duo.[49]

Since custodial torture and death are such heinous crimes, higher courts in India have often granted compensation to victims or their dependents, as the case may be. In *Rudul Shah v. Union of India*,[50] the petitioner was illegally detained for 14 years in Ranchi jail of Bihar. It was the first case that the Supreme Court ordered monetary compensation under Article 32 of the Constitution. In a decision of the Supreme Court in *People's Union for Civil Liberties v. Union of India*,[51] which was a case from Manipur, a disturbed area, in which case there was a fake encounter and two persons alleged to be terrorists were seized by police, taken to a distant place and shot at causing their death. It was held that such administrative liquidation cannot be permitted and interference of the court is called for. The Apex Court awarded a compensation of rupees one lakh to families of each of the deceased. In the *Khatri (II) v. State of Bihar* case[52], infamously known as the Bhagalpur

[46] Human Rights Watch, *India Events 2017*, (Oct. 02, 11:38 AM) https://www.hrw.org/world-report/2018/country-chapters/india.

[47] Seemi Pasha, *Safoora Zargar Denied Bail as Judge Finds Prima Facie Evidence of 'Conspiracy'*, THE WIRE, (Oct. 02, 2021, 11:39 AM) https://thewire.in/law/safoora-zargar-denied-bail .

[48] *Delhi High Court Grants Jamia Student Safoora Zargar Bail*, THE WIRE, (Oct. 02, 2021. 11:40 AM) https://thewire.in/rights/safoora-zargar-bail-delhi-high-court.

[49] S. Vijay Kumar and P. Sudhakar, *Sathankulam custodial deaths: When protectors turn perpetrators,* THE HINDU (July 4, 2020), (Oct. 02, 2021, 11: 42 AM) https://www.thehindu.com/news/national/tamil-nadu/when-protectors-turn-perpetrators/article31983885.ece.

[50] A.I.R. 1983 S.C. 1086.

[51] 1997 (3) SCC 433.

[52] (1981) 1 SCC 627.

blindings case in which 31 under-trial prisoners were blinded by police by pouring acid into their eyes, the Supreme Court had granted monetary compensation to the victims. Though ironically, pensions of many of the victims have been irregular.[53] *Nilabati Behera v. State of Orissa*[54]is yet another case of custodial death where the deceased was taken into police custody and the next day his body was found on the railway tracks with multiple injuries. The Supreme Court once again reiterated that in case of violation of fundamental rights by State agencies or servants, the Court can direct the State to pay compensation to the victim or his heir by way of "monetary amends" and redressal. The principle of "sovereign immunity" shall be inapplicable in such cases. Having regard to the age and income of the deceased, the State was directed in this case to pay Rs 1,50,000 as compensation to the deceased's mother.

But compensation to victims of custodial abuse by courts under Articles 32 and 226 is neither systematic nor uniform. Thus, when a case of custodial torture is established by a criminal court or an Army court, compensation amount should be provided with some uniformity and this could be added within the Cr.P.C. under section 357A under the Victim Compensation Scheme. This should apply to all custodial torture cases irrespective of the fact that the accused who was a victim of torture, was accused of an offence under the IPC or any of the anti-terrorism laws. Additionally, before reintroduction of the 2018 Torture Bill in the Parliament, section 4 can be modified to add that the Court passing such order shall have the power to order that whole or part of such fine that is recovered, be applied in the payment to any person of compensation for any loss or injury caused by the offence thereby, broadening the ambit of torture to include mental or psychological torture and not restricting it to physical torture.

5.2 Loopholes in Domestic Laws

5.2.1 Sections 132 and 197 of Cr.P.C. prohibit the prosecution of certain categories of public officials, including any police officer, without the prior sanction of the state government. This provision should be modified. Inspiration can be taken from the removal of the requirement of such a sanction by the 2013 Criminal Law Amendment when a public official has been accused of any sexual offence.

[53] Mohd. Imran Khan, *Bhagalpur Blindings: Victims' Wait in Darkness as Pension Pending Since 4 Months,* NEWSCLICK,(Oct .02, 2021,11:44 AM) https://www.newsclick.in/bhagalpur-blindings-victims-wait-darkness-pension-pending-since-4-months.

[54] (1993) 2 SCC 746.

5.2.2 The proviso to section 43D(5) under the UAPA allows denial of bail to an accused if a "prima facie" case exists. Where an invocation of UAPA, incorrect in law, opens a window for torture to the accused, the proviso to section 43D(5) opens a door for it. In May 2011, six members of the Kabir Kala Manch were arrested on the ground of allegedly having close links with the CPI(M) and it was proved through the recovery of allegedly "incriminating literature and propaganda".[55]

But in the case of two other applications before the High Court of Bombay, bail was granted and the presiding judge relied on the *Arup Bhuyan case*[56] that possession of literature related to a banned organization does not amount to "*prima facie* evidence of membership" of the banned organization in question.[57]

Moreover, pre-trial detention which is a part and parcel of anti-terror laws like UAPA also causes torture and trauma, which is in some cases physical and in all cases, mental. S. 436A of the Cr.P.C. allows for the release of under-trial prisoners who have already spent at least half of the maximum term of imprisonment for the offence they have been charged with, except offences punishable with death. But the non-obstante clause in the section excludes special laws like the UAPA from its ambit.[58]

5.2.3 Extensive material shows that "misuse and abuse are woven into the provisions of extraordinary laws. Particularly in the context of the current repository of most of TADA's provisions, the UAPA, under which the 'independent' authority set up to sanction prosecution is appointed by the executive itself."[59]

5.2.4 Section 4 of the AFSPA states the special power of the Armed Forces –

"Any commissioned officer, warrant officer, non -commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area:

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[55] Gautam Bhatia, *Arup Bhuyan, Article 19(1)(a), and Bail Jurisprudence in Terror-Related Cases,* INDIAN CONSTITUTION LAW AND PHILOSOPHY, (Oct. 02, 2021, 11: 45 AM) https://indconlawphil.wordpress.com/2015/04/09/arup-bhuyan-article-191a-and-bail-jurisprudence-in-terror-related-cases/.

[56] Arup Bhuyan v State of Assam, (2011) 3 SCC 377.

[57] *Supra* Note 50.

[58] Nikita Khaitan, *Silence and 'Pragmatism': Skirting Bail Conditions in the UAPA,* CONSTITUTION LAW AND PHILOSOPHY, (Oct. 02, 2021, 11: 48 AM) https://indconlawphil.wordpress.com/2020/06/15/guest-post-silence-and-pragmatism-skirting-bail-conditions-in-the-uapa/.

[59] *Id.*

(a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, ***fire upon or otherwise use force,*** *even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;"*

A similar power is given under section 4 of the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990. This power is often misused and abused by the Armed Forces killing innocent civilians or 'suspected' terrorists. Such excessive, brutal and unjustified use of force by the police and the special forces violates Article 3 of UDHR, Article 7 of ICCPR, Article 2 of the Convention against Torture and Article 3 of the Geneva Convention.

5.2.5 Section 6 of the AFSPA provides government security forces with immunity from prosecution. A similar provision exists under section 7 of the AF(J&K)SPA, 1990. The government of J&K had sought sanction from the Central government for prosecuting the accused in 50 such alleged cases that had occurred between 2001 and 2016. On 1st January 2018, the Union Ministry for Defence informed the Rajya Sabha that it had received these requests from the J&K Government. While the requests were pending in three cases, the Government had denied sanction to prosecute the accused in 47 cases involving allegations of murder or killing of civilians, custodial death, beating or torture, fake encounter, disappearance, among others due to lack of sufficient evidence, *prima facie*.[60] Subsequently, the defence ministry had submitted in an affidavit before the Central Information Commissioner that there are no set procedures or norms, criteria and standards that are followed in deciding prosecution sanctions under AF(J&K)SPA.[61]This brings forward a problematic scenario where on one hand there are no set procedures followed while deciding whether sanction for prosecution under AF (J&K) SPA will be granted or

[60] Government of India, Ministry of Defence, Department of Defence, Rajya Sabha, Unstarred Question No.1463 to be answered on 1.1. 2018 , (Oct. 02, 2021, 11:53 AM).
https://www.humanrightsinitiative.org/download/RS-J&KAFSPA-Q&A-Jan18.pdf.

[61] Nidhi Sharma, *There are no set procedures or norms to sanction AFSPA cases: Defence Ministry,* THE ECONOMIC TIMES (July 26, 2020), (Oct. 02, 2021, 11:54 AM) https://economictimes.indiatimes.com/news/politics-and-nation/there-are-no-set-procedures-or-norms-to-sanction-afspa-cases-defenceministry/articleshow/77186823.cms?from=mdr.

not and on the other hand, in 94% of the cases between 2001-2016 sanction applications have been rejected. This lack of uniformity and transparency goes against the tenets of democracy of which the right to information is an inseparable part.

Hence, prosecution under section 6 of AFSPA or section 7 of AF (J&K) SPA should not be solely dependent on the sanction received by the Central Government. Especially in light of the Supreme Court judgment in *General Officer Commanding (Army) v. CBI*[62] of May 01, 2012 wherein the Hon'ble court addressed the issue of the need for sanction to prosecute Army officers under the AFSPA. The Court held that sanction would not be required in 'all' cases to prosecute an official. The officer enjoys immunity from prosecution only in those cases where he 'acted in exercise of powers conferred under the Act' and then also there should be a 'reasonable nexuses' between his action and duties. Moreover, the Act empowers the central government to decide whether such a nexus exists or not and the courts do not have jurisdiction in this regard. Although in making a decision, the government should make an objective assessment of the exigencies leading to the officer's actions. The Court also ruled that although sanction is mandatory under the Act, but only at the time of cognizance of the offence and not during the investigation. Furthermore, the Court also noted that since there is no requirement of sanction under the Army Act, 1950, and therefore, the Army can choose to prosecute the accused through court-martial instead of going to the criminal court.[63]

5.2.6 Section 49 provides immunity similar to Section 6 of AFSPA under the heading "protection of action taken in good faith".

State sovereignty is often cited as the defence by States for enacting domestic laws with provisions the State deems necessary for whatever reasons, may it be the maintenance of law and order, protection of the security and integrity of the State, or public interest, etc. But if a provision in the domestic law conflicts with the international principle of *jus cogens*, which is a 'peremptory norm' of general international law, then the principle of *jus cogens* will supersede.

5.3 National Crime Records Bureau (NCRB) Data for the Year 2020

[62] General Officer Commanding v. CBI and Anr. Criminal appeal No. 257 of 2011.

[63] Rohit, *Is prior sanction always required to prosecute army officers under AFSPA?,* PRS INDIA, (Oct. 02, 2021, 11 :57 AM) https://www.prsindia.org/theprsblog/prior-sanction-always-required-prosecute-army-officers-under-afspa.

In cases of persons not in remand, 43 deaths in custody were reported and 22 cases of deaths in police custody were registered by the police in 2020 and 11 policemen were arrested in this regard.[64] Gujarat observed the maximum number of custodial deaths, 15, of all the states and the Union territories of India.[65] In the case of persons in remand, 33 deaths were reported and 23 were registered and only 1 policeman was arrested in this regard in 2020. Of the total number of persons who died in police custody in 2020, 31 persons died of suicide, 34 died of illness or while receiving treatment in hospitals, 2 died of injuries sustained prior to police custody, 1 died of injuries sustained during custody, 3 died while attempting to escape from custody and 5 died due to other causes.[66] 20 cases were registered against police personnel for human rights violations such as encounter killing and death in custody.

In addition, 14 civilian deaths were observed due to lathi-charge and 2 due to police firing in 2020.[67] As compared to this, five lathi-charge-related civilian deaths were recorded for 2019. A 180 percent surge can be seen for this parameter.

6. Legal Safeguards against Acts of Torture

6.1 Under the Constitution of India

Although the Constitution of India does not expressly prohibit the unjustified application of torture by the State, nevertheless there are certain provisions that guarantee protection from arbitrary arrest and detention. Article 22(1) makes it compulsory for a police officer arresting and detaining a person to inform him of the grounds of his arrest and about his right to consult a legal practitioner to defend him. Furthermore, Article 22(2) mandates the production of the accused person before the Magistrate within 24 hours of arrest. But again, any law that allows preventive detention is an exception to this provision of the Constitution, and UAPA is one such law.

There is also Article 20 clause 3 that embodies the fundamental right against self-incrimination.

Under Various Legislations

[64] National Crime Record Bureau, *Crime in India 2020*, NATIONAL CRIME RECORD BUREAU, Vol. III, Chapter 16A, Table 16A.1, (Sept. 2021) p. 1001.
[65] *Id*.
[66] *Id.* at Table 16A.3, p. 1003.
[67] *Id*., Chapter 16B, Table 16B.4, p. 1010.

6.2 A person who has been arrested has the right to get himself examined by a medical practitioner as guaranteed under section 54 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C.").

6.3 Section 24 of the IEA has provided that a confession to be admissible in court must have been made voluntarily by the accused without being made under any threat, inducement or promise of any nature.

6.4 With the aim of reducing physical and mental violence resorted to by police personnel on arrested persons to extort confession, the confession made to police has been expressly made inadmissible as evidence under the Indian Evidence Act, 1872 (hereinafter, "IEA"), Section 25 and 26.

6.5 Even the Cr.P.C. provides under Section 162 that the statement of a witness that has been recorded by a police officer can only be used for the purpose of contradicting the statement before the court.

6.6 Section 164 further provides that it shall be the duty of the magistrate to guarantee that the accused has made the confession or statement out of his own free will.

7. Role Played by the Judiciary in Controlling the Menace of Custodial Torture

The Constitution of India has conferred the important duty to protect the fundamental rights of the people, on the judiciary. The common man of the country has the utmost faith in the judicial setup that we have. Hence, it becomes the responsibility of the judiciary to curb the menace of custodial torture that is so rampant in our country and strikes a blow to the rule of law which is the touchstone of a true democracy.[68] In *D.K. Basu v. State of West Bengal*,[69] it was observed that where it is necessary to interrogate arrestees in the interest of national security, however, the action of the State must be "right, just and fair" and there should not be the use of torture of extract any kind of information as it would be against the tenets of Article 21. The Supreme Court developed "Custodial Jurisprudence" in this case and gave out eleven guidelines to be adhered to by the police in cases of arrest and detention.

The Supreme Court has used its power under Article 32(2) of the Constitution from time to time to award compensation to victims of custodial abuse or in case of custodial death, to their

[68] *Supra* note 1 at 225.
[69] (1997) 1 SCC 416.

dependents. In *SAHELI v. Commissioner of Police*,[70]the Supreme Court awarded rupees 75,000 as compensation to Ms. Kamlesh Kumari whose nine-year-old son was beaten to death by the Delhi Police officials and directed to recover the amount from the erring police officials. Therefore, the Supreme Court has been evolving compensatory jurisprudence to provide a monetary remedy to the victims of custodial torture but a regulatory framework is required to curb incidences of custodial abuse altogether.

The Supreme Court has criticized police brutality in cases like *Prithipal Singh v. State of Punjab*[71] wherein it was held that: police atrocities, custodial deaths and illegal detention are violative of the constitutional mandate, particularly, under Article 21 and Article 22 of the Constitution,[72] *Arnesh Kumar v. State of Bihar*[73] wherein it was held that the police officers must not arrest the accused unless necessary and the Magistrate should not authorize detention casually and mechanically and failure to comply with these directions can make the police officers as well as the erring Magistrate liable for departmental enquiry, *Ankush Maruti Shinde v. State of Maharashtra*[74] wherein the Court held that lapse on the part of the investigating agency affects fair investigation and fair trial, and therefore, violates fundamental rights of the accused guaranteed under Articles 20 & 21 of the Constitution of India and departmental action to be taken against erring officials.

In the recent judgment in *Paramvir Singh Saini v. Baljit Singh & Others*,[75]the Hon'ble Court ordered the installation of CCTV cameras in interrogation centres. The Court refused to accept excuses such as lack of funds and strictly directed all the states and union territories to immediately install CCTV cameras in every police station in their respective jurisdictions, at all the entry/exit points, corridors, lobby area, lock-ups, interrogation cells, and outside washrooms as well. The Court also directed that the CCTV's should have both audio and video facility, as well as night vision facility and their footage, should be preserved for at least 18 months and the responsibility of proper functioning of the cameras shall lie with the SHO of the police station. Not only police stations but such cameras must be installed in interrogation rooms of all investigation agencies

[70] A.I.R. 1990 S.C. 513.
[71] Prithipal Singh v. State of Punjab, Criminal Appeal Nos. 523-537 of 2009.
[72] (2012) 1 SCC 10.
[73] (2014) 8 SCC 273.
[74] 2019 SCC OnLine SC 317.
[75] SPECIAL LEAVE PETITION (CRIMINAL) NO.3543 of 2020.

such as CBI, NIA, etc. The Court also held that any person who has faced custodial torture can approach the State Human Rights Commission who will then deal with such complaints accordingly. The respected Court also directed that more human rights courts should be established in all the districts.

8. Conclusion and Suggestions

The fact that India has not yet ratified the UN Convention against Torture and enactment of the Prevention of Torture Bill, 2018 is still pending, risks one of the core fundamental rights of the people of protection from torture, implicit in Article 21. It is giving out the impression that India as a nation is perhaps not very committed to its obligations under International Law. If the loopholes in the laws are not fixed, State functionaries may continue to take advantage of them and even misuse them. Accordingly, the authors have made the following suggestions:

1. Ratification of the Convention against Torture must be encouraged.
2. A legal framework to regulate the actions of the police and to make them more accountable for their actions, that is, the enactment of the Prevention of Torture Bill, 2018 is the need of the hour. But in the absence of enabling legislation, provisions of the Convention against Torture must be followed as guidelines calling for the strictest adherence to prohibit and if the need arises, punish State functionaries for committing acts of torture.
3. The need for obtaining prior sanction from the government for prosecuting against certain categories of public officials, including police officials under Sections 132 and 197 of Cr.P.C. may be removed when a police officer has been accused of committing custodial torture.
4. Section 49 of the UAPA may be deleted as it acts as a shield for the erring members of the government or the armed forces or the paramilitary forces who are responsible, either directly or indirectly for acts of torture.
5. The fulfillment of the requirement of a *prima facie* case under section 43D(5) being made should be clearly laid out in the order refusing bail.
6. The 'independent' authority set up under section 45 of the UAPA to sanction prosecution under the UAPA should not be appointed by the executive itself rather by an independent body free from any possibility of influence from the executive branch of the government.
7. The Armed Forces Special Powers Act, 1958 may be amended as follows:

7.1 Fetters should be provided with respect to exercising of powers granted to the armed forces under section 4 and special care should be taken to not use force more than required. Under section 4(a), instead of "fire upon or otherwise use force", it should be replaced with "use force, or if force is not enough, then fire". First force should be used and only when force is not enough to maintain public peace, that firing should be done as the last resort.

7.2 Prosecution under section 6 of AFSPA or section 7 of AF(J&K)•SPA should not be solely dependent on the sanction received by the Central government. Moreover, prosecution under the Army Act should be preferred in case of grave violations by the Army of human rights, where the requirement for prior government sanction is not there.

7.3 India being a member of the United Nations, should take appropriate measures to make the provisions of the following international instruments, an enforceable part of the Indian criminal justice system so that the Indian legal framework to protect against custodial torture, is at par with international standards:

7.4 Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2000.

7.5 Convention for the Protection of All Persons from Enforced Disappearance, 2006.

7.6 Code of Conduct for Law Enforcement Officials, 1979.

7.7 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990.

7.8 United Nations Standard Minimum Rules for the Treatment of Prisoners.

7.9 United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, 1988.

7.8 The Police Act of 1861 should be revised and reformed to bring down the pressure on policemen, from the lowest rank to the highest, by reducing their working hours, increasing their salaries, including political pressure, since this pressure of varied kinds often results in torture and harassment by the police.

7.9 Victim Compensation Scheme under section 357A of Cr.P.C. should apply to all custodial torture cases irrespective of the fact that the accused tortured was accused of an offence under the IPC or any of the anti-terrorism laws.

Thus, the authors have observed that there is a need for these changes and amendments to curb the heinous act of torture which is one of the worst kinds of human rights violation and becomes all the more troublesome when it is inflicted by those entrusted with the duty of protecting the public. Even though not all law enforcement personnel, may it be the police or the members of the Special Forces, are culprits. But those who are must most definitely be punished and the above suggestions, if applied, may help in re-establishing the fading trust of the common public, in the police, specifically, and in the Indian justice system, generally.

EFECTIVE E-WASTE MANAGEMENT MODEL ACROSS THE GLOBE: NEED OF THE HOUR!

Dr. Praveen Kumar[1]

Abstract

According to estimates by the United Nations, the world produces 50-60 million tonnes of e-waste every year and the e-waste management system adopted across the globe is not competent to control the menace of e-waste. The Researcher intends to study global e-waste management models, guiding responsibility principles, adopted models, standard procedures, imposed penalties, lacunas in policy and probable consequences of mismanagement in various countries. The Researcher wants to explore the e-waste management model in India in detail as compared to various models adopted in other countries. The researcher intends to inquire into the effectiveness of various steps like choosing safer technologies, non-hazardous metal substitutes, legal compliance, effective regulatory mechanism, investment opportunities in e-waste recycling and to analyze e-waste management models, legal principles, contemporary approaches to curb the menace of e-waste.

Keywords: e-waste, environment, management, model, laws, WEEE Directives, European Union, transboundary movement, hazard, health, degradation, soil

Introduction

Since the early 19th century, with the advent of electronic gadgets such as TVs, Computers and mobile phones; e-waste management has become a bane across the world. Moreover, this has impacted globally to such an extent, which has compelled the developed nations to announce International E-Waste Day on Oct. 13 to spread awareness amongst the masses to take note of this

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global challenge. Several stakeholders have conducted several events for the public to educate them about the impact of e-waste on our lives.

Smartphones, tablets, and computers are major contributors in the annual global e-waste generated across the globe. Whereas other household appliances like Refrigerators, ACs and other heating & cooling equipment will contribute the rest[2]. This huge quantity of e-waste will rise enormously in the next few years because only 25% of total e-waste generated is getting recycled annually. Nearly 45 million tons of e-waste has been filled in either landfills or burned, or being added in the water channels resulting in polluting our environment and converting into irreversible damages in the ecosystem. In addition to this, the situation tends to raise the alarm because only 66% of World population is covered by e-waste legislation.

Electronic waste in developed countries like Japan has become a serious environmental concern. Even Japan has implemented an effective electronic e-waste recycling model at first; still, it is countering the growing e-waste challenge.

Extent of the Problem of E-Waste:

The entire world is producing a huge quantity of e-waste approximately 55 million tons annually and that requires an immediate and urgent legislative intent to establish more recycling facilities to enhance the rate of recycling else this challenge will get much worse[3]. E-waste is one of the fastest contributors in the entire solid waste produced globally. Menace of e-waste has increase too much in past 5 years, for instance, it was reported 44 million tons in the year 2016 and the same has touched 55 million tons in 2021. Consequently, this sharp rise has resulted in devastation of land, soil and water channels.

Scholars and scientists believe that uncontrolled production of electronic devices for consumers have resulted in a rush amongst the masses to buy more and more electronic devices by replacing older devices. On the other side, Nations have shown apathy to increase the rate of e-waste

[2] Frost & Sullivan, Report on e-waste by ASSOCHAM (21 April 2016).
[3]United Nations, Report by Dept. of International Communications (01 August 2019).

recycling. Ultimately, in the absence of recycling, valuable raw materials present within e-waste go to landfills unnoticed. This is a greater loss for every Country in terms of their natural resources.

Landfills of e-waste have raised a serious environmental concern, where toxic chemicals are contaminating the soil and water streams. In India, agriculture, deemed to be the prominent and major contributor in its economy, depends on natural water streams for irrigation. Traces of harmful chemicals and metals present in the e-waste have been found in the agricultural crops which are resulting in persistent health concerns.

Illegal Transboundary Movement of E-waste to Developing and Underdeveloped Nations:

Despite Waste Electrical and Electronic Equipment (WEEE) Directives and other domestic legislations across the globe, a huge amount of e-waste generated in the developed countries like USA has been constantly shipped to developing countries in the South Asian regions especially on the pretext of the used goods. This adds up in the total quantity of the annual e-waste generated in the particular country. As per the recent reports, more than 40% of e-waste has been imported to India every year from western countries by violating the WEEE directives. In China, this contributes up to 45% of total e-waste generated there[4].

Environmental Risks Posed by E-Waste:

The United Nations has launched several programmes to educate various stakeholders about the environmental risks posed by e-waste. Apathy of the executive Govt., industry and other stakeholders are responsible for making environmental consequences more severe. Problem of e-waste management is a global problem. It can't be resolved at the national level. There is an imminent need to establish an international legal regime to curb the menace of e-waste. The United Nations is committed to curb the menace of e-waste, thereby conducting several activities throughout the year. The United Nations has developed a sustainable model for effective e-waste management which can be adopted worldwide. Developed countries like the USA, ironically, are

[4] Research Unit (LARRDIS), Rajya Sabha Secretariat, New Delhi, Report on E-waste in India (June 2011).

contributing to the problem, because people can afford to buy more and more mobile phones and other electronic gadgets.

Effective E-waste Management Model:

With reference to a global study conducted in 2015, 65% of e-waste generated in western countries has been dumped to South Asian Countries in the pretext of used goods which have not reached their end of life. After enactment of WEEE directives, the practice of exporting e-waste to other countries has turned into a menace which paves the way to make stringent e-waste import laws by under-developed countries of South Asian region. In India, e-waste Management Rules 2011; provides for effective e-waste management regime in India but doesn't provide a check on international imports of e-waste[5]. The researcher intends to propose the following recommendations to establish an effective global e-waste management model which can be categorized in following steps.

The first and foremost task of every Nation shall be on sharing the recent technology with the developing and underdeveloped countries in order to facilitate people to buy latest technology products. We have observed that developed nations are not willing to share their latest technology and keen to introduce obsolete technology with them in order to sell their goods multiple times to the same consumer for the sake of profit. Ultimately this business strategy compels the consumers to replace their electronic items several times and thereby generate the e-waste. The next essential focus shall be on the recycling of e-waste. But due to lack of awareness, absence of collection centers and zero incentives to consumers are some of the areas of serious concern in order to establish a proper recycling model is the need of the hour. WEEE Directives provide for stringent procedures and penalties to recycle e-waste in European Countries. Which makes the recycling an expensive process and in order to reduce the cost of recycling, industry starts exporting their e-waste to South Asian countries on the pretext of used items[6].

[5] United Nations University, Institute for the Advanced Study of Sustainability, The Global E-waste Monitor (2014).
[6] Supra 4.

E-waste Management Model in India:

Effective Recycling begins with eco-labeling which establishes a method to identify the hazardous and non-hazardous products. This task has been assigned to the Bureau of Indian Standards in India to establish an effective e-waste management model. The Board is empowered to prepare and implement E-waste Policy Framework and also assists the Govt. Agencies, Manufacturers, Recyclers & Port and Customs etc. to establish a channel in order to dispose of the e-waste properly. Several manufacturers have established Collection Centers and Recycling facilities in India to recycle the e-waste. Since the quantity of e-waste produced every year still exceeds their capacity to recycle. This has resulted in e-waste management concerns and a huge quantity of e-waste is left in the landfills or water channels. After enacting the e-waste management rules in the year 2011, India still needs a proper implementation of its e-waste management model like other developing countries[7].

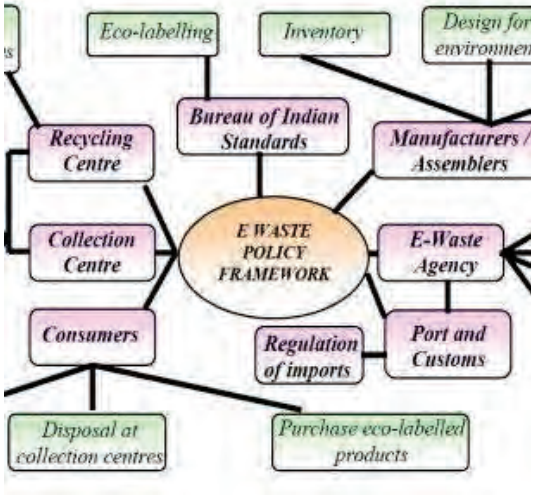

Chart-I: E-waste Management Model in India

[7] Down to Earth, Recycling of e-waste in India and its potential (April 2019).

Findings and Suggestions

After analyzing the extent of the problem and elaborating the findings of the research, the author prescribes the following steps to be taken in order to establish an effective e-waste management model.

Step 1: Eco-Labeling of all Electronics Products by UIN (Unique Identification Number) Method

Every manufacturer of electrical and electronics items shall be directed by the Bureau of Indian Standards to write the Unique Identification Number (UIN) over the product with a scannable barcode. This mandate is the utmost necessary first step in the direction of establishing an effective e-waste management model. The UIN shall provide the complete details of the manufacturers and details about the place of its origin. Registration of UIN with the Central Agencies in every country shall be made mandatory for the manufacturer.

Step 2: Sharing of Inventory Records with National Agencies

Till today, Manufacturers of electronic products are not liable to disclose the inventory details with National Agencies. This contributes to the absence of data with the regulatory bodies in every country. We have no evidence to calculate the growing menace of e-waste across the world. Every time, we start research on assumptions and end with presumptions. The Researcher states to establish a mandate to the manufacturers to share the inventory records with the central agencies so that an effective policy can be made for different categories of hazardous and non-hazardous e-waste items[8].

Step 3: Responsibility of Manufacturers to Collect E-Waste for Recycling (Extended Producer Responsibility- EPR)

Generally, Menace of e-waste starts with illegal transboundary exports to underdeveloped countries. Then, it reaches to scrap markets for recycling which is to be done by unskilled labour. E-waste is a bundle of precious metals like Gold, Platinum, and Copper etc. with hazardous

[8] United States Environment Protection Agency, Criteria for the Definition of Solid waste, e-waste & hazardous waste (2018).

elements like lead, mercury, silica etc. Scrap Dealers buy the e-waste for the purpose of extracting precious metals from the e-waste but they use highly improper methods in absence of safety measures[9]. Several harmful acids like Concentrated Sulphuric Acid, Hydrochloric Acid and Nitric Acid have been used for extraction of precious metals by unskilled labourers. Sometimes the extraction process involves burning of e-waste which results in emission of poisonous gases in the air. At the end, remaining dust, plastic, and ashes of e-waste is being thrown into either water channels like rivers, lakes and other water bodies and sometimes, it's dumped in the landfills. Hence to stop this practice which is the utmost hazardous to the people employed in the scrap industry and to the environment as whole, researchers intend to establish a mechanism, so that the onus of recycling shall be shifted from scrap dealers to the manufacturers of the electronic items. Manufacturers either shall contribute in the establishment of recycling units OR shall be made responsible for collection of e-waste for recycling on their own. Central Govt. agencies shall stipulate the directives for the manufacturers in this regard in order to control the growing menace of e-waste across the globe[10].

Step 4: Incentives for Consumers to Dispose of E-Waste at Collection Centre

Collection of e-waste shall provide incentives to the consumers so that they stop selling their products to scrap dealers. If they get incentives from the collection units which shall be competitively higher as compared to what has been offered by the scrap dealers, it is the only way to establish an effective e-waste management model across the globe. Manufacturers must provide incentives to the consumers if they deposit their e-waste products after reaching their end-of-life through the collection Centers. This practice has been observed in a few Western Countries but it's almost absent in various Countries of Asian region. Regulatory authorities of State shall establish a mandate for the manufacturers to ensure payment of incentives to consumers for 100% collection of e-waste generated in the Country[11].

Step 5: Establishment of Collection and Recycling Centre

[9] Supra 4.
[10] Jianjie Fu, Haiyan Zhang, Aiqian Zhang, and Guibin Jiang, Environ. Sci. Technol, E-waste Recycling in China: A Challenging Field 52, 12, 6727–6728 (2018).
[11] The Energy and Resource Institute (TERI), E-waste Management in India: Challenges and Opportunities (Nov. 2019).

The researcher intends to put focus on establishing more Collection and Recycling Centers for e-waste management across the Globe. For instance, In India, several collection centers have been established in India by various stakeholders but still people are not aware about these facilities. There is an urgent need for the establishment of many Recycling Centers also across the globe. Till now, India is capable of recycling only 25% of its annual e-waste generated. If still we ignore the need to establish more recycling centers, the situation will be worse by 2050 because the rise in annual e-waste generation in India is alarming.

Step 6: Control of Imports of Used Items

E-waste Management Rules 2011 does not provide a mechanism to check the national imports of e-waste in the name of used items. It allows the import of Used Items. Western Countries have found a way to dump their e-waste in the name of Used Items by importing it to South Asian Countries. Another reason behind dumping of e-waste is the high cost of recycling in West whereas its boon in the Indian Scrap markets[12]. The researcher intends to introduce stringent penal provisions in the e-waste Management Rules 2011 to control the transboundary movement of e-waste. This step will drastically reduce the quantity of annual e-waste generation in India.

Step 7: Focus on Research and Development in Technology

Innovations in upgrading technology are the only cause of increase in the annual e-waste generation. Developed Countries are under the onus of protecting the global environment and they are also signatory to the international agreements to share the technology with the under-developed and developing countries. But in practice, sharing technology with the World is nothing but just a possibility. Developed Countries shall share the latest technology with other countries for the sake of protection of environment[13].

Step 8: Importance to Proper Recycling

[12] Santhanam N., Journal of Environment, Health, Science & Engineering, Electronic Waste-an emerging threat to the environment of Urban India (2014).

[13] What Is Megafauna: The Definition and Examples of Living and Extinct Species (June 2021) https://greentumble.com/category/environmental-issues/.

Improper recycling has become a consistent phenomenon across the globe and nearly 20% of e-waste has been recycled properly as per the chart shown below. People are not also aware about the e-waste recycling facilities and thereby compelled to sell the used electronic items to scrap dealers[14]. Even people have no information about the presence of precious metals like Gold, Copper & platinum etc., in the e-waste. Hence, a widespread circulation of e-waste management directives amongst the masses in order to educate them is the need of the hour.

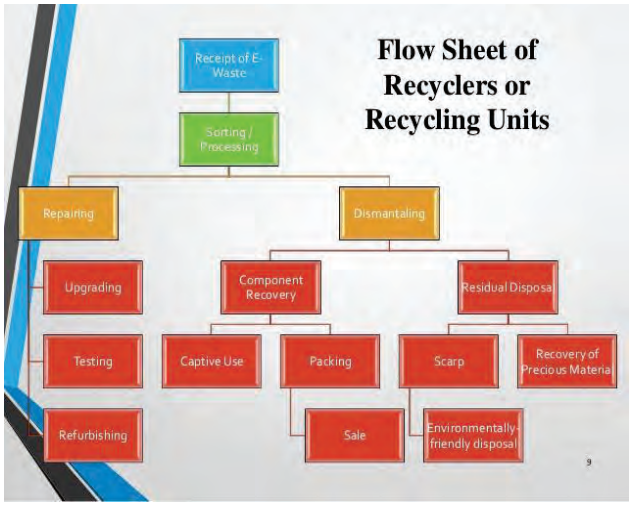

Chart-II: Effective e-waste recycling model for Recycling Unit

In every recycling unit, the process to recycle commences with receipt of e-waste followed by a sorting process. This results in the separation of articles which can be repaired and used further after upgrading, followed by testing and refurbishing. Items which can't be repaired are sent to dismantling with use of proper machines which involves extraction of precious metals like Gold, Silver, Copper, Brass, Aluminium, Palladium etc. After extracting the precious metals, the leftover plastic, silica, lead is separated so that the same can be further used as raw material for manufacturing new items. Finally, after extracting precious metals and raw material from the e-waste, leftovers are sent to landfills. Proper recycling model must be adopted globally to control environment degradation[15].

[14] Supra 4.
[15] Bianca Nogrady, BBC Future, There's gold, platinum and other valuable materials in every phone – the hard part is getting it out" (18 October 2016).

Conclusion

The Author concludes that Extended Producer Responsibility (EPR) must be observed as a fundamental liability principle on the producer and it can be applied strictly under the concept of Corporate Social Responsibility (CSR). WEEE Directives must be adopted as the standards of Environmental, Health and Safety Management Systems in India and other developing countries. Transboundary Shipments or dumping of e-waste from international routes must be curbed. Re-use and Illegal Exports of E-waste must be controlled. Choosing safer technologies, non-hazardous metal substitutes, monitoring of Compliance of Rules, effective regulatory mechanism strengthened by manpower and technical expertise, reduction of waste at source and offering Investment Opportunities in e-waste recycling could be proved to be an effective and sufficient e-waste management model across the globe to curb the menace of e-waste.

RESOLVING DISPUTES THROUGH "LOK ADALAT': PROSPECTS AND LIMITATION

Dr. A. Marisport[16]

"Lok Adalat" is a new form of Alternative Dispute Resolution (ADR) mechanism which is used to settle disputes among the disputants amicably. It is developed in India keeping in mind the issues faced by the litigants in regular courts. It has received formal legal recognition under the Legal Services Authorities Act, 1987 and Section 89 of Civil Procedure Code. It facilitates the disputants to resolve their commercial disputes as well as some other disputes including motor vehicle accidents claims. It is an informal dispute resolution mechanism which resolves the disputes through amicable settlement. Award of the "Lok Adalat" is considered as decree of the civil court. Since, "Lok Adalat" adapts conciliation process of dispute resolution, it could help the disputants to save their time and cost. "Lok Adalat" provides added advantages to the disputants because the award is been finalized by the experience person who has legal background (sitting or former Judge) and the award can be easily enforceable. "Lok Adalat" acts as one of the tools for facilitating poor people to get justice immediately and help the judiciary for reducing case load. In 2002, the Union Government has amended "the Legal Services Authorities Act" and created "Permanent Lok Adalat" and gave adjudicating powers for public utility services.

This article is to analyse how "Lok Adalat" is promoted for resolving disputes and the dispute resolution procedure of "Lok Adalat" under various legislations. This article further analyse how "Permanent Lok Adalat" facilitates the resolution of disputes pertaining to "Public Utility Services" and the differences between "Lok Adalat" and "Permanent Lok Adalat". This article aims to evaluate the current functioning of "Lok Adalat" and suggest solution for efficient functioning of "Lok Adalat" especially Speedy Disposal should not subside the legal entitlements of the parties.

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Introduction

"Lok Adalat" is a new form of Alternative Dispute Resolution (ADR) mechanism which is used to settle the disputes among the disputants amicably. It is developed in India keeping in mind the issues faced by the litigants in regular courts. It has received formal legal recognition under "the Legal Services Authorities Act, 1987" (hereinafter referred as "LSAA") and "Section 89 of the Civil Procedure Code". It facilitates the disputants to resolve their commercial disputes as well as some other disputes including motor vehicle accidents claims. It is an informal dispute resolution mechanism and resolve the disputes through amicable settlement. Award made by "Lok Adalat" is considered as a decree of a civil court. Since, "Lok Adalat" adapts conciliation process of dispute resolution, it could help the disputants can save their time and cost. "Lok Adalat" provides added advantages to the disputants because the award is finalized by the experienced person who has legal background (sitting or former judge). The award passed by "Lok Adalat" is easily enforceable. "Lok Adalat" acts as one of the tools for facilitating poor people to get justice immediately and help the judiciary for reducing case load. In 2002, the Union Government has amended the LSAA and created "Permanent Lok Adalat" for public utility services. In this paper, the author is going to analyse the uniqueness of "Lok Adalat" and judicious notions on the finality of "Lok Adalat" award. Further an analysis is done of the procedure to be followed for referral to be made by the Court under "Section 89 of Civil Procedure Code" to "Lok Adalat".

History of "Lok Adalat"

The term "Lok Adalat" has come from Hindi Language and it means People's Court. India has the tradition of resolving the disputes with the help of neutral elders. Kula, Puga, Sreyni, Mahajan were some well-known such ancient dispute resolution mechanisms in which the elders' decision was accepted by the disputants.[17] In this similar line, "Lok Adalat", helps the disputants to resolve their disputes with the help of a neutral person who has legal background as well.

[17] Mr. Loknath Mohapatra, Dr. Rangin Pallav Tripathy, Mr. Badri Narayan Nanda and Mr. Satya Prakash Raychoudhury, *An Analysis of the functioning of "Lok Adalat"s in the Eastern Region of India*, A Comparative Report, Department of Justice, https://doj.gov.in/sites/default/files/OJA.pdf.

For understanding the compulsory referral of disputes to "Lok Adalat's" and statutory recognition provided to "Lok Adalat's" by LSAA, it is pertinent to look at the history and the background of the LSAA.

The "14th Report of the Law Commission of India" titled "Reform of Judicial Administration" focused upon the requirement for providing legal aid to economically weaker litigants. It states that it is not a small problem of adjective law to provide legal aid to the poor citizens. It is an issue of fundamental character.

The "Government of India" by its order dated October 27th 1972 constituted a committee which was chaired by then Member of the Law Commission Honourable Mr. V.R. Krishna Iyer. The committee has been entrusted with task of considering and finding ways for making legal aid available to the poor and weak sections of the society. It was also been asked to deliberate upon the making available affordable legal advice to the weaker and backward section of the society with regards to their rights guaranteed by the Constitution and other statutes and avoid litigation. The main objective was to make justice accessible and affordable for all.[18]

The "Article 39-A of the Constitution" which was inserted by the "42nd Amendment of the Constitution" provides for Equal Justice and Free legal aids. It mandates for the State to make sure that the justice or chances of securing justice is not refused to the citizens on the ground of their economic or any other kind of disability.[19]

For enforcing the Directive Principle under Article 39-A inserted by "42nd Constitutional Amendment Act" and with a view to implement the report of the Committee chaired by Honourable Mr. V.R. Krishna Iyer, the executive formed the "Committee for Implementing Legal Aid Schemes (CILAS)". The chairman of CILAS was Honourable Justice P.N. Bhagwati. A basic outline was framed by CILAS for setting-up legal aid programs throughout the nation. It placed a strong emphasis on preventive legal aid programs in order to raise legal awareness among the citizens. It advocated dynamic and activist programmes to bring legal-aid services to villages, foster community mobilization, and enforce rights through "Public Interest Litigations"

[18] Report of the Expert Committee on Legal Aid, *Processual Justice to the People,* May, 1973, Governemnt of India http://reports.mca.gov.in/Reports/15-Iyer%20committee%20report%20of%20the%20expert%20committee%20in%20legal%20aid,%201973.pdf

[19] INDIA CONST., art. 39A.

and other statutory safeguards. A sample scheme for setting-up of "State Legal Aid and Advice Boards", "Committees at the High Court, District and taluk levels" to provide legal aid to the citizens at large was also framed by CILAS.[20]

LSAA was passed by the parliament in the year 1987. It was done with a objective to provide free or affordable legal aid services and to guarantee chance of securing justice to the lower class citizens of the nation.[21]

On March 14, 1982, the first "Lok Adalat" was held at Junagarh in Gujarat. "Lok Nyayalaya" were started in 1984 in Maharashtra. Chennai had its first "Lok Adalat" in 1986.[22] "Lok Adalat" obtains the statutory recognition under the LSAA. "Chapter V, Sections 19-22, 22A, 22B of LSAA" deal with "Lok Adalat" and "Permanent Lok Adalat".

As per the powers given under LSAA, "Taluk legal services committee", "High Court legal services committee", "Supreme Court Legal Services Committee", "National legal services authority", "state legal services authority", and "district legal services authority" may organize "Lok Adalat's" according to their convenience of place and time.[23] Family courts also can organise "Lok Adalats" at regular intervals.[24] While organizing "Lok Adalat", "the Legal Services Authorities" may seek the support of college students, members from legal profession and charitable trusts and Philanthropic institutions.[25]

Nature, Powers and Functions of "Lok Adalat"

"Lok Adalat" is presided over by one judicial member who is a sitting judge or retired judge and other members who have experience in the legal field or who has experience in "Lok Adalat" or a professional executive or a mediator.[26] The judicial member must be either sitting or retired

[20] Dr. A. Marisport, *Resolving Pending Cases Through Alternative Dispute Resolution under Section 89 of Civil Procedure Code: A Case Study*, Department Justice, https://doj.gov.in/sites/default/files/GNLU.pdf.
[21] United India Insurance Co. Ltd v. Ajay Sinha & Anr., (2008) 7 SCC 454.
[22] *Supra* note 2.
[23] The Legal Services Authorities Act, 1987, § 19(1), No. 39, Acts of Parliament, 1987 (India); The National Legal Services Authority Lok Adalat Regulations, 2009, § 3(1).
[24] The National Legal Services Authority Lok Adalat Regulations, 2009, § 3(2).
[25] *Supra* Note 9, § 3 (3).
[26] The Legal Services Authorities Act, 1987, § 19(2), No. 39, Acts of Parliament, 1987 (India); The National Legal Services Authority Lok Adalat Regulations, 2009, § 6 (a) – (d).

judge of the Supreme Court or High Court or District Court or Lower Judiciary on the basis of Territorial jurisdiction of "Lok Adalat" and the Legal Services Authorities/Committee in which such "Lok Adalat" is organised.[27]

"Lok Adalat" have the jurisdiction to hear the cases which are pending before the courts or those cases which can be heard by the Court. However, the cases related with non-compoundable offenses cannot be heard by "Lok Adalat". A pending case may be referred to "Lok Adalat" by Court upon the request of both the parties or upon the application of the one party to the dispute. Depending upon the nature of the dispute, the court may on its own motion refer any pending matter to "Lok Adalat".[28] However, "NLSA "Lok Adalat" Regulations" caution "the Legal Services Authorities" and courts and state that mechanical referral of disputes and referral of disputes without the consent of both parties should be avoided.[29] Further, these regulations also prohibits the referral of non-compoundable diverse and criminal matters to "Lok Adalat".[30] A pre litigation dispute can be referred by the Legal Services Institution upon the request of one party after hearing other party.[31]

"Lok Adalat" facilitates the parties to arrive on a settlement for resolving their dispute. The basis of the award passed by the "Lok Adalat" is settlement arrived by the disputants and not on the basis of the merits of the dispute. "Lok Adalat's" Award passed on the basis of settlement is final and binding on the parties. If the dispute referred to the "Lok Adalat" is not resolved then the dispute is referred back to the Court for hearing. If in case parties directly approaches the "Lok Adalat" for resolution of their dispute at the first instance, and the dispute is not resolved by settlement then "Lok Adalat" must refer the disputants to approach the appropriate Court for the redressal of the dispute.

Prior to the enactment of "Section 89 of CPC", civil courts were facing following difficulties even though the LSAA contained an overriding provision:

1) Whether the courts *suo moto* or at the request of one of the parties, could refer the dispute

[27] *Id.*
[28] "The Legal Services Authorities Act, 1987", § 19(5), No. 39, Acts of Parliament, 1987 (India); The National Legal Services Authority Lok Adalat Regulations, 2009, § 10.
[29] *Supra* Note 9, § 10.
[30] *Id.*
[31] *Supra* Note 9, § 10 (1A).

to "Lok Adalat" or not

2) Whether the aggrieved party of a "Lok Adalat" award can file appeal before higher forums or not

3) Nature of the "Lok Adalat's" award especially if the dispute is of criminal nature.

Suo-Moto referral of Pending Cases by the Courts

Though LSAA, states that "Lok Adalat" can hear the pending cases still, there are some practical difficulties encountered by the courts while referring the disputes to "Lok Adalat". The courts have encountered the situation of consent of one party or no consent of parties. The Karnataka high Court in "***H.V. Venkatesh v. Oriental Insurance Co. Ltd***.",[32] answered positively to the above questions. It held that it is a duty of the court to examine all the cases to find out if they can be settled before "Lok Adalat". A case can be referred to Lok Adalat by a Court suo-moto or even at the request of only one party to the dispute provided that due chance of hearing was given to all the disputants. Further the Court must be satisfied that the case is a fit one to be considered and settled before a "Lok Adalat". The satisfaction of the Court must be recorded. Conciliation should be adopted in the cases which are long pending and are not taken-up for trial by referring them to the "Lok Adalats". Establishment of "Permanent Lok Adalat" has opened more avenues for settlement of disputes amicably. The bar and bench both try to resolve the cases by negotiations and "Lok Adalats".[33]

In ***Afcorn Infrastructure case***[34], Supreme Court held that Trial Courts can refer pending cases to "Lok Adalat" in absence of the consent of the disputants if the cases are well suit for "Lok Adalat" proceedings. However, NLSA "Lok Adalat" Regulations as amended in 2019 caution the courts to obtain consent of both the parties before referring the pending case and avoid mere mechanical referral of pending disputes to "Lok Adalat".[35]

[32] H.V. Venkatesh v. Oriental Insurance Company, ILR 2002 KAR 3666.
[33] *Id.*
[34] Afcons infrastructure ltd. v. Cherian varkey construction co. (p) ltd, (2010) 8 SCC 24.
[35] *Supra* Note 9, § 10.

Appealability of "Lok Adalat" Awards

LSAA states that "Lok Adalat" award is final and binding on the parties since, it is made on the mutual settlement. However, there are some situations wherein any one of the parties may challenge the "Lok Adalat" award. These circumstances include apparent irregularity in the process, non-inclusion of necessary parties and the settlement outcome might give unsatisfactory relief. In an ordinary civil or criminal case, there are appeal and second appeal remedies available against the judgement, order or decree passed or made by the Court. But the parties of "Lok Adalat" awards do not have appeal remedy since, there is an express bar of appeal under LSAA. As a result, parties who wish to challenge the "Lok Adalat" awards find some difficulties.

In **"Punjab National Bank v. Lakshmichand Rai"**[36] parties to the dispute decided to refer the pending debt recovery case between them to "Lok Adalat" for the Settlement and accordingly court allowed the disputants to approach the "Lok Adalat". Settlement was arrived at and accordingly "Lok Adalat" made an award. However, one of the parties to the award challenged the validity of the award under "Section 96 of CPC". Upon hearing "the High Court of Madhya Pradesh" held that the right of an appeal shall be governed by the provisions of LSAA in case the award has been passed by a "Lok Adalat". No appeal can be filed under "Section 96 of CPC" when the same has been barred under Section 21(2) of the LSAA.

In "***Kamal Mehta v. General Manager, Rajasthan Roadways Transport Corporation"***[37]**,** the "Punjab and Haryana High Court" observed that the LSAA provides that the Award made by the "Lok Adalat" is final and binding as it is passed on the basis of the compromise between the parties. There is no remedy provided in LSAA against the "Lok Adalat" Award in case of any dispute related with the validity of the award. However, in case the award is not passed on the basis of the settlement arrived at, it does not attain any finality. "Lok Adalat" cannot make an award on merits by transgressing the powers of court.

The "Punjab and Haryana High Court" in "***Parmod v. Jagbir Singh and Ors",***[38] held that the "Section 151 of CPC" cannot be invoked for challenging the "Lok Adalat" Award. However,

[36] Punjab National Bank v. Lakshmichand Rai, AIR 2000 MP 301.
[37] Kamal Mehta v. General Manager, Rajasthan Roadways Transport Corporation and Anr., FAO No. 798 of 1999, Punjab and Haryana High Court, decided on November 7, 2001.
[38] Parmod v. Jagbir Singh and Ors, (2003) 133 PLR 365.

"Article 227 of the Constitution of India" can be invoked by the aggrieved person for disputing the Award.

In "***State of Punjab & Anr. v. Jalour Singh",***[39] Supreme Court commented upon the remedies available to the parties against the Award of the "Lok Adalat". It held that the Award made by the "Lok Adalat" is equivalent to a decree passed by a civil court and executable in same manner. However, it is based on the duly signed settlement agreement and therefore is not appealable. It can be challenged by an aggrieved party by filing a petition under "Article 226/227 of the Constitution of India" on very few grounds. However, when the award is not based on the settlement agreement, it is not an award of "Lok Adalat" and it can be appealed.

In the above case, a motor vehicle claim appeal was settled by the parties on arriving on compromise before the "Lok Adalat". However, the award of the "Lok Adalat" was challenged by one of the parties under "Article 226/227 of the Constitution of India". High Court declined to hear the challenge to the award. The Supreme Court upon hearing sent back the case to the High Court for hearing.[40]

However, there are few anomalies which are not settled in spite of the Supreme Court's ruling which author would like to highlight.

In "***Bharvagi Constructions v. Kothakapu Muthyam Reddy"***[41], parties to the agreement of a sale dispute entered into a compromise agreement and accordingly "Lok Adalat" passed an award on compromise agreement. However, Plaintiffs were misrepresented by the defendants and due to their illiteracy, more land was taken away from the plaintiff's. Therefore, plaintiff challenged the "Lok Adalat" Award on the ground of illegality by filing a fresh declaratory suit. The trial Court rejected the plaint under "Order VII Rule 11(d) of CPC" on the basis that the suit was impliedly barred by law. It directed the plaintiff to approach the High Court under "Article 226/227 of the Constitution of India" for appropriate relief. The plaintiff challenged the order of the trial Court at the "High Court of Andhra Pradesh". The High Court reversed the decision of the lower court and sent back the matter for fresh hearing. The order of the High Court was

[39] State of Punjab & Anr. v. Jalour Singh & Ors (2008) 2 SCC 660.
[40] *Id.*
[41] Bharvagi Constructions & Anr v. Kothakapu Muthyam Reddy & Ors., (2018) 13 SCC 480.

assailed before "the Supreme Court" by the defendants. The "Supreme Court" held that "the Award of the Lok Adalat can be challenged by way of a writ under Article 226/227 of the Constitution before the High Court and not by way of the fresh suit before the ordinary civil court." The Supreme Court directed the Plaintiff to approach the High Court by way of filing a fresh writ petition for challenging the award of the "Lok Adalat". It is interesting note here that it took around 10 years for finding appropriate forum and mechanism to assail the Award of the "Lok Adalat".

In ***"Smt. Soni Kumari v. Sri Akhand Pratap Singh"***[42]**,** a divorce decree was passed by the "Lok Adalat" on the basis of the compromise arrived at by the parties. However, the decree was challenged before the High Court by way of an appeal on the basis of coerced consent and procedural irregularity of the "Family Courts Act" and the LSAA. The High Court dismissed the appeal on the ground of non-appeal ability of the Award of the Lok Adalat. It held that the validity of the award of "Lok Adalat" can be assailed on restricted grounds by invoking "Article 226/227 of the Constitution of India".

Nature of the "Lok Adalat" Award Especially if the Dispute is of Criminal Nature

Section 21 of LSAA states that "Every award of Lok Adalat shall be deemed to be a decree of a Civil Court or, as the case may be, an order of any other Court" which means that the "Lok Adalat" award is final and binding. However, following ambiguities and concerns were raised by the disputant parties before various forums as highlighted in Section 89 Report[43]:

i) Whether the Award of the "Lok Adalat" is to be considered as a decree or not when the Award is made by the "Lok Adalat" in a case referred to it by a criminal Court?

ii) What is the role of a criminal Court which referred a case to the Lok Adalat and the case is resolved by an Award of the "Lok Adalat"?

iii) When an award made by "Lok Adalat" resolving a dispute of criminal nature is not honoured by the parties, what all options are available with the Award holder for the enforcement of the Award?

[42] Smt. Soni Kumari v. Sri Akhand Pratap Sing, First Appeal No. 65 of 2017, Allahabad High Court, decided on 28 March, 2018.
[43] *Supra* note 5

In "***K.N. Govindan Kutty Menon v. C.D. Shaji***",[44] the question before the Apex Court was whether the award made by the "Lok Adalat" in a case referred to it by the magistrate related with the "Section 138 of the Negotiable Instruments Act", is considered as a decree of a civil court and executable by the civil court or not. In this case, a case under "Sector 138 of the Negotiable Instruments Act" was referred by a magistrate court to the "Lok Adalat". Parties to the dispute arrived on a compromise and on the basis of the same award was passed by the "Lok Adalat". However, the award debtor failed to fulfil his obligations under the award and therefore award holder approached the principal Munsif Court by way of an execution petition. The Munsif Court rejected the execution petition on the ground that the award is not a decree in the present case. Order of Munsif Court was upheld by the High Court of Kerala. Award holder challenged the High Court's Order by filing a "Special Leave Petition" under "Article136 of the Indian Constitution". The order of the High Court was reversed by the apex Court and directed the Munsif Court to proceed with execution of the compromise award. The Supreme Court observed that the Award of the "Lok Adalat" passed in Section 138 matter on the basis of the settlement arrived at by the parties is equivalent to a decree of a civil court and hence is executable by a civil court. Various courts including criminal courts, Rent Control Court etc. can refer the cases to the "Lok Adalats" for amicable resolution.[45]

There were some judgments of various High Courts in the same line prior to "the Supreme Court" decision in the aforesaid case. In "***Subhash NarasappaMangrule (M/S) and Others v. Sidramappa Jagdevappa Unnad",***[46] it was concluded by the Bombay High Court that the Award made by Lok Adalat in the Section 138 of Negotiable Instruments Act case is a decree and executable under CPC.

In "***M/s Valarmathi Oil Industries & Anr. v. M/s Saradhi Ginning Factory"***,[47] Lok Adalat had passed an award in a cheque dishonour case. However, the award was not honoured by the award debtor. Therefore, award holder approached the magistrate Court for execution of the award. The magistrate imposed one year sentence on the accused/award debtor for not complying with the

[44] K.N. Govindan Kutty Menon v. C.D. Shaji, (2012) 2 SCC 51.
[45] *Id.*
[46] Subhash Narasappa Mangrule (M/S) and Others v. Sidramappa Jagdevappa Unnad, (2009) 3 Mh.L.J. 857.
[47] M/s Valarmathi Oil Industries & Anr. V. M/s Saradhi Ginning Factory, AIR 2009 Mad. 180.

Award. The order of the magistrate was challenged before the Sessions Court. The sentence was suspended for a short period by the session's court and directed the award debtor to deposit the award amount in the court during the suspension time, failure to deposit the amount would result in automatic cancellation of the suspension of the sentence. The order of the session Court was challenged before the High Court of Madras by way of a criminal revision petition. The order of the Session Court and Magistrate Court was nullified and held that the award of the "Lok Adalat" can be executed by filing a execution petition under CPC. Magistrate Court becomes ***functus officio*** once the "Lok Adalat" passes an award in a criminal case referred to it.

Obligations of the "Lok Adalat"

"Lok Adalat" should not be used for resolving the dispute in an unequal manner that is the disputes should not be resolved because of speedy disposal alone; the Lok Adalat award must be reasonable. The purpose and motive of the Award of Lok Adalat is to provide adequate legal justice to the parties. Legal rights of the disputants must not be affected in the name of speedy resolution of the case. It is the duty of the Presiding Officer of the Lok Adalat that the rights of the poor people are not compromised while resolving the dispute.

In **"*Manju Gupta v. National Insurance Co. Ltd.*"**,[48] a claim of Rs. 2,20,000 was made in Motor Vehicles Claims Tribunal by the father of a victim child of three years who had suffered permanent disability in an accident. The case was referred to the "Lok Adalat". On the basis of settlement arrived at before the Lok Adalat, an award of Rs. 30,000 was made. On the basis of non-meritorious and injustice, the award was criticised. The Allahabad High Court took *suo moto* cognizance of the award. The High Court held that the presiding judge has failed to take note of the obligations provided under "Order XXXII Rule 7 of CPC" and also failed to protect the interests of the minor. The High Court enhanced the compensation amount and held that it is the obligation and duty of the courts to protect the interest of the parties especially when the party is a minor or a person of unsound mind. For settlement of disputes speedily and inexpensively through Lok Adalats, it should not succumb to the pressure. The real cause of justice must not be sacrificed for speedy justice through Lok Adalats.

[48] Manju Gupta v. National Insurance Co. Ltd., 1994 ACC 242, 1994 ACJ 1036.

NLSA's Role in the Promotion of "Lok Adalat"

NLSA has taken many steps for increasing the use of Lok Adalats for resolving disputes. Subject matter specific National level Lok Adalat is organized across the nation every month. At regular intervals, Mobile Lok Adalats are being organised in many parts of the nation.[49] "As on September 2015, 15.14 lakhs, Lok Adalats have been organized in India since its inception and there are about 8.25 crore cases have been settled through this mechanism. Till 2017, about 1,76,196 Lok Adalats were conducted in the state of Gujarat and there were 79,55,142 disputes got resolved including 224,549 disputes related to motor vehicle claims by Lok Adalat."[50]

"Permanent Lok Adalat"

During the 2nd "Annual State Legal Services Authorities Meet, 1999", Former Chief Justice Dr. A.S. Anand airing stated that "There will be no harm if the LSAA is suitably amended to provide that in case, in a matter before it, the Judges of the Lok Adalats are satisfied that one of the parties is unreasonably opposing a reasonable settlement and has no valid defense whatsoever against the claim of the opposite party, they may pass an award on the basis of the materials before them without the consent of one or more parties. It may also be provided that against such awards, there would be one appeal to the court to which the appeal would have gone if a court had decided the matter. This course, I think, would give relief to a very large number of litigants coming to Lok Adalats at the pre-litigation stage as well as in pending matters."[51]

By an amendment in LSAA in 2002, a new body named Permanent Lok Adalat has been instituted. The "Permanent Lok Adalat" have been authorised to hear the disputes in respect of public utility services and subject areas specifically provided in the notification. Section 22A (b) defines "Pubic utility service" which includes transportation, electricity, hospital, and dispensary services etc. It empowers both Central and State Governments to declare any services as "public

[49] *Supra* note 5.
[50] *Id*.
[51] Shivali Wal, *"Permanent Lok Adalats- A Critical Study"*, iPleaders, (Nov. 15, 2021) https://blog.ipleaders.in/permanent-lok-adalats-critical-study/

utility service" for the purpose of LSAA in "public interest".[52]

The "Permanent Lok Adalat" consists of a chairman and two members. The Chairman of Permanent Lok Adalat is "a person who is, or has been, a district judge or additional district judge or has held judicial office higher in rank than that of a district judge" Other two members are nominated by Central Government or State Government on the recommendation of "the Central Authority" or "the State Authority" respectively. They must be "having adequate experience in public utility services".[53]

In case of a dispute among two or more people, anyone of them can approach the Permanent Lok Adalat for the resolution of the dispute if it is related to public utility services. If the case is brought before the Permanent Lok Adalat, none of the party can invoke jurisdiction of any other court in the same dispute. Pecuniary jurisdiction of the "Permanent Lok Adalat" is fixed at 10 Lakh Rupees. At the first instance, the "Permanent Lok Adalat" must try to settle the dispute through conciliation. If in case the dispute is not settled by conciliation or no settlement is arrived at then "Permanent Lok Adalat" can decide the dispute on the merits of the case.[54]

The award made by the "Permanent Lok Adalat" is considered as a decree of the court and it is final and binding.[55] However, the same can be impugned before the constitutional courts if grave injustice is being caused to any of the party. As on 31st January 2016, 239 "Permanent Lok Adalats" are functioning in the country.[56]

The adjudicatory role of the "Permanent Lok Adalat" has been explained by the Supreme Court in "***United India Insurance Co. Ltd v. Ajay Sinha and another***[57]". Apex Court held that the due care and caution need to be taken care of by the Permanent Lok Adalat. It should not act as an adjudicatory body since the beginning of a case with respect to the jurisdiction exercised by it.[58]

Permanent Lok Adalat is a special tribunal formed under LSAA. It is not a regular Court. And

[52] The Legal Services Authorities Act, 1987, § 22A (b) and 22B (1), No. 39, Acts of Parliament, 1987 (India).
[53] *Id* § 22B.
[54] *Id* § 22C.
[55] *Id* § 22E.
[56] "Permanent Lok Adalat", National Legal Services Authority https://nalsa.gov.in/lok-adalat/permanent-lok-adalat.
[57] United India Insurance Co. Ltd. V. Ajay Sinha and Anr. Ciil Appeal No. 3537 of 2008 (Arising out of SLP (c) No. 17758 of 2006).
[58] United India Insurance Co. Ltd v. Ajay Sinha and another, (2008) 7 SCC 454.

therefore, the contractual exclusive jurisdiction clause does not create any bar for "Permanent Lok Adalat" to decide any dispute.[59]

Issues relating to the concluding nature of the Award of the Permanent Lok Adalat has been highlighted in the Report titled Resolving Pending Cases through Alternative Dispute Resolution under Section 89 of Civil Procedure Code: A Case Study"[60]. Issues are as follows:

i) Section 22E of LSAA declares that the award made by the "Permanent Lok Adalat" is final and binding. However, it does not expressly prohibit appeal against the award.

ii) The decision of Permanent Lok Adalat is taken by the majority members on merits. It may result that the decision of judicial member is overridden by non-judicial members.

iii) Appeal is a general remedy available to the litigants in other dispute resolution forums. Therefore, it cannot be circumvented in Permanent Lok Adalat.

iv) Permanent Lok Adalat is authorised to hear a dispute even when only one party to the dispute has approached it. Consumers of "public utility services" may be compelled by the service providers to resolve their disputes through "Permanent Lok Adalat" only resulting in curtailment of the rights of the consumers to approach consumer forum. [61]

The Supreme Court of India upheld the constitutional validity of the Permanent Lok Adalat in the following manner-

> "It is quite obvious that the effort of the legislature is to decrease the workload in the Courts by resorting to alternative disputes resolution. Lok Adalat is a mode of dispute resolution which has been in vogue for over two decades. Hundreds of thousands of cases have been settled through this mechanism and is undisputedly a fast means of the dispensation of justice. The litigation is brought to a quick end with no further appeals or anguish to the litigants. The constitution of the Permanent Lok Adalats mechanism contemplates the judicial officer or a retired judicial officer being there along with other persons having adequate experience in the public utility services.

[59] Inter Globe Aviation Ltd v. N. Satchidanand, (2011) 7 SCC 463.
[60] *Supra* note 5.
[61] Bar Council of India v. Union of India, (2012) 8 SCC 243.

> We do not find any constitutional infirmity in the said legislation. The act ensures that justice will be available to the litigant speedily and impartially. We do emphasize that the persons who are appointed on the Permanent Lok Adalats should be a person of integrity and adequate experience. Appropriate rules, inter alia in this regard, no doubt will have to be framed, if not already in place.
>
> We uphold the validity of the said Act and hope the Permanent Lok Adalats will be set up at an early date. The Lok Adalats are enacted to primarily bring about settlement amongst the parties. The parties are normally required to be present in person and since the impugned provisions are in the interest of the litigating public, the Lok Adalats shall perform their duties and will function; even if members of the Bar choose not to appear."[62]

In "***United India Insurance Co. Ltd v. Ajay Sinha"***,[63] an insurer filed an insurance claim for loss caused by burglary in his godown which was covered by the insurance policy. However, insurer refused the claim on the ground of chances of involvement of insured in the burglary. The insured filed a case before consumer court for claiming the insurance amount. On the ground of presence of criminal element and commercial nature of the transaction, consumer court refused to hear the claim. The insured person filed an application before "Permanent Lok Adalat". An award was made in favour of the insured by Permanent Lok Adalat which was challenged by the insurer in the High Court and the case went up to the "Supreme Court". The Apex Court declared that the "Permanent Lok Adalat" had passed the award in excess of its jurisdiction.

In "***Inter Globe Aviation Ltd v. N. Satchidananda****"*,[64] the Supreme Court of India has set aside the award of the Permanent Lok Adalat on the ground of non-appreciation of law. In this case, a passenger had approached Permanent Lok Adalat on the ground of deficiency in services by the airline company asked for damages. The "Permanent Lok Adalat" has awarded Rs. 1,000 as compensation which was upheld by the High Court and was challenged before the Supreme Court by the airline company.

[62] S.N. Pandey v. Union of India and Another, (2012) 8 SCC 261.
[63] *Supra* note 42.
[64] *Supra* note 43.

Difference between "Lok Adalat" and "Permanent Lok Adalat"

The difference between "Lok Adalat" and "Permanent Lok Adalat" has been made in the Report titled "Resolving Pending Cases through Alternative Dispute Resolution under Section 89 of Civil Procedure Code: A Case Study"[65] which are as follows:

Subject matter	**"Lok Adalat"**	**"Permanent Lok Adalat"**
Nature of forum	It is temporary	It is a permanent
Subject-matter jurisdiction	All types of civil disputes and compoundable criminal disputes.	Public Utility Services disputes provided under Section 22-A notified by the Government
Pecuniary jurisdiction	No pecuniary limitation	Rs. 10 Lakh and below.
Nature of Dispute Resolution	Upon the settlement of the parties, "Lok Adalat" can pass Award.	At the first instance, "Permanent Lok Adalat" try to have a settlement through conciliation. If it fails, then "Permanent Lok Adalat" can pass the award the merits of the dispute.
Validity of the award	"Lok Adalat" award is final and binding upon the parties. It can be challenged on the ground of gross irregularity that too in rare	If there is any irregularity in the "Permanent Lok Adalat" Award then the aggrieved party can challenge such

[65] *Supra* note 5.

	occasions (as stated in "Smt. Soni Kumari v. Sri Akhand Pratap Singh"[66]	award in higher courts. However, this challenge is not in the form of appeal.

Advantages of "Lok Adalat"

- Disputants can bring their pending as well as fresh disputes to "Lok Adalat" directly.
- There is no fee to approaching "Lok Adalat" for the resolution of the dispute and if the fee has been already paid for the initiation of the case, then, it shall be refunded if there is any settlement during "Lok Adalat" referral.
- Unlike court, "Lok Adalat" need not to follow strict application of procedural requirements; hence, the dispute can be resolved quick and satisfactorily
- Award of the "Lok Adalat" is deemed as decree of civil court hence, execution of "Lok Adalat" award is very much possible.
- "Lok Adalat" award is considered as final; hence, "Lok Adalat" awards may be challenged before the High Court on limited grounds.

Referral of Disputes to "Lok Adalat" under "Section 89 of Civil Procedure Code"

The bare provision of Section 89 of CPC provides that "Where it appears to the Court that there exist elements of a Settlement which may be acceptable to the parties, the Court shall formulate the terms of Settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible Settlement and refer the same for:

(a) Arbitration;

(b) Conciliation;

[66] Smt. Soni Kumari v. Sri Akhand Pratap Sing, First Appeal No. 65 of 2017, Allahabad High Court, decided on 28 March, 2018.

(c) Judicial Settlement including Settlement through Lok Adalat; or

(d) Mediation.

(2) Where a dispute has been referred:

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of Section 20 of the LSAA, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

…"[67]

If a civil court refers a dispute to Lok Adalat under Section 89 of Civil Procedure Code, the court can refer the same to Lok Adalat constituted under the LSAA and governed by Section 20 and other allied provisions. The Apex Court has held that the disputes which can be resolved by simple application of law are well suited for being adjudicated by Lok Adalat.[68] In **Afcons Infrastructure Case**, Supreme Court held that the court can on its own motion refer a pending civil dispute without the consent of parties to Lok Adalat.[69]

However, the author has opined that Lok Adalat referred under Section 89 of CPC should not be read as inclusive of Permanent Lok Adalat which is formed under LSAA. The justification for the same is that the Permanent Lok Adalat can adjudicate a case on the merits of the dispute and giving it an adjudicatory role whereas Lok Adalat does not have such role. [70] Further, the amended section got enacted on 1999 whereas, the institution of "Permanent Lok Adalat" brought under 2002 amendment in the LSAA.

When a dispute is referred to Lok Adalat under Section 89 of CPC and is settled by the award of the Lok Adalat, the award should not be given final status. The Court referring the dispute must get an opportunity to review the same and address, if any, inadvertent mistakes or obvious errors in the award. The author would like to suggest the incorporation of the following recommendation of the Law Commission of India in "section 89 of CPC".

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[67] The Civil Procedure Code, 1908, § 89, No. 5, Acts of Parliament, 1908 (India).
[68] *Supra* note 19.
[69] M/s Afcon Infra. Ltd. & Anr. V. M/s Cherian Varkey Construction Co. (P) Ltd. & Ors. Civil Appeal No. 6000 of 2010 (Arising out of SLP (c) No. 760 of 2007).
[70] *Supra* note 5.

> "On receipt of a copy of the settlement agreement or the award of Lok Adalat, the court, if it finds any inadvertent mistakes or obvious errors, it shall draw the attention of the conciliator or the Lok Adalat who shall take necessary steps to rectify the agreement or award suitably with the consent of parties".[71]

In some cases, a dispute is referred to the Lok Adalat by the Court post the filing of a settlement agreement in the court and the Lok Adalat passes the award on the basis of same settlement agreement. The author would like to suggest that since Lok Adalat is an independent dispute resolution institution, it resolves the disputes amicably post hearing the parties, it should not be referred as a body for conversion of settlement agreement into final decree. For conversion of a settlement agreement into a decree, "Order XXIII, Rule 3 of CPC" should be invoked.[72]

Conclusion

As per NLSA statistics, there were 17,46,031 Lok Adalats conducted by the "State Legal Services Authorities" across the country and settled 9,72,81,478 disputes till June 30, 2017. NLSA has conducted Lok Adalats for some special categories of disputes. Lok Adalat helps the parties for resolving their disputes and facilitates the parties to enforce such settlement. However, the author believes that for rendering speedy justice to the poor people, the legitimate rights of the people cannot be compromised. The authors believes that if the Lok Adalat is perfectly conducted, that is well organized conciliatory process then, the disputants will have faith on this system and will show their willingness to resolve their disputes through "Lok Adalats". The author suggests that the Permanent Lok Adalat related structure and functions required to be further streamlined and CPC Section 89 referral should not include the referral of dispute to Permanent Lok Adalat without the consent of the parties.

[71] *Amendment of Section 89 of Civil Procedure Code, 1908 and Allied Provisions*, Report No. 238, Law Commission of India, Government of India (2011).
[72] *Supra* note 5.

THE CONCEPT OF ZERO FIR IN INDIA: LESSONS FOR PAKISTAN

Muhammad Imran Ali[73]

Abstract

Zero FIR is an FIR that can be lodged for a cognizable offense, regardless of the crime scene and the jurisdiction of the police station. Zero FIR is an FIR with free jurisdiction. It is set up to prevent delays in reporting the crime, which will adversely affect the victim. Zero FIR has been considered as one of the revolutionary steps in Indian legal history to alleviate the plight of women. Zero FIR is a useful resource for women in the country where sexual crimes against women are at the highest. A zero FIR is extremely useful in circumstances where a serious crime such as murder, rape or accident has been committed. It requires immediate action rather than the limits of a police station's jurisdiction. The legal right to register a Zero FIR is very noble. This strengthens the public's confidence that when a crime is committed, their voice is heard and not mitigated by the procedural aspects of the law. Unfortunately, the concept of Zero FIR was not adopted in Pakistan. Given the current situation of rape cases, Zero FIR is a strong measure for quick and easy access to justice in Pakistan. Pakistan can learn from the experiences of India. Therefore, not only is it important to make changes in the legislative system, but it is equally important to make people aware of them, so a legal awareness program should be organized to make people aware of their rights. A literature review method is adopted for this research article.

Keywords: Zero FIR, Police Station, Criminal Law, India-Pakistan.

Introduction

The main purpose of criminal law is to protect society from offenders and criminals. To achieve this, law provides for the threat of punishment for those who break the law and convict the culprits. It provides a mechanism for detecting crime. The government and its law enforcement agencies are responsible for maintaining law and order. The criminal justice system is governed by certain

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laws. The penal statutes prescribe the acts of commission or omission and make them punishable. The implicit purpose is to define the crime and its components, so that the criminal prosecution can be based on it and prosecute the arrested offender. Information about the commission of a crime to a police officer is called the First Information Report "FIR." It is written in a register at the police station. The FIR is the first information police have received about the crime. Certainly, FIR has due weight, but it is not basic evidence, it can be used as an introductory statement to prove or disprove the facts written in it. An FIR is an initial report in the form of a written document drawn up by police officers when they receive information about the commission of a cognizable offence. This means that a police officer can take action without the prior permission of the court. The FIR contains a serial number, date / time / place of the event, content, etc. of the offence committed. Information from the FIR may be provided orally or in writing, but must be recorded in accordance with Section 154 of the Criminal Procedure Code (Cr.P.C.).[74] Only after registration of the FIR the police will intervene to investigate the case, after which criminal proceedings will begin. Anybody can register the FIR after the commission of a cognizable offence, be it the victim, a family member, a witness to the crime, a police officer, or anyone who is aware of the offence or by order of the Magistrate. The jurisdictional characteristic of filing an FIR is very important, because each police station has a specific jurisdiction over which it can initiate an investigation upon filing an FIR.

A "Zero FIR" can be lodged with any police station, regardless of jurisdiction. The basic examination takes place at the headquarters of the jurisdictional police station. The case will be enlisted with the order Zero, after which the case will transfer to the concerned police station. It is beneficial for a serious and heinous crime. The sacrosanctity of the legal process under Zero FIR remains the same as that of the original FIR. The Zero FIR will later transfer to the concerned Police Station. The biggest problem that arises is that people are not very aware of Zero FIR and the police do not want to register Zero FIR. Police force the victim and his family to contact the police station that has the jurisdiction to take up the cognizance of that offence. Filling of a Zero FIR is actually similar to filling an ordinary FIR, only that there is no jurisdictional touch to it.

[74] The Code of Criminal Procedure, 1973, No 2 of 1974 (India) & The Criminal Procedure Code, 1898, Act V of 1898 (Pakistan).

Like every standard FIR, a Zero FIR can be registered. The idea of "Zero FIR" originated after the *Nirbhaya* case[75] in India. The concept of Zero FIR is not yet developed and adopted in Pakistan.

First Information Report (FIR)

A First Information Report or FIR is a composed archive drawn up by the police when they get facts about the commission of a cognizable offense. This is the first report of the commission of a crime to police, so it is called the first information report. It is usually a police report drawn up by the victim of an apparent crime or by someone on their behalf. Anyone can submit an oral or written report to the police. The term "First Information Report" is not defined in the Code of Criminal Procedure (Cr.P.C.), but these words are still understood as information recorded in accordance with Section 154 of the Cr.P.C.[76] This provides the police officer with information in the form of a complaint as a charge of a crime. The aim is to start criminal proceedings and police investigations. This report forms the basis of the case. The question is whether a particular document will establish the FIR. It is a factual question that depends on the circumstances of each case.

FIR is the first step in a criminal case that leads to the prosecution and punishment of the offender. It is also the main evidence on which the whole structure of the indictment is based. The main purpose of the FIR is to get the police in charge of a police station to start a criminal investigation as soon as possible and gather evidence. This is the first report on crime and as such a valuable document that highlights crime. This is also important because it is a statement made shortly after a crime is committed, and any prosecution case that can be linked later can be verified on the basis of this initial report. FIR is not substantive evidence but it sometimes affects the prosecution case. The FIR must contain as much information as possible during its recording

Concept of Zero FIR

Zero FIR is a notifiable FIR for a crime that can be identified regardless of the crime scene and the jurisdiction of the police station. The case is then transferred to the relevant police station,

[75]Delhi gang rape: What happened on December 16, 2012 and status of the case, News 18 India, https://www.news18.com/news/india/delhi-gangrape-what-happened-on-december-16-2012-and-status-of-the-case-730141.html. (Aug. 15, 2021, 5:30 PM).
[76]The Code of Criminal Procedure, 1973, No 2 of 1974 (India).

which is responsible for all investigations involved in the case. The police office registering the FIR will classify it as Zero FIR by marking it with a serial Zero and immediately forwarding the relevant documents to the jurisdictional police station where it is numbered, and thereafter initiating an investigation. The main idea of Zero FIR is to investigate or to encourage the police to act initially. Crimes such as murder, rape and accidents require urgent action by law enforcement to uncover relevant evidence, eyewitnesses and other cumbersome details. With Zero FIR, authorities can take the first steps instead of finding out what initially happened at the scene of the crime.

When a person goes to the police station to inform the police that his friend has been murdered on the street (a cognizable offence) such cases require urgent police action i.e., to gather evidence, to obtain information from eyewitnesses, etc. In such a situation, the police cannot apologize by saying that the problem is outside their jurisdiction. This would undermine the purpose of the police to 'maintain law and order.' At the same time, however, it is mandatory to comply with legal requirements. If, after the investigation, the investigating officer concludes that the cause for lodging the FIR does not lie within his territory, he must submit a report and refer the matter to the magistrate. He must also submit all documents, including a copy of the FIR, a sample of the evidence gathered and a detailed report on the investigation conducted and the case will be transferred to the competent police station.

Practice of Zero FIR in India

In any society developed, underdeveloped or developing, crime prevention cannot be avoided. After the commission of an offence, the next step in law enforcement is to report crimes to the police. Among other things, the police must register criminal offenses committed within its area of responsibility. Police generally record simple (non-cognizable) offenses, but not serious (cognizable) offenses, as the State, including the judiciary, raises questions about their effectiveness, jurisdiction and activity as the number of offenses increases and, therefore, the police try to avoid FIR registration. The failure to register the FIR is, among other things, a major cause of dissatisfaction against police by common people. Under these circumstances, the development of the concept of Zero FIR or "FIR regardless of territorial jurisdiction" is revolutionary. The FIR is registered by the in-charge police station (SHO) in accordance with

Section 154 of the Cr.P.C. in the case of a cognizable offense. Therefore, the registration of the FIR is the first step in activating the criminal justice system; however, lodging FIR is an extremely difficult exercise. Typically, an FIR for a conspicuous crime is recorded at the police station responsible for the area of the incident. However, Zero FIR is recorded at any police station, regardless of jurisdiction. In Zero FIR, when a person informs the police of a cognizable criminal offense outside the jurisdiction of that police station, the police must register under number '00' and the FIR is forwarded to the police station having jurisdiction and responsible for other legal requirements including giving a proper number to FIR.

Although the Indian judiciary from time to time clearly ordered the registration of the FIR through various judgments, the attitude and mechanism of the police have so far been similar to the British regime. The Supreme Court in *Lalita Kumari* case[77] established the advantages inherent in FIR registration that the FIR is the first step towards access to justice for the victim and supports the rule of law because the common man informs a cognizable offence to the knowledge of the State. It also facilitates quick. In addition, it leads to less manipulation in criminal cases and reduces incidents of intentional manipulation and delays in filing a FIR. This will provide a valuable platform for victims / informers.

Justice Verma's Committee Report[78] suggested the arrangement of Zero FIR following the gang rape of a 23-year-old young lady in Delhi in December 2012.[79] Any person can lodge an FIR at any police station, irrespective of the territorial jurisdiction in which the FIR is needed to be registered. In addition, section 166A of the Indian Penal Code (IPC),[80] this section may impose a penalty on a police officer who refuses to register the FIR in connection with certain crimes against women (such as rape, assault, etc.) The penalty is imprisonment for up to one year or a fine or both.

[77]Lalita Kumari v. Govt. of UP AIR 2012 SC 1515.
[78]Report of the Committee on Amendments to Criminal Law, January 23, 2013. https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf (Aug. 15, 2021, 5:30 PM).
[79]Supra note 3.
[80]The Criminal Law (Amendment) Act, 2013, No. 13 of 2013 (India).

The Delhi High Court in *Baljeet Singh v. State of Delhi*[81] found that at the time the FIR was registered, even at first sight, it was obvious that the crime had been committed outside the jurisdiction of the police station. After registration of the FIR, the police must forward the FIR to the concerned police station for investigation. Usually in these cases the police register the "Zero FIR" and after the registration of the FIR the FIR will be forwarded to the appropriate police station. In *Kirti Vashisht v. State,*[82] Delhi High Court directed the Commissioner of Police to issue a circular / order to all police stations in Delhi that if a complaint about a cognizable offence is received in a police station and the crime has taken place in the jurisdiction of another police station, in this case "Zero FIR" will be lodged by the police station that received the complaint and then sent to the appropriate police station.

In *Ramesh Kumari v. State of Delhi & Ors,*[83] the Court held that if the S.H.O. refuses to use his powers to register a case involving cognizable offence reported to him and thus violates his legal obligation, the person affected by this refusal may send the substantial content of the information in writing or by mail to the concerned Superintendent of Police, who is convinced that the given information constitute a cognizable offence, must investigate the case or conduct the investigation by a subordinate police officer in the manner provided for in Section 154 (3) Cr.P.C.

Therefore, under the law, the police may register an FIR if the offense was to be a cognizable offense, even though the offense was not committed within the jurisdiction of the police station. Otherwise, if during the registration of the FIR it is established that the crime was committed outside the territorial limits of the police station, the police will be obliged to notify the relevant police station after the registration of the FIR. In the above case, the police normally lodge a Zero FIR and then transfer it to the appropriate police station. Later, it can be expected that the law will allow the police to register FIR if a crime is committed, even if the crime was committed outside the limits of the police station. Otherwise, if it is found that the crime was committed outside the jurisdiction of the police station during registration of the FIR, the police must send it to the

[81] Baljeet Singh v. State of Delhi (2012) Criminal Writ Petition 4425
[82] Kirti Vashisht vs. State & Ors. (2019) CRL.M.C. 5933.
[83] Ramesh Kumari v. State (N.C.T. Of Delhi) and Ors (2002) Appeal (crl.) 1229

relevant police station for investigation after registration. In such cases, the police usually register a "Zero FIR" and then report it to the relevant police station.

Zero FIR is one of the ways in which the public builds trust in police. It increases the public's confidence in the efficiency with which the police will handle more cases without wasting time. If the police try to solve the problems of an ordinary person with immediate and prompt action, it is unlikely that the person will regret his decision to refer the matter to the police. If the police do not cooperate and make the person wait too long and involve them in different procedures, the person will regret his decision and lose confidence in the police. Zero FIR is a quick way to file a case, as the person does not have to go to a specific place where the crime was committed. We must not forget the benefits of the concept that enables prompt registration of the criminal case without going into the formalities of jurisdiction.

Legal Approach Regarding FIR in Pakistan

The term "first information report" is not defined in the Code of Criminal Procedure,[84] but by these words we mean the information provided under Section 154 of Cr.P.C.[85] to a police officer in the form of a charge sheet in connection with the commission of a cognizable offense. The purpose of the FIR is to activate the criminal justice system and to obtain improvised, first-hand information about the incident, to rule out the possibility of fabrication or deliberation when the complainant has time to do something on their behalf.[86] The criminal justice system is based on the assumption of a pious and just police force, an impartial and just investigative system, but it was far from the truth. In these circumstances, if the courts determine that the investigation of crime, misconduct or unfair conduct, partial and gross negligence was or will be misleading, the entire investigation of the crime is misleading. The Second FIR publishes another version to assess such a malicious project aimed at keeping the real culprits safe for investigation / prosecution at a later date. If necessary, however, these powers must be exercised with the utmost care and caution and not in a systematic manner, merely to acknowledge the will of someone who in his will, for whatever reason was dissatisfied with the contents of the previous FIR and wanted to register another FIR.

[84] The Criminal Procedure Code, 1898, Act V of 1898 (Pakistan).
[85] Id, at Section 154
[86] Mushtaq Hussain v. The State (2011) SCMR 45.

This was much more important in the circumstances in which section 200 Cr.P.C.[87] was also intended to deal with such events. However, there may be circumstances in which registration for another FIR would be the only suitable course, such as the successful completion of the alternative course in accordance with Article 200 Cr.P.C. It may not be as effective and efficient for the injured person.[88]

Judicial Approach Regarding FIR in Pakistan

Unfortunately, the superior judiciary did not focus on the registration of Zero FIR in Pakistan. The superior courts judgments revolved around the question of whether a separate FIR can be registered for each new version of the same incident when the relevant cognizable offence has already been reported to the police and whether the FIR has already been registered or not. A secondary issue is that if the separate FIR cannot be registered for a new version of the same incident, how can the police register and investigate that new version? This approach is reflected in some important cases, especially *Mansur Ali v. The state*,[89] the court ruled that a case may not contain two FIRs. The law never allows admission of two FIRs in evidence for the first two briefings. In another judgment, the Court finds that it is clear that the main purpose of the FIR must be to inform the commission of a cognizable offence, for the investigation of which a police officer is authorized in accordance with Section 156 Cr.P.C.[90] Any other information relating to the occurrence of that offence received latterly shall be deemed to be a statement under Section 161 of the Cr.P.C. the order to register another FIR in that situation was not justified by law, even if the state had made a concession.[91] In *Arif Khan v. Additional Sessions Judge, Kabirwala*,[92] the court ruled that the only question in this case requires a decision as to whether in the presence of the first FIR, the second FIR may or may not be registered. The information provided in the form of a cross-version revealed the execution of a cognizable crime and should, therefore, be used as a statement in accordance with Article 161 Cr.P.C. registration of a second FIR is not justified by law.

[87] CrPC (Pakistan), Supra note 12 at Section 200.
[88] Ali Muhammad v. Syed Bibi (2016) PLD Supreme Court 484.
[89] Mansur Ali v. The State (1970) PCr.LJ 287.
[90] CrPC (Pakistan), Supra note 12, at Section 156.
[91] Kaura v. The State (1979) PCr.LJ 521.
[92] Arif Khan v. Additional Sessions Judge, Kabirwala (2006) PCr.LJ 1937.

In *Mst. Sughran Bibi vs. The State*;[93] the Supreme Court indicated three categories of previously delivered judgments on FIR in Pakistan. The 1st category consists of judgments allowing only one FIR per occurrence and clearly stating that all subsequent statements had to be recorded to the police in accordance with section 161 of the Cr.P.C. and that police officers could freely investigate the matter. The net result of this category was that only one case had to be handled by the police and that, therefore; only one trial had to take place. The 2nd category consists of judgments declaring that the police were obliged to register FIR in accordance with Section 154 of the Cr.P.C., so that more FIR's could be registered. The result of this approach was that it made possible the increase in criminal proceedings. The 3rd category of the judgments left the matter to the circumstances of the case, affirming the position of the first category as a general rule while treating the 2nd category as an exception.

The Punjab Police Rules[94] provides for the registration of a Zero FIR. Rule 25.3., stipulates that a cognizable offence reported in another jurisdiction of the police station must be documented in the daily register and the record should be sent to the responsible official of the police station in whose jurisdiction the crime was perpetrated. In the interim, all conceivable lawful measures should be adopted to ensure the arrest of the culprit and investigation of the crime. Further Rule 25.4., quantified that if a police official in the wake of lodging a case and investigation perceives that offence was perpetrated inside the local limits of another police station, he ought to promptly send information to the officer in charge of that police station upon receipt of the information, that official will proceed to the place where the investigation is being conducted and conduct the investigation himself. Rule 25.5, makes it clear that an officer so summoned on the spot of disputed jurisdiction, both will continue the joint investigation on the orders of their superior and neither of them will leave until the jurisdiction has been clarified and recognized. The daily book of the case is kept at the police station where the information was received until a decision is made on jurisdiction. Rule 25.6., describes that if a police officer is released during an investigation, he will keep everything he has done in a case diary and sign it with the date and time of release. This diary must be submitted to the relieving officer, who then certifies that he has acknowledged the case took place within the boundaries of his police station which he is empowered to investigate. Further

[93] Sughran Bibi v. The State (2018) PLD Supreme Court 595.
[94] The Punjab Police Rules, 1934, Vol. 3 of 1934 (Punjab, Pakistan).

Rule 25.7., notes that when a case is transferred from one police station to another, the superintendent of police (SP) will cancel the offense registered at the base police station, and the FIR must be submitted by the police station where the case occurred under his jurisdiction.

While examining the scheme of the Criminal Procedure Code and the Police Rules 1934, the Supreme Court completely ignored rules 25.3, 25.4 and 25.5, i.e., registration of an FIR without jurisdiction (Zero FIR).[95]

Instances of Registration of FIR's Without Jurisdiction in Pakistan

The concept of ZERO FIR is completely ignored in Pakistan. To allay growing concerns about the horrific crime of rape, abduction and kidnapping of women, Zero FIR is considered one of the revolutionary steps in the history of law. Law enforcement agencies usually refuse to register an FIR if the crime took place outside their jurisdiction. However, the introduction of Zero FIR will give the police a legal obligation to investigate and act quickly. There are only a few instances where FIRs without jurisdiction were registered in Pakistan.

India has purported that Pakistani territory was used for the Pathankot terrorist attack and pressured Pakistan to take action against those involved. The Counter-Terrorism Department (CTD) registered FIR at the CTD-Gujranwala Police Station under Sections 302, 324 and 109 of the Pakistan Penal Code (PPC) and Sections 7 and 21-I of the Anti-Terrorism Act 1997,[96] stating therein that the adviser for National Security (NSA), India, reported that on January 2, 2016, four people from Pathankot entered the air base and resorted to heavy fire in which seven people died. The attackers were also killed in the ensuing shooting. The Indian NSA also reported that these attackers probably crossed the border near the Pathankot area. It is also alleged that these attackers called Pakistani telephone numbers used to communicate while they were in India. The NSA claimed that these individuals belonged to a banned organization. The FIR was registered by the Secretary of the Ministry of Interior.[97]

[95] Supra note 21.
[96] Punjab CTD registers FIR against Pathankot attackers and abettors, The Express Tribune, Feb 19, 2016. https://tribune.com.pk/story/1050277/punjab-ctd-registers-fir-against-pathankot-attackers-and-abettors (Aug. 14, 2021, 8:30 PM).
[97] Asif Chaudhry, Pathankot attack FIR lodged in Gujranwala, Dawn, 20-02-2016. https://www.dawn.com/news/1240762 (Aug. 10, 2021, 7:30 PM).

The Federal Investigation Agency (FIA) has registered a case against *Muttahida Qaumi Movement (*MQM) chief Altaf Hussain and other party leaders in connection with the assassination of Dr. Imran Farooq, the former leader of the MQM in 2015,[98] by submitting a conspiracy, aiding, abetting and murder of Dr. Imran Farooq, a former Member Parliament and senior member of MQM in London in September 2010. The case was registered under Sections 302, 34, 109, 120B of the Pakistan Penal Code and Section 7 of the Anti-Terrorism Act, 1997. In these two cases FIRs without jurisdiction have been registered in Pakistan.

Crimes against women skyrocketed today. Zero FIR is an exceptional remedy that is beneficial to people. Certain serious injustices such as accidents, murders and assault, rape, kidnapping that require immediate action by relevant authorities, with Zero FIR these preparatory measures can be taken into account regardless of the territorial limits of the crime. A woman was raped in front of her children by two men on the Lahore-Sialkot motorway on September 9, 2020.[99] Local media quoted police officials as saying that two gunmen who found the woman alone on the road and raped her on gun point in front of her kids. After a long delay, the Gujjarpura Police Station filed FIR No. 1369/20 pursuant to Articles 376, 392 and 427 of the Pakistani penal code and article 7 of the anti-terrorism law of 1997. These kinds of incidents need the remedy through Zero FIR.

Pakistan Needs to Learn from Concept of Zero FIR in India

India's criminal justice system is gradually developing new concepts and providing platforms for maintaining the rule of law. The Zero FIR concept, among other things, is new that allows a person to report an offense to the police regardless of their jurisdiction. The Zero FIR provision appears as a recommendation in the Justice® Verma Committee report in the shape of the Criminal law (Amendment) Act, 2013[100] after the horrific *Nirbhaya* case[101] in December 2012. The provision states that an FIR can be submitted to any police station regardless of crime scene and jurisdiction.

[98] Irfan Haider, Dr. Imran Farooq murder: FIA registers case against Altaf Hussain, Dawn, December 5, 2015. https://www.dawn.com/news/1224384/dr-imran-farooq-murder-fia-registers-case-against-altaf-hussain (Aug. 11, 2021, 9:30 PM).

[99] Staff Reporter, Robbers gang-rape woman seeking help on motorway in Punjab, Dawn, September 10, 2020. https://www.dawn.com/news/1578807/robbers-gang-rape-woman-seeking-help-on-motorway-in-punjab (Aug. 12, 2021, 11:30 PM).

[100] Supra note 8.

[101] Supra note 3.

In addition, Section 166A of the IPC added by the above said Act that may impose a penalty on a police officer who refuses to register the FIR in connection with certain crimes against women (such as rape, assault, etc.) The penalty is imprisonment for up to one year or a fine or both. In the case of *Satvinder Kaur*,[102] the Supreme Court of India has ruled that the police can investigate the case which is outside their jurisdiction. In *Aasaram Bapu Rape* case,[103] the FIR contains a crime that took place under the jurisdiction of Jodhpur, Rajasthan, but the FIR was registered at the *Kamla* Market police station in Delhi and transferred to Jodhpur for further investigation.

On the other hand, the concept of Zero FIR is not adopted in the Criminal justice system of Pakistan. Although Rule 25.3 of the Police Rules[104] stipulates that when an apparent offense is reported in any other jurisdiction of the police station, the offense will be recorded in a daily diary and information will be sent to the SHO of the jurisdictional police station. During this period, all possible legal measures are taken to ensure the apprehension of the perpetrator and the detection of the criminal offense. The Superior Courts focused more on the issue of registration of second FIRs, rather than on the concept of 'Zero FIR.'

In the light of the above, it will be useful for Pakistan to learn from India's progress in reviewing its domestic legislation on the "Zero FIR" concept. To find out what happened for the first time at the crime scene. Investigation and evidence gathering can only be carried out if the FIR is properly registered. Zero FIR does not allow the police to waste an informant's time as it provides a short path.

Conclusion

With the introduction of Zero FIR, however, it is believed that ailments of ordinary people will be effectively solved when people use this tool for remedies in accordance with the law. Therefore, Zero FIR is an FIR with free jurisdiction. This ensures that persons with information about the commission of a crime that may be reported have the appropriate voice and are not dismissed under the pretext of incompetence. It also ensures that a police officer does everything in his power to

[102] Satvinder Kaur v. State 1999 SCC (Cri) 1503
[103] Dev Ankur Wadhawan, How rape convict Asaram Bapu trapped his victims, India Today, April 25, 2018. https://www.indiatoday.in/india/story/how-rape-convict-asaram-bapu-trapped-his-victims-1220161-2018-04-25 (Aug. 15, 2021, 5:30 PM).
[104] Supra note 22.

get justice done to the victims of the alleged crime. No report can be rejected simply because a police station is outside the jurisdiction of the place where the crime was committed. This ensures that evidence is gathered in cases where immediate attention of the police is required.

There are two possible situations: one where the police found out after the disclosure of information about the commission of a cognizable offence that the crime was committed outside their territory, and the other when the police lodged an FIR but during the investigation found that offence had been committed outside its jurisdiction. In both cases, the police must register the FIR if the information shows that a cognizable offence has been committed. In the first case, the police station where the FIR was recorded immediately sends the FIR to the competent police station responsible for investigating the crime. It's called Zero FIR and the police will not count it. In the latter case, the police conduct the investigation, compile the police report and send it with the information under Section 170 Cr.P.C. send the collected evidence to the magistrate who has jurisdiction to conduct the trial. It is a normal FIR as the police counted it, the only difference was that the police subsequently found that the crime was committed outside their jurisdiction.

The authority to investigate outside the territorial jurisdiction is guaranteed by Section 156 (1) Cr.P.C. which allows the investigating body to investigate a cognizable offence outside its territorial jurisdiction. The section states that it is not within the jurisdiction of the investigative agency to refrain from conducting an adequate and thorough investigation based on the fact that it has been concluded that the crime was committed outside its jurisdiction. Additionally, according to section 154, the in charge of the police station is duty bound to register the FIR when he receives information about the commission of a crime, which can be used to determine whether the crime was committed within his jurisdiction or not. If they refuse to register because they do not have the jurisdiction, the police will be prosecuted for resigning from their duties.

Although the concept of Zero FIR was introduced in 2013 and the Indian government occasionally issues circulars, many police stations are reluctant to file a Zero FIR due to territorial constraints, mainly due to a lack of situational awareness of people to the changes that have been made to the legal system and are, therefore, easy to manipulate. Zero FIR is important in cases where it is necessary to report a crime as soon as possible. This will ensure prompt action and fairness. For example, in the case of rape and sexual abuse, priority is given to gather evidence through a

physical examination. Such collection can only be done after lodging the FIR. Because this evidence is very important in such cases and must be protected from corruption or deterioration. In addition, in the case of murder, especially heinous ones, the offender must be apprehended immediately to avoid escape. Again, in order to arrest him and initiate proceedings on the matter, an FIR must first be submitted. This can only be done through Zero FIR.

In Pakistan, the executive and judiciary did not focus on Zero FIR. As much as the reform should be on paper, it is always difficult to put it into practice. First, the police themselves are not aware of the concept of Zero FIR. There have been numerous cases where police officers have unknowingly dismissed a victim due to lack of territorial jurisdiction. The judges only discussed the parameters of the first and second FIR and did not take any steps to introduce the concept of Zero FIR. Pakistan can learn from the experiences of India to make the necessary reforms in the criminal justice system to introduce the concept of Zero FIR.

The legal right to register a Zero FIR is very noble. This strengthens the public's confidence that when a crime is committed, their voice is heard and not mitigated by the procedural aspects of the law. In Pakistan, the executive and judiciary did not focus on Zero FIR. As much as the reform should be on paper, it is always difficult to put it into practice. First, the police themselves are not aware of the concept of Zero FIR. There have been numerous cases where police officers have unknowingly dismissed a victim due to lack of territorial jurisdiction. The judges only discussed the parameters of the first and second FIR and did not take any steps to introduce the concept of Zero FIR. Pakistan can learn from the experiences of India to make the necessary reforms in the criminal justice system to introduce the concept of Zero FIR.

A STUDY OF POLICY AND LEGAL FRAMEWORK ON RIGHT TO WATER: FROM GLOBAL JUSTICE PERSPECTIVE

S.M. Aamir Ali[1]

Abstract

Water is vital for the survival of every living creature on earth; human beings happen to be just one species among them. Right to water looks somewhat nearer to the concrete holistic issue of the well-being of human health. However, if put under a macrocosmic scanner then it is found to be relevant to the economic and the societal standards in whose context it has been considered. When it comes to natural resources there is a general perception that these are God's gifts to humankind and everyone is equally entitled to it. Albeit considering the economic parity this ideal condition is difficult to achieve. The availability of water at a just level through just means is the contemporary concern of the modern world. The present policy and legal framework regarding the right to water lacks effective enforcement measures, and fails to deal with the issues of accessibility and equitable distribution of these resources. The present paper is an analysis of the policy and legal framework regarding the right to water. It aims to examine if the concept of global justice has its implications and can prove vital for the development of the right to water.

Keywords: Equality, Legal Framework, Right to Health, Right to Water.

1. INTRODUCTION

Water has almost always been accessible, thus the need for its formal recognition was not felt until the industrialisation in England from 1700s to 1800s. This resulted in the first emergence of the concept of urbanisation, bringing into light the necessity of clean water. The first formal shortage of water occurred in the 1800s. Since 1970s six core treaties regarding the right to water have been entered into, among them, the right to water was explicitly mentioned in three treaties: the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of Child and

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the Convention on the Elimination of All Forms of Discrimination against Women. Although the other three conventions have not mentioned this right explicitly, they support it nonetheless. The Convention on Rights of Child confirms that all the United Nations member states have given recognition to the right to water apart from Somalia and the United States. In 1972 the United States Clean Water Act came into force which was for the purpose of controlling water pollution. In 1993, the U.N. General assembly designated March 22 as World Water Day.

In 2007, a report of the United Nations High Commissioner for human rights laid down whether or not access to safe drinking water is a human right is still an issue of deliberation. The formation of the United Nations Human Rights Commission provided the member countries with a common arena to discuss issues of sanitation and fresh water access.[2] The period from 2005 to 2015 was considered an international decade for taking up action in favour of 'water for life'. It is pertinent to note that in the year 2010 among all the United Nations Millennium Development Goals, the water access target was achieved much before the prescribed deadline of 2015. Water has been made accessible to more than 2.6 billion people until 2010. The General Assembly has recognised the right of people to have physical accessibility and equitable distribution in respect of the right to water. The U.N. state parties have signed the Sustainable development goals which is an heir of Millennium Development Goals, which resolves to provide clean water for all by 2030. But 844 million people still lack basic drinking water access. In addition to these treaties, there are general comments adopted by the Committee on economic and social and cultural rights which describe this right as the right to adequate, safe, acceptable, physically accessible and affordable water. This right can be understood in two ways, firstly by taking it as freedom which includes the right to be free from impulsive disconnections, or contamination of water supplies, and the right to preserve approachability to existing water supplies, and the right to be free from interventions. The second way is to take it as a prerogative to the equivalence of opportunity for persons to appreciate the right to water.

The developments taking place have contributed to elevating the right to water as a principle of worldwide custom. Though the acknowledgement is very abstract in its terms and the actual

[2] Paula Gerber, Bruce Chen, *Recognition of the Human Right to Water, Has the Tide Turned?,* ALTERNATIVES L.J., 36 (21) (2011).

matters of the right have not yet been convincingly defined. Focusing on the right to access does not always directly affect the way in which the right is realised.

2. RIGHT TO WATER FROM A GLOBAL JUSTICE PERSPECTIVE

John Rawls in his book *A Theory of Justice* has propounded the principle of distributive justice which signifies that, ethical acts and decisions are those that lead to an equitable distribution of goods and services. Rawls proposes that the people behind the veil of ignorance will agree on two things viz., equal rights and freedoms, which assure that everyone has the basic right to life, liberty and property or other essential freedoms, and the fair inequality principle. The fair inequality principle includes within its ambit the difference principle which states that all inequalities must result in the advantage of everyone, particularly the worst off, and must not result in the violation of anyone's right. This principle is somewhat similar to the principle of reasonable classification, and in the context of economic justice stipulates that the classes which are economically weak and due to this are unable to have access to vital resources like water must be provided with some special rights which can help place them in a better position. As the issue of distribution of natural resources gained momentum several doctrines came to be applied, which are controversial, like the doctrine of permanent sovereignty which argues to grant nation-states both jurisdiction-type rights and rights of ownership over the resources to be found in their territories. But the issue of ownership is against the principle of *res nullius* which states that natural resources are ownerless properties and cannot be owned absolutely. *Theories of justice have pointed out that there is a general claim of people over natural resources which have given rise to* ***ownership*** *issues*. But these theories have also recognised special claims.

Chris Armstrong has classified the theories related to the distribution of resources into *attachment and improvement theories*. The attachment theory stipulates that the rights over resources could be granted on the basis of the close relationship or sentimental value which the group of individuals or territory has to that particular natural resource. This theory strongly opposes the dispossession of the natural consumers of natural resources. These two interests can overlap as well-meaning thereby establishing that the same agent has both improved and become attached to a specific natural resource. Legislative enactments and judicial decisions of different countries have

contributed towards the recognition of the rights of water. But sometimes water as a commodity of use has created conflicting issues and the two most controversial issues are that of ownership of the resource and the privatisation of resources. In the Indian context as well, water and its related aspects like that of distribution and accessibility have been an issue of concern in the case of *Vishala Kochi Kudivella Samrakshana Samithi v. State of Kerala*[3]. The court held that the government is bound to provide drinking water to people and this is the most important duty of the Government. The failure to discharge this duty would be considered as a violation of the right.[4]

In the controversy in respect of the Sardar Sarovar Dam, the Apex court approved the validity of the construction of the Dam by relying upon the right to water. It remarked that the project is valid because it will fulfil the water needs of the people residing in the area, but said nothing about the right to water of those people who were displaced.

The doctrines regarding the right to water are developing, extending in scope, and touching upon social, economic, and legal aspects, e.g., the Whanganui River, to which the peoples of New Zealand have some sentimental value attached, has been recognised as a living entity and it has to be represented by one representative from the Maori tribes, and one from the Crown.

On very similar lines in 2017, a division bench of Uttarakhand High Court had declared Ganga and Yamuna rivers as living entities having all the rights, duties and other obligations as are exercised and discharged by a living person, including the fundamental rights. The bench said that it was appropriate to grant legal personality to rivers Ganga and Yamuna by virtue of Article 48-A and 51A(g) of the Indian Constitution. The court, it is apparent from the reasoning, has referred to the Attachment theory of resources as it observed that all the Hindus have deep faith attached to the rivers and they are pivotal to their health. It declared the Advocate General of the State of Uttarakhand, the concerned Chief Secretary and the Director of Ganga project as its caretakers and representatives. But the Central Government appealed to the Apex Court on various grounds including administrative and other issues; one of them was that these rivers flow from other states

[3] Vishala Kochi Kudivella Samrakshana Samithi v. State of Kerala [2006(1) KLT 919].
[4] Chris Armstrong, Against Permanent Sovereignty Over Natural Resources, Politics, Philosophy & Economics, THE MURPHY INSTITUTE OF POLITICAL ECONOMY, 14(2) 129-151 (2015).

as well, so how can it be represented by the officials of Uttarakhand only, and how could they be capable of resolving the issues related to the rivers?[5]

One classic case which shows how the right to water is closely connected to the distribution theory of justice, and how important it is to distribute the resources in a just and lawful manner, is the Kaveri River Water dispute. It arose due to an agreement signed between Madras Presidency and Kingdom of Mysore in which the amount of water granted to Mysore seemed more than sufficient to the Government of Karnataka which had challenged the distribution and demanded that redistribution should take place. It contended that "equitable sharing of waters" is the only solution. The State of Tamil Nadu argued that it had agricultural land and hence it had become dependent upon the existing distribution and any changes to it would bring losses to them. It was decided by the Tribunal that 419 Town Municipal Councils would become the share of Tamil Nadu, and 270 Town Municipal Councils of Karnataka; 30 Town Municipal Councils of Kerala, and 7 Town Municipal Councils of Puducherry. But parties to the case have made the appeal to the Apex Court, and in 2018 the SC decided to redistribute the amount of water, changing the scheme of distribution only slightly. This judgement has received serious criticism from every sphere of society for not making any substantial change.

It is apparent that the right to water has begun to take the level of attention that it actually deserves, and which has been long overdue. Some environmentalists have gone to the extent of asserting that if the Third World War occurs, the reason behind it would be the rising crises of water. All these instances are leading towards a separate and independent jurisprudence that has to be applied to make this necessity of life available to people around the world. The steps taken by the international and national communities of the world are appreciable.

[5] Philippe Cullet, *The Right to Water in India, Plugging Conceptual and Practical Gaps*, THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS, 17 (1), 60 (2013)

3. ISSUES CONCERNING THE RIGHT TO WATER

3.1 Privatisation of the Right to Water:

For the Committee on Economic, Social and Cultural Rights it is a political question that is not yet decided and is thus open for deliberation. The UN framework is neutral on the question of inviting private players to take charge of making water accessible, and whether or not this sort of involvement would be ultimately beneficial. This stance was made clear by the Independent Expert on the issue of Human Rights Obligations related to access to safe drinking water in the words that the human rights framework does not mandate any particular form of service of water, though it fixes the primary duty to assure this right upon the States.

Controversies are there among the people thinking in two different ways: one who supports the idea of making water a commodity and charging price for it, and the other who advocates that water should be made available at no cost. History has also been a witness of instances where it has been shown that citizens have been obligated to pay for water. There are some records that make it evident that even the UN organisation which is the epitome of human rights has agreed to the pricing of water. The UN Special Rapporteur said that a human rights framework does not require that water and sanitation services be provided free of charge. But this question does not have a definite answer e.g., South Africa has adopted free water policy and it is, in fact, the only policy that can suitably be used in the countries which are struggling from poverty issues. Therefore, pricing cannot be the only solution and employing it as an instrument to make people realise the value of water would not always give the expected outcome. The issue of pricing and accessibility are the core issues concerning the right to water when justification of disconnections is to be found. On the other hand, there are few countries that have banned water disconnections completely without explicitly recognising the right to water.

3.2 Inequality in Access to Water:

Water constitutes the basic necessity of life but it has become scarce lately. Water equity stipulates that every person should have reasonable access and a guaranteed right to safe water and its use. The global water crisis is more about the accessibility of water rather than about its availability. Countries can achieve economic benefit through the excessive exploitation of water but it will, in turn, lead to the increase in the problem of shortage of water which can pose a great threat to

human life. It has been observed that the people who belong to the higher economic strata are the ones who are in a position to afford and access safe drinking water more easily than the ones who belong to poor classes. This trend is prevalent in almost all parts of the world. This sort of inequality is affecting the long-term growth prospects of the country, as lacking basic resources like water will lead to failure in achieving the kind of economic development that benefits the economically weak classes. The existing national legislations of most of the countries have one flaw that they do not recognise: the right to water separately and independently. Unsafe access and no guarantee to have such rights is the root of the problem. The inaccessibility to water can lead to other implications like lack of a hydropower plant, which is an energy source but essentially needs water to produce energy, ecological problems, the irrigation and plantation problems. These are some of the important repercussions of not having such rights and can result in a disadvantageous position.

4. INTERNATIONAL FRAMEWORK ON THE RIGHT TO WATER

The majority of the countries across the world have issues concerning water quality, quantity, and access. These concerns entail instantaneous and proficient solutions because of water's critical prominence to human well-being, life, and dignity.[6]

Each state should interpret and implement the human right to water differently depending on their cultural context and legal infrastructure. Just as water can be construed contrarily in terms of quality, quantity, and access, humans enjoying rights and taking responsibilities can be variously interpreted. In order to implement the human right to water internationally, states may need to separately integrate human rights into their legal systems. By 2015, about 33 per cent of the global population still did not have access to improved sanitation.[7]

Right to Water: Evolution of right from being implicit to explicit

The foundational human rights documents, including the International Bill of Rights, the UDHR, ICCPR (International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 1057),

[6] CESCR, Gen. Com. 15 (2002) [hereinafter General Comment No. 15].
[7] WHO-UNICEF Joint Monitoring Report 2012, (July 22, 2021, 3:31 PM), http://www.who.int/watersanitation_health/monitoring/jmp2012/fast-facts/en.

and ICESCR (International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 3) did not embrace explicit reference to the human right to water. Various United Nation bodies admitted the human right to water with guidelines, resolutions and General Commentaries in the first half of this century, it was not till the implementation of Resolution 64/292[8] in July 2010 by the United Nations General Assembly, a high-functioning United Nation body formally recognised the human right to water. "*In September of that year, the Human Rights Council quickly followed suit, declaring that the human right to water is legally binding".*[9]

In spite of the fact that the key fundamental reports of the universal human rights framework didn't legitimately allude to a human right to water, it is contended that water is so verifiably basic for human life that the designers of the UDHR didn't consider a need to unequivocally incorporate the human right to have safe water.[10]

The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") in 1979,[11] was the first principal human rights instrument to openly declare the human right to water. Under Article 14(2)(h) of CEDAW (Convention on the Elimination of All Forms of Discrimination against Women), in order to accurately eradicate discernment against women in rural areas, the state must "ensure to such women the right... [t]o enjoy adequate living conditions, particularly in relation to... sanitation, electricity and water supply.... ",[12] this statement has been inferred not to just ensure equivalent access to water, but a right to freshwater.[13] However, CEDAW Article 14 is only applicable to rural women and is not entirely pertinent to others.

Apart from these, the Convention on the Rights of the Child (CRC), also discusses the human right to water, which was adopted in 1989 by the United States.[14] Article 24(1) of the CRC addresses the need for water, identifying the right of the child to the highest achievable standard of well-being and health.

[8] G.A. Res. 64/292, The Human Right to Water and Sanitation (2010).
[9] Human Rights Council Res. 15/9, U.N. Doc. A/HRC/RES/15/9 (2010).
[10] Id; PETER H GLEICK, *The Human Right to Water*, 1(5) WATER POLICY 487 (1999).
[11] Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13 (1979).
[12] Id. At art. 14(2)(h).
[13] Comm. on the Elimination of Discrimination against Women, General Recommendation No. 34 on the rights of rural women, art. IV, 85, U.N. Doc. CEDAW/C/GC/34 (2016).
[14] Convention on the Rights of the Child, 1557 U.N.T.S. 3 (1989) [hereinafter CRC].

Goal 7.C of the Millennium Development Goals ("MDGs"), based on the United Nations Millennium Declaration,[15] has framed a goal to minimise the count of people without justifiable access to safe drinking water and elementary sanitation standards by 2015. The Millennium Declaration's overall goal was achieved in 2010, and almost 2.6 billion people retained access to better water sources during 1990 and 2015.[16] But, a vital disparity in progress in some regions was also observed. The target was not entirely met in developing regions due to various factors such as physical water insufficiency, the failure of organisations, absence of substructure, poverty, and prompt growth of the populace.[17] Predominantly, four areas, namely the Caucasus and Central Asia, Northern Africa, Oceania, and sub-Saharan Africa did not meet the target. Also, 80 percent of the population in the rural regions are still lacking access to improved drinking water sources.

The conflicts regarding water arise from different sources, including political, monetary, social, social, and ecological causes. A wide assortment of answers for drinking water, sanitation, and access issues have been proposed by worldwide associations, non-legislative organisations, human rights activists, and domestic legislatures. One of the most encouraging ways to deal with water issues is for global entities including national governments, international associations, and global endeavours to legitimately perceive access to water as a human right under universal law. The United Nations (UN) and other universal bodies have perceived the human right to water, and researchers in the field have supported its propagation. [18] When successfully executed and upheld, it guarantees people access to satisfactory amounts of safe water. The human right to water depends on codified instruments that permit everybody to take active participation to ensure the protection of water resources and proper utilisation of the same.

[15] G.A. Res. 55/2, United Nations Millennium Declaration 19 (2000) [hereinafter UN Millennium Declaration]. In 2000, world leaders adopted the United Nations Millennium Declaration as a U.N. General Assembly resolution, which set out what are known as the eight "Millennium Development Goals." See We Can End Poverty: Millennium Development Goals and Beyond 2015, UNITED NATIONS, (July 22, 2020, 3:31 PM) http://www.un.org/ millenniumgoals/bkgd.shtml.

[16] WHO & UNICEF, Progress On Sanitation and Drinking water: 2015 Update And Mdg Assessment 4 (2015).

[17] UN Dep't of Econ. & Soc. Affairs, World Population Prospects: The 2015 Revision, Key Findings and Advance Tables 8, (July 22, 2020, 3:31 PM), https://esa.un.org/ unpd/wpp/Publications/Files/KeyFindingsWPP_2015.pdf.

[18] HENRY SHUE, *Basic Rights: Subsistence, Affluence, And U.S. Foreign Policy* 52 53 (1996). It also imposes transnational duties on one government to avoid depriving people living in another territory, under another government, of access to water.

The operative enactment of the human right to water will deliver common people with their right to water in terms of quality, quantity and access. The Committee on Economic, Social and Cultural Rights accentuates this purpose by characterising the option to water as a privilege to adequate, protected, worthy, genuinely available and affordable water.

This topic has received enough attention that the UN General Assembly declared the period from 2005 to 2015 as the International Decade for Action, "Water for Life".[19]

5. TRADITIONAL INTERNATIONAL DEFINITIONS OF WATER

This area of the research will outline four vital approaches in which water has been conventionally defined, from the perception of 1) navigation, 2) environment, 3) social and cultural, and 4) public health.

5.1 Navigational Definitions

Water has customarily been controlled for its navigational purposes. Generally, states attested rights to non-navigational and navigational utilisation of water, including both quality and quantity of water.[20] Even though the utilities and commercial exploitation of sea is delimited by the United Nation Convention on Law of the Sea,[21] outward water and groundwater, which are also vital cradles of drinking water and sanitation, are transnationally synchronised by the Law of International Watercourses.[22] International civil society, denoted by the International Law Association and the U.N. International Law Commission, has incorporated legal instruments for shaping and controlling the use of water by global nations since the late 1960s. The UN General Assembly embraced the Convention on the Law of Non-Navigational Uses of International Watercourses through the 1997 Treaty. The 1997 Treaty covers non-navigational employment of global watercourses, for example, surface water and groundwater, and incorporates measures to secure, protect, and oversee them.[23] In this region, nations are entitled to their rights *vis-a-vis* other

[19] G.A. Res. 58/217 (2003).
[20] Convention on the Law of the Non-Navigational Uses of International Watercourses, arts. 9, 21, U.N. Doc. A/CONE51/869 (1997) [hereinafter UN Watercourses Convention].
[21] The principal international legal regime is the United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 3. (1982)
[22] STEPHEN MCCAFFREY, *The Law Of International Watercourses* (2007).
[23] UN Watercourses Convention, 1997, art. 1.

nations. The 1997 Treaty accentuates upon the impartial and judicious exploitation of an intercontinental channel,[24] the commitment not to cause momentous damage,[25] and the responsibility for nations sharing a common watercourse to mutually cooperate.[26]

5.2 Environment Definition

As per this definition, governmental bodies, non-legislative associations, and individual privileges to utilise water are socially confined by an obligation to secure water for use by upcoming progeny.[27] Governments of various developing nations often curtail their people's access to water in order to conserve this vital resource to secure the environment.

Various assertions declaration actively plans since the 1970s, for example, the Stockholm Declaration in 1972, the Rio Declaration in 1992, the new Delhi Statement in 1990, the Dublin Statement on Water and Sustainable Development or Dublin Statement in 1992 underscored the shortage of freshwater and the need for preserving water for the future. The Convention on the Protection and Use of Transboundary Water Courses and International Leagues (1992) followed this custom and systematised the general ecological standards of universal water, for example, the preparatory guideline, the polluter pays rule and sustainable development goals.

5.3 Social and Cultural Definitions

Water additionally has social and ethical importance to conventional nearby or indigenous gathering of individuals. This is particularly obvious when governments and global organisations have limited access to water.[28]

In various developing and developed nations, indigenous individuals have complex social-natural linkages and recreational connections to water[29] Indigenous inhabitants prevailing in communitarian cultures have especially significant associations to water because they mutually depend on the same water source.

[24] Id. At arts. 5, 6.
[25] Id. At art. 7.
[26] Id. At art. 8.
[27] KARIN SIMONSON, THE GLOBAL WATER CRISIS: NGO AND CIVIL SOCIETY PERSPECTIVE 7 (2003).
[28] JOOTAEK LEE, *Contemporary Land Grabbing: Research Sources and Bibliography*, 107 L. LIBR. J. 259 (2015).
[29] MARCUS FINN & SUE JACKSON, *Protecting Indigenous Values in Water Management: A Challenge to Conventional Environmental Flow Assessments*, 14 ECOSYSTEMS 1232, 1233 (2011).

5.4 Public Health Definitions

The World Health Organisation (WHO) stresses the fact that safe drinking water is profoundly imperative to human development and well-being.[30] Healthcare-related Government Rules And Operational Water Organisation for water providers, networks, and family use are made mandatory to ensure safe drinking water. To implement this objective, the WHO likewise has listed out The Guidelines for Drinking Water Quality such as:

- health-related targets;
- water safety strategies;
- checking of the safe drinking water agendas;
- corroboration of drinking water quality;
- identification of primacy concerns;
- progress of drinking-water quality principles;
- drinking-water regulations; and
- Sustenance for policies and initiatives to address local necessities and circumstances.[31]

These Guidelines reiterate the association between water and life and health, affirming that safe drinking water is crucial to endure life, and leads to palpable assistance to health.

6. STUDY OF INTERNATIONAL WATER DISPUTES

The overall concept of transnational water conflict is a major concern and requires legislative interference because numerous water bodies present across the world share over 260 significant waterways with two or more nations.[32] However, transboundary water conflicts elevate various serious and administrative questions that repeatedly overthrow the mutual objective.

Given the unpredictability made by various economies, biological systems, climatic situations, legislative issues and societies inside watersheds, transboundary water management administration

[30] *Water Safety and Quality*, WHO, (July 22, 2021, 3:31 PM) http://www.who.indwater-sanitation-health/water-quality/en

[31] Guidelines for Drinking-Water Quality, WHO (2011), (July 22, 2021, 3:40 PM), http://apps.who.int/iris/bitstream/10665/4 4584/1/9789241548151 eng.pdf.

[32] PATRICIA WOUTERS, *Universal And Regional Approaches To Resolving International Water Disputes: What Lessons Learned From State Practice?* 114 (6), (2002).

can be viewed as a kind of possible area of potential conflicts among nations. In this way, a far-sighted transboundary water administration must think about the elements of an expected clash. For the unique situation, a transboundary water dispute is characterised as verbal, financial, or militarily threatening activities between partners over globally shared water assets.[33]

For instance, if Canada chooses to develop a multipurpose dam along an offshoot water body it shares with the United States, the venture can influence water quality and can possibly produce irreconcilable situations between the two nations. Canada's objective is to develop the dam and produce various benefits out of the project, while the United States' advantage might be set against building the dam because of the potential damage it can cause within the nation. Without a set method or guidelines regarding measures to be taken to arrange a settlement to such debates, nations may get involved in strife over the stream. Be that as it may, the presence of Conflict Resolution Mechanisms (CRM) can direct member nations through times of pressure and help them to look after participation. The multilateral treaty signed in 19548 on the matter of the Danube Basin included Conflict Resolution Mechanisms (CRMs). The Israeli–Jordanian Peace Treaty of 1994 secured their mutual water frameworks and legislative guidelines, however, it neglected to accommodate Conflict Resolution Mechanisms (CRMs) and as the riparian were actualising settlement arrangements, regularly needed to include their leaders to address the issues.

India and China share four significant waterways, however not solely between them. The Indus/Shiquan River is flowing through the territory of China, India, and Pakistan. Similarly, the Brahmaputra River is shared by India, China, Bhutan, and Bangladesh. The Kosi and Ghaghara waterways are shared by China, Nepal, and India. Hence all Trans limit waterways of India and China are additionally imparted to different neighbouring countries as well. For every single such waterway, China is the upper riparian nation. India is the central riparian state in the Brahmaputra, Indus, and Sutlej streams, but a lower riparian nation in the other two waterway frameworks.

The Indus Waters Treaty has existed for more than 60 years irrespective of the prevailing conflict between India and Pakistan. While the settlement has adaptable distributing standards, the

[33] JACOB D. PETERSEN-PERLMAN, JENNIFER C. VEILLEUX & AARON T. WOLF, *International water conflict and cooperation: challenges and opportunities*, WATER INTERNATIONAL, DOI: 10.1080/02508060.2017.1276041 (2017).

dispensing rules are clear, outsider referrals for goal permit some administration adaptability, and the terms contain conciliation components that have been proved to be extremely successful, including the Permanent Indus Commission, which is looked upon once every year consistently. Foundations without these attributes can prompt future clashes, as when Iran and Iraq went up against a mobilised water debate in 1981 because of the absence of prosecution terms in their 1975 settlement over joint control of the Shatt al-Arab conduit.

There are the following international cases either decided by ICJ or a similar international dispute resolution body:

- South China Sea dispute.
- Conflict over the Status and Use of the Waters of the Silala (Chile v. Bolivia)
- Manufacture of a pathway in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)
- Pulp Mills present on the River Uruguay (Argentina v. Uruguay)
- Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)
- Case Concerning the Frontier Dispute (Republic of Benin v. Republic of Niger)
- Case Concerning Kasikili and Sedudu Island (Botswana v. Namibia)
- Case Concerning the Gabcikovo and Nagymaros Project (Hungary v. Slovakia)
- Land, Island, and Maritime Frontier Dispute (Honduras v. El Salvador) 1986, 2003

List of UN and other relevant institutions[34]:

- UN-Water
- UN Human Rights Committee
- United Nations Committee on Economic, Social and Cultural Rights
- Commission on Sustainable Development
- World Water Council
- World Water Forum

[34] JOOTAEK LEE AND MARAYA BEST, *Attempting to Define the Human Right to Water with an Annotated Bibliography & Recommendations for Practitioners*, 30 GEO. INT'L ENVTL. L. REV. 75 (2017).

- The World Health Organisation
- Latin American Water Tribunal.
- The European Court of Human Rights
- *Water Lex*

7. CONCLUSION

Right to water is an issue of concern for the international community in the contemporary situation. The necessity of having a uniform international policy framework in respect of this right had been realised in the 16th century, and since then various developments have taken place in that respect. The UDHR, ICCPR and ICESCR are some of the important international instruments which recognised the right to water implicitly. Later, through the Resolution 64/292 of the UN General Assembly in July 2010, the right to water was recognised explicitly. This shows how the water crises have become seriously problematic, and how the world through the international institutions has so far made endeavours to find out the solution for it. The inequality in the distribution of water and accessibility of it to the people of different nations at just rate and in just quantity is the central aspect of the right to water, as mostly it is not about the availability of water but about the capacity of persons to afford it and to be able to make just use of it. This right, apart from being a basic human right, is wider in its perspective as it affects the capability of a country to generate energy, to become more productive, and other related implications that are dependent on the availability of water.

As water is a natural resource and at the global level some uniform framework ought to be developed, looking at the issue from the global perspective has become important because it is *res nullius*. According to the universal entitlement theory, every person has a fair share of it. Ensuring just and equitable distribution is a major challenge for the people of the world. The jurisprudential aspects of it are very important for the development of the right to water and for having any long-term effective solution to the problem of water crises, assuring just and fair deal to every member of the international community is mandatory. Attachment and Improvement theories are the important theories on how the rights in respect of water should be provided. These theories enumerate the different ideologies regarding the right in respect of water. The main issues which are conspicuous regarding the right are the privatisation, ownership, and equitable distribution of

it. Under the aegis of the United Nations concrete steps have been already taken in the direction of refining the policy and legal framework in respect of the right to water. It is commendable that the countries are taking several steps through their domestic laws by introducing new laws, making suitable amendments in their constitutions, through judicial pronouncements towards the recognition and development of this right.

In India, though the constitution does not explicitly mention the right to water, it has been held to be implicit in the right to life guaranteed under Article 21 of the Indian Constitution. Legislations like the Water (Prevention and Control of Pollution) Act, 1974, Inter-State Water Disputes Act, 1956, etc. are some of the laws dealing with the issues related to water pollution and distribution problems. There are sufficient case laws in which judicial pronouncements have been made recognising the right to water as a fundamental right. Around the globe, efforts are being made to tackle the problem of shortage of water, but it is essential that actions to preserve this natural resource must be undertaken at a greater pace, otherwise the world would be facing a peculiar situation of acute crises of water which would threaten the very existence of humankind.

THE IMPACT OF COVID-19 PANDEMIC ON CHILD EDUCATION IN INDIA: AN ANALYSIS

Dr. R. K. Singh[1]

Abstract

COVID- 19 Pandemic/ Corona-virus affected the entire child education system of India. All child-care, nursery, primary and secondary schools are temporarily closed to prevent the spread of corona-virus. Due to closures of all these educational institutions, many problems have arisen before the teachers, parents and governments provide education to children. Physical/ Face-to-face education system affected due to this Pandemic. In these circumstances, distance mode/ virtual mode education emerged as an option/ solution to continue the children's education system. Virtual mode of education isn't new at all in the sphere of children's education. Before this Epidemic, Distance/ Online mode education was going on in India. The National Institute of Open Schooling (NIOS) provides a number of Vocational, Life Enrichment and community-oriented courses besides general and academic courses at Secondary and Senior Secondary level. Here, many problems happened when the entire children's education system had to be made available in virtual/ online mode from physical mode. To deal with this pandemic/ epidemic, in the field of children's education, the governments and educational institutions have tried to design a strategy to use technology for online classes, online learning resources and broadcasts teaching/ learning. However, shifting from face-to-face class to online teaching/ learning totally, is challenging for teachers, child-students, guardians, and the governments due to lack of finance, technical skill, information and communication technology infrastructure, internet access/ connectivity, and online educational resources. The students of poor families do not have mobile, laptop, radio, television and other devices to access the online education, and to learn at their home. Due to this, in online education, we see that the gap between children belonging to rich and poor families is increasing in getting education. In the last one and half years, due to lack of physical classes, there has been a lot of loss to the learning of children. So, the educational institutions should design

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strategies to proper education and also recover lost learning, and return to the students when schools reopen. Recovering lost learning may not be completely possible but to some extent can be recovered. Practical subjects can never be compensated through online mode. There is also a problem in online education that the ability/ skills to operate modern electronic gadgets/ devices are not sufficient amongst teachers, students and parents.

In such a situation, the liability of the government increases to provide internet connectivity across its territory and also to train the children & teachers to develop the skill to operate the electronic gadgets/ devices. And the governments should create such an infrastructure/ assistance so that the children of poor families can also get online education. Some courses are difficult or impossible to teach and learn through online learning methods such as home science, sport, practical, music, art etc. It has been also observed that in virtual education/ remote instruction, not all children are able to attend all the classes due to lack of electronic gadgets/ devices. Assessments and evaluations of students have many serious problems in this online education. All these challenges aside and the biggest challenge is that children up to the age of 14 or 15 years are not able to learn/ understand their courses properly through online mode and for a long time the use of mobile/ laptop is dangerous for the health of children. All these points also need to be taken into account. This disaster/ pandemic can go on for a long time and such disasters can come in future also. So we have to prepare accordingly. It is not that due to this epidemic; online education is the only disadvantage; some of its advantages may also be there in future. Once the entire infrastructure for online education is ready in the country and all the stakeholders of education will be technically sound/ equipped, then the education system will become easy in future.

The aim of this Research Paper is to analyze the effect of the Corona Pandemic on children's education at present and in future in India and for this purpose the Doctrinal Method has been adopted.

Introduction

COVID-19 [2] is a pandemic disease that affects the entire education system of India as well as the whole world. This is not the first pandemic, even before various pandemics have occurred in human history and affected human life as well as the education system in the world. The World Health Organization (WHO) on March 11 declared COVID-19 a pandemic, pointing to the over 118,000 cases of coronavirus illness in over 110 countries and territories around the world and the sustained risk of further global spread. [3] The Wuhan Center for Disease Control and Prevention (CDC) in central China's Hubei Province detected a case of pneumonia of unknown cause on 30th December 2019 in other words we can say that the first COVID-19 case has reported by Wuhan Municipal Health Commission (WMHC) on 30th December 2019, in the Hubei Province, China and China informed to the WHO about it on 6th January 2020. The China CDC succeeded in isolating the first novel coronavirus strain on 8th January, 2020. [4] The corona-virus pandemic is quickly spreading and affecting the whole world to date. In the world about 242,309,468 of total cases, 217,937,276 of total recovered and 4,928,321 of total deaths and in India about 34,108,325 of total cases, 33,470,623 of total recovered and 452,684 of total deaths were recorded until October 20, 2021. [5] Corona-virus is spreading exponentially and all countries are locked/ suspended/ postponed their face to face/ physical/ offline education system and enforcing their people's strict quarantine to prevent/ control the spread of this highly contagious virus/ disease. COVID-19 pandemic impacted the overall economy of the countries; day to day life; emotional, mental, and physical health; national and international business; traveling; hotels, restaurants, religious, entertainment places etc. as well as child-education system.

As we know that education is the base of the development of every country. But the education system has also been affected due to this widespread pandemic disease. Education helps in spreading knowledge in society. This is perhaps the most noteworthy aspect of education. There is a quick propagation of knowledge in an educated society/ country. Furthermore, there is a

[2]. COVID-19 is the name given by the World Health Organization (WHO) on February 11, 2020 for the disease caused by the novel coronavirus SARS-CoV2. COVID-19 is an acronym that stands for coronavirus disease of 2019. https://www.goodrx.com/blog/what-does-covid-19-mean-who-named-it/, searched on 27/10/2021.
[3]. https://time.com/5791661/who-coronavirus-pandemic-declaration/, searched on 28/10/2021.
[4]. http://en.nhc.gov.cn/2020-04/06/c_78861_2.htm, searched on 28/10/2021.
[5]. According to the Dailyhunt App, which people usually download on their mobile.

transfer of knowledge from one generation to another generation by education. Education helps in the development and innovation. Important developments viz. equipment, medicines, electronic products etc. take place due to education. So, looking at the importance of education, we can say that education is a ray of light in the darkness. That is why education has become a basic human right for the people on this earth. It certainly is a hope for a good life and denying this right is an evil. We can also say that uneducated youth are the worst assets for humanity/society/country. Education is also important for employment, a great opportunity to make a decent living. This is due to the skills of a job that education provides. Education improves and refines the speech and expression of a person. Furthermore, individuals also improve other means of communication after education as is done viz. Braille script for blind people and short hand language. Education makes a person a better user of technology because it provides the necessary technical skills which are very necessary/important in this technical era. Hence, without education, it would probably be difficult to handle modern machines/gadgets/articles in this technological era. People become more mature with the help of education and sophistication enters in the life of the people by it. Education teaches the value of discipline and time. Education enables individuals to express their views efficiently, i.e., individuals can explain their opinions in a clear manner. Information plays a very important role in the growth of the society as well as in the development of the country and it is not possible without the ability to read and write because most information is done by reading and writing. Reading and writing is the first step in education. Hence, the lack of reading and writing skill means missing out a lot of information. Due to the importance of education, the governments of all countries must ensure the spread of education.

Education is not the only important asset but children are the biggest assets for any country, because these children will later contribute to the progress of the country by becoming a doctor, engineer, teacher, advocate, judge, executive officer, scientist, policy maker, legislator etc. So, holistic development of children is very important for the future of the country and education is the only way through which holistic development of children can take place. That's why the education of these children becomes very important. Education helps a child to get knowledge and improve their confidence level all through their life. It plays a great role in personal growth as well as in the growth of the country. It is the process of achieving knowledge, values, skills, beliefs, and moral habits. Education is the ultimate way to get victory over all the personal and social

problems. It is very important not only for the children but also to all persons as it plays very important roles in life. In order to live a better and peaceful life, we need education. It transforms the people completely from inside and outside by changing the mind as well as improving the confidence level. In view of all this, child education becomes important and necessary.

Physical children's education system was prevalent before this Corona Pandemic but was affected due to this pandemic. In these circumstances, distance mode/ virtual mode education emerged as an option/ solution to continue the education system. Distance teaching/ learning solutions contain platforms, educational applications, and resources that aim to help students, teachers and parents. Digital learning management systems and massive open online course platforms are also helping in child education. Online teaching and learning are not a new mode for this pandemic in India. Before this Epidemic, Distance mode/ online education was going on in India. The National Institute of Open Schooling (NIOS), formerly known as National Open School (NOS), was established in November, 1989 as an autonomous organisation in pursuance of National Policy on Education, 1986 by the Ministry of Education (MOE), Government of India. NIOS provides a number of Vocational, Life Enrichment and community-oriented courses besides general and academic courses at Secondary and Senior Secondary level. It also offers elementary level courses through its Open Basic Education (OBE) Programmes. Here, many problems happened when the entire children's education system had to be made available in virtual/ online mode from physical mode totally. However, the poor families and students do not have radio, television, and other electronic devices to access the resources, attend the online classes and to learn at their home. Shifting, from face-to-face class to online teaching/ learning totally, is challenging for teachers, students, guardians, and the governments due to lack of finance, Information and Communication Technology (ICT) infrastructure, online educational resources, internet connectivity, and digital technology skills.

Objective of Study

The objectives/ aims of this research paper is to analysis the impact of Corona Outbreak on the child-education and also analysis the challenges before online teaching/ learning, opportunities during epidemic and the effect on education system after Pandemic, give the suggestions/

recommendations of solutions about the continuity of education system during Pandemic and post Pandemic.

Scope / Limitations of the Study

This research paper will cover the impact of the Corona Pandemic on the child-education system, analyze the online teaching/ learning challenges, opportunities and education system after the Pandemic in India.

Method of Study

This paper adopts the Doctrinal Method and for this purpose, various statutes, books, journals, commentaries, reports, magazines, newspapers, websites etc. have been consulted and referred to if needed. Since I am doing an analysis of the impact of the Corona Pandemic on the child-education system, in preparing this paper, evaluative and critical approaches are also applied to examine the existing education policies, technologies, laws and their effects. The actions of governments/ enforcement agencies are also examined.

Importance/ Significance of the Study

Through this research paper, we will be able to know the impact of this Corona Pandemic on the education of children, challenges before online education/ teaching/learning, their solutions, opportunities in this pandemic and to prepare the education system for the future.

Keywords

1. COVID-19 Pandemic, 2. Children, 3. Virtual mode 4. Education. 5. Impact. 6. India

In this Research Paper/ Study, the impact of corona-virus/ Corona Pandemic/ Corona Outbreak on the child-education system in India, the recommendation of solutions about the continuity of education system during COVID-19 Pandemic, online learning challenges, opportunities and education system after corona-virus have been reviewed/ analyzed and discussed.

Who is 'Child'?

Before discussing the impact of the Corona Epidemic on children's education, we need to decide who comes under the definition of child. Children are also addressed with the word 'minor'. There is no fixed definition of 'child' in India. The definition of 'child' has been set differently under different Acts in our country. Various definitions of 'child' and 'minor' under the various Indian laws are as follows:

- Section 2 (ii) of the Child Labour (Protection and Regulation) Act, 1986 [6] states that "child means a person who has not completed his fourteenth year of age". This Act aims to prohibit the engagement of children in certain specified employments, in other words, for deciding in which employment, occupations or processes the employment of children should be banned and regulate the conditions of work of children in employment where they are not prohibited from working.
- According to Section 2 (c) of The Plantations Labour Act,1951 [7] "child means a person who has not completed his fourteenth year." Before the Child Labour Act [8] came into effect, the age of a child was decided fifteen years under this Section. According to the Plantations Labour Act, 'Adolescent' means a person who has completed his fourteenth years but has not completed his eighteenth years. [9] Before the Child Labour Act, [10]came into effect, the age of an 'Adolescent' was decided as- from the completion of his fourteenth years but has not completed his eighteenth years under this Act. [11] Section 24 of the above Act [12] further defines the young children and states that "no child who has not completed his twelfth year shall be required or allowed to work in any plantation." This Act [13] has been formed for the welfare and to regulate the conditions of work of people

[6] The Child Labour (Protection and Regulation) Act, 1986 (61 of 1986) (came into force on 23:12:1986 and 25:05:1993).
[7] The Plantations Labour Act, 1951.
[8] Supra Note 1.
[9]. Section 2(a) of the Plantations Labour Act, 1951.
[10] Supra Note 1.
[11] Supra Note 2.
[12] Ibid.
[13] Ibid.

who are engaged in plantations. The object of this Act is also to obtain uniformity in the definition of 'child' in the related laws.

- The Motor Transport Workers Act, which aims to regulate the conditions of work of motor transport workers, defines 'child' as "a person who has not completed his fourteenth year" [14] and Section 2(a) of the said Act [15] define 'Adolescent' as a person who has completed his fourteenth year but has not completed his eighteenth year. The age of the 'child' and 'Adolescent' are also amended by the Child Labour Act, [16] like the amendment of age under the Plantations Labour Act. [17]

- Section 2(b) states that "Child means a person who has not completed fourteen years of age." [18] This Act makes provisions for the welfare of the workers who are engaged in beedi and cigar manufacturing institutions/ establishments and to regulate the conditions of their work and for matters connected therewith. Section 24 of the said Act says that no child is required or allowed to work in any industrial premises.

- Definition of child defined by the Prohibitions of Child Marriage Act as, "child means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age." [19] According to Section 2 (f) "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority. [20] The text of the Section 3 [21] is as follows: Age of majority of persons domiciled in India. - (1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before. The main objective of this Act [22] is to prevent child marriages and Section 3 [23] of the Act makes the child marriage voidable at the option of a person who was a child at the time of marriage.

[14] Section 2 (c) of the Motor Transport Workers Act, 1961.
[15] The Motor Transport Workers Act, 1961.
[16] *Supra* Note 6.
[17] *Supra* Note 7.
[18] Section 2(b) of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966,
[19] Section 2 (a) of the Prohibitions of Child Marriage Act, 2006.
[20] Section 2 (f) of the Prohibitions of Child Marriage Act, 2006.
[21] Section 3 of the Majority Act, 1875.
[22] The Prohibitions of Child Marriage Act, 2006.
[23] *Id*.

- 'Child' means, according to Section 2 (12) of the Juvenile Justice Act, [24] "a person who has not completed eighteen years of age." The Juvenile Justice Act makes provisions for the welfare, proper care, protection, development, treatment, social reintegration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation. A person who has not completed eighteen years of age is given the status of child under this Act.

- The Protection of Children from sexual offences Act states that, "child means any person below the age of eighteen years." [25] This Act simply aims to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.
- Article 45 [26] of the Indian Constitution says that the State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, free and compulsory education for all children until they complete the age of fourteen years. Article 21 A [27] provide free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, determine. The Right of Children to Free and Compulsory Education (RTE) Act, 2009, [28] which represents the consequential legislation, envisaged under Article 21 A, means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.
- According to the United Nations Convention on the Rights of the Child, 1989, "child means every human being below the age of eighteen years unless under the law applicable to the

[24] The Juvenile Justice (Care and Protection of Children) Act, 2015.
[25] Section 2(d) of The Protection of Children from sexual offences Act, 2012.
[26] Art. 45 shall stand substituted by the Constitution (Eighty-sixth Amendment) Act, 2002, s. 3 (which is yet not in force, date to be notified later on) as— "45. Provision for early childhood care and education to children below the age of six years.—The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.
[27] The Constitution (Eighty-sixth Amendment) Act, 2002 inserted Article 21-A in the Constitution of India came into effect on 1 April 2010.
[28] The RTE Act came into effect on 1 April 2010.

child, a majority is attained earlier." [29] Therefore, International Law gives the status of child to persons who are below eighteen years of age.

In India, every law is formed with different objectives in order to solve the purpose of their establishment and therefore, 'child' has been defined differently. We also find, after analysis of the above laws, that children are divided into two categories due to different purposes, i.e., i) Child- who are under the age of 14 years, and ii) Adolescent, those, who are above 14 years and below 18 years of age. But when we talk about education of children then we find that constitutional provisions, which talks about education of children, are Article 45 and Article 21 A [30] and one statutory law, i.e., the Right of Children to Free and Compulsory Education (RTE) Act, 2009. From the text of Article 21 A, we can conclude that our Constitution also seeks to include only children below the age of 14 in the definition of a child. But in this research paper I am considering not only children up to the age of 14 years in the definition of 'child', but also children up to the age of 18 years.

Impact of Corona Pandemic on Child Education

Since late December 2019, COVID-19 has wreaked havoc across the world as well as India and like any other/ critical/ crucial sector, education has been hit hard and students and schools have been deeply impacted. The schools shut as part of national lockdown from 23rd March, 2020 due to the Corona Pandemic across India. Before the corona epidemic, child education in India was going well with some shortcomings/ drawbacks. Here, I mean to say 'with some shortcomings/ drawbacks' that child education in India was indirectly divided into two types. The first type of education system was in private/ convent schools, in which children from rich and middle families received education and the second system was that in which the children of the poor received through public (semi-government/ fully government) schools. Public schools did not have the same infrastructure as convent schools and this difference is still there today and it seems that it will be there in future also. After study of the Annual Status of Education Report (ASER), [31] it has been

[29] Article 1 of the Convention on the Rights of the Child, 1989.
[30] The Constitution of India, 1950.
[31] An annual survey since 2005, aims to provide reliable estimates of the state of the education system and highlights learning levels, enrolment rates, and major gaps in the system, among other things for each district and state in India

found that there has been a steady decline in enrolment rates at the education of primary level and dropout rates in secondary school education have been consistently high. Further, 'before the Corona Pandemic, children's education was going well', which means to say that children physically attended schools and learned something from their teachers. But since the Corona Pandemic has come, the whole education system has changed. Millions of children do not go to school due to the Corona Pandemic/ Emergency and ongoing humanitarian crises and are taking education from home through online mode/ medium. India has also been greatly affected by COVID-19 and there has also been a loss of life and property. To reduce the loss of life and property due to COVID-19, all schools are closed and the system of online education for children is started. COVID-19 has greatly disrupted the access to education of children in India. While school systems in India have made efforts to reach students at home through various means such as TV, Radio, Audio, Mobile Phone, Laptop, Online study material, etc. This type of education is called the virtual mode of education. The stakeholders also face many difficulties in this virtual education system, which are as follows: [32]

i) Virtual education systems may differ among children from low-income and high-income households and also between the children attending private schools and public schools. Situations indicate that during the pandemic-related school closures, students in private schools and those from households with high economic status have more access to and have more digital devices and are more engaged in regular educational activities than their peers in government/ semi-government schools and from low economic status households.

ii) Schools belonging to the private sector are much richer in digital infrastructure than public schools. As a result, private sector schools are able to provide education to their students to some extent in this Pandemic, whereas public sector schools are not so capable of providing education or providing poor education.

conducted by the central government. It is also the only annual source of information on children's learning outcomes available in India.

[32] I came to know these difficulties through our experiences, because our children are also studying in schools and secondly because I, myself, am a teacher at a Law College.

iii) Some courses are difficult or impossible to teach and learn through online teaching/ learning methods such as home science, sport, practical, music, art etc. All these subjects can never be compensated through online mode but can be taught to some extent.

iv) It has been also observed that in virtual education/ remote instruction, all students are not able to attend all the classes due to lack of electronic gadgets/ devices.

v) The shifting of physical/ face-to-face classes into online classes has many serious impacts on assessments and evaluation. The assessment and evaluation of children through online mode are a challenging task for both- teachers/ instructors and students, particularly practicum teaching and technical competencies.

vi) When children have an online exam/ assessment, they give their exam by copying.

vii) The assessment of practical skills is impossible through virtual/ online mode.

viii) Even the slightest lack of internet connectivity leads to disruption in classes for children as well as giving instruction by teachers.

ix) There is also the power problem. Due to this the classes are not running properly. Electricity cuts more in villages than cities, for this reason also the children of villages are getting separated in education.

x) Many parents' income has stopped or reduced due to the Corona Pandemic, that's why they are not able to arrange the fee and mobile/ laptop / digital gadgets to attend the classes for their wards.

xi) Children's education has suffered a lot in these one and half years due to corona because all the schools are closed.

xii) This Corona Pandemic negatively affected the mental and physical health of children/ students, parents, and teachers. The cases of corona-virus have created a sense of anxiety and uncertainty in the minds of children, teachers and parents, about what will happen. The lockdown is due to corona-virus. Many people are feeling stress, fear, and anxiety, such as a fear of dying themselves or/ and their relatives.

xiii) There is also a danger before the children/ parents that nowadays many objectionable materials are lying on the internet and when the mobile/ laptop/ electronic gadgets are in the hands of children to do the classes, then they can also be affected by these objectionable things/ materials.

xiii) For a long time, the use of mobile/ laptop/ electronic gadgets is dangerous for the health of children.

Governments, non-profit publishers, private companies, NGOs, educational institutions have come forward to meet the challenges related to the online education of children in this pandemic. Such as access to online learning content from free open educational resources provided by non-profit publishers, private companies, NGOs and governments etc. But all these efforts are not yet effective like physical classes.

To make children's education more effective, during online classes, educational institutions should design different curriculum and prepare different teaching-learning strategies in lieu of traditional education system. Educational institutions must also devise strategies to recover lost learning, and return students when schools reopen. This disaster/ pandemic can go on for a long time and such disasters can come in future also. So, we have to be prepared accordingly.

It is not that due to this epidemic; online education is the only disadvantage; some of its advantages may also be there in future. Like once the entire infrastructure for online education will be ready in the country and all the stakeholders of education will be technically equipped, then the education system will become easy in future.

Conclusion and Suggestions

After analyzing the various things relating to children's education, in this Corona Pandemic, I found that millions of children do not go to school due to the Corona Emergency and ongoing humanitarian crises and are taking education from home through online mode/ medium. The stakeholders also face many difficulties in this virtual education system. Shifting from physical class to online teaching/ learning totally, is challenging for teachers, students, guardians, and the governments due to lack of Finance, Information and Communication Technology (ICT) infrastructure, online educational resources, internet connectivity, and digital technology skills, power outages etc. There is growing inequality of educational opportunity among children from

low-income and high-income households and also between the children attending private schools and public schools. Other problems such as cheating in the exam by the students; to teach and learn the subjects, such as, home science, sport, practical, music, art etc.; the assessment of practical skills etc. This Corona Pandemic negatively affected the mental and physical health of children/ students, parents, and teachers. To deal with this pandemic/ epidemic, in the field of children's education, the governments and educational institutions have tried to design a strategy to use technology for online classes, online learning resources, virtual classes and broadcasts teaching/ learning to continue the children's education. It will be crucial for governments/ parents/ teachers to recover from the learning losses suffered during the school closures and to return to students when the school reopen but these losses can never be compensated through online mode but can be recovered to some extent. Some practical subjects cannot be taught through online mode such as sports, home science, art etc. Virtual mode education is not alone in ensuring children learn, it can be a tool for educators, students, and parents to facilitate learning continuity during school closures and allow for more student-centered, engaging instruction in and outside the classroom. Looking ahead, it will be crucial for governments to enact strategies to help students for full and proper education through virtual mode.

To make children's education more effective, during online classes, educational institutions needs to design different curriculum and prepare different teaching-learning strategies in lieu of traditional education system. And online education also has advantages in the future.

Suggestions

I. Government should expand internet connectivity in all its territory so that children and educational institutions can use it.
II. The Government should help poor children in providing digital tools, such as credit cards or loans through banks, because their parents are financially broken due to Corona.
III. Class attendance of the students should be increased by giving extra money by their parents and teachers.
IV. Some changes should be made in the assessment and evaluation of children in traditional systems so that they can be properly assessed and evaluated in this situation through online mode.

V. Parents should pay attention that when their children are using electronic gadgets, then they are not affected due to objectionable matters which are lying on the internet.

VI. To remove the mental stress of the child, the government, guardian and teacher should encourage the students so that their stress can be removed.

VII. The governments should provide training to teachers on technology-based education.

VIII. Parents and teachers need to pay extra attention to ensure that children can get back on track and how to make up for the child's learning loss.

CORPORATE ENVIRONMENTAL LIABILITIES: AN ANALYSIS OF INDIAN LEGAL FRAMEWORK AND ITS IMPLEMENTATION

Tridipa Sehanobis[1]

ABSTRACT

In the present-day scenario, for faster growth of the economy, the government highly relies on the corporate sector. But however, the state, altogether, did not forget the importance of conserving and protecting the environment, therefore enacting a number of legislations to that effect. The rule of obtaining environment clearance for setting up industries is a major provision towards protecting the environment against the evils of corporates. Nonetheless, the corporates in turn to flourish and make profits, resort to various methods that pave the way for low-cost production. Tilting towards this idea, the corporate does not pay any heed to the preservation of the environment, because focusing on that part will definitely increase the production cost. The installment of a trade effluent treatment plant, for preserving the environment, seems to be a burden on industrial proponents because that is going to increase their expenditure and adversely impact their business. Thus, corruption seems to be the only option to tackle the situation. They reproduce ideal statements following the environmental standards before the permitting authority in order to obtain the 'Environment Clearance Certificate' certainly. On the other hand, corrupt practices are also done by the enforcing authorities. The Environment Impact Assessment provision contains a step for on-site visits to ensure the produced statement by the proponent. When the authorities find it otherwise than the report, the corporate finds the option of money being viable, thus offering to enter into a deal with the officer, and the latter may indulge too. The concept of lobbying between the government and the corporate players finds mention here, which is followed up in a surreptitious manner. Lobbying, corruption and political influence are at the root of environmental degradation. This ongoing process of development exists at the cost of the environment, which the laws cannot even keep check on. The paper tries to establish the core factor of the corporate world and the business, responsible for environmental degradation. It also

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seeks to suggest measures to safeguard nature from the hand of the cruel growth of the economy, by way of lobbying and develops a model for effective implementation of the laws and policies.

1. Introduction

Everything that makes up the surrounding and affects the quality of life of the living organisms on the earth is collectively known as 'Environment'. It refers to air, water and land and the interrelationship of all these factors with human beings. So, it is very much important to preserve the environment in its pure form. But with the urge of development, its impact is mostly seen on the environment resulting in environmental pollution. The corporate industries in the name of development and progress are busy in committing acts leading to environmental degradation. Polluting water, rivers, land and air by hazardous waste is an environmental crime under both domestic and international laws. The Basel Convention of 1989 prohibits transboundary movements of harmful waste.

The incidence of environmental degradation needs to be prevented, prosecuted and punished for enforcing the human right to live in a healthy environment. Indian laws relating to Environment were enacted in response to the green judgments delivered by the Supreme Court of India and in consonance of the International Conventions. The apex court has recognized environment rights as part of the Indian Constitution. However, industries of textiles, pharmaceuticals, electronics and construction are committing environmental offenses on a larger scale in India. Dying and use of chemicals to manufacture textile products leaves waste and fiber in water and soil. Pharmaceutical companies are accused of dumping their hazardous waste in clean water surreptitiously. It leads to the high concentration of heavy metal in water reservoirs. Illegal dumping of electronic waste by the e-industries pollutes the environment with mercury and lead. Unregulated construction industry is polluting the air rapidly. Construction sites and brick kilns add black carbon in metro cities' air.

Despite the fact that the legislations relating to air, water and environment are in force in India, the industries' environmental crime is unchecked and a continuous one. The major reasons behind this are lobbying by influential corporations, corruption, and un-independent environment regulators. Lobbying by corporations is common in other countries as well. For example, in Europe, the manufacturers of pesticides and fertilizers bribe the legislators in order to get farming

policies in their favor. In India, asbestos' company is still running its business despite the fact that it causes cancer. The Environmental impact assessment system is also inefficient because it is not independent. Indeed, Supreme Court of India has directed the government to appoint the independent environment regulator. In its absence, many projects run by private corporations get 'Environment Clearance' very easily.

It is apt to mention that real economic growth cannot be achieved by causing ecological imbalance in India. Global industries enjoy the privilege of bypassing the international standards in the less developed countries as the developing nations are not signatories to many international obligations relating to carbon emissions. Race to generate employment is also one of the biggest reasons that developing nations fail to put environmental embargo on the global investors. Therefore, in this context, it is important that international unions like the European Union should strictly monitor its overseas factories.

2. Corporate Activities Hampering the Environment

With the gradual growth of the industries, they are more occupied in fulfilling their goal at the cost of the environment. One such practice leading to a devastating incident was the Bhopal gas leak case, where the Union Carbide Corporation was held liable for it. Because of this incident, the Bhopal residents faced problems for years and are still continuing.

2.1.Pharmaceutical Industries and Its Impact on Environment

Globally, over 100,000 tons of pharmaceutical products are consumed annually. In recent years, the pharmaceutical industries are growing expeditiously with the gradual growth in population. The low production cost of these industries in India attracts the multinational drug companies here. Certainly, the huge majority of the world's drugs are now produced in India along with China. China produces almost around 90% of antibiotic active pharmaceutical ingredients ("APIs") while the Indian companies are leading the manufacture of end dose products.[2] There

[2]Nordea Asset Management by Changing Markets and Ecostorm, Impacts of Pharmaceutical Pollution on Communities and Environment in India,Nordea, (May 12, 2021, 6:50 p.m.) https://www.nordea.com/Images/35-107206/impacts%201-20.pdf.

have been various pollution scandals at antibiotics manufacturing locations, both in China and India, resulting in the spread of drug-resistant bacteria.[3]

Pharmacological waste is possibly produced through an extensive mixture of deeds in a healthcare center, clinics or laboratories, together with but not restricted, to venous preparation or outdated, unused preparations, general combination or compounding, ruptures, needles, the partly used containers, unused unit doses, individual medications and obsolete pharmaceuticals[4] including, analgesic, antidepressant, antihypertensive, contraceptive, antibiotic, steroids and hormones etc. APIs as well as other chemical substances in the course of their manufacture, use and disposal, find their way into the environment, particularly, in the rivers or lakes and sometimes even into drinking water resulting in water pollution. This phenomenon of water pollution has a shattering impact on the environment at large.

Existence of different kinds of antibiotics such as norfloxacin, metronidazole, sulfamethoxazole, ofloxacin, tinidazole was reported as medical wastes in Ujjain District of India.[5] The disposal of antibiotics by the industries in the river streams leads to the growth of antimicrobial resistance (AMR) which is now regarded as one of the dangerous threats to human life.

The Ministry of Environment, Forest and Climate Change categorized the pharmaceutical producing industries as a "red category activity" due to the detrimental impact it generates on the environment as a whole. During the COVID-19 Pandemic, the need for API manufacturing arose. India was designated as a potential hot-spot after China, as it has the capability to produce new APIs and formulations, owing to different favorable factors. Such factors are, low manufacturing costs, erudite mixture abilities, rising experience, etc.

Pharmaceutical wastes are now strictly monitored in the countries with regulated markets such as in US, Europe, UK, Italy, Germany, etc. Although India remained a forerunner in South-Asia to make improvements in legislating the management of different biomedical wastes, there is no distinctive consideration for the proper maintenance and regulation of disposal of pharmaceutical wastes, as revealed by the absence of unambiguous rules for the same. The Government of India publicized Bio-Medical Waste (Management and Handling) Rules, 1998 in July 1998. Suppressing

[3]The Problem of Pharmaceutical Pollution, EEB, (May 12, 2021, 6:50 p.m.) https://eeb.org/the-problem-of-pharmaceutical-pollution/.
[4] Devesh Kapoor, Impact of Pharmaceutical Industries on Environment, Health And Safety,2 (4) JCR, 321, 325 (2015).
[5] Keshava Balakrishna, et. al., A review of the occurrence of pharmaceuticals and personal care products in Indian water bodies, 137 Ecotoxicology and Environmental Safety, 113, 115 (2016).

the Rule, 1998, the Government introduced a new rule namely, Bio-medical Wastes Management Rules, 2016. In this rule, the definition of bio-medical wastes does not include all kinds of pharmaceutical wastes. However, the pharmaceutical wastes like, cytotoxic drugs along glass or plastic containers, vessels, antibiotics, etc. are counted as bio-medical wastes under the rules.[6] But the specific regulation of pharmaceutical waste in a holistic manner is missing. Additionally, there are no explicit guidelines for the administration and regulation of most medicinal products' waste and there is neither any responsibility to screen or control pharmaceutical wastes existing in sewage sludge or in compost used in agricultural fields.[7]

2.2. E-Wastes and Its Impact on the Environment

According to Sinha-Khetriwal, "E-waste can be classified as any electrically powered appliance that has reached its end-of-life".[8] Worldwide, the generation of electronic and electrical waste has reached around 50 million tons on annual basis according to a new joint report issued by seven UN agencies.[9] Out of the total generated e-wastes only 20 percent of it is recycled, and the remaining 80 per cent thrown as waste. Some of these culminate up in landfill, subsequently leading to toxins leaching into the environment. While some is burned, which again leads to emission.

According to reports of E-Waste Monitor 2017, India is generating around 2 million tons of e-waste every year. It ranks 5thamong the e-waste generating countries, after the US, China, Japan and Germany.[10] In India, annually, an exorbitant number of computer machines become outmoded and are abundant from the IT companies in Bangalore alone, which places the city in the danger-list for e-waste.[11] On the other hand the Delhi-based scrap dealers also account for a huge portion of e-wastes in India, as it annually dismantles around 15,000 PCs annually.

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[6] The Bio-medical Waste Management Rules,2016, Sch. I.

[7]World Health Organization, Safe management of wastes from health-care activities, WHO, (May 18, 2021, 8:40 p.m.), https://www.euro.who.int/__data/assets/pdf_file/0012/268779/Safe-management-of-wastes-from-health-care-activities-Eng.pdf.

[8] Santhanam Needhidasan, et. al., Electronic waste – an emerging threat to the environment of urban India, 12 JEHSE, 2014, NCBI, (Jun. 10, 2021, 6:50 p.m.),https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3908467/.

[9] Gnanasegaran A, E-waste chokes Southeast Asia, Basel Action Network, (Jun. 22, 2021, 7:50 p.m.),https://www.ban.org/news/2018/11/5/e-waste-chokes-southeast-asiawww.ban.org/.

[10]Samar Lahiry, Recycling of e-waste in India and its potential, DownToEarth, (Jun. 10, 2021, 6:50 p.m.),https://www.downtoearth.org.in/blog/waste/recycling-of-e-waste-in-india-and-its-potential-64034.

[11]Santhanam Needhidasan, et. al., Electronic waste – an emerging threat to the environment of urban India, 12 JEHSE, 2014,NCBI, (Jun. 10, 2021, 6:50 p.m.),https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3908467/.

The bigger problem is that, recyclers exist at present only in the southern and western zone of India. In southern India, two formal recyclers are set up in Chennai and another one in Bangalore and only one exists in the western India. Thereby, no formal recyclers are operated in the northern and eastern zones of India.

The Electrical and Electronics industries have failed to comply with the Extended Producers Responsibility (EPR) as enshrined in the "E-waste Management Rules, 2016" that was enacted on October 1, 2017. Under the EPR, the producers of the electrical and electronic equipment are obliged to collect and channelize the e-wastes generated from their industries. This EPR technique is regarded as the best one to ensure take-back of end-of-life stuff. The law provides not only for the responsibility of producers to collect the wastes, but also to confirm that the waste materials reach out to the authorized recycler.

Illegal dumping of electronic waste by the e-industries pollutes the environment with mercury and lead. Moreover, the persons involved in the operation of recycling are with low levels of literacy therefore not aware of the hazards of these wastes.

2.3.Textile Industries and its Environmental Impact

Fastness in fashion led to the unwanted consequence of accumulation of textile wastes including fashion wastes. With the growing trend of fashion, the demands of the consumers are increasing at a fast pace. This in turn pressurizes the textile industries to produce more trendy clothes and fabrics at a low cost. In order to reduce the cost different methods are adopted by these industries which have ample of hazardous impact on the environment. To appeal to the customers, the producers emphasize vibrant colors and prints and fabric finishes, which are mostly generated with use of toxic substances and compounds. The release of these toxic chemicals is found in the river. Consequently, the textile industry is regarded as the second largest polluter, contaminating the clean water, after the agricultural industry.[12] Textiles industries are responsible for almost one-fifth of the industrial water pollution globally. It uses around 20,000 chemical substances, containing cancer-causing substances, for producing clothes.

[12]Putting the brakes on fast fashion, UNEP, (Jun. 10, 2021, 6:40 p.m.), https://www.unep.org/news-and-stories/story/putting-brakes-fast-fashion.

A study conducted in Haridwar, India revealed that the groundwater and soil nearby the textile industries were densely polluted and the amount of mental waste present in them was considerably high.[13] The waste water that flows out from the textile industries typically contains lead, PBDEs, organochlorines, phthalates, etc. that are responsible for severe health hazards in living beings and among aquatic life.

Even this industry is responsible for air pollution which is also a key cause of concern. Many adverse substances that are released into air from these units such as, diesel generators, boilers, thermo packs produce a huge number of pollutants that contaminate the atmosphere and are substantially hazardous for human survival.[14]Such pollutants include Suspended Particulate Matter (SPM), nitrogen oxide, sulfur dioxide, etc.[15]

2.4. Construction Industries and its Impact on Environment

Construction industry can be considered as one such industry which pollutes almost all aspects of the environment. The industry impacts the water streams, air quality, the soil, and even leads to sound pollution. According to recent research, the construction sector has been the reason for 50% of climate change, for 40% of drinking water pollution and 23% of air pollution.

The activities of construction that adversely affects the environment are like, production of cement, concrete, steel that in turn necessitate further fossil fuel extinguishing renewable sources of energy. "At the time of construction various types of greenhouse gasses emitted by these toxic gasses and effluents mix with the environment more easily. It could harm marine life and aquatic bodies, also contributing to atmospheric pollution."[16]

Residents closer to the construction site experience a lot of problems such as dirt or sand particles, noise, and stinks. Transportation of resources, site blaring and clearance all have adverse effects on human health. Hitherto, these sites and their activities are not compelled to follow the discharge standards that are imposed on road vehicles.

Although strong directions are issued, they are habitually ignored. Brick manufacture has been banned in Delhi for reasons of ecological conservation. But they are extensively carried on in the

[13]Inconvenient truth: fashion is one of the most polluting industries of the world, Green of Change, (Jun. 10, 2021, 6:50 p.m.),https://www.greenofchange.com/textile-pollution.
[14] *Ibid.*
[15]*Ibid.*
[16] Gagnesh Jain, et. , Case Study of Construction Pollution Impact on Environment,3 (6) IJETER, 432, 439 (2016).

neighboring towns such as in Dadri, Uttar Pradesh. Research suggested that the brick industry in India contributes nearly 10 percent of discharges of black carbon in India. Thus, it is enormously contributing to the climate change of the country.

Since early 2016, the owners of the brick kiln industries have been obliged to obtain environmental clearance before they set up. But in certain areas, people try to find out the easiest way to surpass these rules through bribing the authority concerned.

3. Environmental Laws Regulating Corporate Behaviors

Wholesome environment is a fundamental part of the living society. It is therefore very much essential to preserve the environment in its original form. This objective can be achieved only when the human activities and operational processes used by different industries are kept in check and are regularly assessed, because these are the core reasons responsible for environmental degradation. To ensure to sustenance of environment, various international agreements have been signed and India has also ratified many of them. Those agreements are summarized as under:

3.1.International Framework ensuring Environmental Protection

3.1.1. United Nations Conference on the Human Environment, 1972

The first initiative taken by the United Nations, internationally, focusing on environmental issues was the United Nations Conference on the Human Environment, 1972, held in Stockholm, Sweden. The conference reflected a growing interest towards protection of the environment and laid down the basis for worldwide environmental governance. The Conference paved the way for another environmental program namely, the "United Nations Environment Programme (UNEP), 1972" to synchronize international initiatives, encourage sustainable development and protect the human environment. From this conference the concept of 'Sustainable Development' emerged.

3.1.2. Montreal Protocol on Substance that Deplete the Ozone Layer (to the Vienna Convention for the Protection of the Ozone Layer), 1987

The Montreal Protocol mainly aims at the reduction of the production and consumption of ozone depletion substances and obliges the state parties to abstain from the production or emission of ODS. India adopted this protocol in the year of 1992. In pursuance to this protocol, the MOEF,

GOI, has constituted an Ozone Cell and established a routing agency on the Montreal Protocol for its effective implementation.

3.1.3. Basel Convention on Transboundary Movement of Hazardous Wastes, 1989

This convention is targeted towards minimizing the generation of hazardous wastes and for limiting the transboundary movement of harmful waste materials. Additionally, the convention prevents consignment of the hazardous wastes to countries which are incompetent to manage the wastes in an environmental-friendly manner. India ratified it in 1992.

3.1.4. UN Framework Convention on Climate Change (UNFCCC), 1992

The UNFCCC regulates the emission of greenhouse gasses with global cooperation. It postulates for setting a standard level of emission of these gasses in order to offset the effect of global warming and impact climate change. India ratified it in 1993, but being a developing nation, India was not bound to maintain the standards. However, the position changed with India committing to the Paris Agreement of 2015 for negotiating under the UNFCCC.

3.1.5. Convention on Biological Diversity, 1992

The Convention on Biological Diversity ("CBD") enshrines in it a model for conserving biodiversity, sustaining the living resources and the equitable sharing of the benefits arising out of the resources. This aims at ecological balance. The convention became effective in 1993. The state parties are obliged to follow a composite set of requirements to confirm the conservation of biodiversity and that natural habitats are sustained.

The Nagoya Protocol was adopted in 2010 in line with continuation of the objectives of this convention, for maintaining access to and allocation of the benefits of the biological resources. India enacted the Biological Diversity Act, 2002 aiming to address biodiversity in toto.

3.1.6. Agenda 21 of Rio Declaration, 1992

Agenda 21 is an action plan, non-binding in nature, to achieve the goal of 'sustainable development'. It is a byproduct of the Earth summit organized by the UN in Rio de Janeiro, Brazil in 1992. The stakeholders including the international organizations, local and national government, businesses, and non-governmental organizations are all under an obligation to move towards the goal of sustainable development. India ratified this action plan.

3.1.7. Rotterdam Convention, 2004 *(Prior informed consent)*

This treaty aims to promote the shared responsibility in the trading of hazardous chemicals. This requires safe use of hazardous chemicals in an environmental-friendly manner. It is to be facilitated by a national policy making process on their export and import and through exchange of information. India endorsed this convention in 2005.

Other Agreements to which India is a party

I. The International Tropical Timber Organization (IITO), 1983, 1994.

II. The Convention on Wetlands of International Importance, especially as Waterfowl Habitat, 1971.

III. The Convention Relative to the Preservation of Flora and Fauna in their Natural State, 1933.

IV. The International Convention for the Prevention of Pollution of the Sea by Oil, 1954.

3.2. Legal Framework in India Ensuring Environmental Protection

Presently, enactments on environmental safeguard are furnished with lawful arrangements to imprison the violators and also accommodate 'offences by Companies'. This sounds great to the ears of a preservationist, however if the implementation of law would have been as simple as enacting it, there would not have been a lot of issues.

Numerous legislations for safeguarding environmental interests existed even before the independence of India. Yet, the plunge for bringing into effect a well-built legal structure for environment protection was possible just after the UN Conference on the Human Environment (Stockholm, 1972). Consequent to this, the National Council for Environmental Policy and Planning was established in 1972 to constitute a regulatory body that will be responsible for looking after the issues involving the environment. This Council was subsequently made the Ministry of Environment and Forests and Climate Change (MoEF), GOI. Some of the significant enactments for safeguarding environment interest are discussed as under:

3.2.1. The Environmental Protection Act, 1986

The enactment of the Environment (Protection) Act, 1986 was in pursuance to the commitment made by India at the UN Conference on the Human Environment held at Stockholm, 1972. This heralds an era for safeguarding and improving the human environment. Under this particular act the Central Government is authorized to formulate the standardized guidelines

regarding management of harmful and hazardous materials, environmental quality, emission of chemicals and toxic substances from the factories, and measures for avoiding industrial accidents that may lead to ecological disbalance and degrade the human environment. Additionally, the said government can restrict carrying on any industries in specified areas.[17] The central government is duty bound, under this act, to introduce certain national programs to prevent pollution and further to implement them.

According to the act "persons carrying on industry operations, etc., are not to allow emission or discharge of environmental pollutants in excess of the standards".[18] Moreover the act obligates the "persons handling hazardous substances to comply with procedural safeguards".[19] As per the act, "Whoever contravenes the provision of the act shall be punished with imprisonment for a term which may extend to five years with fine of maximum one lakh rupees, or with both. In case of failure continues, with additional fine which may extend to five thousand rupees for every day."[20]

There is specific provision in act relating to 'offences by companies' and provides that "any offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against".[21]

Under this act the Government attempted to control the pollution in a holistic manner. It was issued through a notification in 2006, the Environmental Impact Assessment (EIA) Report. It realized the importance of analyzing the repercussions of the projects before its execution. EIA scrutinizes the consequences and future variations in the environment going to be caused by such a project if it is allowed to take place. EIA predicts and gives a chance to avoid potential danger to the environment. Based on this report the Government is to allow any industries or projects which are proposing to set up their wings.

3.2.2. Water (Prevention and Control of Pollution) Act, 1974

The act aims to avert and regulate water pollution and to preserve the freshness of water, as the name suggests by itself. In other words, the act is enacted to regulate domestic wastes and the

[17] The Environmental Protection Act, 1986, No. 29 of 1986, s. 3, 25.
[18] *Id at* s.7.
[19] *Id* at s.8.
[20] *Id. at s. 15.*
[21] *Id.* at s.16.

pollutants generated from industries. Increasingly, it provides for the establishment of water boards both at state and central level, which shall be liable to carry out the purpose of the act.

Under this legislation the State board has power to inspect any sewage, trade effluent, plant, equipment, manufacturing process, and water pollution control area to prevent water pollution. It also established standards of emission of water pollutants from industries.[22] Again, without the prior consent of the state board no person can set up any industry, or operation process, which is possible to release sewage or trade effluent into a stream or well.[23]The board may enforce certain terms and conditions with regard to the discharge point of sewage or effluent before granting consent.

3.2.3. The Air (Prevention and Control of Pollution) Act, 1981

Enacted under the guidelines of the Stockholm Conference, 1972, the Air Act provides for the prevention and control of air pollution through several administrative rules and restraints. The act lays down provisions for the conservation of the quality of air. Under this act, like the water act, there is provision for one Central board and numerous State boards, which are to ensure the purpose of the act. The Central Water Pollution Control Board was designated to exercise power and perform the functions as assigned to the central board under this act.

The State Boards are obliged to conduct investigation, inspection in order to assess and monitor the issues concerning the quality of the water resources present in their jurisdiction.[24] The boards are supposed to report the same quarterly and annually during board meetings to the Central Board, which the latter will be monitoring to address the issues in an appropriate manner.

3.2.4. The Wildlife Protection Act,1972

This Act was enacted with an intent to protect plants and animals. Besides, it also provides for certain schedules, enlisting protected plant and animal species, and prohibiting their hunting or reaping. It has listed the species in six different schedules giving them varying degrees of protection. Absolute protection is provided to the species mentioned in Schedule I and part II of Schedule II and any person violating this provision is liable for high penalties.

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[22]The Water (Prevention and Control of Pollution) Act, 1974, s.17.

[23] *Id.,* at s. 25.

[24] The Air (Prevention and Control of Pollution) Act, 1981, Act No.14 of 1981, s.17.

3.2.5. The National Green Tribunal Act, 2010

The National Green Tribunal Act, 2010 (NGT Act) aims to establish a National Green Tribunal (NGT)that will be responsible for adequate and speedy disposal of environment-related cases.

Section 16 (h) of the Act provides, if any person is aggrieved by an order after the commencement of the NGT Act, concerning "granting of environmental clearance in the area in which any industries, operations or processes or class of industries, operations and processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act,1986 then he can apply for an appeal before the NGT within thirty days from the date of such order, appealed against.[25]

The NGT has the power to hear all civil cases relating to environmental issues and questions that are linked to the implementation of laws listed in Schedule I of the NGT Act. These include the following:

- The Water (Prevention and Control of Pollution) Act, 1974;
- The Water (Prevention and Control of Pollution) Cess Act, 1977;
- The Forest (Conservation) Act, 1980;
- The Air (Prevention and Control of Pollution) Act, 1981;
- The Environment (Protection) Act, 1986;
- The Public Liability Insurance Act, 1991;
- The Biological Diversity Act, 2002.

The tribunal has the power to ensure protection and preservation of the environment and its resources including enforcement of the environment rights emerging from the sovereign constitution or the different legislations, by way of awarding compensation for damages caused thereto.

Therefore, this whole lot of environmental legislations has provided due guidelines for the corporate behavior to be in line with the environment sustainability. The acts also provide for punishment for the offences committed by the companies. The NGT has been a special adjudicating body in this regard, playing an active role to address the environmental degradation

[25] The National Green Tribunal Act, 2010, Ministry of Law and Justice, Act 19 of 2010, s. 16 (h).

caused by corporate actions. Besides, the role of the Supreme Court in safeguarding the environmental interest has also been benevolent.

3.3. Judicial Approach

With regard to environmental conservation and its protection, the judicial activism by the Supreme Court of India is commendable. In *Rural litigation and Entitlement Kendra* v. *State of U.P.*,[26] the Supreme Court for the first time introduced "sustainable development" as a part of environmental jurisprudence in India. In the said case the Supreme Court observed that quarrying of limestone carried on by the adjoining industries was leading to excessive soil erosion. The balance between environment and ecological integrity is affected. Court stated that natural resources should be used with requisite care and should not be exhausted in one generation only. The Court directed closure of the limestone quarrying industries in this case in order to preserve the ecological balance**.** The case is also popularly known as Dehradun Mussoorie Hills Quarrying Case.

Again in *S. Jagannath* v. *Union of India*[27], the Apex Court gave directions to close down and demolish the Shrimp industries in the Coastal Regulation Zone and implemented 'precautionary principles' and 'polluter pay principle'. The court held those industries liable for payment of compensation for the ecological imbalance caused by it.

In *Indian Council for Enviro-Legal Action* v. *Union of India*[28],the hon'ble Supreme Court allowed compensation to the farmers whose crops were damaged, being irrigated by the subsoil water drawn from a stream which was immensely polluted by the untreated effluents of twenty-two adjoining industries. Here also the 'polluters pay principle' was adopted that is the damage caused to the environment should be borne by the undertaking causing the pollution and not the government.

In *M.C. Mehta* v. *Union of India (1992)*[29], popularly known as, Oleum Gas leak Case, the Court asserted that any enterprise engaged in hazardous operation should pay compensation for the damages and harm resulting from its activities irrespective of taking reasonable actions referring to the rule of absolute liability, public liability was emphasized.

[26]Rural litigation and Entitlement Kendra v. State of U.P., AIR 652 (SC:1985).
[27]S. Jagannath v. Union of India,2 SCC 87(SC:1997).
[28]Indian Council for Enviro-Legal Action v. Union of India, AIR 1446 (SC:1996).
[29]M.C. Mehta v. Union of India, AIR 382 (SC:1992).

In *M.C. Mehta* v. *Union of India (1988)*[30]known as, the Ganga Water Pollution, the Supreme Court observed that river Ganga is getting polluted by industries, therefore, ordered closure of the polluting tanneries. The court further ordered that the tanneries should come up with a proper set-up treatment plant and unless adequate provision is made for treatment of trade effluents flowing out of the factories, application of new industries could be refused.

4. Critical Analysis of the Laws Relating to the Protecting the Environment and Its Implementation

In spite of having a handful of laws dedicated to the protection and preservation of the environment, the ongoing pollution of the environment is a matter of great concern. Environment is an indispensable part of human beings. The victims of this polluting environment, is ultimately the living society. It can rightly be figured out that there are lacunae in the implementation of the laws against the corporates, who taking advantage of this situation are blooming enormously. The scenario would become clearer if we have a look at the crumpling system of governance in India. The following point would illustrate the situation:

- There exists only one technical personnel to track and monitor every 100 polluting units in the Andhra Pradesh pollution control board.
- The eight senior members of pollution control board of Himachal Pradesh are non-technical bureaucrats
- Among the highly polluting industries only 15 percent of them have officially been detected by the pollution control board of Rajasthan.
- Fifteen states still do not have a single operational site for disposal of hazardous wastes
- In Gujarat it is observed that among the water polluting industries only around 30 per cent comply with standards laid down by the Government. And 50 per cent of such industries comply with standards in Bihar.
- Drawback is also evident in the part of the judiciary in tackling the issues, where 90 per cent of the cases filed by the Orissa pollution control board against polluting industries between 1982 and 1998 are pending.

[30]M.C. Mehta v. Union of India, AIR 1115 (SC:1988).

Therefore, it makes clear that there has been strong reluctance on the part of the State in safeguarding the environment following the laws that are enacted. Enforcement of those laws has become feeble. The state pollution control boards packed with non-technical members are inevitably performing inadequately because control of pollution regulation and monitoring involves a degree of technical expertise.

Again, the discussion of the provision of environment impact assessment (EIA) becomes relevant here. It is a recommendable step that the government has come up with to adhere to the laws and standards for safeguarding the environment but that too falls short with regard to enforcement owing to the corrupt practices on the part of the industries and the enforcing authorities as well. Initially this procedure was maintained for allowing industries to set up, but gradually there was no follow up of this procedure of monitoring the environmental impact of the industry on the environment once they began their operation. This is to say that the monitoring of the activities of the industries post-clearance is not adequately followed up. "Once it is obtained and the plant is commissioned, the EIA reports find their place in archives," says R P Sharma, Senior Environment Manager at Tata Steel.[31]

There is also widespread allegation of corrupt practices against the state pollution control board officers. "People use State Pollution Control Boards posting as a transit and this leads to corruption in the boards," says D K Biswas, Chairperson of the Central Pollution Control Board."[32] It is stated that the cost of non-compliance is lesser than that of compliance under the present-day situation. Therefore, corruption is exhilarated by the polluting units too. Number of such instances were found at the Panipat regional office of Haryana Pollution Control Board where the industrialists reportedly pay the officials each month to obtain the information relating to any surprise raid by the Board. And the amount of the bribe turns out to be less than that of installing the pollution control equipment. Additionally, there is also the issue of autonomy in the decisions taken by the State Pollution Control Boards. Their corrupt practices imply the political color in their decisions. The political influences bar them from taking independent autonomous decisions.

[31]A system in shambles, DownToEarth, https://www.downtoearth.org.in/coverage/environment/a-system-in-shambles-16636, (Jul. 13, 2021, 8:10 p.m.).
[32]*Ibid.*

In the case of *Lafarge Umiam Mining Pvt. Ltd.* v. *Union of India,*[33]the Supreme Court pointed out that "under Section 3(3) of the Environment Protection Act, 1986 the Central Government has a duty to appoint a National Regulator for the appraising projects, enforcing environmental conditions for approvals and impose penalties on the polluters." The court further observed that "currently the EIA and CRZ clearance rely totally on the statement produced by the project proponents and absence of authenticated and reliable data and lack of mechanisms to validate the data provided by the project proponent might lead to subjectivity, inconsistency and inferior quality of EIA report." Hence the court held "the present mechanism deficient in many respects and ordered for the requirement of a Regulator at the National Level having its office in all the states which can carry out an independent objective and transparent appraisal and approval of the projects for environmental clearance and which can also monitor the implementation of the conditions laid down in the environmental clearance."[34]

Very often the industries mischievously reproduce their annual performance report as being a replica of the regulatory standards by manipulation of the facts in paper. Moreover, the pollution control laws in India are full of errors. They are more of a prescriptive nature than as a tool for actually reducing the pollution caused by the corporations. The definitions and standards are uniformly laid down irrespective of the type or size of the industry or the kinds of activities carried on by them. There is no elasticity in the standards. Even if the units violate it on a small or large scale, rarely or regularly, liability remains the same. From inadequate enforcement of rules to slackly framed laws, and corruption among the officers makes pollution control a complete travesty.

5. Conclusion and Suggestions

5.1.Conclusion

India undeniably requires quick economic growth, but definitely not at the cost of environmental safety. A fascination with the growth at the cost of the ecology is not in the interest of our country. In the fuming haste to boom the economic growth where single digit growth rate is not satisfactory and to make it double digit, destroying the ecological balance and making money

[33]Lafarge Umiam Mining Pvt. Ltd. v. Union of India, 7 SCC 338 (SC:2011).
[34]*Ibid.*

is the way found to be the easiest. All forms of pollution and degradation of environmental quality such as, air, water and noise pollution, chemical adulteration, soil erosion, and land dilapidation caused by the industries are so severe in the country the existence of living organisms is a matter of concern now.

There is much difference between the people and the government. Though individuals do not perceive the environment as their extravagance, the government takes the advantage of its power, and sees the corporates as the machinery for faster economic growth. Hence the government gives greater importance to the interests of the corporate sector. And this corporation in turn assumes all the power in the name of development and progress gets in the work of depleting and degrading the quality of the environment. As already mentioned how the persons who are empowered for enforcement of the environmental protection laws are corrupt, the system for safeguarding the ecology is inevitably going to collapse. Corruption from both sides, board officers and corporates, ultimately makes the environment the ultimate victim. Rules and regulations are in place but all they do is make out ways to bypass them.

5.2.Suggestions

This situation can only be improved when the following matters are strictly considered:

- **Effective enforcement of Laws:** As pointed out that weak implementation of the laws is mainly undoing the efforts of safeguarding the environment, the need for strict and effective implementation of law is utmost necessary. The Central Pollution Control Board shall ensure that all the state boards strictly comply with the structure of the law, as regards the constitution of the board and its duties. Also, the provision of EIA shall be maintained strictly.
- **Check on corrupt practices:** The corrupt practices are rife among the state board officials, giving way to corruption by the corporates, overlooking the environmental crisis. Thus, a stern check must be there in the functioning of the state board by the higher authority.
- **Appointment of an independent regulatory body:** As political influence and corruption is widespread; thus, the process of environmental clearance remains ineffective. Therefore, an independent regulatory body must be appointed to comply with the rules and conditions laid down for clearance by the corporates.

- **Stringent laws:** Laws safeguarding the environment are very loosely framed; the industries which violate the law on a regular basis must be punished with more fines and imprisonment than the one who just violated once.

CONSERVING FAIR USE IN ACADEMIA: A LEGAL ANALYSIS OF THE USA AND INDIA

Anika Rafah[35]

Abstract:

The fair use clause within copyright law provides individuals with the freedom to make unauthorized secondary uses of copyright protected materials. This article discusses the concept of fair use from an educational perspective by analyzing the factors which determine whether a particular use is fair or an infringement, as well as by showing the criteria for fairly using copyrighted work in education with some cases. A comparative analysis is drawn out to demonstrate how the interpretation varies by countries like India where the courts take a stricter approach compared to the USA where it is more open-ended. Moreover, while it is true that stricter copyright laws would promote more original work and foster creativity, the article also recommends that expanding the scope of fair use would have beneficial effects by allowing the general public to have more access to copyrighted educational materials.

Keywords: Copyright, fair use, educational purpose, technology, infringement.

Introduction:

Copyright is an essential legal concept for professionals in academia which protects their intellectual property from being used without their authorization. Through copyright laws, not only are creativity and formation of original ideas encouraged, but original authorship is also protected from being replicated. [36] Fair use is an exception to copyright law which remains as "one of the most unsettled areas of copyright law."[37] This allows individuals to use copyright protected material without the permission of the copyright owner. For instance, when a teacher uses an excerpt from a book for teaching purposes, then the concept of fair use takes effect. Therefore, students and educators are able to depend on it for their academic works. While educators often

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[36] Crews, Kenneth D, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 Ohio State Law Journal, 599-702, (2001).
[37] Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996).

use portions of newspaper articles, books and journals to complement their teaching, students also refer to these texts to aid their research and scholarship.

The Concept of Fair Use in Copyright Law:

The basic idea of fair use is that individuals can use copyright protected materials for reasons such as education, commentary, criticism, review, parodies and so on. As long as the use does not replace the need for purchasing the work, then it is considered as a fair use.[38]

Fair use is defined as the "privilege in others other than the owner of a copyright to use the copyright-protected material in a reasonable manner without his consent, privilege in others than the owner notwithstanding the monopoly granted to the owner".[39] Because of fair use, authors, teachers and artists are encouraged to portray their creativity as they have been guaranteed the right to produce and gain from their original work.

Historical Development of Copyright and Fair Use:

Copyright laws were first enacted in England when The English Crown granted a monopoly to the Stationer's Company in order to regulate the spread of negative information concerning the Crown.[40] Afterwards, Parliament enacted the Statute of Anne, which enabled publishers of books to have legal protection for 14 years, during which time, reproduction of their work without authorization was not legally permissible.[41]

In the United States, the Constitution incorporated copyright in American law to protect original authorship.[42] It was modeled after the Statute of Anne and provided the same incentives for individuals to create original work by ensuring copyright protection. It was during the case of Lawrence v Dana (1869), when the term "fair use" was first introduced in the American court system, where Lawrence had sued Dana for unfairly using his notes on Wheaton's "Elements of

[38] Crews, Kenneth D, *Copyright Essentials for Librarians and Educators,* Chicago IL: American Library Association, 45-55, (2000)
[39] Basic Books, Inc. v. Kinko's Graphics Corp.,758 F. Supp. 1522 (S.D.N.Y. 1991)
[40] Willam F. Party, *Copyright Law and Practice*, 10 (1994).
[41] Marshall A. Leaffer, *Understanding Copyright Law*, 1-2 (2d ed. 1995).
[42] U.S. CONST. art I, Sec 8, cl. 8.

International Law." Lawrence had previously edited and commented on two editions of the book for the benefit of the late author's family; however, after the death of Mrs. Wheaton, Dana proceeded to publish another edition with no credits given to Lawrence. While Dana argued that he had abridged and "fairly used" Lawrence's notes, the court eventually ruled that Lawrence's notes "involved great research and labor" and that their use by Dana was not fair – rather it was a reprint.

Copyright law gives the original author a limited monopoly to encourage their intellectual creativity; but the monopoly is restricted by the first sale doctrine,[43] the fair use doctrine[44] and the concept of copyright privilege which only provides for a limited duration of copyright protection.[45]

The Present Administration of Fair Use in the United States:

The common law doctrine was legislatively recognized as Section 107 of the Copyright Act of 1976.[46] The Bill lists four non exhaustive factors to analyze fair use: (1) the purpose and character of the secondary use, (2) the nature of the copyrighted work, (3) the amount or substantiality of the portion used, and (4) the effect of the use on the copyright owner's potential market. Since fair use is interpreted as "an equitable rule of reason" [47] the list of exceptions under Section 107 was neither viewed as an extension to the common law doctrine of fair use, nor were the listed factors intended to be the sole determiners of fair use.

The Copyright Act does not state the importance or considerations given to each factor. The Supreme Court disapproves a strict interpretation of the statute and has expressed that fair use permits and requires "courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designated to foster."[48] On that account, the four factors within Section 107 should be regarded as general guidelines rather than clearly defined

[43] 17 U.S.C., Sec 109 (1994)
[44] 17 U.S.C., Sec 107 (1994).
[45] 17 U.S.C., Sec 106 (1994 & Supp. IV 1999).
[46] Supra note 9.
[47] Sony Corp. of Am. v. Universal Studios Corp., 464 U.S. 417, 448 (1984).
[48] Title 17 United States Copyright Law, Sec 107 (1994).

rules. The aforementioned factors for examining fair use are considered in the following points in more detail.

1. Factor One: The Purpose and Nature of the Use

First, courts must assess the nature of the use by determining whether it is for commercial purposes. The 1976 Copyright Act House Report stated that "the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in a fair use decision." The inspection of the secondary use focuses on the type of use being made rather than the type of entity making it. Furthermore, fair use also cannot be ruled out solely based on the factor of commercial gain.

A commercial use can be modified by a transformative use. Transformation implies that the new work has a non-identical purpose from the original work and makes some new "contribution of ... intellectual value." The prelude to Section 107 of the Copyright Act of 1976 states that plausible purposes of fair use include "criticism, comment, news reporting, teaching, scholarship or research."[49] In general, the greater the transformation, the less any commercial purpose influences the analysis of fair use. When producing a scholarly paper, for instance, it is considered acceptable to quote other researchers' writings for reference.

2. Factor Two: The Nature of the Copyrighted Work

The second factor considers whether the original work is informational or creative in nature and whether it was published. As copyright protects expressive materials such as fiction more than facts or particulars, creative works receive more substantial copyright protection.[50] Facts receive less copyright protection because rewarding the mere acquisition of facts would frustrate the intent of a copyright monopoly to distribute ideas by retarding the disclosure of facts and thoughts.[51]

[49] Geophysical Union v. Texaco Inc., 60 F.3d 913, 931 (2d Cir. 1994).
[50] Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, N.Y. LexisNexis Matthew Bender, 1963, Sec 13, 5(A)(2)(a), at13-170 (49th ed. 1999).
[51] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563-64 (1985).

3. Factor Three: The Amount and the Substantiality of the Portion Used

In each case, the court will examine the quality and proportion of the original work which has been taken for secondary use. If the copied amount is large enough to replace the need for purchasing the original work, then the use is to be judged as not fair. While copying a small percentage would generally be regarded as fair use, using a majority of the work would point towards copyright infringement. However, in rare cases, copying a mere 5 second clip from an entire movie may be determined as an infringement if the court deems those 5 seconds to be highly "substantial."

4. Factor Four: The Effect on the Plaintiff's Potential Market

The fourth factor considers the probable harm to a copyright holder's potential market.[52] It evaluates whether the copied work would result in the devaluation of the copyrighted material and whether it would lead to lost income for the original creator. Furthermore, copyright infringement must directly cause the alleged market harm. The Copyright Act does not provide protection against harms caused by criticism or reviews of the original work.[53] Instead, other areas of law such as slander and defamation deal with such issues.

Case Analysis on Multiple Copying for the Purpose of Education and Research:

Fair use has been tested in court as an affirmative defense only on rare occasions when it comes to educational settings. The following cases apply the fair use factors in academic contexts, where the court's decisions demonstrate a pattern of increased protection for copyright holders and reduced lawful fair use.

1. Williams & Wilkins Co. v. United States

In 1974, the National Institute of Health and the National Library of Medicine were charged with copyright infringement[54] for distributing unauthorized photocopies of articles taken from medical books and journals published by the copyright owner Williams & Wilkins.[55] The defendants would make these photocopies available upon request to their medical researchers who were engaged in

[52] Rubin v. Brooks/Cole Publ'g Co., 836 F. Supp. 909, 920 (D. Mass. 1993).
[53] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
[54] Williams & Wilkins Co. v. United States, 487 F.2d 1345 (1973)
[55] 172 U.S.P.Q. (BNA) 670 (1972), rev'd, 487 F.2d 1345 (Ct. Cl. 1973), aff'd, 420 U.S. 376 (1975)

scientific studies. However, the court found that the defendant's use of the articles constituted fair use due to the nonprofit nature of both the institutes, which signified that there was no intent to make economic gain from the distribution. Furthermore, not only did the plaintiffs fail to prove that the defendant's practices could cause them substantial harm, but the court also had strong concerns that holding defendants' practices to be copyright infringement would harm future medical research.

2. American Geophysical Union v. Texaco Inc.

The American Geophysical Union v. Texaco Inc.[56] case involved Texaco scientists photocopying articles from various journals for research purposes. Although the journals were used for research, Texaco's objective was to use the research to develop profitable products; therefore, the court concluded that Texaco's use was commercial. Texaco's use was not transformative either, as complete texts from the articles were photocopied verbatim. Thus, this factor also worked in the copyright holder's favor. Moreover, it was found that Texaco could have purchased a license for photocopying the articles through the Center for Copyright Clearances, but by not doing so, they had deprived the copyright holder from potential economic gain in the form of licensing fees. On these accounts, the court ultimately judged Texaco's use to be not fair and the defendant was accordingly fined.

3. Princeton University Press v. Michigan Document Services

Princeton University Press v. Michigan Document Services[57] addresses multiple duplication for educational use where Michigan Document Services (MDS) photocopied packets of course materials and offered them for sale to students without obtaining the necessary copyright permissions.

The court held that the copies made by MDS were not fair use based on several indicators. Firstly, MDS replicated entire chapters or articles without any alteration, which made the use non-

[56] 60 F.3d 913 (2d Cir. 1994).
[57] 99 F.3d 1381 (6th Cir. 1996).

transformative; some excerpts were greater than ninety-five pages in length,[58] thus exceeding the limits prescribed in the Educational Guidelines. Moreover, it was a profit-oriented photocopy shop, which meant that they operated for profit and therefore the use was commercial. Some of the excerpts taken for duplication also contained creative material which are considered to have substantial value, thus making the duplication of these materials to not be a representation of fair use. Lastly, the court found the existence of a market where the copyright owners licensed their books and articles for legal replication. This meant allowing photocopy shops such as MDS to continue duplicating without authorization could potentially diminish the revenue earned by the copyright owners through licensing.

Fair use in the Field of Education:

Due to the equitable nature of fair use, the controversies surrounding it seem particularly profound in the area of education. Fair use promotes the goals of copyright by encouraging the spread of information for the enrichment of society while education promotes the cultivation of society, provides access to information, and encourages creativity. Having said that, eliminating copyright protections throughout education would hinder monetary incentives for creation of original work. Although educational fair use should not be viewed as a complete protection to use copyright protected materials, the elimination of educational fair use would be similarly harmful.

Educational Benefits Derived from Fair Use:

Education provides the foundation of an informed populace by teaching reading, critical, analytical and problem-solving skills. All citizens, not just scholars, benefit from openly available information. It is evident that education creates social welfare by broadly disseminating ideas and exposing many people to new concepts.[59]

Educational fair use has beneficial effects upon further creative constructions, teaching expertise and student flexibility. In academia, students and instructors must constantly create new and

[58] The court did not distinguish between a 95-page excerpt representing 30% of a work and a 17-page excerpt representing 5% of the work. The court ended its analysis after deciding the use did not fit within the Educational Guidelines.

[59] A complete exemption for education would be over-expansive. This Note does not seek a broad right of fair use in education, but seeks to preserve a reasonable right of fair use in the educational realm.

original materials. Without the protection of fair use, the costs of producing secondary works would increase. This is because many students are restricted to limited educational budgets, which would prevent them from bearing the cost of licensing. As a result, students may be discouraged from enrolling in classes which require extensive reading materials.

Fair use allows instructors to provide the most appropriate and cultivated education possible. Instructors are able to utilize newly discovered materials that expose students to a more comprehensive understanding. This also enables instructors to keep classes up-to-date, especially in rapidly changing fields.

Limitations in the Economic Model of Fair Use:

From an educational perspective, there are various flaws in the economic model of fair use despite there being high external benefits of distribution of information. For instance, although students are the primary consumers of copyrighted materials such as books and articles, the entities making the purchasing decisions are the educators or the school authority. Instructors making decisions usually focus on the higher objective of intellectual development rather than economic efficiency, which is why in the educational setting, it is less appropriate to use an economic model to explain efficient resource allocation.[60]

Instructors primarily focus on the academic benefits of obtaining a published work rather than its economic benefits. When presented with an option to choose from a number of articles with similar viewpoints, instructors would often determine their choice of article based on the content and academic satisfaction instead of economic factors such as the price. Moreover, finding alternative articles in search of a lower price may be more difficult and could raise the transactional costs to the instructor.

The absence of a central system for acquiring copyright permissions may further give rise to transactional costs. While large universities often use such systems to control future liability, smaller institutions may not have sufficient funds to arrange similar services which can help obtain

[60] Buranen, Lise and Alice M. Roy, eds. *Perspectives on Plagiarism and Intellectual Property in a Postmodern World,* Albany: State University of New York Press, (1999).

copyright permissions. As a result, instructors often have to bear the cost of obtaining the licenses themselves when the institution does not have an available budget and it is not possible to spread the cost among students.

Educational Guidelines According to the U.S. Copyright Act, 1976

Although the factors and circumstances explained above apply to all cases involving fair use, educational uses of copyrighted materials pose special challenges to courts and thus have received particular attention from the legislature. Sections of the House Reports from the Copyright Act of 1976 specifically laid out guidelines for educational uses.[61] The Committee on the Judiciary concluded that broad copyright exceptions need not be granted to nonprofit educational institutions but nevertheless included explicit guidelines to provide educators with some predictability. Thus, the Educational Guidelines were designed to provide a safety net for educational uses of copyrighted materials.[62]

Guidelines for Classroom Use of Books and Periodicals

The Educational Guidelines show specific instances when educators may reproduce copyrighted works without permission for research or classroom use. However, the preamble to the guidelines states that some reproductions not mentioned in the guidelines may still be considered as fair use. Although the Educational Guidelines clearly allow educators to make single copies of portions of books for research or class preparation,[63] the real issues arise when multiple copies are created in order to distribute in a class. In this case, the guidelines provide for the reproduction of multiple copies as long as the use is brief, spontaneous, not cumulative, and includes appropriate copyright notices.[64]

[61] House Report, U.S. Congress. House. Copyright Law Revision, 94th Cong., 2d sess., H. Doc. 1476: 68-70 (1976)
[62] Supra note 26.
[63] The Educational Guidelines indicate that for research or preparation, a teacher may make a single copy of (a) a chapter of a book; (b) an article from a periodical or newspaper; (c) a short story, essay, or poem; or (d) a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.
[64] The brevity factor limits the amount that an educator can reproduce to a maximum amount of 1,000 words or 10% of a work or 250 words of a poem. Id. The spontaneity factor requires that only educators who are unable to obtain the appropriate approvals due to time constraints may make multiple copies. This factor states that teachers must need the work at that time for the "maximum teaching effectiveness," and that therefore, it "would be unreasonable to expect a timely reply to a request for permission."

Even if an educator fulfills those initial requirements for creating multiple copies, the Educational Guidelines present further limitations: educators may not make multiple copies to create or replace an anthology, materials may not be photocopied from term to term, no charge may be made to students in excess of the copying costs, and finally, the Educational Guidelines do not apply to consumables.

Criticisms of the Educational Guidelines

The *Ad Hoc* Committee of Educational Institutions and Organizations on Copyright Law Revision, members of the Authors League of America, Inc., along with the Association of American Publishers, Inc., who proposed the Book Guidelines, represented the interests of authors and publishers. However, educators disagreed with the committee's findings.[65]

The American Association of University Professors and the Association of American Law Schools wrote the Judicial Committee and criticized the Educational Guidelines on the basis of its standards for multiple copying.

Critics proclaimed that the Guidelines create additional confusion over legally permissible secondary uses. Although the prelude to the Educational Guidelines states that the guidelines represent the minimum permissible uses and that other uses could still be considered fair, academic institutions are relatively conventional and would adopt the Guidelines to avoid litigation expenses.[66] Consequently, adopting the guidelines would inadvertently narrow the acceptable applications of fair use in education.[67] The courts have adopted the same conventional view by looking at the permissible uses as requirements instead of guidelines.

Moreover, it is argued that the requirements of being spontaneous, brief and non-cumulative are excessively limiting. In the case of spontaneity, the Educational Guidelines suggest that educators

[65] The three individuals who endorsed the Educational Guidelines represented the Authors League of America, the Association of American Publishers, Inc., and the House of Representatives Copyright Committee. Notably absent were the representatives from educational institutions.

[66] Gregory Klingsporn, *The Conference on Fair Use (CONFU) and the Future of Fair Use Guidelines*, 23 COLUM.-VLA J.L. & ARTS 101, 108 (1999).

[67] Stephana I. Cobert & Oren R. Griffin, *The Impact of Fair Use in Higher Education: A Necessary Exception?*, 62 ALB. L. REV. 437, 440 (1998).

can meet this criterion if they had insufficient time to obtain a license for using a particular work; it further requires educators to know about this service, be able to obtain necessary funding for copyright fees, and receive approval from an authorized representative of the educational body. However, critics argue that this requirement provides very minimal guidance for educators.

A different issue arises when educators lack the monetary resources needed to obtain copyrighted material from the publisher, even though the work is essential for educational purposes. Publishers often claim that not paying fees such as royalties would signify that their work is not being appropriately valued at their economic rate. However, this argument would be valid if it was the case that educational institutions possess unlimited resources for obtaining copyright materials and their licenses for teaching purposes. The amount that an educator is willing and able to pay would correlate with the value and importance that is placed on the material only when it is true that resources of an institution are unlimited.

There is further confusion about the extent to which the Educational Guidelines are legally persuasive as they are not included in the Copyright Act of 1976.[68] As they were originally drafted after negotiations by concerned parties such as educators and publishers, the involvement of congressional committee members during the drafting of the Guidelines is not clear. As a result, they do not extensively reveal congressional intent despite being accepted by the judicial committee. Moreover, the Guidelines particularly being excluded from Section 107 of the Copyright Act by Congress further weakens the importance of this proposal.

The Conference on Fair Use (CONFU), 1994:

Due to rapidly advancing technology, a Conference on Fair Use (CONFU) was held in September 1994 to examine the effects of digitalization on fair use provisions of the Copyright Act and to develop new guidelines which were more suitable. The conference involved representatives from various interest groups including educators, publishers, Congress and the White House who were

[68] MDS, 99 F.3d 1381, 1390. (6th Cir. 1996)

present to discuss issues regarding fair use in the digital world. [69] The White House Administration Task Force on Information Infrastructure, along with publishers, intended to narrow down the scope of fair use of copyrighted works in digital platforms. [70] Conversely, educators argued that the guidelines should provide counsel and recommendations rather than act as a strict set of rules. Due to a large number of divergent views and opinions, the conference failed to develop guidelines for fair use in a digital learning environment even though there is a greater requirement for legislative solutions.[71]

Advancing Technology:

The historical, economic, and legal backgrounds as well as the educational controversies surrounding fair use in copyright law highlight the conflict between maintaining creative incentives and promoting public accessibility. Technological advances further enhance this conflict as new technology lowers transaction costs and allows for greater ease of infringement. With advancing technology, copyright holders advocate for expanding copyright protection, which is for the purpose of reducing public access to information for individual and educational use. Much of the debate concerning educational fair use centers on these technological advances and their effects on intellectual property rights.

A. **Development of Copyrights Due to Technology:**

Changes in copyright law emerged as new inventions appeared during the past fifty years. To counteract the increased threat of infringement caused by technological advances such as the copy machine, the Copyright Act of 1976 and the legislation that followed it provided copyright holders with additional intellectual property.

[69] The Copyright Act of 1976 also granted limited reproduction rights to libraries and archives. Section 108 allows libraries and archives to create at least one copy of a work if it is done without the intent of direct or indirect commercial advantage, the library is open to the public, and the reproduction includes the appropriate copyright notice.
[70] Conference on fair use: Final report to the Commissioner on the conclusion of the conference on fair use, (last modified Nov. 24, 1998), (access date: April 25, 2020) http://www.uspto.gov/web/offices/dcom/olia/confu/
[71] For responses to the CONFU Final Report, see NINCH, Fair Use in Education: Responses to "Final" CONFU Meeting, (May 19, 1997), (access date: April 30, 2020) http://www-ninch.cni.org/ISSUES/COPYRIGHT/FAIR_USE_

The Copyright Act of 1976 significantly increased the rights of copyright holders to include all fixed, original works. This new protection was automatic, as neither a copyright notice nor registration was necessary for protection. It extended the duration of copyright protection from a maximum of fifty-six years to fifty years after the death of the creator. Thus, new technologies forced copyright law to adapt in order to provide adequate protections and incentives to produce.[72]

The anticipation of threat from copy machines was eventually replaced by concerns regarding digital technology. The Clinton Administration envisioned the Internet as a channel for increased distribution and communications, both nationally and internationally. The White House Administration created the Information Infrastructure Task Force (IITF) to research implementation of digital networks, such as the Internet, and the effects of those structures on intellectual property rights. The IITF created the Working Group on Intellectual Property Rights to investigate the feasibility of a global communications network.

The Digital Millennium Copyright Act (DMCA) [73] is the latest amendment to American copyright law which does not clearly address fair use but still has an impact on the fair use doctrine. It has provisions for criminal penalties to prevent people from making unauthorized use of copyright protected material in digital platforms. This also provides publishers and their works with additional copyright protections in the form of encryption or similar software. Furthermore, it enables them to monitor and keep track of the use of their works through Copyright Management Information Systems, which allows them more extensive control of their digital materials along with enforcing copyright protections.

Although providing additional copyright protections increases the profit of the copyright holders, it is at the expense of public access as it raises costs to individuals and educational institutions and decreases the number of expressive works in the public domain.

[72] Association for Computing Machinery (ACM), *Copyright Policy,* New York (1999), (access date: April 26, 2020) https://www.acm.org/publications/policies/copyright-policy.

[73] The Digital Millennium Copyright Act, (1998), sec 1201, (access date: April 20, 2020) https://www.copyright.gov/legislation/dmca.pdf.

B. **The Impact of New Technology on Copyright:**

Beyond new legislation, copyright holders are also able to restrict use of their works without relying on the law due to advancing technology.

1. Global Communications on the Internet

The Internet is a network of computer facilities expediting access to information. Not only does the Internet facilitate applications such as the World Wide Web, but e-mail, newsgroups, electronic bulletin boards, and Telnet are also included. The Internet creates an enormous resource center by locating and distributing information or ideas in text, video, audio, or photographic format.

Computers and the Internet provide individuals with greater duplicating abilities than the simple copy machine.[74] Advanced software, digital graphics, scanners, and other technology allow individuals to make copies of works in digital format and disseminate that information quickly, with minimal cost, and without any concern for geographical borders.

2. Technology hampering the spread of Information

The Internet allows for decreasing copying and distribution costs by enabling creators and copyright holders to better prepare and monitor the use of their works. For example, software programs such as Copyright Management Systems are embedded in other documents or programs allowing copyright holders to keep the accessibility and distribution of works under their surveillance.

[74] Vincent J. Roccia, Note, *What's Fair Is (Not Always) Fair on the Internet*,29 RUTGERS L.J. 155, 161-62 (1997)

In addition to preventing and deterring infringement, technology also increases the ability to prosecute infringement. Encryption,[75] digital watermarks,[76] software metering,[77] and cryptolopes[78] all enable copyright holders to exert greater control over their works.

Fair Dealing from the Indian Perspective

In Indian copyright law, the importance of fair dealing is highlighted in the Copyright Act of 1957 which allows for exceptions for educational uses. Section 52 subsection (1) of the Act explicitly deals with certain circumstances which do not represent a copyright infringement. More specifically, sections 52(1)(g), (h) and (i) consider fair use in the area of education which is why Indian lawmakers who aim to ensure the maximum possible fair use provisions for educational purposes should examine whether these sections are appropriate for achieving the educational policy objectives of the nation.[79]

Section 52(l)(g) further states that, as long as it is for the purpose of school use, it is legally permissible to include short passages from copyrighted published literary works in a different collection which mainly consists of material which are not copyrighted. This exception is available subject to certain conditions, which are to be fulfilled in this regard. The Copyright Act provides that the reproduction of a literary, dramatic, musical or artistic work or any translation or adaptation of such work:

(i) by teacher or a pupil in the course of instruction; or

(ii) as part of the questions to be answered in an examination; or

(iii) in answers to such questions, shall not constitute infringement of copyright in the work.[80]

[75] Encryption encodes information so that only users with an authorized decoder can access the document, software, or information.

[76] A digital watermark is an irremovable identifier embedded in a document. Although it does not alter the original document, if the user attempts to print or disseminate the document, a message will appear that conceals the original document and states that the use is unauthorized.

[77] Software metering requires that hardware be attached to a computer system. The hardware records and charges for each download or program used.

[78] A cryptolope is a program that allows a user to search documents for key terms, but charges a user for the encryption key to open the document and view the actual content.

[79] Michael J. Meurer, Price Discrimination, *Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV.845, 891 (1997).

[80] Copyright Act 1957, s 52(1)(h) and s 52(2).

Section 52(1)(i) provides that the performance of a literary, dramatic or musical work by the staff and students of the institution is not an infringement of the copyright if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution. The exception is wider in scope as the parents and guardians of the students also constitute part of the audience who are allowed.

In Wiley Eastern Ltd. and Ors vs. Indian Institute of Management,[81] the court clearly traced the purpose of the defense of fair dealing to the Indian Constitution: 'The basic purpose of Section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India so that research, private study, criticism or review or reporting of current events could be protected. Section 52 is not intended by Parliament to negatively prescribe what infringement is.'[82]

The specified circumstances under which fair use is permissible, as per Section 52, has been said to be inflexible and exhaustive as any use not complying strictly with the mentioned purposes is deemed to constitute an infringement. Indian courts have repeatedly stated that it is not possible to formulate a strict principle to adhere to when dealing with cases of fair use as each case must be judged upon its own merits and context. The legal principles of fair dealing have been primarily drawn from approaches led by the United Kingdom and United States, but Indian courts have further included specific factors which are not provided by the Copyright Law of India.

Fair use and fair dealing both act as defenses when it comes to making secondary uses of copyrighted materials but the legal nature of these concepts and the extent of their provisions vary greatly. In common law jurisdictions such as India, Great Britain and Canada, their copyright statute allows fair dealing by laying out a set of specific purposes under which using a copyrighted work would be permissible. If the court finds that the use is for a commercial purpose then the use would not constitute fair dealing. However, the United States copyright law takes a more flexible approach by avoiding a specific and restricted list; instead, it uses more versatile language and

[81] Wiley Eastern Ltd. & Ors v. Indian Institute of Management. of Management, 61 (1996) DLT 281 (DB).
[82] Nimmer David, Fairest of them all and other fairy tales of fair use, Law & Contemporary Problems, 66 (2003) 263-287.

provides an open-ended list of purposes which may be a representation of fair use. Ultimately, the differences between the treatment of fair use and fair dealing in India vs its US counterparts depend upon the unique circumstances of each case and the policy preoccupations of the respective courts.

Recommended Mechanisms for Regulating Misuse of Fair Use Doctrine in Academia:

The fair use doctrine is an integral part of copyright law which allows for the legal reproduction of copyrighted work for certain situations. From the above discussion about educational fair use must be met for academic fair use are as follows:

1. The academic research paper must be the original work of the author.

While this factor is open to interpretation, a paper which is supervised by a particular instructor for a course in a recognized educational institution will almost always qualify, as the reputation of the instructor and institution support the paper's "legitimacy." Conversely, individuals without formal academic connections who are writing on their own may need to establish the "legitimacy" of their work.

2. The material used must be directly relevant to the topic.

In the examples of the student papers cited below, the language and pictures of the cartoons were explicitly discussed in the explication of the papers. However, if a cartoon had not been explicitly discussed, but had been used as a decoration, illustration, or just to add color or style, this would not qualify.

3. The references must be provided for the original sources.

It must be clear from where the material was taken and, if possible, who created it. If the material was copied from a website or scanned from a print reference, this distinction should be clear. In all cases, a citation must be given for the original source.

4. The paper must be for non-profit educational purposes.

Academic fair use does not allow one to profit from the use of another person's copyrighted work. Typically, as in the case of papers written by Translation Department students which may be

selected for the FAST website (or the Master's, Licentiate and Doctoral theses that are published in PDF format elsewhere in the university website), there is no question of profit or other financial benefit to the author of the paper, the website or the university, as all are non-profit educational instances. However, if the student were later to sell copies of his paper which included copyrighted work that may have established or increased the market value of the paper, this would disqualify one from academic fair use. In this case the student would need to seek permission to use the copyrighted material and possibly arrange for royalties' payments.

5. The amount of copyrighted material used must not be excessive, and must not affect the market value of the original work.

The amount of copyrighted material used must not infringe on the original authors' ability to make an economic gain from their own works. An individual cannot use such an amount of the author's material that the paper in which this material appeared could be considered an alternative to purchasing the original work of the author.

Conclusion:

Intellectual property laws and principles, especially those related to copyright, are especially relevant for professionals who work in the field of education. A basic understanding of these laws is important for informed use as well as for the development of ethical students. It is only when these laws are understood and applied that scholars, teachers and professionals in higher education can derive the proper benefits from the rights given by this doctrine.[83]

There is a very notable public interest in the controversies surrounding copyright and wider access to educational materials. It is evident that education has a special status as 'fair use' within the interests of the international copyright framework, and lawmakers should make the optimal use of the exception.[84] Considering that the nature of a country's copyright policy could have a significant

[83] Tom Bell, Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine, 76 N.C. L. REV. 557 (1998).

[84] Lape L G, *Transforming fair use: The productive use factoring Fair Use Doctrine*, Albany Law Review, 58 (1995) 677-724.

impact on its ability to meet its developmental and educational goals, the most important objective for lawmakers in India is to reflect on the current fair use provisions for education in India not only for traditional education, but also for distance education and e-learning.[85]

[85] Narayanan P, Copyright and Industrial Designs, 3rd ed., Eastern Law House, Kolkata, (2002) p. 8.

EXPLORING AUDITORS' INDEPENDENCE WITH REFERENCE TO THE COMPANIES ACT 2013

Rinita Das[86]

Abstract

The administration of the company reflects a dispersion of management from ownership which is frequently found to be the underlying reason for corporate deviant behaviour. In many cases it is found that the management betrays the trust of the investors and take advantage of the corporate personality to appropriate to their own selves the property or money of the company or commit any other types of financial frauds. Being a 'watchdog of public interest', it is the responsibility of the auditors to undertake audit in a fair and impartial manner and function independently for improved corporate governance to reduce the information asymmetry. In ongoing corporate disappointments, it is found that the auditors have neglected their obligations and the absence of independence of the auditors from the administration is distinguished to be a significant reason for audit failure.

Effective audit is the outcome of independence of the auditors while reviewing and reporting which acts as a check on the corporate frauds. The doctrinal paper discusses the significance of the role of the auditors, the effectiveness of the Companies Act 2013 in terms of the qualification, rotation, remuneration and prohibition of non-audit services for their independent functioning with the limitations and infers that the corporate structure itself poses a threat to their independent functioning positioning them to challenges. It further explores that the sensitive nature of the 'audit-client relationship' has a potential to destroy the independence of the auditors by the 'familiarity threat' or 'allurement of the auditors to perform non- audit services 'or 'for building up the client base'.

The paper concludes with the suggestions to amend the Companies Act 2013 to promote auditors' independence.

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Keywords: auditors, independence, challenges, Companies Act 2013

Introduction

The management of the company is entrusted with the money and property of the company to conduct the business and administer it according to the principles of law to the best interest of the stakeholders. In Indian perspective as the shareholders' activism is still in nascent stage, as a class they remain uninformed and offhand of the company which makes their interest vulnerable. The confidence and trust reposed on the management are often betrayed by them for their own vested interest. They take advantage of the corporate personality with dispersed ownership to appropriate to their own selves, the property or money of the company. In this perspective, it is the responsibility of the auditors to undertake the audit in a fair and impartial manner that will ultimately benefit all the stakeholders as well as the capital market. The increasing role of the auditors is reflected in the expectation of the people to curb corporate fraud and be a watchdog on the corporate, disseminating information to the stakeholders relating to the financial condition of the company in particular which will enable them to take reasoned decisions on their investment. In the similar line of thought the Court in US v Arthur young and Co. (1985)[87] identified auditors to be the watchdog of public interest.

The auditors ought to uphold the highest degree of professional ethics for the discharge of their responsibilities under the regulatory framework with fairness, independence and competence. Although obligatory, it is challenging for the auditors to maintain independence and discharge the audit function in a fair and impartial manner. On the disruption of independence, his competence, skill and fairness are at stake resulting in audit failure. Therefore, securing the independence of the auditors is a prime concern for improved audit quality.

The independence of the auditors has not been defined in the Companies Act, 2013. But the definition of the term 'independence' finds place in "The Code of Ethics For Professional Accountant" which is a document that governs the independence of auditors, formulated and issued by the "International Ethical Standards Board For Accountants" under the 'International

[87] US v Arthur young and co. (1985) 465 US 805

Federation Of Accountant' as "independence of mind which includes the state of mind that enables an individual to perform the services without being influenced by others in professional judgment and secondly the independence of appearance which means avoidance of circumstances that would cause a reasonable and informed third party to conclude that the objectivity and the professionalism might have been compromised"[88]. The scope of the definition includes the psychological factors that influence the audit function and professionalism of the auditors as well as the external conditions in which he is placed, both suggestively impacting his independence significantly. Therefore, independence of the auditors encompasses factual as well as legal aspects.

This paper discusses the contemporary provisions of the Companies Act 2013 which devised means to promote and stimulate auditors' independence as well as the de-facto issues that the auditors encounter in their audit functions that threatens their independence, the importance of the role that are assigned to them under the law and identify the factors that hinder the independence of the auditors with the inadequacies of the regulatory framework in the light of the challenges that the auditors face while performing the audit functions.

Literature Review on the Threat of Auditor's Independence and the Statement of the Problem

The statutory auditors are the watchman of the interest of the shareholders and ensure that the company discloses the financial condition fairly, correctly and wholly to the stakeholders. Therefore, the statutory auditor acts as a gatekeeper of the interest of the shareholders (Shore, 2000)[89]. Consequently, they have to function impartially, exercising their skill, expertise and competence to ensure the correctness as well as the trustworthiness of the financial information relating to the company. On being appointed by the company, they share an 'audit-client relationship'. The nature of the 'audit-client relationship' has been a very sensitive area that has a potential to destroy the independence of the auditors (Goldman and Barlev, 1974)[90]. On one hand, significant influence is exercised by the financial officer or the director, and on the other hand the

[88] Board for Chartered Accountants in Business: 1990, The Status of the Audit/Client Relationship, Institute of Chartered Accountants in England and Wales.
[89] Shore, Kennetj Edward "Watching The Watchdog; An Argument For Auditors Liability To Third Parties" Vol No. 53(1) SMU Law journal Vol. 388-425, (2000).
[90] Goldman, A. and B. Barlev, 'The Auditor Firm Conflict of Interests: Its Implications for Independence', The Accounting Review, 701-718, (1974)

external auditors consider the company as their client and communicate through the director and do not want to lose them; therefore, both embarks psychologically on the auditors. Moreover, the long- standing relationship of the auditors to the company in which he functions is also a reason for the threat of independence due to the development of the personal connection. In the similar line of thought, the Chartered Accountants Joint Ethical Committee (1995) opined that "the personal relationship between the auditors and the directors have led to 'familiarity threat' that can undermine the independence of the auditors"[91]. An experience of familiar threat is comprehensible in some cases when the past auditors of a company who used to render audit services is later on chosen and appointed a director of the company and constitute the part of the audit committee. The scope of the auditor's role for the performance of non-audit service in the company has also been studied as a factor that destroys his independence. The non-audit service, which is also named 'management advisory service' in the US, enables an auditor to look after the financial interest of the company and therefore the subsequent audit becomes predisposed and influenced. The non-audit services and the competitive pressure has been identified as predatory pricing by Beattie and Fearnley (1994)[92]. Cadbury Committee (1992)[93] raised concern about the predatory pricing of the auditors which they considered to be a restriction for the free and fair functioning of the auditors. The fees that are given for the performance of the non-audit services allure him and consequently influences his independent judgment. The proportion of fees for the discharge of such services is increasing considerably than that of the audit services, (Palmrose 1986[94], Barkess and Simnett 1994[95]). Therefore, this is a cause of concern as the auditors will be inclined to render non audit services. Moreover Briloff (1994)[96] is of the opinion that both non-audit services and the audit services compel the auditors to lessen the disagreements with the directors. Consequently, this pressure enables the auditors to be more compliant to the clients which will have a considerably

[91] Chartered Accountants Joint Ethics Committee: The Framework: A New Approach to Professional Independence, Consultative Paper, Institute of Chartered Accountants in England,(1995)
[92] Beattie, V and S. Fearnley, 'The Changing Structure of the Market for Audit Services in the U.K. - a Descriptive Study', Vol. 26(4), British Accounting Review, 301-322, (1994)

[93] Cadbury Committee: The Financial Aspects of Corporate Governance (Gee) (1992).
[94] Palmrose, Z. V: 'Audit Fees and Auditor Size: Further Evidence', Vol 24(1), Journal of Accounting Research, 97-110, (1986),
[95] Barkess, L. and R. Simnett 'The Provision of Other Services by Auditors: Independence and Pricing Issues', vol. 24(94), Accounting and Business Research, 99-108, (1994).
[96] Briloff, A.: 'Our Profession's "Jurassic Park"', Vol 64The CPA Journal, 26-28, (1994).

negative effect on their independence. The Companies Act 2013 has also prohibited auditors to discharge non-audit services. However, it is not possible to determine the extent of influence exercised by such conduct. The increase of the cost, reducing efficiency and increasing restrictions on the auditors compel them to undertake the work that causes an inflexible framework which ultimately hinders the implementation of the Act. In this environmental setting of profession, the auditors face various threats in regard to the relationship that they have with the company as well as their conduct in the course of the audit function which cumulatively impinges on the independence of the auditors causing a threat to their independent functioning. No study is done in the abovementioned aspects that control the potential threat to the fair and independent functioning in the light of the Companies Act 2013, hence this study.

The induction of the auditors in the profession is preconditioned by the attainment of the professional degree and training, facilitating the discharge of responsibilities with ethics. Karchre (1996)[97] opined that the auditors ought to be sensitive to the professional ethics. According to Sweeney and Roberts (1997)[98] auditor's moral development is associated with his independent judgment. Hence, an association can be traced between professionalism, moral development and independent judgment. However, under the laws the potential of losing independence is hidden in the appointment and power to dismiss the auditors by the management and therefore this paper seeks to explore the effectiveness of the provisions of the Companies Act 2013 that will promote independence of the auditors. Additionally, as the 'audit client relationship' is influenced by many factors that cause a hindrance to the independent functioning of the auditors, this research has been conducted in the Companies Act 2013 to explore the ways devised by the law to secure the independence of the auditors in terms of their appointment and the conduct.

The shareholders do not play an effective role in the appointment and dismissal of the auditors. The voting power of the shareholders on the resolution of the appointment of the auditors are perfunctorily exercised in the Annual General Meeting. The reflection is found in the study of Mc. Innes then inferred that in most of the cases the shareholders confirm the resolutions mechanically

[97] Karcher, J. N. 'Auditors' Ability to Discern the Presence of Ethical Problems', Vol 15 Journal of Business Ethics, 1033-1050, (1996).
[98] Sweeney, J. T. and R. W. Roberts, 'Cognitive Moral Development and Auditor Independence', Vol 22(3), Accounting Organisations and Society, 337-352 (1997).

at the Annual General Meeting. (Mc Innes, 1993)[99]. The significance of the paper lies in the fact that the shareholders of the company are mostly inactive and do not exercise a valuable insight into the functioning of the company and therefore the role played by the auditors in the company and the removal of the hindrances to their independent functioning becomes very significant. The increasing inactiveness of the shareholders intensifies the need of the auditors to function fairly and impartially. Thus, this paper seeks to ascertain the role that the auditors have towards the company, shareholders and the government for improved audit quality.

Functioning of External Auditors: An Overview of the Significance of the Role

The role assigned to the auditors in a company is fundamentally significant under the Indian regulatory framework. They are prevalently entrusted with the undertaking of confirmation and verification of the financial statements that advances and ensures the interest of the stakeholders of the company. The external auditors gather all data that is supposedly important for performing the review. The system of review includes the audit of the records, construction of fiscal summaries, determining the compliance to the laws and guidelines and the adequacy of the internal control mechanism. Any qualification, reservation or any unfriendly comment identifying with the support of the record should be accounted for by the auditor. Accordingly, they should work with an adequate level of independence. An audit can only be effective if the auditors are independent and can report fairly and impartially any breach of conduct or violation of the laws (Fearnley and Page, 1994)[100].

The auditors act as a significant player for promoting better corporate governance in the company. They act as a check on the financial frauds by investigating and scrutinising the documents at the time of an audit. Under Section 143(12) of the Companies Act 2013[101] , they are also entrusted with the duty to report to the Central Government or to the board of directors in certain cases, of any fraud identified by them at the time of their audit functions.

[99] Mcinnes, W. M. Auditing into the 21st Century, Institute of Chartered Accountants of Scotland. (1993).

[100] Fearnley, S. and M. Page (1994), Auditing Regulations in the U.K.: Lemons, Cadillacs and Free Riders, EAA Conference Paper, Venice, April.

[101] Companies Act 2013 Act No 18 Act of Parliament 2013 (India)

The conditions that are necessary to be followed by the company is ensured by the auditors in regard to the following–

1) The financial reports are set up as per the Act and principles,

2) Assets, liabilities, income and the expenses are suitably perceived in the financial reports,

3) The reliability of the declaration given by the company that the financial reports are set up as per the auditing and accounting norms,

4) The company outlines accounting approaches to make the financial data significant and justifiable.

5) Any departure from the guidelines is appropriately unveiled in the report along with reasons.

The stakeholders place great reliance on the financial information reflected in the financial statements. If any financial information is not satisfactory to the investors, they may consider it a reason and incentive to exit. Thereafter the effect is reflected in the stock price of the shares. Hence in some cases it is found that the management unethically states untrue information so that the shareholders affirm the good performance of the managers of the company and do not exercise the option of exit and continue with their investment. As the shareholders lay a considerable importance on the financial statements for any decision regarding their investment, it is necessary for the auditors to be independent for improved audit quality. In the famous case of S.N. Dasgupta[102], the Court held that the auditors are the only safeguard which the shareholders have against the company and the money that is misapplied or misappropriated without their knowing anything. The independence of the auditor in their functioning will increase corporate accountability towards the shareholders.

Another significant role played by the auditors is the inspection which provides the mechanism of observing the obedience to the accounting and auditing standards to identify the weakness in the regulatory framework. The report of the audit inspection is a document that boosts the confidence of the stakeholders on the quality of the audit. It further enables policymakers to comprehend the

[102] Deputy Secretary to the Government of India v S. N. Dasgupta AIR (1955) Cal 414

loopholes and take an endeavor to plug them. This will minimize and consequently remove the weakness in the laws. Audit inspection is conducted in listed companies that are involved in public interest. The chart reflects the three-fold duties that the auditors have towards the Company, Shareholders and the Government.

Exploring Companies Act 2013 on Auditors' Independence

The Companies Act 2013 has elaborate provisions for the administration of companies with accountability, transparency and fairness. The Act has made a progressive step ensuring the independence of the statutory auditors towards better corporate governance regulating the profession of auditing with the ultimate objective of protecting the interest of the stakeholders and providing for strict action against any fraudulent conduct. This section analyses the provisions of the Companies Act 2013 that secures the independence of the auditors which are as follows:

1) In regard to the Qualification and disqualification

The vocations of auditors are regulated by the professional body like the Institute of Chartered Accountants of India. Section 141(1) of the Companies Act 2013[103] states that "a person shall be eligible to be an auditor of a company only if he is a Chartered Accountant by profession". "If there is a firm where the majority of the partners are Chartered Accountants practicing in India,

[103] Companies Act 2013 Act No 18 Act of Parliament 2013 (India)

then the firm can also be appointed as an auditor in its own name. If the firm is appointed as an auditor, only the partners who are Chartered Accountants shall be authorized to act and sign on behalf of the firm" (Section 141(2)). Section 141(3) provides for the restrictions to be complied with for the appointment of the auditors which directly or indirectly signifies the mental condition of the auditor that is likely to destroy his independence of mind in the discharge of audit functions. It includes cases of being an employee himself or holding any security or interest or having any business relationship himself or his relatives with the company. The auditors should have skill and expertise to function proficiently. Therefore, after attaining the professional degree and training it is necessary for them to ensure compliance to certain codes of conduct in the discharge of their professional commitments as specified by the Institute of Chartered Accountants. Any violation of the same will lead to the dereliction of their duties which will consequently disqualify them. On the order of the Tribunal, an auditor who has acted in a fraudulent manner or has abetted or colluded in the fraud shall be "disqualified from being appointed as an auditor unless 10 years have elapsed from the date of the order" as specified in Section 141(3)(h).

The provisions of the Act have provided for the integrity of the profession of auditors primarily in three clear ways: firstly, the required academic qualification for the discharge of the functions as auditors, secondly, ensuring conditions that creates a psychological self-determination of the impartial discharge of functions and thirdly, providing for the restrictions of appointment on the basis of the past fraudulent conduct. Therefore, the Act has secured the proficiency and conditions for the impartial discharge of the audit functions.

2) Prohibition to render Non audit services

According to section 144[104] "auditors shall provide to the company only such services that are approved by the board of directors or the audit committee but shall not include the following:

a) Accounting and bookkeeping services,
b) Internal audit,
c) Design and implementation of any financial information system,
d) Actuarial services,

[104] Companies Act 2013 Act No 18 Act of Parliament 2013 (India)

e) Investment advisory services,
f) Investment banking services,
g) Rendering of outsourced financial services,
h) Management services and
i) Any other kind of services that may be prescribed."

The Act prohibits the rendering of services directly or indirectly through himself or any relatives or any person connected or associated with him or any partner or any subordinate or associate or any person who exercises significant influence. These restraints are considered as 'non-audit services' which ensures that the auditors are not biased in the service and their objectivity is not at stake, on reliance on the sources on which they conduct audit. The firm must either resign as an auditor or refuse to supply the non-audit services. The performance of non-audit service may not be a direct reason for audit failure but directly impedes the independence of the auditors. Hence, the Act has prohibited the rendering of non-audit services. This causes a loss to the auditors as they are deprived of the fees that are charged for the non-audit services. Remuneration for the non-audit services is substantially more than the expenses and long affiliation additionally devastates the freedom of the auditors. In ongoing corporate disappointments, it is inferred that the auditors have neglected their obligations. Of the few explanations for such corporate disappointments, the absence of independence of the auditors from that of the administration is distinguished to be a significant one.

3) Rotation of auditors

According to Section 139(2)[105] an individual cannot be appointed for more than one term which consists of 5 years. A firm shall not be appointed for more than two terms i.e., 10 years. After the completion of the term as stated, the individual auditor or the audit firm shall not be appointed for five years in the same company. Therefore, there must be a gap of 5 years in both cases, for firms and individuals. If on the date of appointment there is a common partner who was in the audit firm, and his tenure has expired in another audit firm, then that audit firm will also not be eligible for appointment. This rule shall be applicable to all "unlisted public companies having a paid-up

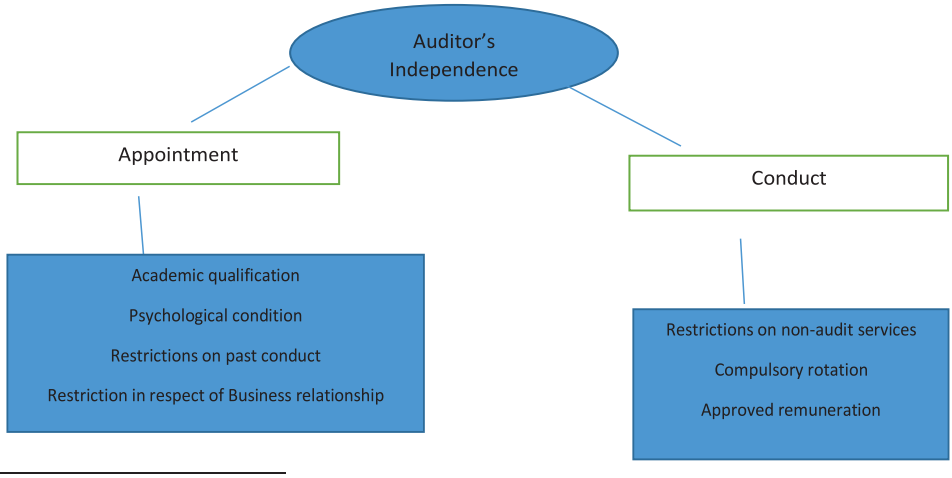
[105] Companies Act 2013 Act No 18 Act of Parliament 2013 (India)

capital of Rs 10 crores or more, all private companies having a paid-up capital of Rs 20 crores or more, all companies that is below the threshold as mentioned but has borrowed from public financial institutions, banks and public deposits of Rs 50 crores or more". But the provisions shall not be applicable for One Person Companies and small companies.

The compulsory rotation of auditors is primarily for securing the independence of the auditors but this is limited to one or two terms as mentioned above. After the 'engagement period' of one or two terms, the auditor needs to serve the "cooling period" of 5 years or 10 years as the case may be and then he can again be appointed. This cycle of engagement and restrictions go on indefinitely. The long relationship of the auditors with that of the management of the company which creates biases in the mind of the auditors towards the management cannot be eliminated by the intermediate gap of 5 or 10 years in his functioning because a company may have two sets of auditors or audit firms or both, that function in its turns complying to the provisions for the rotation of auditors as stated in the Act.

4) Remuneration of the auditors

According to section 142(1)[106] the remuneration of the auditors shall be fixed in the General Meeting or the manner in which it is determined. The Board of Directors has the right to fix the remuneration of the first auditors. Theoretically the shareholders approve the resolution for the remuneration of the auditors but if they are not active and informed, acting as a mere authority to approve may not create a check on the management's decision on remuneration of the auditors.



[106] Companies Act 2013 Act No 18 Act of Parliament 2013 (India)

Substantial modifications have been made in the company law to promote fairness of the performance of the auditors and ensure the required independence. Fairness in performance and improvement of the professional sceptics is ensured by the Act encompassing the purview of his appointment, performance and the termination from professional engagement which are as follows:

1) The appointment of the auditors is fixed for a term and the appointment needs to be ratified in the AGM.
2) Number of audits conducted by the auditors is reduced to 20 including private limited companies.
3) Compliance in relation to appointment and resignation has been formalised.
4) Auditors have to make a report relating to the financial condition of the company that needs to be placed before the shareholders in the AGM.
5) Responsibility of the auditors to see that the company complies with the auditing standards.
6) The auditors have to report fraud to the Central Government.

Independence in performance is secured by the following mandate:

1) Compulsory rotation of auditors for all listed companies and certain unlisted companies after every five years in case of auditors and ten years in case of firms to be followed by the company.
2) Certain 'non- audit services' that the auditors cannot render,
3) The act of the relatives of the auditors leads to his disqualification.
4) The business relationship of the auditors' leads to his disqualification.

Challenges Inherent to Independence

The strategy of planning the financial statement based on data given by the company and recording such data relating to finances have some procedural loopholes which pose a threat to the internal auditors to act with independence. The CEO and the CFO exerts a significant influence on the auditor in regard to the preparation of financial statements. Traditionally the person in charge of the finances and accounts of the company represents the facts to the board and the board approves it. Thereafter the internal auditor acts on such information to prepare a financial statement and provide it to the company. Within such a relationship of 'employer and employee', the internal auditors hardly can challenge, doubt and dispute the information that is given to them. On the other hand it is not unusual for the internal auditors to identify and screen the financial irregularity and make good the financial statements that need to be audited and placed before the shareholders in the AGM. Therefore, the discovery and reporting of fraud by the internal auditors is less. Whereas the Treadway Commission or the National Commission on Fraudulent Financial Reporting of US (1987)[107] has opined just the contrary and proposed that the "properly organised and effectively controlling internal auditing gives the management and the audit committee opportunity to monitor the reliability and integrity of the financial reporting system". The report concluded that the internal auditors are more conversant with the corporate culture and therefore in a better position to detect any fraud in the company.

The monetary state of the organization is reflected in the financial reports which are made in accordance with the book-keeping and auditing guidelines. The directors or managers with accessibility to the monetary data of the organization have an occasion to submit to fraud for their vested interest. The makers of the financial statements and the managers may take the opportunity to manipulate the said statements and create documents reflecting the sound financial condition of the company. Therefore, if the performance of the auditors is not satisfactory or if they do not function independently for the benefit of the stakeholders with high levels of professional skepticism, they may mislead the public about the true financial condition of the company. Moreover, continued fraudulent conduct in the company will lead to the failure of the company

[107] Report of National Commission on Fraudulent Financial Reporting (1987)

itself. It can also have a massive impact on the economic conditions of the country as noticed earlier in Enron Corporation, Worldcom, Satyam Computer Service Ltd to mention a few. Each audit failure is a reflection of the violation of the law and the lack of the auditor's satisfactory expert sceptics that eventually questions the auditor's freedom.

The issues that threaten the independence of the auditors include the performance of non-audit services, the familiarity threat due to long standing professional relationships, and increased competitive pressure among the auditors to upkeep the client base. These aspects are psychological in nature and are presumed to be hindrances for their independent functioning. For the promotion of the independence of the auditors, the Companies Act 2013 has provided for the increased penalty imposed on auditors in case of any violation of the Act and the compulsory rotation of auditors after a term of five years or two terms of ten years. The perception of the auditors cannot be changed or restricted by increased penalty or gap of intermediate term of five or ten years.

Conclusion

The grant of non-audit services affects the independence of auditors and the Companies Act 2013 also has imposed such restrictions on them. However, it is necessary to enforce the laws stringently. Strict and permanent rotation of the auditors is not possible to be maintained at work and therefore the provisions of rotation of auditors as stated in the Act cannot secure their independence at work. However, prima facie it is a tool to reduce the familiarity threats and competitive pressure. There is a necessity to have a code of conduct for internal and statutory auditors which needs to be closely monitored by the National Financial Reporting Authority. The law should devise ways to make the audit process and the conduct of the auditors', a mechanism of whistleblowing against corporate frauds. This will enable the auditors to be whistleblowers additionally as a part of their statutory duties with the increased sanction for violation.

The corporate governance principles that run on transparency and faith in corporate administration imposes this huge responsibility on the auditors. This faith is reposed by the stakeholders on the corporate governance system and ultimately on the auditors who are supposed to protect their investments through increased accountability and transparency. If there is any kind of information

asymmetry between the company and the investors, the audit report acts as a mechanism to reduce the asymmetry.

Independence of auditors is significant in two broad ways, firstly for the company, the practicing auditors review and make decisions on the financial condition and secondly for the financial market, their opinions create sound understanding. Auditors experience pressure to be more accountable to the company and the investors. The uncertainty regarding the competitive pressure, familiarity and the institutional governance threatens the objectivity of the auditors. The company's initial report may be uninformative and the auditors use the audit knowledge to state and predict the client's investment value in the company. This is true in all cases whether the company has some hidden information or not. For this proper and fair dissemination of information, the auditors have to function as an autonomous entity within the corporate organizational structure. However, independence cannot be distinct and closely controlled. Although there are standards imposed by the institutional regulatory framework securing independence, it depends largely on the mental attitude of the auditors. Consequently, ethical consideration should be given a greater prominence in corporate governance structure and the independence of the auditor will function as an important aspect of the same.

UNDERSTANDING THE SOCIO-LEGAL PERSPECTIVE OF DUMPING SOLID WASTE IN WETLANDS: A CRITICAL STUDY ON ASSAM'S 'DEEPOR BEEL' WETLAND

PULAK SYMON[1]

Introduction

There has always been stamping of cruelty and greed on our mother Earth because of its rich resources but the question lies as to how much will magnanimous nature undertake the perils of being treated secondary? The brutal denuding of forest cover for self-gain, creating untreated toxic wastes from industries, and polluting water bodies can be witnessed by everyone. The grim fallout of the destruction being done on a daily basis to nature stands upon the realization of a nearing ecological apocalypse which has actually twisted to show its worst.

The scientists have researched significantly to find the specific concerns affecting the ecosystem, the concerned legal authorities have dutifully crafted the laws than why is the implementation of the rules turtling its pace? The issue crumbles itself in the hands of the loathed corrupt officials who are duty bound to implement laws but are delaying it for self-gain.

The recent boom of population has forced to deforest the once lush green valleys with concrete jungles portraying a dismal picture. Likewise, the conquering of wetlands for building houses and disposing of wastes is a heart wrenching crime to the environment. The unplanned solid waste disposal in environmentally rich areas is alarming to realise the poor management of the system. The wetlands also known as "earth's kidneys" need to be protected. They are the filters for the environment. The constant dying of wetlands is a serious matter of concern for humanity and the environment.

The research paper realising the environmental crisis will manifest the issue of solid waste management circling the 'Deepor Beel' wetland in Guwahati and how does this Ramsar site has been affected by environmental degradation through illegal dumping. The paper will also focus on the legislations for handling waste management and parallelly inspect the Wetland Protection rules

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and regulations.

Evolution and Background of Deepor Beel

The term 'Deepor Beel' owes its origin from a Sanskrit word 'Dipa' which means 'elephants' and 'Beel' in Assamese describes a large water body or a wetland. The word 'Deepor Beel' in unison blends the idea of elephant's territory which is the wetland. It is endowed with a rich flora and fauna covering the beel enchanting every heart with its pristine beauty.

The beel is beautifully placed 10 kms on the South west side of the Guwahati city. It gets fed through various channels. Rerouting from the present channels, earlier the Deepor Beel had its links with the mighty Brahmaputra River through the Sola Beel and the swamps of Pandu. The natural connections with the earlier links got disconnected due to urbanisation. The developments of residential complexes, the National Highway 37 dissecting the earlier connection as well as the railway line through the beel has placed it in a disadvantaged position.[2]

Presently, the beel is fed by its main inlet which is the Basistha River and the Bharalu River. The Bharalu River is considered one of the most polluted rivers in India which is also a sign of nearing apocalypse for the wetland. The quality of the wetland is also degrading due to the constant pollution fed by it.

Deepor Beel as a wetland qualifies the criterion because it acts as a home for not only rich flora and fauna but welcomes each year a lot of migratory birds. Apart from providing a rich ecological significance, the beel provides fish to 500 poor families of five different villages which is the main source of income for such people. It is also monitored that migratory fishes from river Brahmaputra are also found in this beel. Also, the fringe areas of the beel are used by the people to cultivate crops and earn their living. In the earlier times, the beel was used as a recreational hunting ground to hunt elephants, deer, doing boat rides etc. [3]

[2] Report on Visit to Deepor Beel in Assam – a wetland included under National Wetland Conservation and Management Programme of the Ministry of Environment & Forests, https://niti.gov.in/planningcommission.gov.in/docs/reports/E_F/DeeporBeel.pdf, (last visited Sep 29, 2021).
[3] Dr. Prasanta Kumar Saikia, Qualitative and Quantitative Study of Lower and Higher Organisms and Their Functional Role in The Deepor Beel Ecosystem, NDSU Shillong (last visited Sep 29, 2021).

1. Solid Waste Management and the Realities Concerning Deepor Beel

It is a regular visual of solid wastes nowadays visible on water bodies. The sight of floating bottles, plastic wastes and untreated sewage amalgamated with foul odour is just another sight we are adjusted to in the present times. The solid waste comprises the discarded items which are no more beneficial for use. The harmful untreated waste generally comes from industries, agriculture, households etc.

Attempts to define "solid waste" have been made by the World Health Organisation in 1971. It defines wastes which do not freely flow and are non-liquid in nature like garbage, rubbish etc.[4]

Solid waste has become a hazard as it is polluting all the water bodies and affects human life through various diseases like cholera, typhoid and various water borne diseases. The need arises for a proper framework to manage dealing with the issue.

Solid Waste Management (SWM) has been realised to be the most neglected part of urban development. The main objective of various States in India is to just find an open dumping site and pile up the city's waste in it without any treatment done to it.

SWM is a process wherein the solid wastes are collected, transported, treated and disposed of. The whole idea is to control the generation of solid wastes and reduce the impact being done by it on human health and environmental degradation.[5]

The legalities of Solid waste management are dealt with by various laws in India. In the Criminal aspect, the Indian Penal Code (IPC) and the Code of Criminal Procedure (CrPC) outlays the law. The IPC in chapter XIV categorically states about the offences committed to public health. Solid wastes come with diseases which affect humans and the environment. Anything which affects the public at large through various acts and creates injury, danger is learnt to be 'public nuisance'. Solid waste thus comes under the category of public nuisance under IPC. The statute does not have

[4] J. R. Rouse, Solid Waste Management in Emergencies, Technical Note 7, WHO RO Office for S.E Asia (2004), https://www.who.int/water_sanitation_health/hygiene/emergencies/solidwaste.pdf.
[5] Rick Leblanc, An Introduction to Solid Waste Management, The Balance Small Business (28 October,2020), https://www.thebalancesmb.com/an-introduction-to-solid-waste-management-2878102.

specific provisions relating to solid waste management as such. [6]

Also, the CrPC under section 133 of the Code states "removal of nuisance". The District Magistrate and the other officers mentioned in the statute have the authority to remove "public nuisance" from rivers or channels which is meant for the public.[7]

Article 47 of the Indian Constitution states the importance of public health and mandates as a paramount principle to take steps to improve the public health situations.[8]

The Environmental law is also equipped with various laws to protect and regulate wastes of all forms. The polluters pay principle puts forward the idea of compensation of damage done to the environment by a person who is responsible for such degradation.[9]

2. Critical Analysis of Solid Waste Management in India

The increase in solid waste in India has been on a rise with the constant urbanisation taking its pace. The new addition of electronic and plastic wastes has choked the environment with its non-biodegradable qualities. During the upsurge of the COVID-19 last year, the numbers of bio-medical waste and domestic hazardous waste shot up to alarming figures. The plate of waste shows variety but the treatment of it pictures a dismal state.

The new urban India generates around 62 million tonnes of solid waste which was reported through the Planning Commission Report of 2014. Also, the prediction is more than double which is 165 million tonnes of waste by 2030.[10] The increase of wastes to such higher numbers is because of increased commercial activities, high standards of living etc.

If enquiry is done relating to the efficiency of waste collection in India comparing developed countries, it is learnt that India is still at 70%, lagging behind the developed countries which are at

[6] Prof Satish C. Shastri, Solid Waste Management- An Indian Legal Profile, CEERA NLSIU, https://nlsenlaw.org/solid-waste-management-an-indian-legal-profile/.
[7] Code of Criminal Procedure,1973, Section 133.
[8] The Constitution of India, 1950, Article 47.
[9] Pramit Bhattacharya, Waste management Laws in India (14 May 2016), https://blog.ipleaders.in/waste-management-laws-india/.
[10] Shailshree Tiwari, Why India's solid waste management system needs a digital overhaul, Down to Earth (25 February 2021), https://www.downtoearth.org.in/blog/waste/why-india-s-solid-waste-management-system-needs-a-digital-overhaul-75671.

100%.

The statistics of treatment of solid waste in India still crawls at 11.9 million tonnes of the 43 million tonnes produced. The remaining 31 million is disposed of in the landfill sites which are untreated and affect the environment.[11]

Data relating to State wise collection and treatment of solid waste is not even half the number produced. The graph of States with the data is attached below to help identify the saddened state of garbage not even properly collected.

[11] Ibid.

[12] CPCB, "The National Action Plan for Municipal Solid Waste Management", https://cpcb.nic.in/uploads/MSW/Action_plan.pdf, (last visited 26 August,2021).

Annexure-I

STATE-WISE GENERATION, COLLECTION AND TREATMENT

(February' 2016)

S.No	States	Generated (TPD)	Collected (TPD)	Treated (TPD)	Landfilled (TPD)
1	Andaman & Nicobar*	70	70	05	
2	Andhra Pradesh*	4760	4287	6402	
3	Arunachal Pradesh	116	70.5	0	
4	Assam	650	350	0	
5	Bihar	1670	-	-	
6	Chandigarh	370	360	250	
7	Chhattisgarh*	1896	1704	168	
8	Daman Diu & Dadra*	85	85	Nil	
9	Delhi	8370	8300	3240	
10	Goa	450	400	182	
11	Gujarat	9988	9882	2644	
12	Haryana	3103	3103	188	
13	Himachal Pradesh	276	207	125	150
14	Jammu & Kashmir*	1792	1322	320	375
15	Jharkhand*	3570	3570	65	
16	Karnataka	8697	7288	3000	
17	Kerala	1339	655	390	
18	Lakshadweep*	21	-	-	
19	Madhya Pradesh	6678	4351	-	
20	Maharashtra	22,570	22,570	5,927	
21	Manipur*	176	125	-	
22	Meghalaya	208	175	55	122
23	Mizoram*	552	276	Nil	
24	Nagaland	344	193	-	
25	Orissa	2374	2167	30	
26	Puducherry	495	485	Nil	
27	Punjab*	4105	3853	350	
28	Rajasthan*	5037	2491	490	
29	Sikkim*	49	49	0.3	
30	Tamil Nadu	14500	14234	1607	
31	Tripura	415	368	250	
32	Telengana	6740	6369	3016	3353
33	Uttar Pradesh	19180	19180	5197	
34	Uttrakhand	918	918	Nil	
35	West Bengal	9500	8075	851	515
	Total	1,41,064	1,27,531 (90%)	34,752 (27%)	4,515

data of Annual Report 2013-14 & 2014-15

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1.3 Solid Waste Management in Guwahati

Guwahati is rich with beauty considering its flora and fauna. The recent urbanisation has been heart wrenching as solid waste management is still a foreign dream. The statistics indicate that half of the garbage is not even collected properly while there is Zero waste treatment done.

The present generation of garbage produced in Guwahati City is 625 tons per day. But where the garbage is disposed of is a matter of concern. Since 2006, more than 95% of the solid waste from the Guwahati city has been disposed of near the margins of a Ramsar site, Deepor Beel.[13] It is a wetland which is rich with both flora and fauna. The flocking of migratory birds in parts of the year is common as well as an elephant corridor which hosts various wild elephants.

The problem is the dumpsite's proximity to the Deepor Beel. The constant pollution of the water because of the unplanned solid waste has created issues and violates the "Municipal Solid Wastes (Management and Handling) Rules 2000 and the Wetland (Conservation and Management) Rules 2010".[14] The rules violate for polluting a protected site.

The National Green Tribunal has ordered the Guwahati Municipal Corporation to shift the dumping of wastes to another site within two months in 2019. Also, the order mandates that necessary steps should be adopted by the Government to arrange, store and segregate the solid wastes abiding with the "Solid Waste Management Rules 2016". The undertaking mentions to transport segregated waste to "Assam Power Generation Limited" to actualise the concept of waste to energy plants.[15]

Understanding the Guwahati Municipal Corporation (GMC) and its role to deal with the Solid waste management, focus has to be to realise, how far has the "Solid Waste Management Rules,

[13] Mubina Akhtar, People Protest as Guwahati, a Planned Smart City, Dumps Its Garbage at Sensitive Area, The Wire (22 July 2021).
[14] *Ibid.*
[15] *Ibid.*

2016" been adhered.

GMC has divided itself into 31 wards. NGOs are being appointed and assigned for performing the role of primary collection of wastes and street sweeping. The secondary role of collection is managed by a fleet of modern machines which includes compactors, tippers etc. [16] The final waste is deposited in the Boragaon landfill.

But how effective is the role of the Government in segregating and disposing of waste is a concern. It is learnt that Boragoan has a compost plant which produces just 5 tonne compost per day out of 625 tonnes per day. It plans to increase in future to 200 tonnes per day which still leaves 400 tonnes of garbage untreated.[17]

GMC has engaged IIT Kharagpur to help design an engineered landfill. But the engagement has been from late 2010. The present problem still persists in 2021 so where did they lack to achieve the goal? Or are the authorities turning a blind eye on this issue?

Some positive news can be a foresight of development for renewable plastic waste in Assam. Oil India Numaligarh and North Eastern Electric Power Corporation plans for plastic to fuel project. It is a waste to energy project to be done in Guwahati. But GMC is still required to provide proper land for setting up the processing plant.

1.4 "Deepor Beel" Wetland: Turning from Beauty to Beast

Deepor Beel, once a beauty, a home to thousands of flora and fauna has knelt before the humans to not destroy it. The constant dumping of garbage from 2004 has impacted the lands, the people, the environment, everything.

The wetland is under constant attack from all sides for different reasons. Firstly, in the eastern region it faces constant pollution from the landfill site which is one of the prime issues of degrading wetland. Secondly, the polluted Bharalu river which carries with it all the domestic and industrial wastes join the wetland to discharge its waste which is a perennial flow of pollution. Thirdly, the

[16]Guwahati Municipal Corporation, Conservancy and MSW Management, https://gmc.assam.gov.in/portlets/conservancy-msw-management, (last visited on 27 August 2021).
[17] *Ibid.*

coming up of the industries in the western part of the wetland is an added cream to the issues as they deposit large concentrations of trace metals in the wetland.

There has been a report when a Hargilla (Stork) was in a fragile situation because of consuming waste from the GMC dumpsite. Locals had to rescue the bird later. This situation throws light as to how deplorable conditions have been in those areas. The constant pollution to the waterbody of Deepor Beel stretches for around 40.14 kms.[18] It has affected aquatic animals as well.

Parimal Suklabaidya, Minister of Fisheries, Excise, Environment and Forest has restricted people not to consume fishes from Deepor Beel because of the rampant pollution.[19] The grim situation needs a call for stronger actions to be initiated by the Government and laws implemented. The main objective should be on how to mitigate solid waste disposal in these wetlands and how to improve the hydrology of these wetlands.

The NGT order which strictly mentioned to shift the dumping site away from Deepor Beel was followed by the Government. The new site selected was Chandrapur which is a defunct thermal plant. The people protested, braving the police and halting the garbage trucks to not pollute the area. The people protested the fact that the dumping grounds are totally contrary to the proposed Integral Solid waste management facility. [20]

There was blatant ignorance of legal norms while dumping garbage in Chandrapur. It was dumped on a forest hill near people's home which irked the local people to fight for their rights. Two groups the "All Assam Students Union" (AASU) and a locally made "Dumping Site Protest Committee" protested to which they were lathi charged by the police. Is this what the Government is up to? Instead of protecting the environment and people ruin it more for them?

After the protests, the Judiciary intervened to stop dumping in Chandrapur till further approval

[18] Environment and Forest Department Government of Assam, Action Plan for Deepor Beel, https://www.pcbassam.org/RRC%20Action%20Plan%20Final/Priority%20III/Deepar%20Beel.pdf, (last visited on 27 August 2021).
[19] Srijit Banerjee and Saumya Mishra, NGT order for New dumpsite within two months; GMC in fix over location, https://www.guwahatiplus.com/guwahati/ngt-orders-for-new-dump-site-within-two-months-gmc-in-fix-over-location (11 May 2019).
[20] Mubina Akhtar, People Protest as Guwahati, a Planned Smart City, Dumps Its Garbage at Sensitive Area, The Wire (22 July 2021).

was made. The Government played wittily shifting the dumping site to Deepor Beel again but this time they have started dumping the garbage 1 km from the earlier site. Is this a solution for such a cry to protect the environment and the wetland?

Guwahati comes under the first list of 20 smart cities mission in India. In it having a functional solid waste management is a prerequisite. It also mentions that all sewage needs to be treated before being discharged. Guwahati to be a future smart city will still be a dream considering the present turtle pace.

1.4.1 The Pollution and Further Impact of the Deepor Beel

Apart from dumping of solid wastes in the wetland there are various other reasons which contribute to pollute the wetland.

i. The mushrooming of factories recently near the wetland is a problem in itself because the deposit of waste materials produced from the factories are dumped along a 2 km radius affecting the flora and fauna of it. The pollution from brick kilns is also a health hazard for the workers.[21]

ii. Untreated sewage which seeps in the wetland threats the aquatic life in it. The presence of toxic chemicals enhances growth of weeds like polygonum barbatum, polygonum orientale etc which has caused fishes to die. Many fishes were found floating in the wetland by the locals.

iii. The Deepor Beel turned tourist spot, picnic spot has made the situation worse because the garbage they produce after using the packaged foods is witnessed to be thrown directly on the beel. The water quality is no more potable as it is more like sewage water unclean with dark stains.

iv. It is learnt that “plastification” of the wetland has worsened the condition of water and degraded its standards to that of a wasteland. The bird watchers also reported to have

[21] Sarfaraz Azgar, Land Degradation and Environment Pollution: Impact of Brick Kilns, B. R Publishing Delhi (2004).

noticed less sighting of birds due to the pollution level.[22]

2. Laws Relating to Solid Waste Management and Wetlands In India

The Constitution of India under fundamental duties (Part IV A) imposes duties to its citizens to protect the environment and its flora and fauna[23]. Also, under Article 48 A it mentions the role of the State to take the responsibility to not only protect but to improve the environment and safeguard its forests and wildlife.[24] It is the responsibility of the State to protect the water bodies as it comes under State list i.e., List II in Entry 17.

The solid waste management rules in India firstly needs mention of

1. **The Environment Protection Act, 1986**

Section 3 of the Act states the role of the Central Government as a guardian to take measures to protect and improve the environment. [25] The duty includes making rules to stop excess emissions polluting the environment, inspection of industrial areas, spreading awareness to the people through various manuals, codes and guides. The Central Government has powers to constitute authorities to protect the environment. Section 6 of the act empowers the Central Government to make rules to regulate the environment. [26]

Chapter 3 of the Act describes the prevention, control and abatement of environmental pollution. In Section 7 of the Act, it restricts emission of excessive pollutants in the environment from the set limit. Section 9 states that if any person has caused harm to the environment due to unforeseen circumstances is liable to prevent it and notify the authorities about it.

Any person who performs industrial work, its operation or the related process or handling hazardous substance are dutifully bound to render services to the Central Government whenever required and the failure to perform or delay in performing such activities tantamount to an offence.

[22] Pratidin News, www.pratidintime.com, (last visited on 28 August 2021).
[23] The Constitution of India, 1950, Article 51 A (g).
[24] The Constitution of India, 1950, Article 48A.
[25] The Environment Protection Act, 1986, Section 3.
[26] The Environment Protection Act, 1986, Section 6.

2. Solid Waste Management Rules, 2016.

The rules mandates segregating waste and channelizing it so that the waste can be reused, recovered and recycled. The solid waste is divided into three parts which includes organic wastes which are biodegradable in nature. Secondly, dry waste which includes paper, plastic, wood etc. Thirdly, domestic hazardous wastes which includes mosquito spray refills, baby diapers etc.

The new rules discourage throwing, burning or burying of the solid wastes in public places, personal residences, drains or any water bodies. Also, the concept of paying "user fee" to waste collectors is brought about through this Act. The concept of "spot fine" is levied when the waste is not segregated or littered.[27]

The new rules lay down some new parameters relating to waste disposal which states that a waste landfill area should be 100 metres away from rivers, 200 metres away from a pond as well 200 metres away from the highway, parks etc., and 20 km away from an airport. Laws are also enforced to not dispose of solid waste on hilly terrain. [28]

3. Hazardous Waste Management Rules 2016

Section 3(17) of the Act defines hazardous waste. In simple terms, it states that waste is life threatening and dangerous to the environment as well.[29] These types of waste can be categorised as either flammable to acutely poisonous in nature. Thus, the importance of handling and treating these wastes are important.

The rules bring to concern the import and export of solid wastes. The rules also state that no country can export their wastes to India. Permissions are required for import of used electrical items etc only if proper treatment of the solid wastes can be done. [30]

The rules lay down direction for storage, treatment and disposal of solid wastes. CPCB monitors safe operation of it in the facilities. Transportation of hazardous waste is governed by "Motor

[27] Vikaspedia, Solid Waste Management Rules 2016, https://vikaspedia.in/energy/environment/waste-management/solid-waste-management-rules, (last visited on 30 August 2021).
[28] Ibid.
[29] Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016, Section 3(17).
[30] Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016, Section 12.

Vehicle Act, 1988".

4. Bio Medical Waste Rules, 2016

These rules replace the earlier rules of 1998. These rules deal with the human-animal anatomical wastes. The waste generates when treatment is done to them. The waste is generated from hospitals, pathology labs etc.

Segregating such wastes and treating it in an environmentally safe environment reduces the adverse impact on human health. It is the duty of the State Government to provide for disposal of bio medical waste and proper treatment plants. It also is the duty of the Health Care facilities to find an area which is ventilated, safe and secured location to store biomedical wastes.

5. Plastic Waste Management Rules 2016

The Plastic Waste Management Rules 2016 supersedes the earlier 2011 rule. The new rule aims to reduce 6000 tonnes of uncollected plastic waste which is regularly generated by various industries and manufacturers through a new principle known as "Extended Producer's Responsibility" (EPR) Act.

The new rules mandates that the size of the plastic bag should be increased from 40 to 50 microns. The broadening of jurisdiction of plastic from municipal areas to rural areas is done as the usage of plastic takes place in rural areas too. The recent rules promote plastic waste to be used for road construction which is advantageous as the recycled waste is of some use.

In 2018, the rules were amended to introduce registration of producers or importers under the central registration system. Even though the plastic rules are in place and amended still the reality of usage of plastics shoots higher every day.

THE LAWS RELATING TO WETLANDS IN INDIA

1. **Ramsar Convention 1971**

It is the first ever treaty which was signed to protect the natural resources. The treaty was signed in a town named Ramsar wherein the name of the treaty became Ramsar Convention. The main aim through this convention is to save the wetlands and halt the loss of it.[31] Deepor Beel was added as a Ramsar site in the year 2002.

2. **Wetland Conservation and Management Rules 2010**

The rules lay down the activities which are considered harmful for the wetland. The activities include untreated solid waste dumping, industrialisation, construction and various other activities. Central wetland Regulatory authority is brought to existence so as to monitor whether proper implementations of rules are ensured. Amendments in 2016 and 17 were brought to restrict activities in the wetland.

3. Indian Fisheries Act 1897

The rules penalise the polluter who pollutes the wetland by disposing of waste or chemical effluents which pollute the water of the wetland. Fishing can also be prohibited by the Government whenever required in various locations for specific periods.[32]

4. **Indian Forest Act 1927**

The Act safeguards both the ecological and environmental security of our country. The role of our forests is to protect the land from not getting eroded, bring stability to the pollution levels, prevent desertification and salinization. Forests provide them water solely depending on the wetlands for water. The interdependency of one with the other is crucial for the environment. Polluting the wetland and degrading it or destroying it will have adverse effects on the forests as well.

It is the duty of the State Government to protect the wetlands and save the environment from getting destroyed totally. Many wetlands have been wiped out due to urbanisation and

[31] PC Sinha and R Mohanty, Wetland Management policy and law, Kanishka Publishing House (January 2002).
[32] The Indian Fisheries Act, 1897, Section 7.

industrialisation which is a dismal plight to realise.

5. The Guwahati Water Bodies Act 2008

The main motive of the Assam Government to enact this law was to minimise the problem of waterlogging, protect the "Deepor Beel" and the various wetlands and develop an ecologically friendly environment. It is through this Act that the Government wants to reacquisition land in Deepor Beel and focus on eco-tourism.

Even though the Act aims to develop what is still not being done, it is really a pressing need for the Government to implement its law and take proper actions to protect and conserve its biodiversity.

3. Conclusion and Suggestions

The paper attempts to project the degrading issues that Deepor Beel faces with time even being a Ramsar site. The protection of this wetland is important to save the environmental heritage which is also a jewel to the Guwahati City.

Saving the Beel needs a holistic approach and contribution from all the sectors and the Government's active participation in execution of its laws. Apart from it, the people and the growing generation should be made aware about the natural heritage we have amongst us. There should be proper sensitization drives about the wetland's importance to the environment and its people.

Instead of having advertisements of luxury branding boards in the middle of the city, awareness posters about wetlands should be put up. Likewise, children should be taught in schools which will keep the generations realise the importance of wetlands.

Guwahati is a developing city and the recent inclusion of it in the smart city mission expects the city to manage its waste through its solid waste management and not dump the wastes in an open landfill.

Deepor Beel is like an environmental indicator for the Guwahati city. When the migratory birds will no longer flock on this beautiful Beel it will confirm the destructed condition of the Beel into a quagmire of pollution.

It is time for the State Government to realise the importance of the wetland and restrain dumping of solid wastes and plug the errors of the incoming pollution. It is time we save our environment before it turns against us. It is time, it is time.

REVISITING MEDIA FREEDOM IN INDIA: GAGING REASONABILITY OF REASONABLE RESTRICTIONS

-Sunidhi Setia[1] and Ashutosh Jain[2]

Abstract

Realising the impact of free reporting on judicial accountability and netizen's right to information the Indian judiciary has done enormous efforts to uphold media freedom. However, legislative gagging of news media under the garb of reasonable restrictions to muzzle dissent and stifling press freedom has led to India securing 142nd rank in Press Freedom out of 180 Countries. Through this paper, the authors highlight the development of freedom of press in India and dwells into critical policy issues relating to it. Acknowledging the importance of reasonable restriction on media freedom, the paper via judicial decisions questions the reasonability of legislative use of Article 19(2). Media is not an heirloom of the ruling government but a neutral, independent body holding those accountable who breach the constitutional sanctity of the bracket of their power. The paper focuses on the need to bridge the gap created through conflicting judicial and literal interpretation of the statutes. Authors, thus concludes by providing possible suggestions to uphold the media freedom in the digital era maintaining equilibrium in public interest and public order.

1. Introduction

"Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter".

-Jefforson

Dismissing the Election Commission's plea to refrain media from reporting oral remarks made by judges in judicial proceedings, a bench comprising Justice DY Chandrachud and Justice MR Shah upheld the media coverage of the Court proceedings as a part of freedom of press.[3] Accenting protection under fundamental right of Freedom of speech and expression, Court discussed the

[1] Academic Tutor and Research Assistant, JGLS, Sonipat
[2] Practicing Advocate at Delhi High Court
[3] The Chief Election Commissioner of India v. M R Vijaybhaskar & Ors., Civil Appeal No. 1767 of 2021.

importance of reporting of judicial proceedings and its impact on judicial accountability and netizen's right to information.[4] Hon'ble Court considered reporting through social media platforms an extension of Freedom of speech and expression in the digital era and treated this as a celebration of constitutional freedom and ethos.[5] Despite recent judgements where the Courts strongly upheld the free reporting by media platforms, legislative gagging of news media led India securing 142nd rank in Press Freedom out of 180 countries.[6] Internet governance and criminal sanctions like sedition, defamation are unprecedentedly used to silence dissent and stifling press freedom in India. According to an independent case study, "*Behind Bars: Arrest and Detention of Journalist in India 2010-2020*",[7] a total of 154 journalists were arrested, detained, interrogated, or served show-cause notice for their professional work in the last decade, surprisingly 67 out of these were recorded in 2020 alone.

It is interesting to note that while the Courts have been keen on protecting the freedom of media guaranteed under the Constitution of India (hereinafter "Constitution"),[8] the State has been controlling and depriving the very freedom under the garb of reasonable restrictions imposed thereof under the Constitution.[9] Before discussing the rights and restrictions with regard to Freedom of speech and expression of media under the Constitution, it is pertinent to underline the importance of freedom of this fourth pillar of democracy and its impact on accountability of other three.

Authors through this paper while highlighting the development of freedom of press in India, dwells into critical policy issues relating to it. Acknowledging the importance of reasonable restriction on media freedom, the paper via judicial decisions questions the reasonability of legislative use of Article 19(2). The paper focuses on the need to bridge the gap created through difference in judicial decisions and literal interpretation of the statutes.

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[4] *Id.*
[5] *Id.*
[6] Reporters without Borders, https://rsf.org/en/ranking/2021 (accessed on 06-06- 2021).
[7] Free Speech Collective, Behind Bars: Arrest and Detention of Journalist in India 2010-2020, https://freespeechcollectivedotin.files.wordpress.com/2020/12/behind-bars-arrests-of-journalists-in-india-2010-20.pdf, (accessed on 07-06- 2021).
[8] Art. 19 §, Cl. 1 (A) of Indian Constitution, 1950.
[9]. Art, 19 § Cl. 2 of Indian Constitution, 1950.

1.1. Development and Importance of Media Freedom in India:

In 1780, the first newspaper '*Bengal Gazette'* was printed in India and with the rise of nationalist freedom movements in 1857, the British in order to control and curb these movements, started censoring newspapers in British India.[10] During Pre-Independence, as the press was used a major tool to uprise the national rebellion, with every great movement like '*Satyagrah'*, '*Quit India Movement'* or outbreak of '*World War II'*, the press freedom was compromised with plentiful acts like 'Gagging Act of 1857', 'Vernacular Press Act of 1878', 'Official Secrets Act of 1903', 'Press Act of 1910', 'Press Emergency Act of 1931' to name a few along with the 'Prevention of Seditious Meetings Act of 1911' and the 'Criminal Law Amendment Act of 1908'.[11]

The Constituent Assembly Debates clearly emphasised that freedom of media has always been an implicit part of Freedom of Speech and Expression considering press and citizen or an individual, all the same.[12] Freedom of Press can be defined as dissemination or circulation of ideas, knowledge, information, and thoughts devoid of any administrative or statutory control.[13]

The media freedom is sine qua non for the growth of any healthy democracy. Allowing greater access and reduced government control on dissemination of knowledge and information, directly helps the media to serve as a watchdog. Freedom of Media is the foundation stone of a healthy and prosperous democratic system.[14]

During the discussion on Article 13[15] on the floor of the Constituent Assembly, Prof. K. T. Shah while moving an amendment to sub-clause (a) of Clause (1) of Article 13 asked to add words '*of*

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[10] Radhika Iyenger, *A pre-independence history of press freedom in India*, The Indian Express, May 3, 2017, at 1.
[11] DNA Web Team, *DNA Special: Evolution of Indian media from pre-independent era to present times*, DNA, November 17, 2020.
[12] Constituent Assembly Debates, Vol 7, Doc. 65, Para No. 168, December 2, 1948, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02
[13] Manmeet Singh, *Freedom of Press-Article 19(1)(a)*, (June 5, 2021) http://www.legalservicesindia.com/article/1847/Freedom-of-Press---Article-19(1)(a).html
[14] Romesh Thapar v. State of Madras, AIR 1950 SC 124.
[15] Draft Constitution of India of 1948 § 13, https://www.constitutionofindia.net/historical_constitutions/draft_constitution_of_india__1948_21st%20February%201948.

thoughts and worship; of press and publication;' to read the amended sub-clause as "*subject to the other provisions of this Article, all citizens shall have the rights-(a) to freedom of speech and expression; of thoughts and worship; of press and publication*".[16] However, considering freedom of Press as a subset of the larger right of Freedom of speech and expression of citizens, Dr. Ambedkar emphasised on the absence of necessity of specific mention of such right.[17]

In *Bennett Coleman,*[18] when the government restricted the newsprint import through 'Import Order 1955' and regulated the sale, acquisition and use of newsprint under 'Newsprint Policy of 1972-73', the Court came down heavily on the government. The Court held that freedom of press is indisputable, and it is this freedom that ensures the right of all citizens to speak, publish and express their views. Further, Supreme Court in *Indian Express Newspapers (Bombay) Private Lt. Vs. Union of India and Ors.,*[19]while assuming the role of press as public educator for public at large, considered its primary duty to uphold this right and protect it from all legislative interferences which are contrary to constitutional mandate. In recent case of *Jagisha Arora v. State of Uttar Pradesh & Anr.,*[20], Hon'ble Supreme Court, while ordering immediate release of the journalist booked for defamatory remarks against sitting Chief Minister of State of UP on bail, categorically stated that the "*the fundamental rights guaranteed under the Constitution of India and in particular Articles 19 and 21 of the Constitution of India are non-negotiable*". It is pertinent to note that freedom of press not only has institutional importance but according to UNESCO publication *"Many Voices, One World*", freedom of media along with freedom of information and assembly plays a pivotal role in upholding and realizing human rights.[21]

Having discussed the importance and development of media freedom, the authors acknowledge that it is equally, if not less important, to regulate this freedom through reasonable restriction to protect privacy and prevent hate speech that may threaten the established rule of law. As rightly

[16] Constituent Assembly Debates, Vol. VII, Doc. 64, Para 34, December 1, 1948, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-01
[17] *Id* at 10.
[18] Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788.
[19] Indian Express Newspapers (Bombay) Private Ltd and Ors v. Union of India and Ors., (1985) 1 SCC 641.
[20] Jagisha Arora v. State of Uttar Pradesh & Anr, Writ Petition(s) (Criminal) No(s). 164 of 2019.
[21] United Nations Educational, Scientific and Cultural Organization, International Commission for study of Communication Problems, Many Voices, One World, at 233, (1980). https://d3n8a8pro7vhmx.cloudfront.net/medium/pages/72/attachments/original/1516334503/040066eb2.pdf?1516334503

said '*with great power comes great responsibility*', this fourth pillar of democracy while adhering to media ethics needs to upgrade its game.[22] However, on apprehension of a possible violation of a right, over censoring or stifling regulations will have a chilling effect on Freedom of speech and expression. Through a series of judicial decisions from both apex Court and various High Courts, authors will now put forth the second and important argument of gagging the reasonableness of use of restrictions under Article 19(2) to muzzle the dissent.

2. Public Order, First Amendment and Reasonable Restrictions

The word 'restriction' on Freedom of Speech and Expression, along with other fundamental rights as enshrined under Article 19 (2) of the Indian Constitution, was not an alien concept to the Constitution framers. Rather, the Constituent Assembly excessively debated and discussed the need to put restrictions on citizens' right to express themselves in their own country freely. Vehemently supporting the idea of not conferring an absolute right of Free speech and expression, Dr. Ambedkar cited the stand taken by the Supreme Court of the United States in the case of *Gitlow v. People of New York,*[23] wherein the Court held that no right can be absolute and the State can take reasonable measures to regulate any act that may lead to violence. Therefore, after many deliberations and discussion, the Article 19(2) at the time when the Constitution was adopted read as follows: -

> *"(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to or prevents the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."*

After the adoption of the Constitution, the Hon'ble Supreme Court gave liberal interpretation to Freedom of speech and expression. Decisions of Hon'ble Supreme Court in *Romesh Thapar*[24] and

[22] Tauseef Jawed, *Freedom Of Press In India: A Fundamental Right?* 2BURNISHED L. JOURNAL, 162, 2021. http://burnishedlawjournal.in/wp-content/uploads/2021/04/FREEDOM-OF-PRESS-IN-INDIA-A-FUNDAMENTAL-RIGHT-By-TAUSEEF-JAWED-1.pdf
[23] Gitlow v. People of New York, 268 U.S 652 (1925).
[24] *Id* 18.

Brij Bhushan,[25] were important to mark inception, development, and promotion of the right of Freedom of speech under Article 19(1). It acted as the ignition to the change in Article 19(2). The Court decided against curbing dissemination of information. It reasoned that 'Public Order' is not a ground envisaged under Constitution to be used under reasonable restriction and insisted on the requirement of higher burden of showing a threat to the security of the State. Consequently, the government was left with no other option except to come up with the First Constitutional Amendment Act to fill the gap which was created through such interpretation.

2.1. First (Amendment) Act, 1951 and Gaging the Reasonable Restrictions

With an objective to increase government control over free speech and at the same time not limiting the judicial power of review, The Constitution First (Amendment) Act, 1951, added the words 'reasonable', 'public order' and 'incitement to an offence' to the existing Article 19 (2). The word 'public order' empowers the government to enforce restrictions. The word 'reasonable' enlarged the scope of judicial review and allowed the Courts to check the proximity of the intent of legislation and content over which restrictions are to be applied.[26] Henceforth, the Article 19 (2) after amendment stands as follows:

> *"(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes* ***reasonable*** *restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States,* ***public order****, decency or morality, or in relation to contempt of Court, defamation or* ***incitement to an offence.****"*

Post amendment, development of reasonable restrictions in India was a bumpy ride with varied graphs of judicial decisions. From *Express Newspaper to Sakal Newspaper* the jurisprudence of freedom of press took a 180-degree turn. While upholding the constitutionality of 'Working Journalist (Condition of Service) and Miscellaneous Provision Act, 1955' the Supreme Court in *Express Newspaper (Private)*,[27] held that a newspaper company should pay its employees as other

[25] Brij Bhushan v. State of Delhi, AIR 1950 SC 129.
[26] Forum R. Patel & Purvi Pokhariyal, Freedom of Speech and Expression with Special Reference to Freedom of Press, 10 GNLU J., DEVELOPMENT AND POLICY, 102, 104-106, (2020).
[27] Express Newspaper (Private) vs. Union of India, (1986) 1 SCC 133.

businesses do, even if it creates a great financial burden on newspapers or shutting down newspapers owing to inadequate funds. Taking a *U-turn*, considering restrictions on circulation or volumes of newspapers as direct encroachment of Freedom of speech and Expression, the Supreme Court in *Sakal Newspaper (Private) Ltd.*,[28] held the 'Daily Newspaper (Price and Pages) Order, 1960' unconstitutional. In *Madhu Limaye*,[29] the Supreme Court, on the term '*in interest of public order' observed that it not only includes the actions disturbing the security of the state but actions breaching public tranquility and peace.*

The consequence of such vast interpretation by the Court resulted in legitimizing the State power to use laws to control dissent or information which goes against its agenda under the garb of 'public order'. Where the judiciary, to help media freedom flourish and to uphold the balance in rights of stakeholders, refined and defined restriction of public order, the question is how religiously the very tests laid down by judiciary are being taken into considerations while restricting media houses and social media users.

With passage of time, successive governments started using various other tools to restrict free speech. In terms of media, most of the notorious tools used by State authorities include public order, defamation, sedition, gag orders and now newly enacted Intermediary Guidelines, 2021.[30] These excessive restrictions and intolerant administration have proved to be quite a brutal blow on media freedom.[31] This plight of media freedom is not only detrimental to freedom of speech but also to the right to information of the citizens of the nation.[32] These unreasonable impositions of restrictions and the media censorship require the gaging reasonability of very restrictions through judicial decisions. The authors will now discuss how under the guise of public order, sedition or incitement of an offence, journalists, media houses and even social media users have been slapped with criminal charges, raids, and arrests.

[28] Sakal Newspapers v. Union Of India, (1962) AIR 305.
[29] Madhu Limaye v. Sub-divisional Magistrate, Monghyr and Ors, (1970) 3 SCC 746.
[30] The Information Technology (Intermediary Guidelines And Digital Media Ethics Code) Rules, 2021.
[31] Ayushi Singhal, *Freedom of Press: Fourth Pillar Of Democracy*, XIII, J. of Xi'an University of Architecture & Technology, 387, 389-390 (2021).
[32] Devarshi Sen Deka, *Defining the Rule of Law: India's Narrative to the Idea of Justice*, Legal Service India, (last visited on May 29, 2019), https://www.legalserviceindia.com/legal/article-732-defining-the-rule-of-law-india-s-narrative-to-the-idea-of-justice.html.

2.1.1. Public Order

Post amendment, during protectionist phase when newly amended Article 19(2) went under scrutiny, the Court while rejecting the need to establish proximate link between speech and public order in *Ramji Lal Modi*[33] and *Virendra*[34], overemphasized on term "*in interest of"* public order and upheld the validity of section 295A of 'Indian penal Code, 1860'[35] and draconian provisions to impose prior restraint on newspapers under colonial 'Press Act'. In the author's opinion, these decisions provided the government a significant leeway to restrict freedom of speech. However, vaguely deciding as to when exactly public order is endangered by press freedom, arguably cannot be considered reasonable restrictions.[36] The breath of term '*in interest of"* qualified the reasonableness perspective when Supreme Court in *Ram Manohar Lohia*[37] limiting the ambit of the term public order stressed on the need for direct proximity between speech and public disorder. To avoid vagueness created due to judicial interpretation of term public order, the apex Court further re-defined the *'proximity test'* in *S. Rangarajan*[38] by requiring the proximity to be like '*spark in a powder keg'*. It is to be noted that the prior restraint needs to satisfy proximity tests not only while dealing with traditional media houses but also with internet restrictions.[39] After public order, defamation is another kind of reasonable restriction used by legislative and police authorities to control and exploit media reporting.

2.1.2. Defamation

Slapping journalist with criminal defamation[40] for "*alleged dissemination of wrong information*' has become a trend and widely utilised method to jeopardise free and fair media reporting. Despite apex Courts emphasise on requirement and adequacy of reasonable verification of facts by media houses unless reckless disregard of truth is proved on part of publisher in *R. Rajgopal*,[41]the situation of filing defamation cases against the media has not stopped. Panning government's

[33] Ramji Lal Modi Case v. State of U.P, 1957 SCR 860.
[34] Virendra v. State of Punjab, (1957) AIR 896.
[35] Indian Penal Code of 1860 § 295 A, No. 45, Act of Parliament, 1860 (India).
[36] Gautam Bhatia, *Free Speech and Public Order,* The Centre for Internet and Society, (Feb 17, 2016), https://cis-india.org/internet-governance/blog/free-speech-and-public-order-1.
[37] Central Prison v. Ram Manohar Lohia Citation, 1960 AIR 633.
[38] S Rangarajan v. P Jagjivan Ram, 1989 SCC (2) 574.
[39] *Id* at 35
[40] Indian Penal Code of 1860 § 499, No. 45, Acts of Parliament, 1860 (India)
[41] R. Rajgopal v. State of Tamil Nadu, (1994) 6 SCC 632.

abstract and hypothetical considerations for curtailing personal liberty, the Court in *Sri Soumen Sarkar*[42] quashed the 'lookout circular' by the State Government against the journalist booked for allegedly showing defaming content on his news portal. The High Court also questioned the high headedness of the State authorities for impounding the passport of journalists by overriding the laws. Focussing on indispensability of press freedom and its vital importance in democracy Madras High Court in *R. Mani*[43], observed that State authorities need not subjugate occasional transgression by the press for the larger interest of sustaining democracy. In *Grievance Redressal Officer*,[44]Madras High Court, while citing the case of *New York Times*[45] quashed the criminal defamation proceedings against journalists, by relying upon the principle that "*Erroneous statements were inevitable in free debate*". The Hon'ble Court, pressing upon the duty of the Courts in protecting the fundamental right of speech of expression stated that, *"The sentinel must ever be alert to danger and charge forth when required. The Court can never desert its duty when it comes to protection of fundamental rights. Those observations will apply to the entire higher judiciary,*"[46]Ironically, defamation cases are not the only battle that the media is forced to fight right now.

2.1.3. Gag Orders

Another type of restriction over media reporting is in the form of 'Gag Orders'. These are the Orders plaintiff seeks from the District Courts in the form of injunctions to prevent media from reporting about the pressing issues. In *Association for Democratic Reforms*,[47] the Karnataka High Court, while setting aside the *Ex-parte* Injunction Order passed by Bangalore City Court restricting media from making any 'defamatory statement' against the plaintiff, observed that the test of defamatory statement is required only after the challenge by appropriate forum by the aggrieved person, in absence of same there cannot be any restrictions on telecasting and publishing.

[42] Sri Soumen Sarkar v. The State of Tripura', WP (C) No. 200 of 2020.
[43] R. Mani v. State of Tamil Nadu, Writ Petition No 25706 of 2012.
[44] Grievance Redressal Officer v. V.V. Minerals Pvt. Ltd, Crl OP(MD) No. 9067 of 2016.
[45] New York Times v. Suvilian, 376 US 254.
[46] Devashri Mishra & Muskan Arora, *The Movement against Criminal Defamation: Lessons for a Postcolonial India*, 9, Indian J. Const. L. 62, 78-84 (2020) https://ijcl.nalsar.ac.in/wp-content/uploads/2020/08/9IndianJConstL62_MishraArora.pdf.
[47] Association for Democratic Reforms v. Election Commission & Anr, Writ Petition No. 15399 of 2019.

Further in landmark *Muzaffarnagar Shelter case*,[48] when Patna High Court Order[49] to prevent the media from reporting anything regarding the case was passed and later challenged in the Supreme Court, the apex Court emphasizing the importance of media reporting allowed the media to report the issue.

In *Sunil Bhagel*,[50] the Bombay High Court while vacating the gag order passed by the Ld. Session Court[51]to restrict media from reporting the case, observed that "*the Press is the most powerful watchdog of public interest, in democracy. In fact, the presence of Press and Public in criminal trials encourages all participants to perform their duties diligently and conscientiously. It discourages misconduct and abuse of power by the prosecuting agency, prosecutors, judges, and all other participants. It discourages witness from committing perjury. In that sense, the presence of press and public protects the integrity of the trial; and public awareness of the Court proceedings helps maintain public confidence in the judicial system.*" Having discussed the reasonable restrictions, authors now dwell into misuse of draconian law of sedition, which despite explicit exclusion under Article 19(2) by our founding fathers, turns out to be malignant tool in hands of the State to control and curb freedom of media.

2.1.4. Sedition

Sedition has been used as a lethal tool to suppress criticism and dissents from the colonial era. From the trial of *Tilak*[52] to the great trial of *Mahatma Gandhi*[53], the menace of the law of sedition and its role to curb media freedom is noteworthy. Aware of the notoriety of this provision, it was purposefully kept outside the purview of restrictions by framers of our Constitution. However, Sedition did not see the end of the day but survived under Indian Penal Code, 1860 as Section 124-A, its validity was challenged in *Tara Singh Gopichand*,[54] and *Ram Nadan*,[55]where the Punjab and

[48]Nivedita Jha v. The State of Bihar & Ors, Special Leave Petition (C) No. 24978 of 2018.
[49] Santosh Kuamr Jha v. State of Bihar & Ors., C.W.J.C No 12845 of 2018.
[50] Sunil Bhagel v. State of Maharashtra & Ors, Criminal Writ Petition No. 132 of 2018.
[51] CBI v. M. L. Parmar & Ors., Session Case No 177 of 2013.
[52] Emperor v. Bal Gangadhar Tilak, (1917) 19 BOMLR 211.
[53]Gandhian Public Charitable Trust, Great Trial of 1922, Last visited on June 8, 2021.https://www.mkgandhi.org/law_lawyers/25great_trial.htm
[54] Tara Singh Gopichand v. State, 1951, CriLJ 449.
[55] Ram Nandan v. State of Uttar Pradesh, AIR 1959 All 101.

Haryana High Court and the Allahabad High Court respectively struck down Section 124-A and held it to be void after commencement of Constitution.

Contrastingly, the apex Court in *Kedar Nath,*[56]upheld the constitutional validity of the law of sedition and defined the limits of state. The Court opined that something will only be seditious if it "*incited violence or has a tendency to create public disorder*". "*The connection between the speech and public disorder should be close and not far-fetched*."[57] However due to the gap between the interpretation of sedition law by the apex Court and literal provisions in Section 124A, the lower Courts and the police in blatant disregard of this interpretation continue to slap charges of sedition against anyone who has a dissenting opinion.[58] This requirement of actual incitement of violence and public disorder to water down the scope of sedition in India has been suggested by various law commission reports and Indian Penal Code Bill, 2015[59].

Sedition law, as we know it today, is a cognizable and non-bailable offence, it penalises not only actual incitement of disaffection but also its attempt.[60] It is pertinent to note that British who enacted the sedition law to curb Wahabi activities and nationalist protest, have revoked it in the United Kingdom itself in 2009 through Section 73 of 'Coroner and Justice Act, 2009'[61] by stating that "*sedition is an arcane offense of the bygone era*" and thus the law was repealed. Reiterating the scope and ambit of sedition as per *Kedar Nath*, Supreme Court of India in *VinodDua*,[62] quashed the First Information Report filed against journalist Vinod Dua.

In recent case of *Disha Ravi*,[63] the blatant use of provision can very well be seen, where a Bengaluru girl was arrested for creating and sharing a toolkit through her social media and was allegedly charged for being part of 'global conspiracy' leading to Republic Day violence in the

[56] Kedar Nath v. State of Bihar, 1962 AIR 955.
[57] *Id.*
[58] Ytharth Kumar & Sreyoshi Guha, *Sedition: Crucifixion of Free Speech and Expression?* 2 Lib. Stud., 109, 110-111 (2017),https://sls.pdpu.ac.in/downloads/Ytharth%20Kumar,%20Sreyoshi%20Guha.pdf.
[59] The Indian Penal Code (Amendment) Bill, 2015; Law Commission, *Hate Speech* (267, 2017).; Law Commission, *Consultation Paper on Sedition* (2018).
[60] Indian Penal Code of 1860 § 124 A, No. 45, Acts of Parliament, 1860 (India).
[61] Coroners and Justice Act of 2009 § 73, c. 25.
[62] Vinod Dua v. Union of India & Ors, Writ Petition (Crl) No 154 of 2020.
[63] State v. Disha A Ravi, Patiala House Court, Bail Application No. 420 of 2021.

National Capital.[64] It is to be noted that had the guidelines in *Kedar Nath* been considered, there shall not be any arrest made in the first place in absence of evidence of any actual harm. Further a three-judge bench of apex Court through its Order to accept the petition to relook into sedition of two journalists who were booked for broadcasting critical view on Chief Minister's Covid Management Policy gave a ray of hope to many.[65] This decision will look not only into sedition law alone but in context to the right of electronic and print media to communicate news and information. Acknowledging the role and importance of digital and social media platforms in circulating and communicating news and information the authors will now dwell into the reasonability of various restrictions imposed on social media users while exercising their fundamental right to speech and expression.

3. Social Media with Reasonably Restricted Freedom

Today, media is not just confined to the four walls of a newsroom or the pages of a newspaper. Media has become an umbrella term that inculcates social media and other allied media platforms to opine on social and political movements around the globe.[66] Social media today amplifies the voice of ordinary citizens. Media activism jolts people out of their comfort zones and calls for action for a better functioning of the society through digital news portals established and facilitated to exercise their freedom of press by publishing information with respect to current affairs on the internet.[67] However, the new age media platforms that have so far been out of the government control radar have now been forced to subvert to State control. The latest addition in laws to bend freedom of speech of social media is '*Information Technology Rules, 2021*'.[68] With digital news

[64] Yashovardhan Azad, *Can a protest toolkit attract sedition law?* Hindustan Times, (accessed on 19-02- 2021, 06:24 PM),
https://www.hindustantimes.com/opinion/can-a-protest-toolkit-attract-sedition-law-101613739245213.html.
[65]Kishorechandra Wangkhemcha & Anr. v. Union of India, Writ Petition (Criminal) No. 106 of 2021.
[66] Meera Mathew, *Freedom of information, right to express and social media in India*, 3, Interactive Entert. Law Review, 94, 95-97.
[67] Vineet Kaul, *The Pros and Cons of New Media and Media Freedom*, 2, Jour. of Mass Communication and Journalism, 1, (1-10) https://www.hilarispublisher.com/open-access/the-pros-and-cons-of-new-media-and-media-freedom-2165-7912.1000114.pdf
[68] 'Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021' notified on 25.02.2021 through GSR 139(E)
https://www.meity.gov.in/writereaddata/files/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf

portals becoming a popular alternative to news dissemination, it becomes necessary for the policy makers and judiciary to act for protection and upliftment of independence of these platforms.

Part II of the impugned Rules provides unprecedented powers to the intermediaries in defining what would amount to free speech and what would fall in restricted speech. Rule 3[69] states that an intermediary must inform the user not to host, display, upload, modify, publish, transmit, store, update or share any information that according to the intermediary is defamatory. Further, Rules empower the intermediary to inform the user not to host, display, upload, modify, publish, transmit, store, update or share any information that according to the intermediary is against public order.[70]

Without giving any specific definition as to what would amount to defamatory or public order, it is left to the intermediaries to decide the fate of free speech. In the wake of criminal liability with a capitalistic mind set, the intermediaries are prone to compromise the values inherent in the idea of Freedom of speech and expression.

It is interesting to note that in *Shreya Singhal*,[71] the Supreme Court held that the intermediaries are required to take down or block content upon notification only upon the receipt of an order from a government agency or a Court and not at the intermediary's discretion or on receipt of request by an affected person. Therefore, the power given to the intermediaries is not only abstract or vague but also against the ruling of Supreme Court itself.

Further, Part III of the Rules bind publishers of online content by '*Code of Ethics*' under which publishers must follow a three-tier system for regulation calumniating in oversight by the Central Government.[72] Rule 14 further elaborates the role of the Central Government, where an 'Inter-Departmental Committee' will examine the complaints made against the content and make recommendations to the Government to take further action. The government in furtherance will take note of the recommendation and take appropriate action.[73]

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[69] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 § 3.
[70] *Id*.
[71] Shreya Singhal v. Union of India, (2015) 5 SCC 1.
[72] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, § 9.

[73] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, § 14.

Such government oversight is an executive control over online speech that directly threatens Freedom of speech and expression. Needless to say, such a situation will lead to an era of prior sanction of Freedom of speech and expression. The code is further vague and unclear as it directs the publishers to adhere to the guidelines to "*take into consideration India's Multi-racial and Multilingual context*" and exercise "*due caution*". It is pertinent to note that any content alleged to be not in conformity, may be blocked on recommendation of the Inter-Departmental Committee. But what would amount to Multi-racial and Multilingual context has not been defined and has been again left to the wild imaginations. Though Article 19 (1) (a) of the Constitution does not give any right to propagate hate speech. It is important to understand that any law to curb hate speech needs to be clear and precise. In absence of such clarity, the vagueness of the law would lead to chaos. Ultimately, we conclude that the Guidelines stifle press freedom by prescribing vague standards for deleting, modifying, and blocking content published on such portals and adjudicatory processes as codified under the Guidelines.

4. Conclusion

Voltaire once said, "*I do not agree with a word you say but I defend to death your right to say it*." The freedom of press has not been given a separate right under the Constitution, but its freedom is enshrined along with all the citizens of the country under Article 19 (1) (a) of the Constitution. It is the common understanding across the globe that the role of the media is not to mitigate the power structures of the State but to speak truth to power.

The need for free media has been felt more during the COVID-19 pandemic. During the crisis, the media has done an exemplary job of showing the lacuna in the administrative system and its apathy towards the people's needs. The media had to bear the brunt of State authorities in form of criminal charges under sedition, criminal defamation, and misinformation. The continuous State regulations to restrict the criticism of the government, harassment through imposing multiple litigations and strict interpretation of laws by the enforcement agencies, show that the State has waged the war against the media for its free reporting and expression. The clear vendetta of the State authorities against the media is so satiric that even D. Y. Chandrachud, J, the Supreme Court made a stark

remark as to whether the sedition case has been filed against the journalists who captured the floating dead bodies in Ganges River.

By discussing the catena of judicial decisions, it will not be incorrect to question whether Article 19(2) of the Constitution, whose all objective was to protect the Republic from falling apart from both external and internal forces, has lost its objective? While framing the Constitution, the founding fathers could have never envisaged the situation that the safeguard, provided by them to the government to protect its identity and existence of the people of the State, will be used as a tool to monopolise the control over free speech, particularly on media. Further the test of reasonableness requires that "the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive character, beyond what is required in the interest of the public." Further Justice Subba Rao has also stressed on the very fact that there should be a proximate connection or nexus of these restrictions with public order, and they should not be far-fetched.

It is high time that the media freedom is not taken lightly and the reasonable restriction under Article 19(2) are used reasonably by balancing the public interest and public order as media is not an heirloom of the ruling government but a neutral, independent body holding those accountable who breach the constitutional sanctity of the bracket of their power.

The role of the media is to bring out the facts and stories that need to be told to the citizens to make informed choices. Today the scope of media has increased many folds with the introduction of social media into the mainstream media, which has provided various platforms to the citizens to receive the requisite information. However, even with the new arms, the media has not been able to withstand the pressure of the State. The FIRs against journalists, reporters, and citizens for raising or disseminating information has been a continuous process. The new trend has been to destroy the credibility of the media itself so that its reporting cannot be trusted at the very first place.

The freedom of media is paramount for the existence and stability of any democratic state because the essence of democracy lies in the right of people to democratic choices and to make such democratic choices the citizens need to have the right to information. To restrict the media from disseminating information freely will destroy that right and lead us to an Authoritarian State, the

very situation, against which the founding fathers of the nation fought for independence. Therefore, Freedom of media needs to be celebrated and every attempt to curb this freedom should be done away with.

5. Recommendations

The authors make following recommendations that can be incorporated to promote reasonable freedom of press:

- There is a dire need to review existing laws and check whether they are imposing unreasonable restrictions.
- Enacting laws for the protection of the life and property of the journalists and media houses.
- Re-defining the boundaries of criminal laws like sedition, criminal defamation and public order with respect to their applicability in the media.
- Freeing the media control from the clutches of the central government by dismantling the Ministry of Information and Broadcasting and creating an independent body like the Election Commission, headed by retired Supreme Court or High Court judges, which would monitor the media with specific laws enacted for this purpose.

UNDERSTANDING STATE RESPONSIBILITY DURING THE TIMES OF A PANDEMIC: COVID-19 AND ITS RESPONSES

Harsh Mahaseth[1] *and Sanchita Makhija*[2]

1. Abstract

The recent outbreak of the Covid-19 has brought the whole world to a standstill. It is harrowing to realize that the pandemic has shaken the deepest structures of society. State responsibility and human rights issues have been at the forefront of discussions right from the beginning of the outbreak in China when the State was alleged to have delayed the intimation regarding the virus to the world.[3] *The severity of the virus escalated to the level of a pandemic*[4] *rising to a level where governments started to restrict movement with the imposition of quarantine or isolation, and the violation of certain rights was justified in the name of emergency.*[5] *India has imposed a nationwide lockdown from the very early stage of the disease spread,*[6] *curbing down several individual rights, unlike most nations that did not resort to such measures initially.*

The authors aim to analyze the concept of State responsibility in the time of Covid-19 with respect to India's actions. In furtherance of the aforementioned, the article has been divided into three sections. The first section shall explain the concept of State responsibility and its implications in the time of a pandemic by discussing the relevant international instruments. The second section shall analyze India's response to the pandemic and whether it abides by the international and domestic standards of State responsibility. The third section will conclude with suggestions on

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[3] China's move to lockdown Wuhan delayed spread of coronavirus outside: Study, available at https://economictimes.indiatimes.com/news/international/world-news/chinas-move-to-lockdown-wuhan-delayed-spread-of-coronavirus-outside-study/articleshow/74628483.cms?from=mdr.

[4] WHO announces COVID-19 outbreak a pandemic, World Health Organization, available at http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic.

[5] Human Rights Dimensions of COVID-19 Response, Human Rights Watch, available at https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response.

[6] Government of India issues Orders prescribing lockdown for containment of COVID-19 Epidemic in the country, Press Information Bureau, Government of India, Ministry of Home Affairs, (2020).

what could be the right balance between protecting the rights and combating the crisis with an emphasis on the role of adjudicatory bodies at both a national and international level.

2. The Concept of State Responsibility in the Time of Pandemic

The concept of "State responsibility" was originally conceived as a set of international rules governing States' international obligations in their relations with other States.[7] It defines what amounts to a violation of an international obligation by a State and the consequences of such violations. The Draft Articles on State Responsibility of States for Internationally Wrongful Acts 2001 (hereinafter ARSWA) adopted by the International Law Commission (hereinafter ILC), even though not binding on the States, is an authoritative document which has a persuasive value. Most of the provisions enumerated under the ARSWA have attained the status of *jus cogens*.[8]

Article 1 of the ARSWA postulates that every internationally wrongful act, which could be an action or omission, of a State entails the international responsibility of that State The commission of an internationally wrongful act depends on two criteria: firstly, "*on the requirements of the obligation which is said to have been breached, and secondly, on the framework conditions for such an act*".[9] The Permanent Court of International Justice (hereinafter PCIJ) in the *Phosphates in Morocco case*[10] affirmed that, when one State commits an internationally wrongful act against another State, international responsibility is established "immediately as between the two States". Further, the International Court of Justice (hereinafter ICJ) has reaffirmed the principle on several occasions including the *Corfu Channel case*,[11] the *Military and Paramilitary Activities in and against the Nicaragua case*,[12] and the *Gabˇcíkovo-Nagymaros Project case*.[13]

Article 2 provides that the wrongful acts are those actions or omissions which constitute a breach of international obligations and can be attributable to the State under international law. It specifies the conditions required to establish the existence of an internationally wrongful act of the State or

[7] Sucharitkul, S *State Responsibility And International Liability Under International Law*, 18 Loyola of Los Angeles Int'l. & Comp. L.J. 821 (1996).
[8] Articles on Responsibility of States for Internationally Wrongful Acts, art. 19, Supplement No. 10 (A/56/10).
[9] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.
[10] Phosphates in Morocco (Italy v. Fr.), Judgment, 1938, P.C.I.J., Series A/B, No. 74, 10, ¶ 28.
[11] Corfu Channel Case (United Kingdom v. Albania) , Judgment, I.C.J. Reports 1949, 4, ¶ 23.
[12] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 142, 283, 292.
[13] Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, [1997] ICJ Rep 3, 38, ¶ 47.

in other words, the constituent elements of such an act. The ICJ has made reference in the cases of *United States Diplomatic and Consular Staff in Tehran* case,[14] *Dickson Car Wheel Company* case,[15] etc.

Further provisions of the ARSWA explain that such conduct is attributable to a State under international law, *firstly*, "*when a State organ commits it through the legislature, executive, and judiciary or any other functions irrespective of position it holds in the organization of the State or character of as an organ in the central government or in a territorial unit of the State*";[16] *secondly*, when committed by a person or group of persons, or if, such "*person or group of persons is, in fact, acting on the instructions of, or under the direction or control of that State in carrying out the conduct.*"[17]

Chapter III of the ARSWA explains the breach of an international obligation. It states that "*there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character and such breach shall result in legal consequences*."[18] Therefore, the State to breach an international obligation should have violated conduct attributed to it as a subject of international law with an international obligation incumbent upon it.[19] The primary obligation is the determining factor in whether a State is considered to have breached its international obligations. The interpretation and application of this determining factor are crucial to the standard to be observed, and the result to be achieved.

Now we may look into what all international obligations shall be relevant in the light of a pandemic. International obligations relevant to State response towards the Covid-19 outbreak can be broadly classified into two. *Firstly*, such obligations make it necessary for the States to take timely measures to curb the spread to other areas beyond their borders. This obligation becomes

[14] Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Order, 12 V 81, 3 & 29, ¶ 56. Cf. page 41.
[15] Dickson Car Wheel Company (U.S.A.) v. United Mexican States, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678 (1931).
[16] *supra* note 8.
[17] *id.*
[18] Articles on Responsibility of States for Internationally Wrongful Acts, art. 12, Supplement No. 10 (A/56/10).
[19] supra note 7.

relevant in the context of allegations of China's delayed response.[20] The initial cover-up of the outbreak in Wuhan allowed the virus to spread beyond China. These omissions may well constitute an international wrong for which China is liable vis-à-vis other states that suffered damage, including economic damage, as a result thereof.[21] *Secondly*, the obligations regarding a State's own population's human rights while tackling the pandemic within their borders.

Regarding the former, although the outbreak is unprecedented and there is no law that specifically deals with such a situation, the International Health Regulation, 2005 (IHR); Constitution of the World Health Organization and the Vienna Convention on Law of Treaties (hereinafter VCLT) would be the international instruments that will govern such State response.

The VCLT is an international agreement regulating treaties between States.[22] It establishes comprehensive rules, procedures, and guidelines for how treaties are defined, drafted, amended, interpreted, and generally operate. It is otherwise known as the "treaty on treaties."[23] The VCLT is considered a codification of customary international law and state practice concerning treaties.[24] It governs the international agreements. It encompasses the principle "*pacta sunt servanda*" which means that every State has to perform its obligations under any treaty in good faith under international law.[25]

Further, the International Health Regulation is an agreement between 196 countries, including all WHO member states aimed at creating a mechanism for global health security and is framed under the aegis of the Constitution of the WHO. The Constitution of the WHO put forth the objective as "the attainment by all peoples of the highest possible level of health". This shall be read in the light of Article 18 of VCLT that states shall not defeat the objects and purposes of a treaty.[26] Article

[20] COVID-19 and the mirage of a China-led international order, available at https://economictimes.indiatimes.com/blogs/et-commentary/covid-19-and-the-mirage-of-a-china-led-international-order.

[21] State Liability for Failure to Control the COVID-19 Epidemic: International and Dutch Law, European Journal of Risk Regulation, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7156574/

[22] Patricia Bauer, Vienna Convention on the Law of Treaties, available at https://www.britannica.com/topic/Vienna-Convention-on-the-Law-of-Treaties

[23] Anthony Aust, *Vienna Convention on the Law of Treaties (1969)*, Oxford Public International Law, (2006).

[24] 50 Years Vienna Convention on the Law of Treaties, available at https://juridicum.univie.ac.at/news-events/news-detailansicht/news/50-years-vienna-convention-on-the-law-of-treaties/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=c429b920a208a21200d829194f27c907.

[25] The Vienna Convention on the Law of Treaties, art. 26, opened for signature 23 May 1969, 1155 UNTS 331.

[26] International Health Regulation, art. 3, 2005.

5 of the Regulation makes it mandatory to develop, strengthen and maintain, as soon as possible the capacity to detect, assess, notify and report events in accordance with the regulation[27]. It also provides the mechanisms and directions for timely intervention and communication at a global level in a health emergency. Similar provisions that mandate truthful disclosure and communication during a health emergency are provided under the Constitution of the WHO.[28] Therefore, a willful and intentional failure to share information expeditiously with WHO in the event of a public health emergency in accordance with IHR constitutes a breach of international obligations as provided under ARSWA.

3. Human Rights

The international human rights regime can be considered the strongest of all, after due consideration of the number of instruments and implementations attributed to it. More than 60 human rights instruments together form the international standard of human rights.[29] This framework does address the concerns in times like that of a pandemic when certain restrictions over individual rights become necessary.

For instance, the International Covenant on Civil and Political Rights (hereinafter ICCPR), deems it lawful to suspend or restrict certain rights, in cases of a national emergency or for public health reasons.[30] Similarly, the Siracusa Principles, adopted by the UN Economic and Social Council in 1984, and the UN Human Rights Committee, provide authoritative guidance on government responses in such similar circumstances. Measures taken must be lawful, necessary, proportionate and for the welfare of the people.

Another aspect relevant in the context of Covid-19 is the recognition of public health as a right by various international instruments. This imposes an obligation upon states to carry out activities to ensure the well-being of its citizens. The International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), states that every individual has a right to the highest attainable

[27] International Health Regulation, art. 5, 2005.
[28] Article 63; Article 64, Constitution of the World Health Organization.
[29] Willmott-Harrop E., *Human rights mechanisms and international law*, (2001).
[30] *Emergency Measures and Covid-19: Guidance*, United Nations Human Rights Office of the High Commissioner, (2020).

standard of physical and mental health. It further provides that "*Governments are obligated to take effective steps for the prevention, treatment and control of epidemic, endemic, occupational and other diseases*."[31] It is also imperative to note that the United Nations Committee on Economic, Social and Cultural Rights, which monitors state compliance with the covenant, has stated that: "*The right to health is closely related to and dependent upon the realization of other human rights. These and other rights and freedoms address integral components of the right to health.*"[32] It further explains that the right to health includes facilities of goods and services available in sufficient quantity, accessible to everyone without discrimination, and affordable for all, even marginalized groups etc. Both the ICCPR and ICESCR are legally binding treaties, and a breach of the same shall result in consequences arising out of state responsibility as in the case of IHR.

1. The Indian Scenario

The international standards of human rights provide that even in an emergency, any curtailment of rights needs to be lawful and will have to consider the disproportionate impact of such actions on specific populations or marginalized groups. A pandemic at the level of Covid-19 beyond doubt needs stringent measures to bring the crisis in control and India has resorted to the highest possible control mechanism by declaring a nationwide lockdown at an early stage of the pandemic itself. This swift action has garnered applause from various spheres, and the WHO itself has praised the action as "tough and timely."[33]

At the same time, a nationwide lockdown without any prior intimation has raised serious questions considering that a large portion of India's population depends on daily wages for subsistence.[34] There has been a mass exodus of migrant workers. Reports also suggest that the government efforts to provide financial help and food security have been inadequate, and have not reached a large proportion of the rightful beneficiaries.[35] Adding on to this is the devastating condition of public

[31] International Covenant on Civil and Political Rights, Article 12, 19 December 1966, 999 UNTS 171.
[32] The right to the highest attainable standard of health, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social And Cultural Rights*, General Comment No. 14 (2000), ¶3.
[33] Srivastav T, *Why India has the upper hand against COVID-19*, (2020).
[34] Vyas A. & Gutta S., *How the government can ramp up its efforts*, The Print, (2020).
[35] 'Future is scary': Poor hit hardest by India coronavirus lockdown, available at https://www.aljazeera.com/news/2020/04/scary-poor-hit-hardest-india-coronavirus-lockdown-200409105651819.html.

health infrastructure, which makes it nearly impossible to combat the pandemic of such a large scale with the number of infected persons scaling up every day.

India has a robust constitutional framework enlisting numerous rights and providing for clear measures as to how and when such a situation has to be restricted. The author concludes the discussion over international standards with a proportionality test. Whether the measure as drastic as the ones imposed in times of an emergency is necessary is discussed briefly above. Further, it is elaborated on whether it was the least restrictive option for the State to achieve its goal? This was a question discussed at length in both the *Puttaswamy* judgments by the Indian Supreme Court as well and shall be the test for determining the need for such actions.[36]

India's lockdown, as already pointed out, has been criticized for its arbitrariness and lack of transparency. The right to life enshrined under Article 21 of the Indian Constitution postulated that India's citizens have a right to live with dignity and not a mere animal existence[37].

Thousands of migrant workers were thrown into misery by the lockdown without any proper aid from the State. This raises a serious question in this regard, and hence the actions cannot be justified to qualify the proportionality test. It should also be considered that the State controls resources and media and therefore, the mitigation of harm prior to the lockdown was well within the realm of the possible.

A problem that needs to be dealt with is the protection of the health workers. The very people who are protecting us from the pandemic, while putting their own lives on the line, are exposed to hazards, such as pathogen exposure, long working hours, psychological distress, fatigue, occupational burnout, stigma, and physical and psychological violence, that put them at risk of infection.[38] They have the right to full protection in recognition of their increased vulnerability

[36] K Justice K. S. Puttaswamy (Retd.) v. Union of India, MANU/SC/1044/2017.
[37] Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295: 1964 SCR (1) 332.
[38] *WHO calls for healthy, safe and decent working conditions for all health workers, amidst COVID-19 pandemic,* World Health Organization, available at https://www.who.int/news-room/detail/28-04-2020-who-calls-for-healthy-safe-and-decent-working-conditions-for-all-health-workers-amidst-covid-19-pandemic.

under Article 14 and Article 21 of the Constitution. However, there have been reports of insufficient preventive equipment and other impaired facilities from many parts of the country.[39]

India is also a State that has been widely criticized for its inadequate data protection policy in the past. Even in the midst of the Covid-19 situation, the issue of data privacy has come to the forefront of discussions with the mandatory introduction of *Aarogya Setu App*, a mobile application released by the Ministry of Electronics and Information Technology, Government of India. The Government has made it mandatory for both public and private sector employers who are allowed to work during the lockdown period.[40] It is also made mandatory for all people in containment zones, and non-adherence to it will invite penal action under the Disaster Management Act, 2005 and also under Section 188 of the Indian Penal Code.

The application continuously tracks its users with the aid of the Global Positioning System (GPS) as well as Bluetooth. This raises questions over the necessity of such an action that intrudes an individual's privacy. It is argued that the mandatory use violates the fundamental right of privacy as upheld by the Supreme Court[41] . Such actions have not been reported even in countries that have robust data protection and privacy policies and legislation. Various petitions are filed in different High Courts on the same and are *sub judice* at the moment.

Several concerns similar to the abovementioned have concerned India's response to the Covid-19 crisis as violative of both international and domestic standards.

2. Legislations Dealing with the Covid-19 Pandemic in India

India, unlike other countries, failed to enact legislation specifically dealing with the Covid-19 pandemic and therefore, had to use draconian laws such as the Disaster Management Act, 2005 and the Epidemic Diseases Act, 1897. The two aforementioned laws have been the most prevalent in terms of the usage to curb the virus. Below, the two laws have been analyzed:

[39] *Shortage of personal protective equipment endangering health workers worldwide,* World Health Organization, available at https://www.who.int/news-room/detail/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide.
[40] Government of India, Ministry of Home Affairs, No. 40-3/2020-DM-I(A), (2020).
[41] supra note 36.

Disaster Management Act, 2005

The Disaster Management Act, 2005 was enacted "to provide for the effective management of disasters and for matters connected therewith or incidental thereto." The legislation was enacted under List 23 of the Constitution, which deals with Social Security and Social Insurance to provide the State Governments with the leeway to enact state level legislation on the management of disasters. It provides for the setting up of Disaster Management Authority(s) at the National, State and District level. The definition of disaster under the act includes man-made disasters and therefore, the act was used to impose the nationwide lockdown in India.

Epidemic Diseases Act, 1897

The Epidemic Diseases Act, 1897 was enacted during the colonial era of the British Empire to deal with a plague that broke out in the state of Bombay. The law has been used time and again in the country, even as late as 2018 to Nipah Virus. Unlike the Disaster Management Act, the Epidemic Diseases Act empowers the state governments. Section 2 of the Epidemic Diseases Act empowers that state to take measures or prescribe regulations to prevent the outbreak of the concerned disease. The said section has been used incessantly by various state governments to issue guidelines for curbing the menace that is the Covid-19 virus. Section 3 of the Act has also been amended to prevent attacks on healthcare workers.

3. Conclusion

Most of the countries around the globe, and India in particular, have put in maximum efforts to contain the spread of the pandemic and thereby fulfilled their obligations of State responsibility. The affected States adopted various measures like lockdowns and social distancing to save their people from catching the deadly coronavirus. However, International Law dictates that "*regardless of a health emergency or an epidemic, the measures taken to affect human rights should be legal, necessary, reasonable and proportional. Every measure must be recorded in evidence, and there should be strict adherence to the procedure prescribed. The priority of taking measures to restrict the outbreak lies on an equal pedestal with the significance of following due process without*

depriving the people of their human rights."[42] Another main concern would be with regard to the practical difficulties of enforcing state responsibility at an international level over India or any state with respect to the Covid-19 response.

[42] Kosher R, *A State's Responsibility in an Epidemic: Human Rights and the Coronavirus Outbreak*, Opinion and Research from the Human Rights Community at Columbia University, (2020).

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