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IILS LAW REVIEW

INDIAN INSTITUTE OF LEGAL STUDIES

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ABOUT ILS

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, ILS is nestled in the cradle of the quaint Himalayas and picturesque surroundings assimilating nature and education, a combination which is a rarity in itself. ILS is an institute that promotes holistic study in Law in the form of short-term courses, field work, experimental learning, Clinical legal classes in addition to the regular under graduate 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 organizing 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 organizing a series of National and International Seminars, Conferences, Symposiums, Workshops and Inter and Intra Moot Court competitions. The Institute had started with organizing national seminar on "Civil Justice Delivery System". Today, it has reached the peak of organizing international seminars with the SAARC Law Summit & Conclave being the blooming one.

Presently, the world is facing health crises due to emergence of a pandemic by COVID-19 virus and physical gatherings have been completely stopped, especially in schools, colleges and universities since past almost 6 months and more. 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 modes 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 the academic development with its adoption of inter-disciplinary and practical approach has aided its students to gain 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 a 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

This journal, though in its nascent and juvenile stage, has received the rare distinction of being recognized by the UGC. It provides the entire team responsible for its publication, the vivacity and vigor to move forward and present ideas and thoughts to its readers. It has been made possible by the relentless efforts put in by the editorial team which has had the good fortune of having extremely able and imaginative research assistants.

While choosing on the topic, I have decided to jot down a few lines on the unprecedented crisis that the entire human race has been facing due to the COVID -19 Pandemic. The onset of spring this year has been quite different from other years. It had demonstrated signs of pathological anxiety. The COVID -19 Pandemic has diseased humankind and it has been considered as a global health crisis of the modern civilization. This has been the greatest challenge we have encountered since the World Wars and the Great Economic Depression of the 1930s. The present hour weighs heavy with gloom and it is the dire need of the world to generate pragmatic

responses to overcome this epidemic and the most erudite brains all over the globe are tirelessly striving to devise strategies and remedies to combat this crisis.

If we take a look at the history of the Corona virus, it originated sometime in the middle of December 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 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 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.

In adverse times as this, when our newsfeed is buzzing everyday with dark and gloomy information about lockdown, boycotts, rising death toll, a sense of uncertainty is baffling our minds. We, as responsible citizens of our country must try to hold on our nerves. We must learn not to panic as lots of myths and fake news are being circulated by fraudsters. Domestic abuse, depression, suicidal tendencies are increasing because of the anxiety that is looming large. We must realize that anxiety is contagious and make conscious efforts to combat it.

COVID -19 has had adverse impact on the entire educational system and the entire student fraternity has been affected irrespective of their social backgrounds. The mental health of students has also been impacted upon. An effort has been initiated to normalize education system by the use of technology. About 1.5 billion children around the world have had to stay home and indoors in their efforts to minimize the transmission of the virus. Even though remote learning opportunities have been adopted yet 30 percent of the students -around 463 million worldwide- were deprived access to such a method by remote learning due to deprivation and poverty. This

has led to a global education emergency and the repercussions shall be felt for decades to come. Such unequal access to education particularly in rural areas shall lead to skewed human response development which is detrimental to humanity.

Humans have devised and evolved various means to restrict the impact of the virus but its devastating effect is visible everywhere-this is the struggle for existence -this is the new normal. People should spread positive messages. This is the time to explore one's hidden talents and work on them. Because of communication gaps, people are becoming more paranoid. Social distancing must be replaced by physical distancing. One should maintain proper hygiene and positive thinking and physical activity can reduce stress and boost immunity. Though a staggering number of people are getting infected, they are recovering also. B.B.C and other institutional research agencies estimate that most of the Corona Virus related information circulating on social media are not reliable. One must stay away from the medical internet jargon that one doesn't understand.

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.

A handwritten signature in dark ink, appearing to read 'J. Choudhury', with a horizontal line underneath it.

JOYJIT CHOUDHURY

EDITORIAL



Prof. (Dr.) GANESH JI TIWARI
Editor-in Chief & Principal,
Indian Institute of Legal Studies

Legal scholarship is a bastion of the law and very vital to the continued relationship of law and society. It sheds light on particular issues, creating dialogue between 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 to progress is 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 ideals.

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 for a to academicians, professionals and students alike to express their views on various dimensions of the law as it stands and the law, as it should be. The IILS Law Review aspires to be at par with foreign law school reviews in terms of quality. Throughout the years, the editorial boards have attempted to maintain the threshold of quality while ensuring the

frequency of issues is consistent. 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 Sixth Volume (Vol. VI, Issue No. 1) of the IILS Law Review. I thank the Institute, the Board, the authors 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, going forward, is that it should always seek to achieve newer and greater heights and keep the spirit of legal scepticism alive.

In this issue, we are proud to present excellent literature on different areas of law and policy including Constitutional law, Jurisprudence, Human Rights, Alternative Dispute Resolution, Consumer Protection laws, and Criminal laws.

On Behalf of the Board of Editors,



PROF. DR. GANESH JI TIWARI
EDITOR-IN-CHIEF & PRINCIPAL
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IILS LAW REVIEW

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AN EVALUATION: HOW FAR ARE THE RIGHTS OF WOMEN PRISONERS PROTECTED
UNDER BANGLADESHI LAWS?

Nazia Wahab¹

Abstract

Mahatma Gandhi said “hate the sin, love the sinner”. Numerous international instruments also ensure some basic rights of prisoners. For example, it is said that “All persons deprived of their liberty shall be treated at all times with humanity and with respect for the inherent dignity of the human person”. This is further said that women prisoners shall not suffer discrimination and shall be sheltered from all forms of forcefulness or abuse. Like other countries of the world, Bangladesh also has a number of women prisoners. Hence, they need some gender specific requirements. Nevertheless, the author thinks that, Bangladesh is not fully complying with the international instruments. Additionally, there are some scholastic views regarding this. Some academic by their writings also confirmed that, our women prisoners are deprived of some basic rights. In this paper, the author will try to analyze the existing laws of country for protecting women prisoner’s right and its compliance with international standard. Therefore, the author will try to give some suggestion to ensure women prisoner’s right.

Keywords: Evaluation, Women, Women Prisoner, Bangladeshi, Rule and Regulations

1. Introduction:

“And as diseases vary, aids must vary;

A thousand kinds of ill, a thousand cures.”- Jeremy Bentham²

Punishment is the coercion used to enforce the law of the land, which capability it is one of the pillars of contemporary civilization. Providing a nonviolent society and life is the duty of the state. Punishment is one of the purposes of punishing and may furthermore assist active functions, primarily the decreasing of crime. Thus, penalizing is the dominion where the state acts in its most forcible

¹ Assistant Professor, Department of Law and Human Rights, University of Asia Pacific, Dhaka, Bangladesh, Email: nazia@uap-bd.edu

* One of my students Shahriar Islam Shovon (students of 2nd year 2nd semester, Department of Law and Human Rights, UAP) helped me by sum up some literatures. I would like to acknowledge his effort here.

² BENTHAM JEREMY, DUMONT ETIENNE, THEORY OF LEGISLATION, P 122 Volume 2 (Weeks, Jordan, and Com 1840)

method against its citizens³. In the history of the world, societies have punished criminals while at the same time trying to justify the practice on ethical and balanced grounds and to clarify the relationship between punishment and justice⁴. In this respect, certain punishments are determined by criminal justice systems in every society. Imprisonment is one of these punishments, is imprisoned persons are captive in prison⁵. Though, the convicted is punished to prison and restricted of his or her freedoms, but she or he has fundamental rights and freedoms that must be secured even if in prison. All of these rights and liberties are protected by the rule of law.

This is mention worthy here that, “Women in prison” have turn into the fastest-growing phenomena around the world⁶. Bangladesh has a number of women prisoners. Women prisoners are considered as the weak group in prison because of their gender. The reasons of this vulnerability are mostly common to different countries around the world. Women prisoners naturally have economically and socially poor backgrounds, and a number of women in low-income countries undergo from a diverse health conditions which may be untreated in the community. This situation is also existed in Bangladesh and has been ignored and unnoticed not only in the scholarly literature of the country but by the policy makers of the country. This is positive that, recently some of the scholars have tried to focus in sociological perspective, but very few scholars are trying to emphasis on legal perspective⁷.

Different research shows that, all over the world women prisoners suffers from diverse types of discriminations⁸. Women considered as a weak group in prisons, due to their sex. Though, there are significant differences in their condition in different countries, the reasons for their weakness and consistent requirements, a number of issues are common to most. i.e. disproportionate victimization from sexual or physical abuse prior to imprisonment, disproportionate victimization from sexual or physical abuse prior to imprisonment, A high level of mental health-care, Sexual abuse and violence against women in prison, high likelihood of having caring responsibilities for their children, families

³ Mirko Bagaric, *The Punishment Should Fit the Crime - Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, San Diego Law Review, Vol. 51, No. 2, 2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2661913>

⁴ Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, <<https://hls.harvard.edu/content/uploads/2011/09/michele-materni-criminal-punishment.pdf>>

⁵ Ebad Rouhi, Leila RaisiDezaki & Mahmoud JalaliKarveh, *Protection of Prisoner's Human Rights in Prisons through the Guidelines of Rule of Law*, Journal of Politics and Law; Vol. 10, No. 1; 2017 <file:///C:/Users/Nazia/Downloads/Protection_of_Prisoners_Human_Rights_in_Prisons_t.pdf>

⁶ Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth, Prison Policy initiative* <https://www.prisonpolicy.org/reports/women_overtime.html>

⁷ M. Anwarul Aziz Kanak & Mohammad Mizanur Rahman Chowdhury, *THE PRESENT RIGHTS OF PRISONERS IN BANGLADESH: DISPARITY BETWEEN LAW AND PRACTICE*, International Journal of Social Science, 2014 VOL 20, 1 <<https://www.tijoss.com/TIJOSS%2020th%20Volume/3Mizanur.pdf>>

⁸ ANGELA Y. DAVIS & CASSANDRA SHAYLOR MERIDIANS, “Race, Gender, and the Prison Industrial Complex: California and Beyond”, pp. 1-25 Vol. 2, No. 1 (2001)

and others, gender-specific health-care needs⁹. This problem also visibly existed in Bangladesh also. Nevertheless, the problem is directly and indirectly unnoticed by different ways. The situation is discounted by not only by scholarly research but also by the Governmental organization and policy makers. The few initiatives have been taken in recent times, but the actions are still insufficient for meeting the actual demand. Still, some discrimination and basic human rights violation has been noticeable. This is notable that, some academic have been try to dig the problem by sociological problem. Legal issues and human rights perspective are not focused properly. This paper will try to point out some legal issues relating to decimation of women prisoner's basic rights prevailing in Bangladesh.

The prime and foremost objective of the study is to make it visible that our existing laws and regulation relating to protect women prisoner's rights are sufficient or not? To point out the issues my objectives will be-

- i. To discuss the existing women's prisoners' rights in Bangladesh;
- ii. To discuss the violation of women prisoners rights in Bangladesh;
- iii. To analyze the existing Bangladeshi Rule and Regulations relating to protect the women's prisoners' rights in Bangladesh.
- iv. Finally, this study will try to give some positive suggestions to recover the existing situation.

Precisely, in this paper, the author will try to evaluate the existing laws of Bangladesh for protecting women's prisoners' right. In addition, the author will also try to analyze the compliance of international instruments with the domestic legislation regarding women prisoners' right.

2. Conceptualization of the Study or Justification of Punishment:

Before going into the main issue, we need to discuss some primary topic relating to the title.

First of all, we need to know "Who is Prisoner?" According to Black Law Dictionary, "a prisoner means a person, who is deprived of his liberty; one who is against his will kept in confinement or custody. A person restrained of his liberty upon any action, civil or criminal, or upon a person or trial for crime".¹⁰

According to Black's Law Dictionary, "Legal right is a right or privilege that if challenged is supported in court".

⁹ Handbook on Women and Imprisonment, 2nd edition, with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) < https://www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf >

¹⁰ What is PRISONER? Definition of PRISONER (Black's Law Dictionary)<<https://thelawdictionary.org/prisoner/>>

According Salmond, “A perfect right is one which corresponds to a perfect duty. A perfect duty is one which is not merely recognized by law but which is also enforceable by law”¹¹.

There are diverse opinions about the justification of the punishment. It is said punishment is “an ever-present challenge to society”¹². There are different theories of punishments such as deterrence, incapacitation, and rehabilitarianism.

- a) *Deterrence*: Maybe the most extensively believed explanation for punishing criminal offenders is the deterrence of future crime¹³. By punishing criminal offenders, the state can concurrently achieve two types of deterrence. Firstly, punishing an offender deters the overall population from attractive in criminal act by signifying the harmful consequences of doing so; this is known as common deterrence. Second, punishing an offender incentivizes that offender to himself refrain from upcoming criminal act; this is known as specific deterrence¹⁴.
- b) *Retribution*: Another usually quoted justification for punishment is retribution the “application of deontological ethics to criminal justice”¹⁵. Retributivism depends on the basis that criminal offenders should be made to suffer, in the form of criminal punishment, in “payment” for their crimes¹⁶.
- c) *Incapacitation*: Another broadly acknowledged reasoning for criminal punishment is the incapacitation of dangerous offenders. Under this theory, the criminal justice system should classify and separate daring criminals in order to protect society from future crimes¹⁷.
- d) *Rehabilitation*: Finally, the justification for punishment is the rehabilitation of criminal offenders, for those who have committed crimes have departed from suitable societal

¹¹ Anamika Singh and Shriya Badgaiyan, LEGAL RIGHTS, International Journal of Law and Legal Jurisprudence Studies : ISSN:2348-8212:Volume 2 Issue 6 < <http://ijlljs.in/wp-content/uploads/2015/10/13.pdf> >

¹² In line with the dominant trend (flew 1954a, ch 3), “purpose and justification are treated here as synonymous. For contrary approach see Amstrong (1961)

¹³ While the general public and the vast majority of commentators accept deterrence as a legitimate aim of the criminal justice system, there are serious academic criticisms of deterrence and of utilitarian justifications for punishing offenders writ large. See, e.g., Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 UTAH L. REV. 205, 214– 15

¹⁴ Anthony Ellis, A Deterrence Theory of Punishment, The Philosophical Quarterly, Volume 53, Issue 212, July 2003, Pages 337–351 < <https://academic.oup.com/pq/article-abstract/53/212/337/1602294?redirectedFrom=PDF> > accessed on 22 March, 2020

¹⁵ GUYORA BINDER, VICTIMS AND THE SIGNIFICANCE OF CAUSING HARM, 28 PACE L. REV. 713, 715 (2008).

¹⁶ See, e.g., John Cottingham, Varieties of Retribution, in RETRIBUTION 3, 3 (Thom Brooks ed., 2014)

¹⁷ Walter B. Miller, The Journal of Criminal Law and Criminology (1973-) Vol. 64, No. 2 (Jun., 1973), Northwestern University Pritzker School of Law pp. 141-162

standards, the main aim of the penal structure might be a tool to get them back in line with social standards¹⁸.

Imprisonment can fall under different theories of punishment, i.e. Imprisonment can be deterrence, incapacitation or rehabilitation. It means imprisonment has justification though some authors think that traditional theories have some limitations¹⁹. However, being prisoner does not mean, a prisoner will be deprived of all basic rights. In this respect women prisoners need some gender specific rights.

3. Present Situation of Women Prisoners in Bangladesh

According to Prison Population Statistics, 2017, Bangladesh has total 68 jails. Among 68 jails, 13 are Central Jails and 55 are District Jails²⁰. Total numbers of the prisoners are 73,113, among them 54,992 are under trials, 18,185 are convicted, 70,405 are Male prisoners and 2, 772 are Female prisoners²¹. Long term prisoners 6,109, amongst them 4,904 are life sentenced and 1,204 are death sentenced. Number of the children under 6 years with mothers is 325; among them 155 male and 170 Female²².

This is also notable here that, the total land area of the prisons 1,421 acres. The percentages of the occupation of the prison's area are 51.45% in central jail and 48.55% in the district jail²³.

The survey says, the actual capacity of our jails for the prisoners is 36,614, but actual populations of prisons are of 86,433. This is more than double²⁴.

Tahsina Akhter²⁵, in her paper stated that, all over the world, women in prison undergo some serious discrimination. She also, mentioned, number of imprisoned women is increasing at a shocking level. Hence, we cannot deny the human rights obligations towards them.

M. Anwarul Aziz Kanak and Mohammad Mizanur Rahman Chowdhury²⁶ in their study found that, our prisons are overcrowded, prisoners are served with low quality of food, and corruption of the jail

¹⁸ For a description of American criminal law's one-time use of, and ultimate rejection of, rehabilitation as a justification for punishment, see Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1–6 (2003)

¹⁹ RAHMAN MUHAMMAD MAHBUBUR, *CRIMINAL SENTENCING IN BANGLADESH*, p169 (2017) BRILL,

²⁰ Prison Population Statistics 2017 , VOL 01, Feb 2017 , Bangladesh Jail
<<https://prison.gov.bd/prisonsite/assets/userfiles/files/Prison%20Statistes%202020.pdf>> accessed on 19 October, 2019

²¹ *ibid*

²² *ibid*

²³ *ibid*

²⁴ THE BANGKOK RULES, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures or Women Offenders with their Commentary , UNODC https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf accessed on 19 October, 2019

²⁵ AKHTER TAHSINA, *WOMEN PRISONERS IN BANGLADESH:SOME SOCIOLOGICAL INSIGHTS FOR REFORM*, International Conference on Social Sciences and Humanities, September 2014- Istanbul, Turkey

authority is one of the common scenes of all the jails of Bangladesh. Thus, human rights are violating in our prison in every now and then.

Tahsina Akhter²⁷, again cited in her study that-

- i. The worst things that a women g through while being in jail is that they are not interested to come out of it. (Ain-O-Shalish Kendra, 2000)
- ii. Regular harassment of female prisoners and demanding bribes from prisoners by jail authority are very common practices inside the prisoners in Bangladesh. (Odhikar, 2001)
- iii. The rule that a female detainee will be overseen by female officials is violated. The result is that they are subjected to abuse and maltreatment. (UBINIG, 2006)

So, in a brief, the main problems of the prisons are, overcrowding, lack of health and hygiene facilities, poor living conditions, and so on. In addition, it is clear that, women prisoners are suffering from discriminations and poor standard of living.

4. A Review of Bangladeshi Rules and Regulations regarding protection of women's prisoners

Right:

Before starting the discussion on Bangladeshi legislation regarding protection of women's prisoners' rights, we need to discuss about international responsibilities provided by international instruments. Bangladesh is committed under the International Covenant on Civil and Political Rights (ICCPR), among others, to treat "all persons deprived of liberty with humanity and with respect for the inherent dignity of the human person," to segregate under trial prisoners from convicts and juveniles from adults and to bring prisoners as speedily as possible to trial"²⁸.

The UN Standard Minimum Rules for Treatment of Prisoners obliges states to observe the fundamental principles of security of life, health and personal integrity, non-discrimination in the treatment of prisoners, and to create conditions that allow for prisoners to adjust and integrate into normal community life²⁹. Additionally, United Nations Rules for the Treatment of Women

²⁶ M. ANWARUL AZIZ KANAK AND MOHAMMAD MIZANUR RAHMAN CHOWDHURY, THE PRESENT RIGHTS OF PRISONERS IN BANGLADESH: DISPARITY BETWEEN LAW AND PRACTICE, The international Journal of Social sciences, VOL.20 No.1, February 2014

²⁷ TAHSINA AKHTER, WOMEN PRISONERS IN BANGLADESH:SOME SOCIOLOGICAL INSIGHTS FOR REFORM, International Conference on Social Sciences and Humanities, September 2014- Istanbul, Turkey

²⁸ International Covenant on Civil and Political Rights, Article 10

²⁹ Standard Minimum Rules for the Treatment of Prisoners,

< <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx> > accessed on 19 October, 2019

Prisoners and Non-custodial Measures for Women Offenders known as the Bangkok Rules set some special provision for women prisoner. The rule provides some guidelines for the treatment of prisoners, in particular the Standard Minimum Rules for the Treatment of Prisoners, the procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Prisoners³⁰.

United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders set some basic principles for female prisoners:

1. *Regarding newly arrived prisoners*: Freshly arrived women detainees shall be provided with services to communicate their families; access to legal facilities; information about prison rules and regulations, with their convenient language³¹.
2. *Women with Children*³²: Previous to or on admission, women with caretaking responsibilities for kids shall be allowed to make preparations for those children. Additionally, the number and individual particulars of the kids of a woman being admitted to prison shall be noted at the time of admission. The records shall include, without influencing the rights of the mother, at least the names of the children, their ages and, if not accompanying the mother, their location and custody or guardianship status. The rules, further said, the information connecting to the children's individuality shall be reserved confidential, and the use of such information shall always fulfill with the prerequisite to take into account the greatest benefits of the children.
3. *Allocation*³³: Females convicts shall be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation.
4. *Individual Cleanliness*: The space of women prisoners shall have conveniences and supplies essential to meet women's specific hygiene requirements, including sanitary napkins provided free of charge. In addition, the rules said about supply of pure water for to

³⁰ THE BANGKOK RULES, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures or Women Offenders with their Commentary, UNODC https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf accessed on 19 October, 2019

³¹ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)
Clause 1 & 2

<https://www.unodc.org/pdf/criminal_justice/UN_Rules_for_the_Treatment_of_Women_Prisoners_and_non-custodial_Measures_for_Women_Offenders_Bangkok_Rules.pdf>

³² Ibid ,

³³ Ibid, clause 4, Rule 4

be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.

5. *Health Care Services*

The Resolution says many things about women prisoner's health care.

- i. Relating to Medical screening: A comprehensive medical screening is essential on entry level for every women prisoner³⁴. The screening is important for diagnosis of blood borne diseases, other congenital diseases, existence of sexual abuse and other form of violence³⁵.
 - ii. Gender-specific health care: If any prisoner requires a female Doctor or Nurse for her gender specific diseases, the authority should meet her demand³⁶. It also says that, during examination, only medical staff shall be present there and no one else³⁷.
 - iii. Mental Health care: Mental health is also important for gender specific trauma for women prisoner³⁸.
 - iv. HIV prevention, treatment and support: HIV related service and program should be responsive to the women prisoners if required.
 - v. Substance abuse treatment programs
 - vi. Suicide and self-harm prevention
 - vii. Preventive health care services
6. *Safety and security*: Effective actions shall be taken to confirm that women prisoners' self-esteem and respect are secured throughout personal examinations, which shall only be carried out by female staff who have been appropriately trained in appropriate searching procedures and in accordance with established procedures.
7. *Contact to the Outside World*: The authority should introduce and encourage the provisions for communicating women prisoners with their relatives, including their kids, their children's guardians and legal representatives by all rational means³⁹.
8. Institutional personnel and training
9. Pregnant women, breastfeeding mothers and mothers with children in prison

The Constitution of the People's Republic of Bangladesh:

³⁴*Ibid*, Rule 6

³⁵*Ibid*, Rule 6

³⁶*Ibid*, Rule 7

³⁷*Ibid*, Rule 10, 11

³⁸*Ibid*, Rule 12

³⁹ Rule 8

The constitution of Bangladesh is ensuring “equality before law” and “equal protection of law⁴⁰”. It says, “All citizens are equal before law and are entitled to equal protection of law⁴¹”. Additionally, in Article 28(4) “Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.”

Being a citizen of Bangladesh, women prisoner’s rights are equally important as general women. Women prisoners are also human being; hence they also have some basic human rights and constitutional rights as well .i.e. fooding and clothing, some gender specific hygiene and health care and so on.

Bangladesh has a Jail code. The Code comprises of, Prisons Act 1894, Prisoners Act 1900, Identification of Prisoners Act 1920, Rules made under Section 59 of the Prisons Act 1894 and Rules made under Section 60(a) of the said Act of 1894 for the superintendence and management of jails and subsidiary jails respectively. These Acts provides a number of the rights for the prisoners, some rights are specifically focused on the female prisoners.

The Prisons Act 1894

The term is clearly defined in this Act. Here "prison" means any jail or place used perpetually or for the time being under the general or special orders of Government for the confinement of prisoners, and includes all lands and buildings appurtenant thereto, but does not include— any place for the confinement of prisoners who are exclusively in the custody of the police; any place specially appointed by the Government under section 541 of the Code of Criminal Procedure, 1898]; or any place which has been declared by the Government, by general or special order, to be a subsidiary jail:

Separation of prisons

The Act also provides the provisions for separation of prisons. The Act says, the females shall be captive in distinct buildings, or separate parts of the same building, in such manner as to avoid their nearsighted, or communicating or holding any intercourse with, the male prisoners⁴².

Fooding and clothing

The Act, says about food, clothing and bedding of civil and unconvinced criminals. This provision is applicable both for male and female prisoners⁴³.

⁴⁰ Article 31

⁴¹ Article 27

⁴² Prisons Act, 1894 (Act No. IX of 1894), Section 27

⁴³ Prisons Act, 1894 (Act No. IX of 1894), Section 31-33

Health care of the prison

Regarding healthcare the Act pronounces that in case of the illness of the prisoners, the Jailer shall, without delay, call the attention of the Medical Subordinate to any prisoners desirous to see him, or who is ill, or whose state of mind or body appears to require attention⁴⁴. In addition, the act says, hospital or proper place should be provided for the prisoners⁴⁵.

The Prisoners Act 1900*The concept of Prison*

This Act also provides the definition of “prison”. It says prison comprises a place which has been confirmed by the Government, by general or special order, to be a subordinate jail.

Reformatory School

The Act, says about reformatory school in two places⁴⁶.

Special Provisions for the Lunatic Prisoners

If the Government believes that, a person is lunatic, he may by an order remove a lunatic to a lunatic asylum or other place of safe custody within Bangladesh there to be retained and treated as the Government guides during the remainder of the term for which he has been ordered or sentenced to be detained or imprisoned according to law⁴⁷.

The Identification of Prisoners Act 1920

The Act provides the special provisions regarding taking photograph of the convicted persons. A magistrate of first class can also pass an order for taking by a police measurements or photograph of any person for the purpose of any investigation of proceeding under the criminal procedure code if the prisoner was previously arrested in connection with such investigation or proceeding. There is likewise provision for devastation of measurements or photo taken of an under trial prisoner after his release or acquittal by the court unless he was formerly sentenced of an offence punishable with rigorous imprisonment for one year or more⁴⁸.

⁴⁴ Prisons Act, 1894 (Act No. IX of 1894),Section 37

⁴⁵ Prisons Act, 1894 (Act No. IX of 1894),Section 38

⁴⁶ Prisons Act, 1894 (Act No. IX of 1894),Section 14, 28

⁴⁷ Prisons Act, 1894 (Act No. IX of 1894),Section 30

⁴⁸ The identification of Prisoners Act, 1920, section 3,4,5

5. Findings and Recommendations

- i. **Regarding Individual Cleanliness:** United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders clearly states some women specific cleanliness provisions⁴⁹. Nevertheless, the Prisons Act 1894 is not fully complying with those guidelines. The Act only says about some general medical care. When prisoners will be sick the authority will treat him/her. In addition, the Rules for the superintendence and Management of Jails in Bangladesh also covered only some general sanitary regulations. The gender specific hygiene is not specified in our legislations.
- ii. **Regarding Health Care Services:** International Instruments also provides some gender specific healthcare services. Women prisoners frequently have larger primary health-care requirements in contrast to men⁵⁰. Their situation may grow into worse in jails due to the lack of satisfactory health care, lack of hygiene, insufficient diet and overcrowding. Additionally, all women have gender-specific health requirements and necessity to have regular access to consultants in women's health care. For example, regular mental health-care HIV prevention, care and support, special treatments for pregnant women and so on. However,
The Prisons Act 1894 and the Rules for the superintendence and Management of Jails in Bangladesh provide only general medical care provisions. They will treat a prisoner when a prisoner is sick.
- iii. **Safety and Security:** According to the Handbook on Women and Imprisonment women of many countries are sexually abused and chastened by law enforcement officials, even in prisons. Such abuse can range from simple abuse to rape⁵¹. It includes oral abuse, inappropriate touching during pat-down searches, frequent and unnecessary searching and spying on prisoners⁵².

⁴⁹ THE BANGKOK RULES, UNODC, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary, 16 March 2011 <https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf> accessed on 22 March, 2020

⁵⁰ Møller, L., Stöver, H., Jürgens, R., Gatherer, A. and Nikogasian, H., eds., Health in Prisons, A WHO Guide to the essentials in prison health, WHO Europe (2007), p. 27.

⁵¹ Handbook on Women and Imprisonment, 2nd edition, with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) <https://www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf> accessed on 22 March, 2020

⁵² *ibid*

A number of the print media of Bangladesh has been published several incidents of sexual abuse against women and girls prisoner. From arrest to prison stage women prisoners are suffered numerous sexual abuses. As the incidents are occurred by the member of government authority, most of the incidents have not entertained by the law enforcing agency. For example, August 06, 2019, one of the reputed newspapers in Bangladesh has been published a news that one Office in Charge (OC), including other cops rape a woman⁵³. 05 Aug 2019, another news media bdnews24.com published a news that, a woman apparently gang-raped by policemen in Khulna⁵⁴.

Sometimes the authority tries to abuse their power and detain unlawfully. In this respect this is mention worthy here a case named *BLAST v Bangladesh vs. Bangladesh and others* [*'Safe Custody' Case*], Writ Petition No. 1157 of 1997⁵⁵. In this case the honorable high court division issued a Rule Nisi on 24.02.1997 calling upon the respondents "to show because why the detainee should not be brought before the court so that it may satisfy itself that she is not being detained without lawful authority".

Bangladeshi legislation is almost silent in this respect.

- iv. **Allocation:** United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) says a specific guideline for women prisoners' accommodations. The UN rules says, the accommodation of women prisoners shall have services and supplies necessary to meet women's specific cleanliness needs, including sanitary napkins provided free of cost and other gender specific needs⁵⁶. However, In Bangladesh a number of the scholastic research confirms that our jails are overcrowded for the prisoners⁵⁷. A joint project of Ministry of Home Affairs (MoHA) and

⁵³Star Report, OC, other cops rape a woman, Daily Star, August 06, 2019

<<https://www.thedailystar.net/frontpage/news/police-probe-rape-allegation-against-cops-1782217>>

⁵⁴ Khulna Correspondent, bdnews24.comhttps, 05 Aug 2019 , Woman allegedly gang-raped by policemen in Khulna <:bdnews24.com/bangladesh/2019/08/05/woman-allegedly-gang-raped-by-policemen-in-khulna>

⁵⁵ BLAST, BLAST v Bangladesh vs. Bangladesh and others [*'Safe Custody' Case*], Writ Petition No. 1157 of 1997 <<https://www.blast.org.bd/issues/righttoliberty/252> >

⁵⁶https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf

⁵⁷ Ministry of Home Affairs (MoHA), Prison Directorate, the Ministry of Law, Justice and Parliamentary Affairs (MoLJPA) and the independent Anti Corruption Commission (ACC), Justice and Prison Reform for Promoting Human Rights and Preventing Corruption Overcoming the Problem of Prison Overcrowding in Bangladesh, October 2016<https://globaldeliveryinitiative.org/sites/default/files/case-studies/k8801_giz_bangladesh_prison_reform_cs_p3.pdf>

GIZ on May 2018⁵⁸. The survey says, the actual capacity of our jails for the prisoners is 36,614, but actual populations of prisons are of 86,433. This is more than double.

In accordance with the provision of the Rules for the Superintendence and Management of Jails in Bangladesh⁵⁹, in every sleeping ward, superficial and cubical space shall be allowed for each prisoner, as below, according to the conditions specified⁶⁰:

	Superficial area per prisoner	Cubical space per prisoner
	Square meter	Cubic meter
In wards in which the prisoners sleep in two rows	4.18	16.99
In wards in which the prisoners sleep in four rows	5.65	21.24
In wards in which the prisoners sleep in more than four rows	9.26	35.40

The system is applicable both for male and female prisoners. There is no specific system for women prisoners. It seems that the legislative system is only centric in pen and paper. This is why overcrowding in prison is one of the problems in Bangladesh. Even international body also affirmed that our prisons are overcrowded⁶¹.

- v. ***Special Foods for Pregnant Prisoners:*** As per the information of World Health Organization (WHO), on 2015, around 303 000 women died from pregnancy-related causes, 2.7 million infants died during the first 28 days of life⁶². The statistics are really

⁵⁸ Improvement of the Real Situation of Overcrowding in Prisons in Bangladesh (IRSOP) < https://www.giz.de/en/downloads/giz2016-en-prisons_bangladesh.pdf > accessed on 19 October, 2019

[A joint project of Ministry of Home Affairs (MoHA) and GIZ], Key Statistics, May 2018 https://www.blast.org.bd/content/report/irsop/201805_IRSOP_Key%20Statistics_May_2018.pdf

⁵⁹ Rules for the Superintendence and Management of Jails in Bangladesh, (Published under the authority of Government) Vol-I, (2006)

⁶⁰ *ibid*

⁶¹ Improvement of the Real Situation of Overcrowding in Prisons in Bangladesh (IRSOP) [A joint project of Ministry of Home Affairs (MoHA) and GIZ], May 2018

<https://www.blast.org.bd/content/report/irsop/201805_IRSOP_Key%20Statistics_May_2018.pdf>

⁶² WHO, Pregnant women must be able to access the right care at the right time, says WHO, Updated 7 November 2016 < <https://www.who.int/news-room/detail/07-11-2016-pregnant-women-must-be-able-to-access-the-right-care-at-the-right-time-says-who> >

shocking. Dr Ian Askew, Director of Reproductive Health and Research, WHO says "Pregnancy should be a positive experience for all women and they should receive care that respects their dignity⁶³." In this respect, even pregnant prisoners need special diet. However, the Rules for the Superintendence and Management of Jails in Bangladesh stated a diet for all prisoners⁶⁴. The rule doesn't specify special foods for pregnant prisoners.

This is how, Bangladeshi legislations are not fully positive for the Women prisoners. However, on 2006 Bangladesh government has passed a special law titled Special Facilities for Women Prisoners Act, 2006. The Act provides some special facilities for women prisoners, i.e., Prisoners can be bailed with condition, prisoners will be taught with some handy craft, prison authority will give special training to the prisoners and they will be given after care and so on. Nonetheless, some prisoners will not eligible to get these special benefits. For example, The prisoner with death sentence, life imprisoned, convicted for conspiracy against state and convicted under explosive and narcotic laws.

It is notable that, even this newest law is also totally apathetic about gender specific women rights.

Bangladesh Legal Aid and Service Trust (BLAST) is one of the largest legal services organizations in Bangladesh. BLAST has some special features as a legal services organization. First, it helps both women and men. Second, it undertakes wide criminal defense related task and has a considerable specialization in labour law, in addition to expertise on family and land law⁶⁵. This organization has done some incredible job for prisoners' rights.

In the case of *BLAST & Another v Bangladesh & Others*⁶⁶ ensures safeguards on arrest, fair trial, freedom from torture, arrest without warrant, remand in police custody. However, these rights are merely basic prisoners' rights. In every democratic county these rights should be ensured.

⁶³ WHO, Pregnant women must be able to access the right care at the right time, says WHO, Updated 7 November 2016 <<https://www.who.int/news-room/detail/07-11-2016-pregnant-women-must-be-able-to-access-the-right-care-at-the-right-time-says-who> >

⁶⁴ Rules for the Superintendence and Management of Jails in Bangladesh, (Published under the authority of Government) Vol-I, (2006)

⁶⁵ Bangladesh Legal Aid and Service Trust (BLAST) <<https://www.blast.org.bd/who>> accessed on 19 October, 2019

⁶⁶ *BLAST & Another v Bangladesh & Others* 55 DLR (2003) 363

In another Case *BLAST & Another v Bangladesh & Others*⁶⁷ this judgment pronounced for ensuring safeguards on arrest, fair trial and access to justice for under trial Prisoners. Even in this case some elementary rights are discussed.

Some cases are still pending.

After above discussion, it is clear that, Bangladesh has a number of legislations which are dealing prisoners' rights are not following international standard. Being a prisoner, women prisoners have some gender specific rights. But, they are deprived of those essential rights. We should consider those rights to be inserted into our legislations and make sure to ensure their rights.

⁶⁷ *BLAST & Another v Bangladesh & Others* 57 DLR (HCD) (2005) 11

PROTECTING ELECTORAL DEMOCRACY IN THE AGE OF DISINFORMATION: THE LEGAL REGIME IN INDIA

Anshuman Sahoo¹

Abstract

While the disruptive developments in the broadcasting technologies and online social media have paved way for a promised land of deliberative democracy, it also has driven home the socio-political issue of disinformation and a consequential disruption of the very spirit of democracy. This paper discusses the issue of disinformation from the lens of the Indian electoral laws, and how far it has been successful in preventing the same. It looks into the Indian electoral laws from primarily two angles: laws regulating election campaigns and laws regulating electoral finance; and then attempts at analysing whether the laws have been sufficient in curbing disinformation. It ends with some recommendations and hopeful note for deliberative democracy in the cyberspace in the years to come.

1. Introduction

In October 2009, Beppe Grillo, a comedian and a blogger, and Gianroberto Casaleggio, a web strategist, founded a political party in Italy under the name *Movimento 5 Stelle* (the Five Star Movement). What started as a meet-up party of 40 friends in 2005, turned into a populist, right-wing political party in 2009, only to emerge as the largest individual party in the Italian parliament in 2018².

Fast forward seven years, in the 2016 US elections, Donald Trump, a political newbie stepped into the US politics to fight the presidential elections against Hillary Clinton. He had a lesser available fund for the election campaign, started late, lacked any previous experience, and had a considerably smaller team. He was disadvantaged; so much so that he often was a laughing stock in the American public discourses who dared fight Hillary Clinton. When the results came, however, Donald Trump had

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² BBC News, *Italy election: What does the result mean?*, BBC (October 20, 2019, 00:04 AM), <https://www.bbc.com/news/world-europe-43291390>.

prevailed the national elections and soon the public intellectuals were seen debating over how Trump managed to get victory over Clinton³.

The connecting link between the above two scenarios is hard to miss: both these political leaders have successfully exploited the opportunity put forward by social media to their advantage, and used it to shape the public opinion in their favour. This, allied by many other similar cases, establishes the unavoidable significance of the social media politics in a cyber-society of the twenty-first century. Contrasting with the history, tracing can be done back to the nineteenth century when print media was the prevailing source of public communication, with little readership thereof in the public. No broadcasting technology was available so far, and the public knowledge relating to the political affairs in the country was limited as well as fragmented. This limit in public knowledge was clearly reflected in the policy-making – policy-making was primarily done by the policy elites, with little or no involvement of the public.

A ground-breaking change was observed in the twentieth century with the introduction of broadcasting technologies, predominantly in the forms of radio and television. This significantly affected public knowledge, culture, and politics. Public knowledge was no longer limited and was also suddenly a lot more ubiquitous. With the same content being aired to the elites as well as the common men, fragmentation was somewhat reduced – which was a good thing for democracy. People could finally agree on a lot of things – and polarised views were replaced by informed curiosities. The broadcasting in the twentieth century was unique in at least two aspects; the first being the concentration, and the second being the public reach. Television and radio, although widespread, but were still very limited when it came to the number of media houses – a handful of media houses ruled the broadcasting domain with a lot of powers and responsibilities on them. Of the second aspect, that being the public reach, broadcasting in the form of television fared significantly in terms of public reach because of the addiction people had to it – making possible spreading of propaganda and opinion-shaping solely through media.

The twenty-first century came with the introduction of the internet, and was again significantly different from both the preceding eras. The concentration in media was gone with the introduction of social media, and fragmentation in public knowledge and opinion was again prevalent. Individuals were empowered beyond belief, with no guarantee that they were informed in the corresponding magnitude. And here we had, for the first time in human history, individuals who are not informed but

³David Howard, *Can Democracy Withstand the Cyber Age?: 1984 in the 21st Century*, 69 HASTINGS LAW J. 1355 (2018).

are empowered beyond belief – making the perfect recipe for populism and majoritarianism. Markus Prior⁴ explains this beautifully in his book *Post-Broadcast Democracy*, which brings us closer to the understanding of why and how social media has come to play such an important role in electoral politics today.

Social media provides the users with a very large reach to other users, proving itself to be a near-perfect public sphere which can spell wonders for a deliberative democracy⁵; but at the same time, it's unrestricted, unedited, nearly-unverifiable and not-so-transparent, which makes it a breeding ground for fragmentation, populism and polarisation as well – which are not so desirable for a democratic society.

2. Disinformation – undermining Democracy?

Alongside all the promises that the internet has for an ideal democracy, it also poses a lot of threats to democracy – and disinformation is a significant threat, if not the worst one. Disinformation, as commonly understood, is false information spread deliberately to deceive⁶. What started initially as a Russian tactical weapon, has now spread its roots to be perceived as an indispensable reality given the present socio-political situations⁷. As Cass Sunstein argues in his book *#Republic*⁸, given the current trend, it's not long before the internet becomes full of echo chambers and informational cascades of misinformation (and disinformation alike) which will lead to a highly polarised and ill-informed society – spelling the doom of democracy.

Scholars recognise four primary ways in which disinformation may be spread⁹. The first and the most used way is the direct sharing of disinformation, wherein the sharer directly shares and spreads disinformation repeatedly, leading his/her circle to believe in that. The second way is 'hacking and releasing', in which authenticate and authoritative sources of information are hacked and are used to spread disinformation. The third and the fourth ways are more subtle in nature, and hence more dangerous to democracy because they go unnoticed almost always. The third way is the manipulation of search rankings, and the fourth is selective censorship – in which state or authorities often play a sponsoring role.

⁴MARKUS PRIOR, *POST-BROADCAST DEMOCRACY: HOW MEDIA CHOICE INCREASES INEQUALITY IN POLITICAL INVOLVEMENT AND POLARIZES ELECTIONS* (Cambridge University Press, 2007).

⁵Antje Gimmmler, *Deliberative democracy, the public sphere and the internet*, 27 PHILOS. SOC. CRIT. 21–39 (2001).

⁶LADISLAV BITTMAN, *THE KGB AND SOVIET DISINFORMATION: AN INSIDER'S VIEW* (Pergamon-Brassey's 1983).

⁷There is a broad consensus amongst scholars and academicians that cyberspace has paved way for a lot of disinformation, misinformation, and propaganda spreading at a large scale. See Alice Marwick & Rebecca Lewis, *Media manipulation and disinformation online*, DATA SOC. RES. INST. 1–104 (2017).

⁸CASS R SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* (Princeton University Press 2017).

⁹Marwick and Lewis, *supra* note 7.

When it comes to disinformation online, netizens often take advantage of the digital media platforms to manipulate news frames and use the same to set their agendas and propagate propagandas to the viewers. Given the amount of time netizens spend on the internet and other social media platforms, such a strategy is proved extremely advantageous. Sometimes, mass psychological warfare techniques like ‘attention hacking’ are even used to enhance the visibility of such agendas – and this is done primarily by the strategic use of social media platforms, memes, and bots. Memes and trolls, given their association with the freedom of speech and expression, are hard to regulate – but they are the ones who play the most significant roles when it comes to spreading disinformation online.

The media in the twenty-first century is driven by artificially intelligent algorithms who depend primarily on social media, analytics and metrics, sensationalism and ability of a story to become viral, clickbait et cetera – and this particular aspect makes the media even more vulnerable to becoming a tool in the spreading of disinformation, even unintentionally. Extremists online exploit this opportunity to delve deep into the young generation’s minds and plants racism, hate culture, and other unwarranted concepts that are destructive for a healthy democracy.

Disinformation plays a crucial role specifically during elections, wherein media resources are misused by various political parties and other stakeholders as a potent tool to either present a grandiose view of themselves or disparage the opponents. Examples of such incidents are plenty, as we discussed at the beginning of our discussion, and include many famous cases like the 2016 US presidential elections and Brexit.

3. Disinformation and electoral laws in India: A look at the efficacy

Elections and related matters in India are addressed primarily by three pieces of legal machinery: the Representation of the People Act, 1951¹⁰, the Conduct of Election Rules, 1961¹¹, and the Election Commission of India. The Act and the rules are the defining statutory instruments, whereas the Election Commission of India is a constitutional body with very wide powers vested upon it by the Constitution of India itself¹². The commission is an autonomous body and is responsible for conducting elections at various levels in the country, including elections to the Lok Sabha, Rajya Sabha, state legislative assemblies and councils, and even to the offices of the President as well as the Vice-President of the country. While discussing the electoral laws of India in context of

¹⁰ The Representation of the People Act, 1951, No. 43, Acts of Parliament, 1951 (India).

¹¹ The Conduct of Election Rules, 1961, Ministry of Law Notification No. S.O. 859, dated the 15th April 1961 (India).

¹² Article 324 of the Constitution of India, 1949 is the source of constitutionality of the Election commission of India. The article grants the Election Commission of India powers of immense width and wholesome responsibilities.

disinformation, we'll look at the issue from two predominant perspectives: laws relating to electoral finance in India, and the laws relating to election campaigns in India.

Electoral Finance and the Law in India

Electoral finance is a key point to be considered while regulating electoral behaviour, and laws regulating such finance have existed across jurisdictions in various forms. While resorting to regulating electoral finance, countries generally adopt two ways to do so. As a first option, countries try to control the sources from which political parties can raise their funds. By controlling the source itself, like donations or other activities, they try to ensure that there's a limit on the funding available to the political parties for their electoral expenditures. The second option that countries resort to is to regulate the amount of money that the parties/campaigners can spend during election campaigns. Such laws try to regulate how political parties can spend their money in the course of electoral activities, and the ceiling amount which they are allowed to spend.

As various scholars have noted, the law prescribing and regulating electoral finances in India doesn't have its roots in the realities of the political scenarios. The laws have several legal as well as structural lacuna and hence allow the political parties a lot of alternatives to get away with the violations, or even don't stick to the regulations at all. The deficiencies in the structure and the language of the law, allows the political parties to exploit the loopholes and fabricate their expenditure accounts. The deficiencies also create bottlenecks in the regulation of election expenditures¹³.

One of the primary deficiencies in the law, to start with, is the powers and responsibilities accorded to the Election Commission of India. The Election Commission of India, by virtue of the Art. 324 of the Constitution¹⁴ and the Representation of the Peoples Act¹⁵, is assigned a plethora of roles, including that of both the investigator and the adjudicator in cases of electoral disputes. Such an arrangement, although not unjust per se, goes against the established conventional principles of law in India.

The main provisions providing for election finance in India are sections 77, 78 and 10A of the Representation of the People Act¹⁶. Starting with s. 10A of the Act, it provides that the Election Commission can disqualify¹⁷ a person from holding a seat in the legislature, or from running in future

¹³Jasmine Joseph & Daniel Mathew, *Election Finance as a Challenge to Democracy in India: Legal, Policy, and Institutional Challenges and Responses*, 51 VERFASSUNG R. UND ÜBERSEE 456–477 (2018).

¹⁴*Supra*, note 9.

¹⁵*Supra*, note 7.

¹⁶*Supra*, note 7.

¹⁷ Such a disqualification can said to spring from the provisions of Article 102(1)(e) and Article 191(1)(e) of the Constitution of India, 1949.

elections for a period extending up to three years if they fail to lodge accounts of election expenditure in the specified time in the specified manner, and fail to provide justifications for such above failure.

The question that arises next is whether the power vested upon the Election Commission under s. 10A is substantial or merely formal in nature. In *Ashok Chavan*¹⁸ case, the Union government pleaded that the power under s. 10A are merely formal in nature – the Election Commission has power only for checking the formal requirements, and not the *adequateness, sufficiency, or correctness*¹⁹ of the disclosures. The Supreme Court, however, declined this position and held that the powers under s. 10A are substantial in nature.

Next come the sections 77 and 78 of the Act, which needs to be analysed in three steps. Firstly, ss. 77 and 78 of the Act²⁰ stipulate that accounts have to be duly maintained and shall not exceed the prescribed limits for all the candidates. Secondly, s. 123(6) of the Act delineates the actions that could be considered as corrupt practices and s. 100(i)(b) makes them a ground for disqualification of the returned candidates. Finally, s. 100(i)(d)(iv) specifies that contravention of the provisions of the Constitution as well as the Act, rules, or orders made there under as a ground for disqualification of a returned candidate.

A plain reading of ss. 77 and 78 r/w s. 123(6) gives the understanding that a failure to file accurate accounts is a corrupt practice. The Supreme Court, however, has come up with a counter-intuitive interpretation to this and held that “a corrupt practice for the purposes of the Act occurs only in the instance of failure to limit election expenditure within prescribed limits i.e. failure to act in accordance with s. 77(3). It has nothing to do with the accuracy or correctness of the declaration made under s. 77 r/w s. 78.”²¹ What follows is that the failure to file accurate accounts is not a corrupt practice, as the Supreme Court also held in another case in 1999²².

From a legal point of view, this leads us to ask the question that what, exactly is the relationship between ss. 10A, 77, and 78. Is the s. 10A a mere reiteration of s. 77 r/w s. 78? Such a legal dilemma weakens the law and the interpretation thereof. From an application viewpoint, such structural dilemmas in the law allow the political parties to freely fabricate their expenditure accounts, making it difficult for the election commission to investigate the true amount. Combine this with the fact that paid news and social media political advertisements are not very much transparent, and we have this

¹⁸ *Ashok Shankar Rao Chavan v Dr. Madhav Rao Kinhalakar*, (2014) 7 SCC 99.

¹⁹ *Ibid.*

²⁰ *Supra*, note 7.

²¹ *Dalchand Jain v. Narayan Shankar Trivedi* [1969] 3 SCC 685.

²² *LR Shivaramagowda v. TM Chandrashekar* [1999] 1 SCC 666.

perfect recipe for a campaign for disinformation. The 255th Law Commission report recognises the need to amend s. 10A and recommends that filing incorrect contribution details by political parties be made equally punishable as filing incorrect expenditure details, and the quantum of punishment be increased from three years to a period of five years imprisonment²³.

Disinformation thrives on incidents like paid news, social media ads, and paid media services. Paid news makes it difficult for the citizens to know the unbiased truth, leaving them with biased views as truths. Since most of our generation spend their entire days on social media platforms, social media ads become a potent tool in the hands of the political parties to promote political propaganda and polarised viewpoints. And lastly, paid media services, like the troll pages and so-called humour pages, play a significant role in building public opinion. When the electoral finances are not strongly regulated, they breed an easy ground for such paid propaganda to thrive on.

Election campaigning and the Law

The relevant legal provision dealing with regulating disinformation in the course of election campaigns is s. 126 of the Representation of the People Act²⁴ and the Model Code of Conduct²⁵ as directed by the Election Commission of India.

S. 126 of the Act puts a bar on certain publications during 48 hours immediately preceding the elections, and such prohibition extends to social media as well. The social media platforms are required to prohibit any such publication or advertisements during the said periods, and if published, are required to take down the content within three hours of being reported. For the question of whether social media platforms come under the purview of s. 126 of the Act is a settled one, the answer is in affirmative²⁶.

In the recent case of *Sagar Suryavanshi v. Election Commission of India* before the Bombay High Court, the petition raised issues regarding the use of social media before and during the elections and the purity of election process. The petition apprehended that social media contents, especially the paid advertisements, if not controlled, can significantly affect the national elections.

²³ Law Commission of India, *Report No. 255 Electoral Reforms*, GOVT. OF INDIA (NOV. 10, 2019, 08:12 PM), <http://lawcommissionofindia.nic.in/reports/Report255.pdf>.

²⁴ *Supra*, note 7.

²⁵ *Model Code of Conduct for the Guidance of Political Parties and Candidates*, ELECTION COMMISSION OF INDIA (8 November, 2019, 08:50 PM), <https://eci.gov.in/mcc/>.

²⁶ The Election Commission of India, in its Press Release No. ECI/PN/ 36/2019 dated 23rd March, 2019 clarified that social media platforms also come under the purview of s. 126 of the Representation of the People Act 1951. The Supreme Court affirmed this in the case of *SagarSuryavanshi v. Election Commission of India* (2019).

The respondents to the case, the Facebook, Google, YouTube, and Twitter readily acknowledged that they aren't looking at the matter from an adversarial point of view and are willing to cooperate with the Election Commission of India to ensure a free and fair election. In addition to adherence to the Model Code of Conduct issued by the Election Commission of India, the social media platforms also have agreed to stick to the 'Voluntary Code of Ethics'²⁷. Facebook has mentioned that it is voluntarily launching several tools including the provision that only authorised advertisers be allowed to purchase political ads. The identity of the advertiser will be verified as well as transparent in the case of Political advertisements.

This provision of Facebook of treating political ads differently breeds ground for other numbers of concerns, however. Recently, Twitter has also announced that it'll prohibit all kinds of political ads on its platforms, contending that political fame should be earned and not bought²⁸. One of the immediate concerns that follow is that whether this will further create an information gap by putting various politicians at different footings, based on their already existing number of followers, and also a gap in public reachability of various kinds of activists²⁹. The more fundamental issue, however, is that when discriminating political ads from other generic ads, who gets to decide what exactly is meant by 'political'³⁰ – and this opens a pandora box as to how the private entities are encroaching upon the realm of fundamental rights of the individuals by virtue of their power.

However, the significant issue with the law here is that the provisions of s. 126 come into operation only 48 hours before an election, whereas the processes of disinformation and propaganda building know no time boundaries – they can come even five days before the election or even five years before the election, and still disrupt the free and fair nature of a democratic election process.

4. Conclusion: The way forward

Although it may be difficult to regulate disinformation in an era where almost everything follows the rule of code instead of the rule of law, it is not impossible. Facebook recently has started working with fact-checking institutions like fact-check.org to flag false stories. Legislations can be passed to make such arrangements mandatory wherein social media platform are bound to tie-up with multiple

²⁷ Submitted by Internet and Mobile Association of India (IAMAI) on behalf of its members. See Press Note no. ECI/PN/91/2019 dated 26th September 2019.

²⁸ *Twitter to ban all political advertising*, BBC NEWS (October 31, 2019), <https://www.bbc.com/news/world-us-canada-50243306>.

²⁹ Tristan Greene, *How a ban on political ads is the second best gift Twitter ever gave Trump*, THE NEXT WEB (November 9, 2019, 10:50 AM), <https://thenextweb.com/insights/2019/11/07/how-a-ban-on-political-ads-is-the-second-best-gift-twitter-ever-gave-trump/>.

³⁰ Shannon C McGregor, *Why Twitter's ban on political ads isn't as good as it sounds*, THE GUARDIAN (November 10, 2019, 09:41 PM), <https://www.theguardian.com/commentisfree/2019/nov/04/twitters-political-ads-ban>.

independent fact-checking institutions to auto-verify the authenticity of the stories. However, there is no guarantee that such a mechanism will remain independent and non-politicised for long – and appropriate measures should be taken for that also. Law needs to adopt a stricter approach when it comes to ensuring transparency of political funding and expenditure, as rightly pointed out by the 255th report of the Law Commission of India. Law should also require transparency and non-anonymity in social media contents, paid and unpaid alike, to pave way for a genuine deliberative democracy. However, no solution so far has been thought of information polarisation. Artificially intelligent news reporters have become the trend of the era, and the method by which they collect and verify news content are highly vulnerable to disinformation online.

All said and done, regulation can never outperform empowerment. Regulation seems to be an outdated approach considering the rapid pace in which technological advances are being made. Given the circumstances, citizen empowerment often seems to be the best possible measure wherein citizens are empowered with the skill set and motivation necessary to tackle disinformation and strive for deliberative democracy.

Mr. Souradeep Rakshit¹ and Ms. Arpita Mitra²

Abstract

Some jurist uses those theory with a broader perspective where there is an element of morality attached to it depicting the moral pragmatism which means that where there is an existence of any moral theory it has certain moral claims attached to it which is considered to be very practical and true and that shall be reckoned as a natural law theory. Basically, the concept of natural law is not made by any homo sapiens rather it is revealed and exposed by man. It is therefore not enforced by any legislature or by any agency those are external. It is just the result and consequence of propagandas and evangelizations of the philosophers, saints etc. And further it can be added that there are no express penalties for the breach of these law and neither any award or reward for the purpose of enduring such laws. It is therefore termed as divine law having its origin from the Law of God. The concept of adultery does not put a harsh impact on the society or it does not menace the society like any other crimes such as murder, grievous hurt, dacoit or extortion etc. And the punishment or sanction given for adultery do not provide for a solution for the person suffering through the offence of adultery. Thus, initially in a country like India the concept of adultery has been considered to be punishable crime and was forbidden expressly by law. However, there is no doubt that the entire conception of adultery was different in the past and it differs now in the present era. Therefore, this paper will deal with the amendment with regard to adultery and the major judicial decisions that fosters an impact on this concept.

1. Introduction

It is needless to mention that we all are familiar with the concept of ‘natural law theory’ that marks the significance of certain ethics and the theories related to the same but still when we confine to the concept of natural law we can perceive that there are still some confusions with regard to the different

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meanings those attached to it³. Some jurist uses those theory with a broader perspective where there is an element of morality attached to it depicting the moral pragmatism which means that where there is an existence of any moral theory it has certain moral claims attached to it which is considered to be very practical and true⁴ and that shall be reckoned as a natural law theory. Therefore, by natural law, it means there exist a system of law that has emanated from God or reason or morals⁵. There is no specific and exact meaning of the Natural Law because from the jurisprudential aspect it is said that natural laws are those laws which are said to evolve from a supreme authority other than any other superior or sovereign power or any political authority. Many thinkers on legal sense have proposed their different views with regard to the views on natural law. The philosophy of Natural Law has dominated the Greece during fifth century BC when it was considered to be an eternal source of law. The concept of natural law has been mostly applied by Locke for the purpose of bringing a change in the society but Hobbes used it to maintain the present state of affairs in the society⁶. The main concept of 'rule of law' has been in existence in the common law countries since long and countries like England and India under the banner of common law country derive their source from the natural law theory because the natural law is eternal and cannot be altered at any point of time. It is also considered to be Common Law having a universal application and directs the morality of law. Further natural law is against any separation between 'is' and 'ought' aspect of law because the concept of natural law has been originated from the concept of 'justice, right or reason' and thus there cannot be any difference of opinion on this purview of law, as it has been considered to be one of the most perfect sources of law that is not subjected to any other kind of disparity or discrepancies⁷.

2. Development of Natural Law Theory

A brief discussion with regard to the concept of natural law theory shall be presented in the historical order in the paper further so that it gives an idea about the different ideologies and the effect that it

³ MERRIHEW ADAMS ROBERT, *FINITE AND INFINITE GOODS: A FRAMEWORK FOR ETHICS*, 200-04 (Oxford: Oxford University Press) (1999).

(Aug. 10, 2019, 08.00 AM), <https://plato.stanford.edu/entries/natural-law-ethics/>

⁴ Volume 12 Issue 1, SAYRE-MCCORD - GEORGE, *MORAL THEORY AND EXPLANATORY IMPOTENCE*, 433-457 (Cornell University Press, ed. 1988, Reprint) (2007).

(Aug. 12, 2019, 10.00 AM), <https://doi.org/10.5840/msp19881252>.

⁵ DR. AGARWAL H.O., *INTERNATIONAL LAW AND HUMAN RIGHTS*, 65-70, (22nd ed., Central Law Publications) (2018).

⁶ Ms. Nikita Sultana & Ms. Pritha Chatterjee, *Incompatibility of Jurisprudential Theories in the Contemporary Era*, FASTFORWARD JUSTICE'S LEGAL BLOG (Sept. 05, 2019, 10.04 AM), <http://www.legalservicesindia.com/article/519/Natural-Law.html>

⁷ Laksheyender Kumar, *Natural Law*, Legal Services in India (Sep. 08, 2019, 11.47 AM), <http://www.legalservicesindia.com/articles/519/Natural-Law.html>.

depicted on law. The development of natural law theory has been on four categories and they are as follows –

a. Ancient Period –

1. *Heraclitus (530-470 B.C.)* – Here the concept of Natural Law was evolved and originated by the Greek Philosophers who pointed mainly three characteristics about the law i.e. destiny, order and reason. The ‘reason’ was considered to be an important element of natural law because during those time due to instable political conditions all around there were many frequent changes in the state and thereby the concept of natural law evolved to serve the best interest of the people so that the struggling of the people in the society can be minimised to an extent⁸.
2. *Socrates (470-399 B.C.)* – During this period, it was contended that the concept of natural law is considered to be moral law also. Human beings usually have a perception and a moral conscience with regard to bad and good things that govern their thinking ability and that are how humans react and judge every law. Socrates did not however deny the existence of the theory of the Positive Law and therefore he pleaded and supported further the concept of Natural Law because according to him the obedience of law was of supreme importance for the purpose of maintaining consistency and safety in the society⁹. According to him the conception of Natural Law theory was formulated only for the purpose of obeying it rather than disobeying the same¹⁰.
3. *Aristotle (384-322 B.C.)* – As per him, humans possess two elements in him i.e. firstly, he is the creature of God and secondly, he owns an ability to think and accordingly decide on his own will power¹¹. Therefore, by way of reasoning every man can evolve by himself the principle of justice in every activity he does. According to him, the law discovered and evolved on reasoning is justified and results into natural justice. He further signifies natural law theory to be of something that has a universal application on everyone and does not change or is subjected to any alterations due to the thinking of the men in future. The law therefore must be

⁸*Natural Law, Legal Positivism, The morality of Law Dworkin's "Third theory of Law" Legal Realism and Critical Legal Studies*, THEORIES OF LAW, Jusunit (Sept. 19, 2019, 5.30PM), <http://www.jus.unitn.it/users/patterson/course/topics/materiale/analyticjurissupplemental.pdf>.

⁹*Natural Law Theory*, (2017), ASTON UNIVERSITY STUDENT DOC (Sept. 14, 2019, 9.33 AM), <https://www.studocu.com/en/document/aston-university/law/lecture-notes/natural-law-theory-jurisprudence/1522729/view>.

¹⁰ J. Tasioulas, *The Nature of Law*, ed. 2020, THE CAMBRIDGE COMPANION TO PHILOSOPHY OF LAW, Cambridge & New York: Cambridge University Press, (Sept. 14, 2019, 10.30 AM), <https://plato.stanford.edu/entries/natural-law-theories/>.

¹¹ FULLER, LON, *THE MORALITY OF LAW*, 199–227, (revised ed. 1969, New Haven & London, Yale University Press, (1965).

subjected to amendments rather than getting annulled or void¹². And this is where it differs from the concept of Positive Law theory where the law is the result of the human mind solely.

b. Medieval Period –

This period started from the twelfth century and existed till the mid of fourteenth century in the European history. This period was that time particularly dominated and controlled by the Christian fathers who evolved various doctrines for the purpose of establishing the churches in the state. And in that way, they gave a new dimension to the concept of Natural Law theory in a systematic and a rational manner. The Christian saints like Ambrose, St. Augustine and Gregory promulgated a new view point with regard to natural law theory that law that is divine must be considered to be of utmost superiority than any other laws in the society. Especially the view of St. Thomas Aquinas must be considered to be taken into consideration with regard to the Natural Law because he defined law into four categories namely –

1. Law of God or external laws,
2. Natural Law i.e. based on the reason and justifications,
3. Law that is divine and
4. Human Laws which can be called as Positive Law¹³.

He therefore contended that the concept of Human Law or Positive Law must remain within its ambit and it shall be considered to be valid only to an extent as long as it does not result into conflict with the concept of Natural Law theory or the Eternal Law. He also considered Churches to be one of the authorities to interpret and construct the concept of divine law.

c. Renaissance Period –

1. *Hugo Grotius (1583-1645)* – He propounded the theory of Natural Law and contended that the sovereign is subjected to the natural law. It is the duty of the sovereign further to make sure that all the subjects of the sovereign are bound the natural law and it shall be applicable

¹² J.DAVISON MARK ET AL. MONOTTI ANN L ET AL WISEMAN LEANNE, AUSTRALIAN INTELLECTUAL PROPERTY LAW, 105-110, (Second Edition 2012, Cambridge University Press, New York, Reprinted) (2009). <https://books.google.co.in/books?id=jTFpke52VDgC&pg=PA188&lpg=PA188&dq=Natural+law+theory+aston&source=bl&ots=SbKE0->

¹³ GARDNER, JOHN, “LEGAL POSITIVISM: 5 1/2 MYTHS”, 19–53, American Journal of Jurisprudence, (ed., 2001, reprinted in Gardner 2012).

internationally both during the time of peace as well as war¹⁴. He propounded his theory basically on the conception of social contract. He therefore considered natural law to be of supreme authority and that cannot be altered by God himself. The subjects of the State have no right to alter or change the natural law however bad it is to them. It is therefore the duty of every citizen to abide by the natural law in the state. It is therefore observed that main concern of the Grotius behind evolving this principle was to bring uniformity in the political maintenance in the State itself.

2. *Thomas Hobbes (1558-1679)* – According to Hobbes, initially humans in the society survived with a constant fear of chaos in their lives everywhere. Their condition in the society was horrible and ruthless. Therefore, in order to protect themselves from the agony and pains in their lives men voluntarily entered into a social kind of contract for the purpose of submitting themselves to a supreme authority under their control so that their assets and life could be safeguarded¹⁵. Thus, Hobbes supported the fact that the rulers must exercise their power absolutely and even they should be subjected towards the sovereign authority¹⁶. He made a contention that even the rulers must be subjected to the Natural law and lastly as a result is doctrine resulted in a more stable and protected form of Government in the State¹⁷.
3. *John Locke (1632-1704)* – According to Locke, the property and assets of people were insecure during that time and it was solely for this reason that people surrendered themselves to a sovereign authority for the protection of the same. But this did not mean that men completely surrendered themselves to the supreme authority, they only surrendered a part of them that would help in the maintenance of the law and order in the society. His main contention was that even after surrendering a part of the life; still people could retain with themselves their right to life and personal liberty¹⁸. The main aim and objective of the Government is to support and sustain the natural rights of the citizens and as long as the Government fulfils all these criteria,

¹⁴ From Darkness to Light: The Renaissance Begins, *History.com Editors*, A&E TELEVISION NETWORKS (May. 05, 2020, 10.00 AM), <https://www.history.com/topics/renaissance/renaissance>

¹⁵ ADLER MATHTHEW D. et al. ALEXANDER LARRY et al. A. ALLEN ANITA et al. M.BALKIN JACK et al. A.BAL CARLOS et al. H.BIX BRIAN et al. MOOTS III FRANCIS J. et al. GARVER EUGENE et al. GOODRICH PETER et al. HAYMAN Jr. ROBERT L et al. LEVIT NANCY et al. PATTERSON DENIIS et al. PETHER PENELOPE et al. SARAT AUSTN et al. D. SMITH STEVEN et al. B.SOLUM LAWRENCE et al. WRIGHT R.GEORGE, ON PHILOSOPHY IN AMERICAN LAW, 50-55 (Francis J. MOOTS III ed., Cambridge University Press 2009) <https://books.google.com.tr/books?id>

¹⁶ HOLMES O., NATURAL LAW, 81-84, (The Natural Law Reader. Dobbs Ferry N.Y.: Oceana Publications, 1964).

¹⁷ Volume 21 Issue 1, Brown, Brendan F., Racialism and the Rights of Nation, 14-16 (Notre Dame Law Review, ed. 1, 1945) <https://scholarship.law.nd.edu/ndlr/vol21/iss1/1>.

¹⁸ Stanford Encyclopedia of Philosophy, *Locke's Political Philosophy*, (Sep. 29, 2019, 10.00 PM), <https://plato.stanford.edu/entries/locke-political/>.

the laws enforced by it are considered to be valid but once the Government does not take into consideration the interest of the people, the same laws concludes to be inoperative and the Government will stand nowhere¹⁹.

4. *Jean Rousseau (1712-1778)* – All the subjects of the State did not surrender themselves to a particular authority i.e. sovereign but to the entire community that was considered by Rousseau as a will power in general²⁰. All citizens have a right to protect their freedom and also have a right to exercise equality and therefore it is the foremost duty of every citizen to obey the general will and surrender his rights only to that extent because in that way he exercises his own will and rational way of thinking. Therefore, both the State and the laws made by it is subjected to the direct control of the sovereign and as per him the Natural Law theory must be limited to the freedom and equal treatment of all the individuals²¹.
5. *Immanuel Kant (1724-1804)* – As far we have studied about the Natural Law perspective and the evolutions of Social Contract by humans, these philosophies were further supported by Kant in the 18th century. He differentiated between the Natural Rights and the Acquired Rights and identified that only the Natural Rights were important and necessary for the purpose of withholding the rights of the individuals. He further inserted two principles underlying his philosophy and they were –
 - a) Every human being must be governed by his own conscience and his own willpower so that his actions are result of his own decisions.
 - b) The second principle was that every human must exercise its own will and own determination self-sufficiently.

d. Modern Period – During this period the concept of Natural Law theory attained some practicality in the 19th century. The principle evolved by Bentham and Austin was totally different from the concept of divine law and it was then when the concept of Natural Law deteriorated. But anyhow the concept of this law resulted in a great change in the field of economics and politics in the society that took place in Europe. Law on the basis of ‘reason’

¹⁹ FRANKLIN, JULIAN, JOHN LOCKE AND THE THEORY OF SOVEREIGNTY: MIXED MONARCHY AND THE RIGHT OF RESISTANCE IN THE POLITICAL THOUGHT OF THE ENGLISH REVOLUTION, 201-203, (Cambridge: Cambridge University Press, 1978).

²⁰ CHARVET, J., THE SOCIAL PROBLEM IN THE PHILOSOPHY OF JEAN-JACQUES ROUSSEAU, (Cambridge: Cambridge University Press, 1974).

<https://stanford.library.sydney.edu.au/entries/rousseau/>

²¹ AN ESSAY CONCERNING TOLERATION AND OTHER WRITINGS ON LAW AND POLITICS, 1667–1683, J.R. Milton and Phillip Milton (eds.), (Oxford: Clarendon Press, 2006).

and ‘rationality’ was the main concept that was prevalent during the 18th century but in the modern era it was considered that such concept of law is not at all acceptable in the evolutionary period of science and technology²². The jurists concluded that the existence of the Natural Law theory was not at all real the concept of social contract that made the people to surrender themselves to the sovereign authority for the purpose of protecting their assets was totally a virtual concept. And there was an immediate requirement of a new and modern era of legal field²³.

- e. **The revival of Natural Law in the 20th Century** – After all these, when there was an end towards the 19th century, the concept of ‘Natural Law’ started gaining some importance again due to many reasons²⁴. The reasons for such revival of the Natural Law theory were the philosophers who supported the concept of positivism could not satisfy the aspiring needs of the people accordingly that gave way to the extravagant application of Natural Law theory because people accepted the reason of morality as an important and an essential element of law²⁵. Secondly, there was an urgent need to change the dogma and belief of the people for the purpose of a better political and an economic condition in the state. Therefore, in the 20th century there was a need of the acceptance of the Natural Law that would upgrade the moral conscience of the people further in the society.

3. Adultery: The Constitutional Perspective

Adultery has been defined as one of the relations between two of the individuals who are not considered to be married to each other legally. The physical relation that is shared between them is with mutual consent between both the partners and the basic element of this kind of relationship that there is a persistence of sexual relationship that takes place without a legal bonding between them. It is also known as an existence of extra marital affair and is considered to be a crime among the common law countries. In other countries like Finland, Belgium and Sweden, they don’t consider

²² GOMEZ-LOBO, ALFONSO, MORALITY AND THE HUMAN GOODS: AN INTRODUCTION TO NATURAL LAW ETHICS, 150-153, (Washington, DC: Georgetown University Press 2002).

²³ HOBBS, THOMAS, [EL], ELEMENTS OF LAW: NATURAL AND POLITIC, 65-68, J. C. A. Gaskin (ed.), (Oxford: Oxford University Press, 1994).

²⁴ IRWIN, TERENCE, “ETHICS AS AN INEXACT SCIENCE: ARISTOTLE’S AMBITIONS FOR MORAL THEORY,” 23-26, in Brad Hooker and Margaret Little (eds.), (Moral Particularism, Oxford: Oxford University Press, 2000).

²⁵ MACIAS, JOHN, “JOHN FINNIS AND ALASDAIR MACINTYRE ON OUR KNOWLEDGE OF THE PRECEPTS OF THE NATURAL LAW” 103–123, (Res Philosophica, 93 - 2016).

adultery to be an offence or any existing crime in the society²⁶. But in country like India they consider adultery to a heinous crime and is therefore punishable under law. The concept of marriage in India has a mystical and a transcendent existence in the society and a voluptuous connection between two individuals breaks this bond because it brings an element of disloyalty among the married partners. The concept of adultery is therefore considered to be a violation of trust and transgression of married potentials and thereby carries with it an element of punishment and sanction along with it²⁷.

3.1 Historical Evolution of Adultery –

Other than few tribal communities, the development of the family pattern has been on the masculine side i.e. the male-controlled side and therefore it restricts and prevents, especially women from entering into sexual relation outside the ambit of their marriage²⁸. This restriction restricts sexual incidents in many conditions because any kind of relationship that becomes sexual in nature requires authorisations and endorsement in the society therefore adultery should be considered one of the phases and trait of a behaviour that is criminal in nature other than those crimes that have been specifically mentioned under the penal statute²⁹. So when we speak about section 497 of IPC, it can be contended that the existence of such has no practical applicability in the society and admitting this fact many other countries like European Union, Austria, Netherlands, Belgium, Finland, Sweden and Britain have mostly legalised the concept of adultery and in states like them, the concept of adultery is still persisting in the legislations prevalent there but hardly there is any prosecution provided to the offenders of the adultery³⁰.

In India, the penal provisions with regard to the same have been always unstable and subjected to disagreement. As per him, he was of the opinion that including such provision with regard to adultery would be useless because such concepts should be kept on the domain of the public in society³¹. The first Penal Legislation contained the provision with regard to the same under the head Offences Relating to Marriage containing four sections i.e from 494-498. Therefore, the punishment was to

²⁶ RHONHEIMER, MARTIN, NATURAL LAW AND PRACTICAL REASON: A THOMIST VIEW OF MORAL AUTONOMY, (New York: Fordham University Press, 2000).

²⁷ Critical Analysis Of Law Of Adultery In India, Dr. Anjali Sharma (Asst Professor M.L.B Govt College Of Excellence Gwalior) and Neha Sharma, LL.M, (Amity University, Gwalior)

²⁸ Dr. Arshi Pal Kaur, *Decriminalisation of adultery in India: A socio-legal analysis*, International journal of basic and applied research, (Sep. 25, 2019, 12.30 PM), www.pragatipublication.com

²⁹ MARTIN J. SIEGEL, FOR BETTER OR FOR WORSE: ADULTERY, CRIME & THE CONSTITUTION, 45-47, 30 J. FAM. L. (1991-1992).

³⁰ Gaur K.D., COMMENT ON THE DRAFT OF FIRST LAW COMMISSION REPORT, INDIAN PENAL CODE, 388-390, (2nd Edition Eastern Law Publication).

³¹ Vol. IV, HARI SINGH GOUR, PENAL LAW OF INDIA, 4077-4078.

provide to only those married or unmarried has voluntary and consensual sexual intercourse with a married woman, without the consent or connivance of her husband, he would be criminal held liable for the offence of adultery.

Now when we speak about adultery, there comes a general notion that women are usually not considered to an offender in such kind of activities because they tend to take an advantage from the situation that they starve for the love and affection from their husband. And this was the sole reason that women were considered to be the only victim of such an offence and not the ones who were considered to commit crime³². In the year 1972, there was an introduction of an Amendment Bill stating that special facilities must be provided to women under section 497 of IPC³³. Anyway, even after the Amendment Bill, the changes could not be introduced further and law with regard to adultery remained the same as it was enacted in 1860³⁴. Sec 497 of IPC reads as follows - *If a man has sexual intercourse with a woman who is and whom he knows or has reason to believe to be, the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, the man and woman are guilty of the offence of adultery*³⁵.

3.2 Adultery, its Constitutional Challenges and Recent Developments

There are certain challenges that pose a confusion and threat to Sect 497 of IPC ad they are enumerated in the following ways –

- a. Section 497 of the Indian Penal Code imposes on the husband the right to accuse and indict the man i.e. the adultery but does not provide any rights to the wife to act against the women with whom she finds her husband committing adultery. Thereby any way the women are the ones enjoying the most advantageous position³⁶.
- b. Section 497 does not provide women with any right to sue another woman committing adultery because as per the Supreme Court the law is of such a nature that imposing punishments on the women would be against the holiness and purity of the marital personalities and therefore it is

³² RATANLAL & DHIRAJLAL, 2 LAW OF CRIMES AT 2710 (Bharat Law House 26th edition 2007) (C.K. Thakker and M.C. Thakker)

³³ Ratanlal and Dhirajlal, The Indian Penal Code, 478, 26th Edn., 11th Edn.

³⁴ RATANLAL AND DHIRAJLAL'S, INDIAN PENAL CODE (Enlarged Edition), 29th Edition, 2002.

³⁵ DR. K.D. GAUR, A TEXT BOOK ON THE INDIAN PENAL CODE, 734, (Central Law Publications, 2004, Ed.).

³⁶ If the wife u/s 497 is below the age of 16, her consent will not be treated as free consent, as she does not attend the age of majority to give her consent. However, in present context, it is difficult as the percentage of child marriage is low, except in few areas of India. Thus, if the wife u/s 497 has been reported to have age below 16, it will fall u/s 376.

always advantageous to ponder the crime on the men himself. Therefore, this is specifically followed by the procedure of law³⁷.

- c. Violation of Right to Equality – Section 497 of the Indian Penal Code states about the offence with regard to adultery but on the same hand it seems to be gender bias specially on the ground that a women is barred from suing against the lady with whom her husband has entered into adultery whereas it is allowed to a husband to prosecute another if he gets proof of adulteration with his wife³⁸.
- d. Misuse of Article 15(3) of the Constitution of India – The framers of the Constitution of India during the middle of the twentieth century, enacted the law on the belief that no person should be subjected to discrimination on the ground of sex. But when we look upon the section of IPC it can be clearly seen that an element of discrimination is subsisting by providing excessive protection to the women. Article 15(3) states that nothing in this section shall prevent the State from making special provisions for women and children in India. Therefore, in the opinion of the author, the special treatment provided to the women under this provision should be restricted where the case of special treatment is giving way to biasness to the other genders³⁹.

4. Role of Judiciary to Eliminate Discrimination Against Women

In this regard it is necessary to discuss the three most important judgments of the Supreme Court of India on Adultery laws.

- a. Firstly, adultery was challenged in the year 1951 in **Yusuf Aziz v. State of Bombay**⁴⁰ case. In this case the Supreme Court stated that Section 497 was valid but that further did not give any valid permission to the women to commit adultery. Further it stated that women can be a prey for the offence of adultery but cannot be considered to be a culprit under the same. And therefore Article 15(3) was held to be constitutionally valid for the purpose of providing special protection to the women to seepage the crime itself⁴¹.

³⁷ Volume 11 Part 1, DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, 796, (Lexis Nexis, 2017 ed. Ninth Edition)

³⁸ Dr. Vijaykumar Shrikrushna Chowbe, *Adultery- A Conceptual & Legal Analysis*, (Sep. 29, 2019, 11:04 AM) www.ssrn.com

³⁹ K.I. Vibhute, *Adultery” in the Indian Penal Code: Need for a Gender Equality Perspective*, (2001) 6 SCC (Jour) 16, (Oct 03, 3.00 PM, 2019).

<http://www.ebc-india.com/lawyer/articles/2001v6a3.html>.,

⁴⁰ *Usuf Abdul Aziz v The State of Bombay*, 1954 AIR 321, (India).

⁴¹ However, in *Smt. Kamti Devi and another, v. Poshni Ram*, AIR 2001 SC 2226[2001 AIR SCW 2100], the apex court has refused to admit the DNA test even though it is accurate against the conclusive proof u/s 112 of the Evidence Act, 1972 and declared that during the subsistence of valid marriage, the legitimacy of the child shall not be questioned. Hence, even

- b. The other judge with regard to adultery under Section 497 came in the year 1985, in **Sowmithri Vishnu v. Union of India**⁴². This judgement stick to the point that the crime of adultery shall be considered to be a crime to be committed against another man in the society and the men were no more allowed to bring any legal action against their wives on such grounds. It was further held leading the women accountable for the same would result into a struggle by one woman against the other woman.
- c. The next case on a bigger context came up for consideration in **V Revathy v. Union of India**⁴³ in the year of 1988, where it was held by the Supreme Court that women those are included in the prosecution for adultery always promote “social good”.

Now when we speak about the amended laws, there came up two more legal implications with regard to the law of adultery. The Law Commission of India Report in the year of 1971⁴⁴ and the Malimath Committee on the Criminal Law Reforms of 2003 advised certain amendments and the contention of both the parties were on the same footing i.e. to make Section 497 of IPC to be gender neutral.

Finally, in one of the landmark judgements in the year of 2008, in an answer towards one of the PIL in Supreme Court, the Court revolved the traditional law of 150 years. Dipak Mishra said⁴⁵ that main and sole reason for this was that a man particularly cannot be considered to be the master of his wife.

But Justice D.Y. Chandrachud stroked down the inequality on the gender justice and contended that Adultery is considered to be arbitrary and adultery cannot be considered to be a crime unless there is an element of crime present on the act itself. Therefore, the most awaited judgement was delivered by five-judge bench that comprised of Chief Justice Deepak Mishra, Justice R.F. Nariman, Justice Indu Malhotra and Justice A.M. Khanwilkar that altered the constitutionality of Section 497 of IPC.

5. Conclusion and Suggestions

Therefore, when we speak about the impact of such a judgement, it can be easily seen that such a judgement would give more way to crimes and may affect the sanctity and purity of the bond of marriage. This as a result might threaten the marriage between two people and shall result in a condition for the individuals to enter into extra marital affairs thereby giving rise to illegitimate

the accurate and scientific ‘paternity test’ on the basis of DNA does not help out the husband in case of proving offence u/s 497 of the IPC. The apex court in *GoutamKundu v. State of W.B.* AIR 1993 SC 2295 [Paras 22 & 26] developed the grounds for permitting the paternity test, and declared that it must carefully examine as to what would be the consequence of ordering the blood test' whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

⁴² Smt. Sowmithri Vishnu vs Union of India &Anr, (1985), 1988 SC 835, (India).

⁴³ V. Revathivs Union of India &Ors, (1988), 1988 AIR 835, (India).

⁴⁴ 42nd report

⁴⁵ <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-quashes-adultery-as-unconstitutional/articleshow/65975327.cms?from=mdr>

children in the society. Initially the section made a subjective categorisation with regard to the rights of husband and wives that as a result in return resulted in violation of Article 14 of the Constitution of India. Therefore now, in case of adultery between any partners, the only remedy available to a partner is to go to the court and claim divorce⁴⁶.

So, in the upcoming future we are not familiar as to what will be the position of law in India but in a common country like this, the act of adultery must be considered to be an offence otherwise it would lead to increasing number of divorces in the society. It is felt that the Apex Court should look into this matter again keeping the fact in mind that India is a common law country and the natural law principle can never be ignored under any circumstances.

⁴⁶Decriminalisation Of Adultery – A Setback To The Institution Of Marriage In India

<https://www.outlookindia.com/website/story/decriminalisation-of-adultery-a-setback-to-the-institution-of-marriage-in-india/317282>

ADJUDICATION OF ECONOMIC CRIMES IN INDIA WITH SPECIAL REFERENCE TO FUGITIVE ECONOMIC OFFENDERS ACT, 2018

Rakesh Kumar Sahoo¹

Abstract

The recent enactment of the Fugitive Economic Offenders Act, 2018 (hereinafter referred to as FEO Act, 2018) by the parliament, is seen as an urgent step in order to curb the growing menace of high-value economic scams taking place in India, which has led to a degrading economy and loss of trust among the public in the financial system of the country. It is not wrong to state that banking and non-banking financial institutions form the backbone of the Indian economy and financial regulators like Reserve Bank of India and SEBI are constantly working on strict regulation to prevent occurrence of such economic offences. Despite these strict regulations, there is an alarming increase in the number of economic crimes, especially related to the Indian financial sector. It is observed, in the recent past, that loans are granted to big industrialist without proper or inadequate security and upon default the money is lost and the offenders flee the country anticipating punishment, leaving the banks burdened with increasing amount of non-performing assets (NPA) to deal with. Thus, there arises a need to reconsider, whether the existing legislation is adequate to tackle this problem or it was the need of the hour to bring into existence a more stringent legislation like the FEO Act, 2018 to handle the situation.

1. Introduction

According to the NCRB data on economic offences, in the past decade the reporting of economic crimes such as Criminal Breach of Trust and Cheating has almost doubled. A similar trend is seen in the crime rate or incidence of crime per 100000 people for economic offences, which was at 6.6 in 2006 and has increased to 11.9 by 2015, nearly double in past ten years. In terms of numbers, the crime incidence under the head of “economic offences” out of the four specified categories, cheating accounted for maximum number of cases, with 1,09,611 cases followed by criminal breach of trust

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with 18,708 cases and forgery with 13,729 cases during 2016. Non-Performing Assets² or NPA is not a term which is unknown to Indian economy especially with its rising numbers since the crisis of 2009 which stood at Rs 8000 crore³, due to economic crisis of 2008-09 and subsequent liquidation of Kingfisher Airlines. However, by 2018 the amount rose to Rs 11,400 crore⁴ with unearthing of Nirav Modi Scam, the operating mode this time being outright fraud. The problem doesn't stop there, as according to the latest RBI data⁵, system-wide gross non-performing assets of banks rose to 11.2 percent or at Rs 10.39 trillion in FY18 from 9.3 percent in FY17. Further, the share of public sector banks stood at Rs 8.95 trillion, or at 14.6 percent. And since the 21 public sector banks (PSBs) owned by the government comprise roughly 80 per cent of the Indian banking sector, it is ultimately culprit for the share of debt being dealt with. The Asset Quality Review⁶, conducted by the RBI in 2015, disclosed an elevated incidence of NPAs in the bank balance sheets. The aggregate Gross NPAs of Public Sector Banks (PSBs) risen from Rs. 2,79,016 Crore as at March 2015 to Rs. 8,95,601 Crore as at March 2018 as a consequence of transparent acceptance of stressed assets as NPAs.

2. Factors Leading to Enactment of Fugitive Economic Offenders Act, 2018

In light of the above discussion, it is safe to conclude that there exist some lacunae in the existing legal framework which compromises the effectiveness of the legislation and in order fill those loopholes, proper identification of the same is the primary requirement. The objective of the FEO Act, 2018 is very limited in scope with respect to the value of economic offence it wants to regulate i.e. offences the value of which is above 100 Crore or high value offences. Therefore, it is only pertinent to observe that the lacunae in the existing legal framework, in handling these high value economic offences. *Firstly*, in large defaults, criminal proceedings are likely to occur throughout the country where assets are located in several criminal courts. This multiplicity of proceedings may result in different courts having conflicting orders of attachment. *Secondly*, a court is unlikely to attach property outside its jurisdiction without following the approval procedure. The same thing is time consuming if it is followed. Such offenders may remain outside the jurisdiction of Indian courts for a considerable period of time as a

² RBI Master Circular on "Prudential Norms on Income recognition, Asset Classification and Provisioning pertaining to the Advances Portfolio" dated September 1, 2001.

³Uday Mahurkar & Punj, Who killed our banks? India Today (2019), (Nov. 17, 2011, 08:23 P.M) <https://www.indiatoday.in/magazine/the-big-story/story/20180521-india-public-sector-bank-npa-vijay-mallya-nirav-modi-debt-bailout-1231739-2018-05-10>

⁴*Id*

⁵ Reserve Bank of India "Report on Trend and Progress of Banking in India 2017-18" dt. 28.12.2018 available at <https://rbi.org.in/scripts/PublicationsView.aspx?Id=18746>.

⁶ Reserve Bank of India, Report on Trend and Progress of Banking in India 2015-16 dt 29.12.2016 available at <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/0FRTP16A120A29D260148E58B484D4A60E381BB.PDF>.

result of such delays. Further, the Prevention of Money Laundering Act, 2002 ("PMLA Act") provides for the confiscation of property derived from money laundering the proceeds of crime of an offence as provided in the list of scheduled offences. The Enforcement Directorate (ED) is entitled, subject to confirmation by the adjudicating authority and appeal, to attach provisionally the property of the defaulter pending trial. The property is confiscated to the Central Government on conviction in the trial, free of all liabilities. However, as a consequence of the conclusion of the trial, the confiscation provision may rarely be used expeditiously. Furthermore, the purpose of such confiscation is to punish the offense committed and not strictly to deter any absconding accused of returning to India. However, under the FEO Act, 2018 the process is initiated by a special court as provided in the Act which declares a person as "fugitive economic offender". The effect of this declaration is twofold: - *first*, any property that is criminal proceeds that the person is accused of, as well as any property owned by that person in India, shall be confiscated and acquired in favour of the Government of India. *Secondly*, at the discretion of any court, such person or any company in which he is a promoter or key manager or majority shareholder may disqualify any civil claim.

Another reason for enactment of the FEO Act is that India is a signatory to the United Nations Convention against Corruption (UNCAC) which is a multi-lateral treaty among the members of the United Nations introducing a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption. The FEO Act, 2018 adopts and gives effect to the "*non-conviction based confiscation of property*" in corruption related cases as enshrined in under Article 54 (c) of the UNCAC. Since, this treaty calls for international cooperation in prosecution of corruption cases and provides for the member states to consider such inclusions in their domestic law, India seems to have taken a pro-active step towards respecting the promise to strengthen the internal mechanism, in order to curb corruption related offences.

3. Critical Analysis of Fugitive Economic Offenders Act, 2018

That there was need for enacting a stringent legislation which could act as a deterrent to the fugitive offenders who flee the jurisdiction of the State anticipating criminal prosecution which was possible due to the fact that the existing laws in this regard were ineffective in preventing them. The FEO Act, 2018 may seem harsher from the perspective of the individual facing prosecution, however that is in consonance with the object of the Act, which aims at creating a deterrence which is impossible to achieve without laying down harsh laws, for the relatively harsher crimes being committed by economic offenders. However, at the same time it has to be borne in mind that, no law in the garb of creating deterrence can forego the necessary safeguards in order to withstand a challenge of

constitutionality. Thus, it becomes pertinent to analyse the legislation as to where challenges might accrue. These include, firstly, the provision for attachment of property by the director, who is appointed by the Central Government, even prior to filing of application before the special court under Section 4 of the Act and that such attachment shall continue for a period of 180 days or as may be extended. Secondly, the provision dis-allowing, an individual declared as a fugitive economic offender, from filing or defending any civil claim before any Court or tribunal in India. And, lastly, with respect to the use of the term “reason to believe” which accords wide discretion to the power of the authorities mentioned under the Act.

3.1 Pre-Trial Confiscation of Property

Section 5(2) of the FEO Act, 2018 provides for provisional attachment of property, notwithstanding the procedure laid down under Sub-section (1) of Section 4. This power of provisional attachment of property vests in the authorities under the Act, a wide discretion to attach any property for which there is reason to believe that the property is proceeds of crime and is likely to be dealt in a manner which may result in the property being unavailable for confiscation.

This provision is in stark similarity with the Section 5(1) of the Prevention of Money Laundering Act, 2002 which also provides for provisional attachment of property and therefore owing to the similar nature of both the Acts, it is pertinent to establish whether Section 5(1) of the PMLA is violative of Article 14 of Constitution of India, and based on such determination, the fate of Section 5 of the FEO Act, 2018 can be inferred on similar lines.

In the recent case of *J.Sekar and Ors. v. Union of India*⁷, the constitutional validity of second proviso of Section 5(1) of Prevention of Money Laundering Act, 2002 was examined by the Delhi High Court, wherein it was held that is not satisfied that the second proviso to Section 5(1) PMLA of the PMLA is so excessive and disproportionate so as to render it arbitrary. The court held that the mere possibility that a provision may be abused is not a ground to strike it down under Article 14 of the Constitution. The court however, has to be satisfied that there are sufficient safeguards in the provision itself as introduced by the legislature, which the HC was satisfied after analysis of the scheme of the Act. Lastly, the court held that it is unable to agree that there is manifest arbitrariness, as there is nothing excessive or disproportionate, in the legislation to be held as manifestly arbitrary.

⁷ J. Sekar and Ors. v. Union of India, 2018 145 SCL 637 (Delhi).

3.2 Extension of Power of Confiscation Beyond “Proceeds of Crime”

Under Section 12(2) (b) of the FEO Act, 2018, the Special Court is empowered to order to the effect that any properties or benami properties other than the proceeds of crime, in India or abroad, are to vest with the Central Government, with all rights of the properties free from all encumbrances upon the individual being declared as a Fugitive Economic Offender. This also raises a contentious question i.e. whether the Central Government is empowered to lay claim over properties extending beyond the “proceeds of crimes” or whether such a claim would be a violation of the offender’s right to equality before law under Article 14 of the Constitution of India? In order to ascertain the above mentioned questions, the relevant test were analysed by the Hon’ble Supreme Court in the case of *State of Jammu & Kashmir v. Shri Triloki Nath Khosa and Ors.*⁸, where it laid down the two prolonged test of classification that must be based on an intelligible differentia and having a rational nexus to the object of the law, being sought to be achieved.

In my reasoned opinion, the Act passes both the requirements under Article 14 of the Constitution of India, because *firstly*, the provisions of this Act are applicable to a fugitive economic offender as opposed to a non-fugitive economic offender and thus the intelligible differentia is quite clear since the former evaded the criminal prosecution under the Indian law by staying abroad upon the issue of an arrest warrant in his name, as opposed to the latter who did not conduct such an evasion. This argument is based on the judgement of the Supreme Court in the case of *Asgarali Nazarali Singaporawalla v. The State of Bombay*⁹, where while addressing the issue of reasonable classification for the purposes of Prevention of Corruption Act, 1947, the court was of the view that the legislature classified the offenses relating to bribery or corruption by public servants under one group. *“The classification was founded on an intelligible differentia which distinguished the offenders thus grouped together from those left out of the group, who could be dealt with by the normal provisions contained in the Indian Penal Code or the Code of Criminal Procedure, 1898. Thus, there would be no question of any discriminatory treatment being meted out to them as compared with other offenders who did not fall within the same group or category and who continued to be treated under the normal procedure.”*

Secondly, such classification has a rational nexus to the object of the Act that is sought to be achieved i.e. to provide measures to deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian courts, to preserve the sanctity of the rule of law in India.

⁸State of Jammu & Kashmir v. Shri Triloki Nath Khosa and Ors, AIR 1974 SC 1.

⁹Asgarali Nazarali Singaporawalla v. The State of Bombay, AIR 1957 SC 503.

It is to be understood, that the purpose of the Act is not to punish the fugitive economic offender but only to create deterrence or pressure which would prevent the fugitive economic offender from staying abroad and thereby, force them to return to India in order to face prosecution. To this end, it plays a key role in requiring such a return by securing their property over and above what constitutes proceeds of crime. In the case of *Asgarali Nazarali Singaporawalla V. The State of Bombay*¹⁰, the Supreme Court while adjudicating the challenge on the constitutionality of the Prevention of Corruption Act, 1947, held that “*the provision of the Act providing for special court with exclusive jurisdiction was enacted with an end to achieve speedy trial of the offences and it cannot be denied that this intelligible differentia had rational relation to the object sought to be achieved by the impugned Act.*” Thus, the aforementioned reasons have the effect of saving from unconstitutionality and therefore with respect to the concerns raised over pre-trial confiscation and extension of confiscation beyond proceeds of crime are not violative of the Constitution.

3.3 Bar on filing civil claim

Section 14 of the FEO Act, 2018 being a non-obstante provision provides that on declaration of an individual as a fugitive economic offender, any court or tribunal in India, in any civil proceeding before it, disallow such individual from putting forward or defending any civil claim. It is a sweeping provision in the sense that it also bars any company or limited liability partnership from putting forward or defending any claim with which a fugitive economic offender might be related. This relationship of the company includes any promoter or key managerial personnel or majority shareholder of the company who has been declared as FEO and in case of the LLP, the relationship might be in the form of that individual having a controlling interest in the limited liability partnership. This is an unnecessarily wide and stringent provision, given the fact that the FEO Act, 2018 doesn't adjudicate upon the rights and liabilities of an individual by declaring that person as guilty or innocent, but rather only declares him as fugitive economic offender or not. Therefore, restricting the right of “access to justice” is bound to face the wrath of the Constitution of India.

The Concept of Access to Justice is an invaluable human right and is also recognised in most constitutional democracies as a fundamental right. It has its origin in common law and goes back as much as in the Magna Carta. *The Universal Declaration of Rights* drafted in the year 1948 gave recognition to two rights pertaining to “access to justice” i.e. *right to an effective remedy*¹¹ and *Right*

¹⁰*Id*

¹¹ Article 8 of the Universal Declaration of Rights, 1948.

to full equality to a fair and public hearing by an independent and impartial tribunal¹², and also is part of the *International Covenant on Civil and Political Rights, 1966*¹³. The legal position in India is no different in India. Access to Justice has been recognised as a valuable right by courts in India, even long before the commencement of the Constitution. One such reference can be made to *Brij Mohan Lal v. Union of India and Ors.*¹⁴, where the Supreme Court declared that Article 21 guarantees to the citizens the rights to expeditious and fair trial. The Court observed:

“137. Article 21 of the Constitution of India takes in its sweep the right to expeditious and fair trial. Even Article 39A of the Constitution recognises the right of citizens to equal justice and free legal aid. To put it simply, it is the constitutional duty of the Government to provide the citizens of the country with such judicial infrastructure and means of access to justice so that every person is able to receive an expeditious, inexpensive and fair trial. The plea of financial limitations or constraints can hardly be justified as a valid excuse to avoid performance of the constitutional duty of the Government, more particularly, when such rights are accepted as basic and fundamental to the human rights of citizens.”

And finally, in the case of *Anita Kushwaha and Ors. V. Pushap Sudan and Ors.*¹⁵, the Supreme Court while considering the question of whether “access to justice” is indeed a fundamental right under Article 21 and if so, what is the sweep and content of that right, held that it sees no real reason why “access to justice” should not be considered among the class and category rights under Article 21, where the word “life” has been construed to include a broad spectrum, of right considered incidental and/or integral to the right to life. Further, the Supreme Court clarified the sweep and content of the right of access to justice, by providing four facets that constitute the essence of access to justice, the most important of which is the need for adjudicatory mechanism.

The infringement of the fundamental right of “access to justice” under the Act cannot *per se* result in the Act being struck down, as in the ultimate analysis of its constitutionality; the Hon'ble Courts must consider the compelling state interest behind such a law. Recently, in the case of *Justice K S*

¹² Article 10 of the Universal Declaration of Rights, 1948.

¹³ Clause 3 of Article 2, International Covenant on Civil and Political Rights, 1966.

¹⁴ *Brij Mohan Lal v. Union of India and Ors.*, (2012) 6 SCC 502.

¹⁵ *Anita Kushwaha and Ors. v. Pushap Sudan and Ors.*, AIR 2016 SC 3506.

*Puttaswamy (Retd.) and Anr V. Union of India and Ors.*¹⁶, the Hon'ble Supreme Court of India held that, while adjudicating constitutionality pursuant to Article 21, the court must take into account the reasonable limitation imposed on those rights in the pursuit of compelling social, moral, state and public interest. There is compelling state and public interest that should be promoted in the case of the FEO Act. *Firstly*, to deter economic offenders from evading Indian courts' jurisdiction, *Secondly*, to bring Fugitive Economic Offenders to justice. These recurrent incidences of economic offenders' fugitive escapes have resulted in a sharp decline in investor confidence and abuse of finance and business due process along with huge losses to the country's individuals and businesses. The subject speaks of its own importance, understanding nothing less than the future and growth of the Indian economy, which is plagued by those frivolous, fraudulent acts, which only led to severe barriers to growth.

3.4 Interpretation of “Reasons to Believe” – Wide Discretion to Authorities

Section 5 of the FEO Act, 2018 provides for attachment of property mentioned in the application under Section 4 of the Act, by the order the Special Court. The authorized officer shall have the “reasons to believe” for two things:

- The person should be in possession of proceeds of crime
- Those proceeds of crime are likely to dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime

The expression “reasons to believe” is not defined either under the Prevention of Money Laundering Act, 2002 or the FEO Act, 2018, so as to determine what constitutes adequate reasons to believe, which otherwise seems to cast wide discretion on the authorities under the Act to confiscate property categorising them as “proceeds of crime”. However, Section 26 IPC defines “reasons to believe” and is understood in the sense of “*sufficient cause to believe that thing but not otherwise*”.

In the relevant case of *J. Sekar and Ors V. Union of India*¹⁷, the Delhi HC while adjudicating what should constitute the “reasons to believe” under the PMLA that are to be recorded held that, “*reasons to believe cannot be a rubber stamping of the opinion already formed by someone else. The officer who is supposed to write down his reasons to believe has to independently apply his mind. The process of thinking of the officer must be discernible. The reasons have to be made explicit.*”

¹⁶Justice K S Puttaswamy (Retd.) and Anr v. Union of India and Ors., AIR 2017 SC 4161.

¹⁷J. Sekar and Ors. v. Union of India, [2018] 145 SCL 637(Delhi)

Thus, it is not for the courts to substitute its own belief, since the same has to be done by the “director” under the Act, and the court will scrutiny only if there was sufficient material and reason to arrive at such “reasons to believe”.

4. Conclusion

In a developing country like India where globalisation is fast escalating, economic offences are increasing by leaps and bound besides the traditional crimes. With the growing materialism all around the world, acquisition of more and more wealth has become the final end of human activity. As a result, moral values have changed and frauds, misappropriation, misrepresentation, corruption, tax evasion, etc. have become the techniques of trade, commerce and profession. While many argue that the Fugitive Economic Offenders Act, 2018 was a result of legislation which was taken out of desperation and in haste but the fact remains that without resorting to such drastic steps it would not have been possible to recover the public money taken away by the offenders to an offshore country of their convenience.

The FEO Act, 2018 doesn't decide substantive rights of an individual but only seeks to ensure the return of fugitive economic offender within the country, and therefore there is rational nexus within the provisions of the Act and the object sought to be achieved by the Act. Further, with respect to the conferring of wide discretion given to the authorities under the Act, it is seen that adequate safeguard are in place in the form of requiring the authorities to record their reasons in writing, which can be subject to judicial review by the courts. Also, as clarified by the Supreme Court, the mere possibility of abuse of powers cannot lead to the conclusion that the same is a ground to strike down the provision on the basis that it is ultra-vires or unconstitutional.

Thus, where adequate safeguards are provided in the legislation itself, the same has to be followed. Moreover, keeping in mind the glaring public and state interest such stringent action by the state can be justified, as long as the action is within the object sought to be achieved and doesn't become a tool of oppression at the hands of the State. The Act prompted the government to spring into action and this prompt initiative started yielding results as sizeable properties and real estates of a prominent disgraced entrepreneur was attached by the Enforcement Directorate and reports suggest that exemplary success has already achieved in this regard. So contrary to the common view the author believes that this was the most appropriate step.

THE EVOLVING CONCEPT OF CITIZENSHIP IN INDIA: A CRITICAL ANALYSIS*Atif Ahmed¹ & Girija Shankar Bagh²****Abstract***

The core concept of citizenship, has been the possession of a formal status of membership within a political and legal entity along with certain rights and obligations, which serves as a distinction between the insider and the outsider. The two main understandings of citizenship by Ancient Greece and Imperial Rome have evolved into the ‘republican’ and ‘liberal’ accounts of citizenship.

In this paper, we seek to trace the origins of the term ‘citizenship’ by gaining an insight into what the term denoted in ancient Greece and Imperial Rome. Then the authors move on to defining citizenship in the contemporary world today, analysing the multi-dimensional components associated with it and then apply it to the conception of citizenship in India. In the main part of the paper we address the changing conception of citizenship in India with respect to the Citizenship Amendment Bill, 2016 and the National Register of Citizens. In the last part of the paper the authors will discuss how the Bhartiya Janta Party has led the largest disenfranchisement movement, specifically targeting the Muslims by stripping them of their citizenship

1. Introduction

The Greek version of citizenship was based on Aristotle’s model of citizenship. He believed that while it was natural to live in political communities and perform various functions, only a few qualified as *politaior* citizens. Only males who were above the age of 20 years, ancestors were Athenian citizen, patriarch of a family, warrior and master of slaves.³ Hence, gender, class and race defined citizenship. He explained citizens to be those who “rule and are ruled by turns”⁴ and that citizenship included the “power to take part in the deliberative or judicial administration”⁵. Aristotle acknowledged that this form of citizenship could only exist in small states, as not everyone could have a role in governance. Also, in such small settings it becomes imperative that decisions are taken on the basis of consensus,

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³ Finley, M., 1983. *Politics in the Ancient World*. Cambridge University Press, Cambridge.

⁴ Aristotle, 1988 [335–323 BC]. In: Everson, S. (Ed.), *The Politics*. Cambridge University Press, Cambridge.

⁵ Ibid.

for the welfare of the society, which requires the citizens to have shared values and common interests. Therefore, a citizen must “not belong just to himself” but “also to the polis”.⁶

This model of citizenship provides a significant amount of popular control over the government and the people who qualified to be citizens had to be a part of the governance of the country. It established the concept of political equality as all the citizens were treated equally. Critics argue that this model is potentially despotic⁷ as it oppresses women, slaves, non-citizens and on the other hand, oppresses citizens as well, by compelling them to sacrifice their private lives in the interest of the state.

The expansion of Rome led to two innovations to the traditional concept of citizenship. One, the concept of dual citizenship was introduced as people of conquered territories were allowed to retain their form of government and were conferred with a form of Roman citizenship. Two, legal citizenship, instead of the traditional political citizenship was conferred i.e. “citizenship without vote”. The application of law extended beyond political boundaries, with all the citizens being conferred with a legal status. Under Roman law, legal status was conferred to owners of property and extended to their possessions, as slaves were owned by their masters, a free person was someone who owned himself. The law was used to define how we could use ourselves and our things.⁸

Essentially, citizenship is viewed as a “contested concept”, with a convergence of its key components⁹: membership, legal status, rights and participation. It may be understood as membership in a formal community with a status, rights and duties associated with the membership.

The concept of membership in citizenship is based on the distinction between the insiders and the outsiders in a society. Since the French Revolution, the definition of citizenship has been based on membership within a nation that is “bounded, homogenous and stable”¹⁰, thereby merging the concept of nationality and citizenship. While the nation has become the standard to define community of citizens, the concept of nationality can be constructed in different ways. The most oft made distinction in nationhood is ethno-cultural and juridical-political constructions of nationhood. The French and German are classic examples of these models. The concept of nationhood in France is based on a group of people living in a territorial state, legislative assemble and a common law, whereas in Germany

⁶POCOCK, J.G.A., 1995. THE IDEAL OF CITIZENSHIP SINCE CLASSICAL TIMES. IN: BEINER, R. (ED.), THEORIZING CITIZENSHIP. SUNY Press, New York, pp. 29–52.

⁷CONSTANT, B., 1988 [1819]. THE LIBERTY OF THE ANCIENTS COMPARED WITH THAT OF THE MODERNS. IN: FONTANA, B. (ED.), POLITICAL WRITINGS. Cambridge University Press, Cambridge, pp. 308–328.

⁸CICERO, 1991 [44 BC]. IN: T.GRIFFIN, M., ATKINS, E.M. (EDS.), ON DUTIES. Cambridge University Press, Cambridge

⁹VANDENBERG, A. (ED.) 2000. CITIZENSHIP AND DEMOCRACY IN A GLOBAL ERA. NEW YORK: St. Martin’s Press.

¹⁰Brubaker, R. 1992. Citizenship and Nationhood in France and Germany. Cambridge, MA: Harvard University Press.

nationhood is associated with the ethnic community and strong ties with the homeland. This model is challenged due to the presence of diversity in culture and identity politics within nations, leading towards de-merger between the nations and state which means that civic membership is given more importance than belonging in an ethno-national community in awarding citizenship.¹¹

2. Legal Status:

Membership within a national community is accompanied with conferring of a legal status, thereby establishing a contractual relation between the citizen and the nation describing both, rights and duties. Based on the different concepts of nationhood, citizenship maybe acquired on the basis of parents (jus sanguinis), like in Germany or on the basis of birth (jus soli), as in France. Under circumstances citizenship can be attained as well through marriage (jus matrimonial) or through duration of stay (jus domicile). Due to increased international migration dual citizenship and jus domicile have become more popular and also hybrid systems of legal citizenships¹².

A hierarchy is present in forms of partial citizenship, based on rights and participation, between non-citizens and full citizens. “At the top of the ladder are the full and also active citizens, those ... who have the most complete set of rights and who most fully discharge their civic duties. ... On the second rung down, are the full but passive citizens, in the sense of being apathetic about performing duties. Thirdly, there are the second-class citizens. These are the individuals who have the legal status of citizens, but because of discrimination, are denied full rights in practice. For the fourth level we may use the term ‘underclass’. These people have the legal standing of citizens, but are so economically and culturally impoverished that they are in effect excluded from the normal style of social and political activity which the term connotes. Fifthly, there are residents, sometimes referred to by the recently revived word ‘denizen’. These persons are not nationals of the state in which they live; they are therefore not legally citizens and have no political rights, but nevertheless enjoy many civil, social and economic rights associated with citizenship”¹³. The complexity in the process of becoming a citizenship is similarly prevalent in the experiences of being a citizen as well¹⁴.

¹¹BRUBAKER, R. 2004. ETHNICITY WITHOUT GROUPS. CAMBRIDGE, MA: Harvard University Press.

¹²SAMERS, M. 2010. MIGRATION. LONDON: ROUTLEDGE.^[1]_{SEP}

¹³Janoski, T. & Gran, B. 2002. Political citizenship: Foundations of rights. Isin, E.F. & Turner, B.S. (eds.) Handbook of Citizenship Studies, 13–52. London: Sage.

¹⁴Harriss, J., Stokke, K. & Törnquist, O. (eds.) 2004. Politicising Democracy: The New Local Politics of Democratisation. Basingstoke: Palgrave.^[1]_{SEP}

3. Citizenship as Rights:

The collection of rights connected with citizenship is the third dimension of citizenship. The liberal approach considers civil liberties of an individual as the most prominent feature of citizenship¹⁵. There are rights in other forms as well, T.H Marshall categorised rights into a three-fold typology of civil, political and social rights.¹⁶ Civil rights are those rights “necessary to individual freedom—liberty of the person, freedom of thought, speech and faith, the right to own property and to conclude valid contracts and the right to justice”.¹⁷ These rights consolidate the principle of equality before the law and rule of law. Political rights are the rights to participate in the political process and the public arena. These rights include the freedom to stand for office, the right to vote form political organizations and protest. With the creation of welfare states, social rights began to be vested with the citizens. They are a diverse set of rights ranging from “a modicum of welfare and security to the right to share to the full in the social heritage and live the life of a civilized being according to the standards prevailing in the society”.¹⁸ These rights are interconnected and can be broadened and deepened, for instance the concept of environment citizenship proposes the idea of protection of environment against degradation, thus making the environment a right-bearing object¹⁹.

Participation:

An important aspect of citizenship is bearing responsibilities, to be a ‘good citizen is thus to be a self-governing member of a self- governing community’²⁰. Therefore, in the process of becoming a citizen, apart from the question of identity, legal status and rights, the issue of participation is equally important. Apart from community responsibilities, like payment of taxes or service in the military, the most important form of participation is being involved in governance. However, Citizens are stratified on their possibilities of receiving an active role in political participation. Based on their political practices and participation, three types of citizens were identified; Participant citizens, who are either introduced by the political elite as their supporters or others who are active in mobilisation for political integration from below. Non-participant citizens are those reverent citizens who accept the political authority and their programmes without giving direct support. They may be cynical citizens, who

¹⁵ISIN, E.F. & TURNER, B.S. (EDS.) 2002. HANDBOOK OF CITIZENSHIP STUDIES. London: Sage.

¹⁶MARSHALL, T.H. 1992. CITIZENSHIP AND SOCIAL CLASS. MARSHALL, T.H. & BOTTOMORE, T. (eds.) Citizenship and Social Class, 3–51. London: Pluto.

¹⁷ Ibid.

¹⁸MARSHALL, T.H. 1950. CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS. Cambridge: Cambridge University Press.

¹⁹ Ibid.

²⁰DAGGER, R. 2002. REPUBLICAN CITIZENSHIP. ISIN, E.F. & TURNER, B.S. (EDS.) HANDBOOK OF CITIZENSHIP STUDIES, 145–157. London: Sage.

justify their inactivity in the political arena with the improbability of making a difference in the political results. Marginal citizens are those who have been excluded from the political arena. Whereas, opportunistic citizens put their interests first and enter the political system only if it stands to benefit them directly. Therefore, while acknowledging participation as key component of citizenship due attention needs to be paid to the interrelations between the political spaces and the citizen's political capacity and strategies.

4. The Concept of Citizenship:

The Constituent Assembly engaged in heated discussions regarding the concept of citizenship in India. The main issue was whether the criteria for granting citizenship should be; the birth of the individual on Indian soil or on the citizenship of the parents and the individual's descent. The former form of citizenship was settled on as it was viewed as "enlightened, modern, civilised, and democratic" citizenship rather than the latter which was considered to be "an idea of racial citizenship". Part II of the Constitution of India, 1950 and the Citizenship Act, 1955, are the two legislations that cover the concept of citizenship in India. These legislations do not provide the definition of citizenship but only lay down the criteria for a "natural person" to acquire citizenship.

The vague boundaries between domicile and nationality is where the concept of citizenship lies, posing the problem of understanding citizenship as either nationality or domicile. Nationality confers civil rights to an individual particularly in the field of international law, whereby citizenship is a concept interlinked with the grant of civil rights under municipal law. Therefore, all citizens are nationals of the specific state, but all nationals need not be citizens that state.

The complex concept of citizenship contains within itself the idea of nationality, in the guise of ethnicity, while domicile may be taken to be permanent residence. The courts in India, have leaned towards identifying citizenship as domiciliation. In *Star Trading Corporation v Commercial Tax Officer*²¹, has stated, "that nationality and citizenship are not interchangeable terms".

Domicile is the basis of the legal relationship between an individual and the legal system of the territory to which he belongs where, that system is treated as his personal law (Halsbury 1974). In India, there are three ways of obtaining domicile: through birth, choice or operation of law. In India the term domicile may connote two things; permanent residence for the state to make laws and as

²¹*Star Trading Corporation v Commercial Tax Officer AIR 1963 SC 1811*

conforming to the law of the land. The Supreme Court clarified the concept of domicile in India in *Pradeep Jain v Union of India*²²

“It is clear on a reading of the Constitution that it recognizes only one domicile, namely, domicile in India. Article 5²³ of the Constitution is clear and explicit on this point and it refers only to one domicile, that is, domicile in the territory of India. India has one single unified legal system and only one citizenship, namely, the citizenship of India.”

The Citizenship Act, 1955 provides for acquisition and determination of Indian citizenship. It sets four ways in which citizenship can be acquired; birth, registration, descent and naturalisation. It defines the term “illegal immigrants” and via an amendment in 2005, introduced the concepts of PIO and OCI. The law states that any person born in India till 1987 is an Indian citizen. The people born between 1987 and 2003 in India is narrowed to having at least one parent who is an Indian citizen. Though, a person may qualify for registration and naturalisation following the procedures laid down in the act and rules. The rules were further amended in 2004 by introducing the term “illegal immigrants” which included any person staying in India without proper legal authorisation. Therefore, any “illegal migrant” or a descendant of an illegal migrant would be barred from getting citizenship, diluting the principle of jus soli.²⁴

5. Citizenship Amendment Bill:

The Citizenship Amendment Bill²⁵ 2016 was introduced by Rajnath Singh the Minister of Home Affairs in the Lok Sabha. The 2016 Bill is the newest in a string of amendments to the Citizenship Act that attempts to enact a majoritarian and exclusionary concept of citizenship, substituting the current—however weakened—pluralist and inclusive conception.

There are several drawbacks with this legislation, as it seeks to grant the benefit of citizenship along communal lines. The merger of categories OCI and PIO has also been done haphazardly leaving gaping loopholes.

²² *Pradeep Jain v Union of India* AIR 194 SC 1420

²³ Indian Const. art. 5.

²⁴ The Citizenship Act, 1955, Section 1(b) defines an “illegal migrant” as a foreigner who has entered India “without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf,” or “with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time.”

²⁵ The Citizenship (Amendment) Bill, No 172 of 2016,

The 2016 Bill²⁶ incorporates three important amendments:

- (i) Persons belonging to minority communities, that is, Hindus, Sikhs, Jains, Parsis, Buddhists and Christians from Pakistan, Bangladesh, and Afghanistan shall not be treated as illegal immigrants.
- (ii) The third schedule of the 1955 Act is amended in order to reduce the residence requirement from eleven years to six years.
- (iii) OCI card holders are at the risk of losing their status if they violate any laws of the country.

The Citizenship Amendment Bill 2016 seeks to deviate from the conception of citizenship as delineated in the Act of 1955. It introduces religious discriminations which were erstwhile absent. Even before the introduction of the Bill, the BJP government had taken steps to implement the smooth functioning of the Bill. Non- Muslim illegal migrants were exempted from the Foreigner's Act, 1946 who came from Bangladesh and Pakistan via an executive order in September 2015. Immunity, from any adverse action arising due to staying in the country illegally was given to this category of immigrants. The Ministry of Home Affairs in October 2018, issued a directive that speeded up the process of granting citizenship to non-Muslims legal migrants from these countries.²⁷ The amendment bill explicitly seeks to remove disqualifications for "illegal migrants" belonging to "Hindu, Sikh, Buddhist, Jains, Parsis and Christians from Afghanistan, Pakistan and Bangladesh" permitting them and their descendants to attain Indian citizenship. Also, it reduces the time required for them to achieve citizenship through naturalisation in a period of six years instead of eleven years.

6. Constitutionality of the Bill

The tests laid out in Article 14 of the Constitution rely on the principles of reasonable classification and nexus between the object and the legislation, (*State of Madras v V G Row* 1952)²⁸. This Bill fails both the tests on the following grounds:

Apart from the obvious discrimination between Muslims and non-Muslims belonging to the three countries, in the process of obtaining Indian citizenship. The bill does not consider the plight of illegal immigrants of other countries like China, Nepal, Myanmar and Sri Lanka. The amendment bill differentiates between: (i) Muslims and non-Muslims from Bangladesh, Afghanistan and Pakistan (ii)

²⁶ Ibid.

²⁷ Chandrachud, Abhinav, Secularism and the Citizenship Amendment Act (January 4, 2020). Available at SSRN: <https://ssrn.com/abstract=3513828>

²⁸ *State of Madras v V G Row* (1952): AIR 196.

migrants from these three countries and migrants from other countries (iii) Migrants who fled due to religious persecution and those migrated due to other forms of persecution.

The government has stated that the amendment and the executive order seeks to help the minorities facing religious persecution. The government has excluded several other communities facing religious persecution. Like the persecution of the Ahmadiyas in Pakistan which is backed by the state, the Shias and specifically the Hazarachs in Afghanistan who are persecuted due to their beliefs. As these communities are of from the Muslim religious faith their persecution has been ignored from the ambit of the bill.²⁹

The bill fails to acknowledge the religious persecution carried out in countries other than these three countries. The Muslim Rohingyas in Myanmar have faced the most despicable form of ethnic and religious persecution. The Buddhists in Tibet and Muslim Uighurs in the Xinjiang region have been subjected to brutal religious persecution.³⁰

The distinction that the Bill creates between Muslims and non-Muslims migrants is irrational and unjustified, as it goes against its proclaimed objective of accommodating minorities from religious persecution. The criterion of religious belief as basis for eligibility to acquire for “illegal migrants” is unreasonable. An inadequate reasoning for the inclusion of this clause, renders it unconstitutional, it fails the test of reasonability under Article 14 (Right to Equality) of the Constitution and goes against the “basic structure doctrine” (*Kesavananda Bharati v State of Kerala*)³¹. The distinction between the three Muslim dominated countries and other countries is also based on unfair discriminatory practices. There may be instances where the categorisation set forth by the Bill break down in cases where a Muslim converts to Hinduism or if a child of an inter-religions couple illegally migrates to India to escape religious persecution. The main problem with the Bill is that instead of taking into consideration actual persecution it relies on communal generalisations, making the bill unjustified and discriminatory.

The sole purpose of the Bill is to separate Muslim immigrants from the three countries from other immigrants and grant citizenship specifically to Hindu migrants. Specifically, this bill does so by conclusively rejecting Muslims from citizenship. The bill appears to enforce the notion of Hindus as the real citizens of India. The solely religious classification is arbitrary as it violates the basic tenet of

²⁹M. Mohsin Alam, The Constitutional Case Against the Citizenship Amendment Bill, Economic and Political Weekly (2019) Vol. IIV No. 3

³⁰ Ibid.

³¹*Kesavananda Bharti v State of Kerala* 1973 4 SCC 225.

the Constitution, secularism. Any legislation that fails the test of “basic structure” is unconstitutional. In *S R Bommai v Union of India*³² Secularism has been held as basic structure. It is also incorporated in the Preamble, which is used as the guiding light to interpret the Constitution.

Citizenship is the basis of a country’s political and constitutional identity, allowing the inclusion of people based on their religious belief is a violation of this principle.

The idea of the Bill that it is the Hindus who are the natural citizens of India and that the Muslims are second-class citizens is a contravention of the principles of inclusivity and universality of citizenship in the Indian Constitution.³³

7. The National Register of Citizens is both a communal and a gendered issue

January 1st 1966 was made the base date for the recognition and removal of foreigners according to the Assam Accord. This issue of foreigners entering Assam had died down and would only resurface during Assembly elections and in the respect of Illegal Migrants (Determination by Tribunal) (IMDT) Act, 1983; struck down by the Supreme Court in June 2005 (Ahmed 2006). Most recently this issue came up in 2014 when The Bharatiya Janata Party (BJP) came into power in Assam in alliance with the Asom Gana Parishad (AGP) by promising to “deport all Bangladeshis from Assam.”³⁴ The NRC process was put on fast-track when the BJP regime started in 2016.

Various studies have proven that this mass frenzy stirred amongst the Assamese people creating hatred for the Bengalis is false and that no substantial increase in illegal migrants has been noted after independence.³⁵ Experts have historicised this occurrence of migration and stated that there has been a continued loss of tribal commons assisted by the movement of many communities by the British. Poor people from East of Bengal, with the help of the Hindu Assamese Elite were brought in pre-and post-independence and this continued even after Bangladesh was created. Rajkhowa and Phukan (2018) state³⁶ that “the current situation cannot be seen only through the situation during the 1980s as a lot has changed since then” and the Bengali Muslim community can no longer be seen only as a “Bangladeshi

³² *S R Bommai v Union of India* (1994): AIR 1918.

³³ Sharma, Chetna, *Citizenship Amendment Bill 2016: continuities and contestations with special reference to politics in Assam, India, Asian Ethnicity*, vol. 20 No. 4, 522-54

³⁴ *Raiot Collective* (2018a): “Doubtful Citizenship, Distorted Rights in Assam,” 23 July, <http://raiort.in/doubtful-citizenship-distorted-rights-in-assam/>

³⁵ Ahmed, Abu Naser Saied (2006): “Introduction,” *Nationality Question in Assam: The EPW 1980–81 Debate*, Abu Naser Saied Ahmed, New Delhi: Akansha Publishing House

³⁶ Rajkhowa, Gaurav and Ankur Tamuli Phukan (2018): “Nagariks on the Rolls: NRC and the Prevailing Consensus in Assam,” *Raiot*, 8 November, <http://raiort.in/nagariks-on-the-rolls-nrc-and-the-prevailing-consensus-in-assam/>.

problem” without taking into account the internal migration within Assam and migration from other Indian states due to development-induced displacement and ecological devastation.

8. The Exclusions:

30th July 2018 was when the final draft list of the NRC was released and contained 40 lack unlisted persons. While attempts are being allowed to appeal the names not included, the government has not issued any statement about the consequences faced by those who are not included in the list. The NRC is not an adequate solution to ascertain citizens and is only an instrument of the government to help the “cis-heterosexual Hindu upper-caste family system”. The process of NRC has led to massive exclusions and the following paragraphs will illustrate how such exclusions have been made and its impacts on marginalised communities.

In the state of Assam, the occurrence of floods is a common phenomenon and every year a substantial amount of population loses their homes and documents. Therefore, only the privileged and the elite have the resources to store safely their legacy data and documents. Another problem that persists in Assam is the low level of postal and internet services due to which people fail to receive notices for hearings by the Foreigners Tribunals and are adjudged to the Doubt Voter ex- parte, which again has a huge impact on their ability to prove their citizenship.³⁷

The intellectuals of Assam consider the use of paperwork to prove citizenship a dangerous thing as paperwork was essentially generated by the colonizers who mainly used paperwork for most functions. These formal structures were foreign to the locals and tribal populations³⁸

Darrang, Bongaigaon, Kamrup Metro and Nagaon districts of Assam faced severe impact of the NRC as the majority of the population is Bengali-speaking who are the Namashudras, a Scheduled Caste community who are indigenous to these parts of East Bengal. As they were tribal people, they were brought into Assam to clear the forest and cultivate the land. Most of them were brought after partition and before the war in 1971, which is when around 10 million people escaped Bangladesh to get free from persecution.³⁹

³⁷Raiot Collective (2018b): "Do the Tribals of Assam Have an Opinion on NRC?" 8 August, <http://raiot.in/do-the-tribals-of-assam-have-an-opinion-on-nrc/>.

³⁸ (2018b): "Do the Tribals of Assam Have an Opinion on NRC?" 8 August, <http://raiot.in/do-the-tribals-of-assam-have-an-opinion-on-nrc/>.

³⁹Mallik, Pramode (2018): "NRC Has Excluded Not Only Muslims but Dalits Too, *Forwardpress*, 20 August, <https://www.forwardpress.in/2018/08/nrc-has-excluded-not-only-muslims-but-dalits-too/>.

Women have faced the brunt of exclusion caused by the NRC. They were required to submit a Panchayat certificate in situations where they did not have any birth or education certificate linking them with the legacy holder. It has been noted that the Panchayat certificate belonging to Muslim and non-Muslim Bengali women had to undergo a far more stringent verification than a Panchayat certificate of women belonging to other communities. Women in general have faced the difficulty of producing the required documents when they have been married as a child, as it becomes difficult to prove the link with the father after the name- change done with marriage.⁴⁰

Almost the entire transgender community has been excluded in the NRC. The All Assam Transgender Association (AATA) states that out of the 20,000 transgender in Assam almost none have been listed in the NRC. Many of them could not apply as they lacked the documents required for registration. As most of them leave their biological parents at a very early age, it becomes practically impossible for them to attain legacy data to establish their link. The very few transgender women who have found their names on the NRC is their dead names, and the repercussions of this are not yet known.

Rajkhowa and Phukan⁴¹ write that the Assam Movement has historically been exclusionary in character. This has been pointed out time and again by various ethnic groups; hence a consensus amongst all communities of Assam as claimed by the Assam Accord is questionable. The new political will has to be shaped by conflict and disagreements between the many voices that stand against this prevailing consensus. They further write that the NRC initiative does not actually draw its lineage from the Assam Movement but from the paradigm of depoliticisation adopted by the state throughout the 1990s and 2000s. For this purpose, it becomes extremely important to understand the political motivation behind the NRC process being reinstated by the current government. Saikia writes that the “language movement” overshadowed the problem of illegal immigration in Assam and the Bengali Muslims were politically allied with the Assamese against Bengali Hindus. The issue of illegal immigration gained prominence as it was re-appropriated by “political entrepreneurs.”⁴²

⁴⁰ White, Melissa Autumn (2014): "Documenting the Undocumented: Towards a Queer Politics of No Borders," *Sexualities*, Vol 17, No 8, pp 976–997

⁴¹Rajkhowa, Gaurav and Ankur Tamuli Phukan (2018): "Nagariks on the Rolls: NRC and the Prevailing Consensus in Assam," *Raiot*, 8 November, <http://raiot.in/nagariks-on-the-rolls-nrc-and-the-prevailing-consensus-in-assam/>.

⁴²Saikia, Smitana (2019): "Citizenship Bill: Submerged in Sectarian Politics, BJP Turns A Blind Eye to Historical Complexities of Assamese Sub-nationalism," *Firstpost*, 18 January, <https://www.firstpost.com/politics/citizenship-bill-submerged-in-sectarian-politics-bjp-turns-a-blind-eye-to-historical-complexities-of-assamese-sub-nationalism-5920781.html>.

If one is to understand how the “language movement” was appropriated by “political entrepreneurs,” understanding the NRC with the Citizenship (Amendment) Bill (2016) is important. This bill created tensions among the Assamese communities, including the AGP, political allies of the BJP, the intellectuals and artists of the state as well as the militant separatist groups. The AGP also broke its alliance with the BJP government. Several protests ensued across the north-eastern states, and other regional parties also threatened to sever alliances with the BJP in the event that the bill was passed. The Assamese do not view the NRC as a communal issue but as an ethnic one, the BJP government at the Centre has made it a communal issue by deliberately excluding Muslims. Similarly, the Citizenship Amendment Bill is opposed in the North-East as it opens the borders for minority communities of other countries which is opposed by the Assamese on the ground of ethnicity.

9. Conclusion:

Both the NRC as well as the Citizenship (Amendment) Bill (2016) attempt to protect and validate the heteronormative upper-caste Hindu family in the name of giving protection to marginalised groups. This trend of upholding of the heteronormative family system while further marginalising certain communities. The entire idea behind the NRC of removing foreigners from Assam along with the Citizenship Amendment Bill boils down to removing only Muslim foreigners from Assam and preventing Muslim immigrants to gain citizenship. This in turn may strongly affect the electoral politics in Assam as out of the 40 lack people whose name did not feature in the NRC list, around 25 lacks are Muslims. Therefore, in a case where the Citizenship Amendment Bill is enacted, the 15 lack non-Muslims whose name did not feature in the NRC will end up becoming citizens eventually. It is only the Muslims who will be refused citizenship and the right to vote.

The concept of citizenship is gender-blind, however in different ways, the definitions of citizenship have excluded women, marginalised groups and queer people. Citizenship promises a set of social, civil and political rights, however marginalised groups have been deprived of these rights and are treated as second-class citizens. The Citizenship (Amendment) Bill arbitrarily discriminates against other religious minority groups in Pakistan, Bangladesh and Afghanistan. It is too short-sighted in its protection against religious persecution by making it the only ground for asylum whilst ignoring the persecuted minorities in Sri Lanka and Myanmar.

The NRC, in the garb of appeasing the indigenous people of Assam and assimilating them into the Indian nation, is actually an attempt to increase the rift between groups residing in the region while

also creating further vulnerabilities for those who do not fit into the hetero-normative Hindutva way of life by tracing citizenship through lineage. Those who do not fit into this way of life have been excluded from the time the idea of a modern state came into existence.

Deportation of thousands of people who have been living in a place for almost half a century is both inhuman and impractical. The least that can be done now is to ensure the rights of the people who are currently residing in the country. Substantial work is required towards eliminating conditions that push marginalised groups to migrate across borders amidst and despite so much risk.

Sudhanshu Singh¹

Abstract

The 21st century has witnessed numerous hurdles for businesses such as globalization, new markets, rigid competition and many more. Throughout the world the companies have now been compelled to lend a hand in environmental conservation services and be socially driven in the community. Sustainability has to be adopted by the companies to be prosperous and developed. Various institutions throughout the world has been a guiding light for all economic entities to adopt a certain set of standards for a tenable growth of the business and the environment of the society. The article studies the impact of corporate social responsibility (CSR) on the performance of pharmaceutical companies in India. The sample consists of handful of top multinational pharmaceutical companies. It brings out the non-economic interests of the pharmaceutical companies towards the society.

Keywords: Corporate Social Responsibility, Non-economic Interest, Sustainability, Pharmaceutical Companies.

1. Introduction

Corporate Social Responsibility is a developing and significant piece of a Company's general prospect plan intended to accomplish a long term targets. Corporate Social Responsibility is the intentional and voluntary step which incorporates the government assistance conducted for benefit of the society as a whole. The basic concept is to contribute to a better society and a cleaner environment of one's own accord. It is an idea whereby organizations inter-mix social and natural issues into their business tasks. Corporate Social Responsibility has been characterized by numerous writers and organizations lately. The idea of CSR was put forward in 1953 in the article named "Social Responsibilities of Businessman" by William J. Bowen. Bowen in this manner inferred the social duty of agents alludes to the commitments of business people to seek after those strategies, to settle on those choices or to follow those lines of activity which are attractive regarding the targets and estimations of our general Public. European Commission defined CSR as

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“a concept whereby companies integrate social and environmental concerns in their business operations and interaction with their stakeholders on a voluntary basis.” World Business Council for Sustainable Development explains CSR as “the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.” According to Forbes (2010), Corporate Social Responsibility functions in two ways. The company tries to conduct social welfare and development and in while doing so it promotes the goodwill of the company helping it grow its reputation and hence can reach the consumers easily. As per Infosys founder, Narayan Murthy, “Social responsibility is to create maximum shareholders value, working under the circumstances, where it is fair to all its stakeholders, workers, consumers, the community, government and the environment.”. CSR has consistently drawn an association with a standard of supportability, which attests that the associations or endeavors should settle on choices not just on budgetary factors, for example, benefits or profits, yet in addition dependent on the prompt and long term social and ecological results of their exercises. The wide arrangement ethical standards and arrangement of morals for corporate dynamic, which unmistakably develops and maintains an association's social duty, emerges from the belief that a business grows stronger with the help of the society and by undertaking such activities, the business tends to return the favor to the society. This builds up the stake of a business association as a positive picture among the general public. For the development of the company CSR management and reporting framework should be concentrated by the top-level management to be transparent and on record for successful scrutiny. The more the impressions of CSR are promoted and adopted into the business process, the helpful it will be to make the most from different strategies and hence handle the various programmes and projects that are lined to occur. Business opportunities are also gained through this system of value chain as the various large contracting parties look for socially strengthened and adapted enterprises to business with. Social responsibility is a doctrine that includes all the economic entities whether it is government, private corporation or quasi-public organization and determines their responsible role towards the society. CSR helps the organizations by decreasing the expenses and dangers, expands the brand worth and notoriety, adequacy and the productivity of representatives, and improves straightforwardness and clarity in the workplace of the organizations. According to Carroll, “CSR encompasses the economic, legal,

ethical and discretionary (philanthropic) expectations that society has of organizations at a given point in time.”²

2. Various Standards and Principles on CSR

Organization for Economic Co-operation and Development (OECD): OECD rules dependent on better arrangements for better lives convey proposals on cultural issues identifying with work, ecological guidelines, human rights, market rivalry, tax collection, science and innovation fighting unfair practices and safe guarding buyer rights.³

Universal Declaration of Human Rights: Since its reception by the global intergovernmental association the United Nation, it has had broad impacts on cross border nations for the sustainable society and economic welfare.⁴

Principles for Responsible Investment (PRI): It is essentially a system where financial specialists come to cooperate and set down manageable roads. It is a help to the organizations for capable speculation. It gives a structure to accomplishing better long-term speculation returns and increasingly manageable markets.

International Organization for Standardization (ISO) 26000: the international standard setting body concerns itself with setting down new standards on Social Responsibility. ISO 26000 is intended for use by all types of organizations and in all countries and to assist organization to operate in a socially responsible manner.⁵

International Labor Organization (ILO): ILO seeks the elevation of societal evenhandedness and globally accepted human and labour rights. It articulates universal labour principles in the form of conventions and commendations setting minimum standards of elementary labour rights.

Global Reporting Initiative (GRI): This universal free standard association has helped different monetary elements since its introduction to the world in 1997 to report their drives and effects on

²RichaGautam&Anju Singh, *Corporate social responsibility practices in India: a study of top 500 companies*, Global Business and Management Research (GBMR): An International Journal, Vol. 2, No. 1, 2010 pp. 41-56

³ OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, (Oct 20, 2019, 10 AM) <http://dx.doi.org/10.1787/9789264115415-en>

⁴ UN Global Compact, Universal Declaration of Human Rights, (Oct 20, 2019, 10 AM) <http://un.org/Overview/rights.html>

⁵ ISO 26000 guidelines, (Oct 20, 2019, 10 AM)

<http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/home.html?nodeid=4451259&vernum=0>

significant issues through which the general public advantages, for example, environmental change human rights and so forth.

Occupational Health & Safety Advisory Services Standard: It is pertinent to those entities which purposes to institute a health and security board in their company.

UN Global Compact: the voluntary initiative which is based on the various CEOs commitments to implement the principle of sustainability accepted ten principles in pursuit of a more sustainable inclusive global economy which does not restrict to human rights, forced labour, child labour, environmental challenges and responsibility, non-discrimination, freedom of associations, etc but even beyond.⁶

3. The Pharma Outlook

Corporate Social Responsibility (CSR) in the pharmaceutical business is crucial for both society and the pharmaceutical business when all is said in done. The profit maximization process is no more the focal objective of such organizations and they presently measure achievement in numerous manners then just measuring money. Hence Companies are now understanding the long-term benefits of sharing their economy with the common people. Therefore, it's more than a moral obligation for the institutions in this industry. Sustaining health can raise the standard of living as medicines have gone beyond a simple commodity and consumer increase in such expenditure has made it a necessity product and may instill brand loyalty for many. Clearly, the reason for the same is that medicine protects lives and acts as a need, not a want. Likewise, there is proof that alleviating negative public observation can ease a portion of the exorbitant guideline that is presently set up. There is a lot of discussion with respect to whether any organization genuinely has a commitment to anybody other than their investors. In the book 'Invisible Hand', Adam Smith quoted several confirmations in support of his action that, "every individual... neither intends to promote the public interest, nor knows how much he is promoting it. He intends only his own security, his own gain". Furthermore, he is in this driven by an imperceptible hand to advance an end which was no part of his goal. By seeking after his own advantage he as often as possible advances that of society more viably than when he truly plans to advance it. The financial specialist just had an idea for a time around 50 years prior and had no genuine thought regarding how the profit-making organizations would really tail it down the line.

⁶Richa Gautam & Anju Singh, *Corporate social responsibility practices in India: a study of top 500 companies*, Global Business and Management Research (GBMR): An International Journal, Vol. 2, No. 1, 2010 pp. 41-56

The pharmaceutical organizations are asserted for different deceitful practices that cost billions of dollars every year. Misrepresentation and defilement exercises can occur in any health care facilities, regardless of whether they are public or private, all around financed or ineffectively subsidized or irrespective of their location. Removing out health care fraud is central to the well-being of both the citizens and the overall economy. The then largest pharmaceutical and biotech companies ranked by healthcare revenue are: Pfizer, Novartis, Merck and Co., Bayer, GlaxoSmithKline, Johnson and Johnson, Sanofi, Hoffmann–La Roche, AstraZeneca, Abbott Laboratories. Pharmaceutical Companies participated in global market, but every country have their own regulation.⁷

Health, learning, water, livelihood, environment and disaster relief are some of the arenas which are primacies in the area of Corporate Social Responsibility (CSR). Some also help conduct trainings in vocational skills for communities and undertake local-level community programmes that are need based. More than 80% of the people living with HIV in the state are yet to get treatment. Of the estimated 1.25 lakh people living with immune functioning disorder in Uttar Pradesh, only 25,278 are getting free treatment, according to data from the UP State Medical Control Society. Here, arises the need of CSR and pharmaceutical companies to combat the vulnerable and disastrous situation to do everything possible to test and treat the untapped patients. Pharmaceutical Companies such as Cipla specialized in drug manufacturing should as part of CSR concentrate mainly on combating the menace of HIV/aids at the national wide than plunging into other schemes and programs. It has been projected that at an average, 68 people die every day due to cancer in the state of Gujarat. A total of 24,667 people had died of cancer in 2014 and in 2013, it was 23,966. According to the figures, Gujarat was ranked 10th in term of prevalence and deaths in the country. Uttar Pradesh topped the chart with 82,121 deaths, followed by Maharashtra with 44,924⁸. Though pharma companies are engaged in varied activities and schemes in the limelight of CSR it is necessary that efforts are taken to tackle issues targeted on specific health hazards of a particular region than simply doing away with a program just for records and fame. India relies on Medical Council of India (MCI) to prevent malpractices. The MCI notification on December 10, 2009, prohibits all healthcare professionals in India from accepting benefits from pharmaceutical

⁷ Jain, A, *Corporate Social Responsibility: An Explorative Review*, Journal of Accounting and Finance, Vol.26, No.1 (October 2011-March 2012), pp. 13-19.

⁸ Singh, R. G. *Corporate social duty rehearses in India: An investigation of best 500 Companies*, Global Business and Management Research: An International Journal (GBMR), Vol. 2, No.1, pp. 41-56.

or allied healthcare companies for any purpose, including educational programs or sponsorships even if the event is organized by independent third-party organizations

There are various ways CSR can benefit the business houses. Institutions have realised that CSR is one of the important ways in which one entity can tell apart itself from its competitors.

Some benefits of CSR are as follows⁹: Benefits to the Company:

- Improved financial performance
- Lower operating costs
- Product safety and decreased liability
- Workforce diversity
- Access to capital
- Reduced regulatory oversight
- More ability to attract and retain employees
- Greater productivity and quality
- Increased sales and customer loyalty
- Enhanced brand image and reputation
-

Benefits to the Community and the General Public

- Corporate involvement in community education, employment and homelessness programmes
- Product Safety and quality
- Charitable contributions
- Employee volunteer programmes

Environmental Benefits

- Greater material recyclability
- Greater use of renewable resources
- Better product durability and functionality
- Integration of environmental management tools into business plans.

4. Organisational Impact

Cipla Pharma, Cipla Care, and Direct Cipla Foundation through Dr. K. A. Hamied as well as Institute & Cipla Cancer Palliative Care Centre Community service supports good works and charities, with the help of time, money and goods. They emphasize mainly on the well-being of women and children and their health issues. At Cipla, they constantly work towards ensuring

⁹Vijetha Shetty, *Corporate Social Responsibility: An Analysis and Implications under Companies Act 2013*, https://www.academia.edu/19302505/Corporate_Social_Responsibility_An_Analysis_and_Implications_under_Companies_Act_2013 (Oct 20, 2019, 10 AM)

access to high quality and affordable medicines to support patients in need. The organization also distributes hand paddled tricycles, wheelchairs, and crutches to patients with multiple disabilities which is why they have been trusted by healthcare professionals and patients across geographies for the last 8 decades.¹⁰

Dr Reddy's Lab Pharma, Dr. Reddy's Foundation (DRF) is a non-profit partner of Dr. Reddy Laboratories. Driven by its confidence in the inalienable inspiration and limit of the person for progress given the proper and satisfactory condition, DRF advances and evaluates novel ideas that are constantly refined and scaled up to cover bigger groups of distressed populaces.

- DRF involvements span two sectors livelihood: DRF associates with rural and urban youth, minors with frailty and farmers to speak about the issues of employability, revenue generation and subsequent enhancement in value of life.
- Education: DRF attempts to deliver numerous prospects for education to those who have never attended school, or have dropped out of it. It also tries to develop the quality of education in schools. This is because they believe that success of communities is an integral path towards progress of companies.
- Direct through Environmental: Water Usage Energy Usage Wastewater Discharge COD & TDS Load Discharge HW-hazardous waste disposal GHG emissions Environmental Protection¹¹

Novartis Pharma's 'Novartis Access Principles' promises to bring easy access to medicines to more people, irrespective of where they are. For all the new drugs and medicines, they will efficiently coordinate access procedures by the way they research, create and convey all around. Novartis Social Business attempts to improve access to medicinal services to battle chronic and infectious diseases in developing nations. Novartis Oncology Access is a feasible access arrangement which is intended to improve access in nations with restricted healthcare repayment frameworks. The Novartis Foundation reconnoiters pioneering solutions for public health issues, with an objective of creating a transformational influence on patients and societies. Sandoz their generics division conveys access to first-class medications, medical information and healthcare to

¹⁰Cipla Limited, CSR Box, (Oct 20, 2019, 10 AM) https://csrbox.org/India_Company_Cipla-Palliative-Care-And-Training-Centre-Maharashtra_77

¹¹Dr. Reddys Labs Limited, CSR Box, (Oct 20, 2019, 10 AM) https://csrbox.org/India_Company_Dr-Reddys-Labs-Ltd-Andhra-Pradesh_68

millions of individuals each year. Treatment for Leprosy Direct Free Multi Drug therapy, cured 4.5 million patient's community services¹²

Dabur India Pharma gives back some piece of what Dabur has picked up from network Indirect Establishment of Sundesh, NGO Programs for natural recovery and assurance of imperiled plant species. They also extend their initiatives for promoting well-being and cleanliness among the oppressed through trust and create ecological mindfulness among youthful personalities. The CSR initiatives they seek are in as per their expressed Vision and Mission, centered around their plants and workplaces, yet in addition in different geologies dependent on the necessities of the networks. Eradicating hunger, poverty and malnutrition Provision of food, nutrition supplement, clothes etc for the poor, children and other deprived sections of the society. They also support the nourishment in Anganwadi areas particularly the wellbeing of the laborers of the region. They have extended their support for various social concerns such as easy access to drinking water, supporting the homeless, spreading awareness programs, arranging for health check- up camps, building immunity, awareness about female infanticide etc. They have also actively participated towards ensuring environmental sustainability and ecological balance through Plantation drives in schools, villages, their manufacturing units and so on. They have supported rural areas by providing vocational training to farmers and teaching them about non-conventional energy sources to empower their livelihood.¹³

5. Conclusion

Business houses everywhere throughout the world are understanding their stake in the general public and taking part in different social and natural exercises. The need of great importance is to define powerful vital strategies and receive different instruments as indicated by the organization history, its substance, eccentricity in relationship with its various partners so that CSR can be best executed towards its objectives – sustainable development of the environment, social and monetary progress. This exploration investigates the current writing accessible on CSR. Starting at now, the patterns have changed and CSR influences the organization's notoriety and generosity as well as administer the monetary presentation. It was examined that the revealing practices go from the refined and settled framework to "a concise notice of CSR" in the yearly report. CSR announcing will keep on improving all around, yet the data it contains would should be normalized. An element saw in the improvement of CSR revealing is the impact of a few worldwide and nearby associations with various structures, lists, orders and activities and so on. A

¹² Codes, Policies and Guidelines, Novartis, (Oct 22, 2019, 10 AM) <http://www.novartis.com/our-company/corporate-responsibility/reporting-disclosure/codes-policies-guidelines>

¹³ Dabur India's CSR Policy, (Oct 22, 2019, 10 AM) <https://www.dabur.com/in/en-us/csr-be-the-change/csr-policy>

large number of these activities are willful yet are probably going to obstruct as opposed to help the advancement in the announcing frameworks. India's markets endure to exhibit a cornucopia of adverse externalities where the costs of resource use, environmental dilapidation, or community commotion are neither paid by those who sustain them nor are reflected in actual prices. The present monetary structure gives little consolation for organizations to think about the long term the substance of genuine manageable turn of events. There are a few organizations in India engaged with various issues, for example, social health, education, advancement of rural sectors, sanitation, strengthening the position of women in the society. Investigation of a few overviews in India propose that however numerous organizations in India have accepted the general language of CSR, CSR appear to be in a befuddled state. Singular organizations characterize CSR in their own restricted manners and settings. The outcome being that all accomplishments commenced in the appellation of CSR are mainly benevolence, or an extension of compassion. It appears that CSR in India has been embryonic in domain of profit dissemination. There is a need to build the understanding and dynamic cooperation of business in evenhanded social advancement as a vital piece of good business practice.

BLANK CHEQUE-ANOMALIES THAT SWIRL AROUND THE ISSUANCE AND DISHONOUR OF BLANK CHEQUES

Karpagam Mayavan¹

Abstract

*Ability to create fiction is one of the most distinctive characteristics of humankind. It has not only helped humans to live individually but also collectively. Starting from the creation of religion to trade, fictions like trust, good faith etc. have played a crucial role in all spheres transcending boundaries. One such important fiction, in the commercial world is the creation of negotiable instruments. The history and genesis of negotiable instruments was well explained and articulated in the English case of **Goodwin vs. Roberts**, dating back to the customs and usages of traders and merchants. In India, laws regarding negotiable instruments were accordingly codified during the colonial period itself. The NI Act recognizes three types of negotiable instruments namely Bills of Exchange, Promissory Note and Cheque. Among these instruments, cheque plays a pivotal role, since most of the litigation centers around this instrument. Whilst, the dishonor of bill of exchange or pro-note only bears a civil liability albeit, the dishonor of cheque alone attracts a criminal liability warranting serious consequences. In the gamut of negotiable instruments, besides the issuance of post-dated, ante dated cheques, inter alia now the practice of issuance of blank signed cheques too have become a common phenomenon in the commercial transactions.*

Now this article analyses and purports to answers, questions like, whether blank cheques are really a negotiable instrument? Is blank cheque also a valid cheque in the eyes of law? Is blank cheque an inchoate instrument? Does it have a carte blanche implied authority for the holder in due course to fill the content in its blank instrument? Does the dishonour of blank cheque, which was given as security or for other purpose attracts criminal liability under section 138 of NI Act? Does the statutory presumption under section 139 of the NI Act applies to blank cheques too and if so, to what extent? All these anomalies around the blank cheque can be corrected the banks should accept only those

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cheques which are drawn completely in the handwriting of the drawer or in case, the circumstances warrants the issuance of blank cheque at the time of presentation, it should be appended with a note from the drawer spelling out the authority to fill the cheque and other particulars to be filled there in. The above holistic approach will make all the commercial transactions to be more pragmatic, cohesive, trust worthy.

Keywords : Cheque, Unsigned, Blank Cheque, Inchoate Instrument, Negotiable instrument.

1. Introduction

Ability to create fiction is one of the most distinctive characteristics of humankind². It has not only helped humans to live individually but also collectively. Starting from the creation of religion to trade, fictions like trust, good faith, have played a crucial role in all spheres transcending boundaries. One such important fiction, in the commercial world is the creation of negotiable instruments. The history and genesis of negotiable instruments was well explained and articulated in the English case of **Goodwin vs. Roberts**³, dating back to the customs and usages of traders and merchants. In India, laws regarding negotiable instruments were accordingly codified during the colonial period itself⁴. The NI Act recognizes three types of negotiable instruments namely Bills of Exchange, Promissory Note and Cheque⁵. Among these instruments, cheque plays a pivotal role, since most of the litigation centers around this instrument⁶. Whilst, the dishonor of bill of exchange or pro-note only bears a civil liability albeit, the dishonor of cheque alone attracts a criminal liability⁷ warranting serious consequences. In the gamut of negotiable instruments, besides the issuance of post-dated, ante dated cheques, inter-alia now the practice of issuance of blank signed cheques too have become a common phenomenon in the commercial transactions. Now this article analyses and answers, the anomalies that swirl around the issuance and dishonour of blank signed cheque, as to whether blank cheques are really a negotiable instrument? Is blank cheque also a valid cheque in the eyes of law? Is blank cheque an inchoate instrument? Does it have a carte-blanche implied authority for the holder in due course

² HARARI, YUVAL N, SAPIENS, A BRIEF HISTORY OF HUMANKIND, 23, (2014).

³ (1857)L.R. 10. Ex. 337.

⁴ Negotiable Instrument Act, 1881 (Act No. 26 of 1881)

⁵ Section 13, NI Act, 1881.

⁶ Nearly 38 lakhs cases pending as per the Law Commission of India. 2008. Report No. 213: *Fast Track Magisterial Courts for Dishonoured Cheque Cases*. New Delhi: Government of India, p.10.(Apr.19, 2019, 10:04 AM). lawcommissionofindia.nic.in/reports/report213.pdf.

⁷ Chapter XVII, inserted into NI Act, 1881 by Banking Public Financial Institution and Negotiable Instrument Laws (Amendment) Act, 1988 (Act No. 66 of 1988)

to fill the content in its blank instrument? Does the dishonor of blank cheque, which was given as security or for other purpose attracts criminal liability under section 138 of NI Act? Does the statutory presumption under section 139 of the NI Act applies to blank cheques too and if so, to what extent?

2. Is blank cheque a Negotiable Instrument?

The term negotiable instrument has been defined under section 13 of the NI Act to mean a bill of exchange, promissory note or cheque payable on order to a bearer. Negotiable instruments are documents which are physical embodiments of rights. In the words of Justice Willis,

*'an instrument the property in which is acquired by anyone who takes it bonafide, and for value, notwithstanding any defect in title from the person whom he took it, from which follows that an instrument cannot be negotiable, unless it is such and such a state that the true owner could transfer the contract or engagement contained therein by simple delivery of instrument'*⁸.

The important characteristics of a negotiable instrument are that (1) property (2) transferability (3) title (4) right to sue (5) raises certain presumption (6) prompt payment on presentation⁹. In simple parlance, the term negotiable instrument means a written document which creates a right in favor of someone and which is freely and easily transferable. Since a blanked signed cheque can easily be transferred and creates a title to the person who receives it, no doubt it can be construed as a negotiable instrument, but to what extent the property in such instrument bearing its validity is uncertain and ambiguous.

3. Is blank cheque also a valid cheque in the eyes of law?

The NI Act under section 6 defines a cheque as¹⁰,

'A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.'

⁸Sristi Yadav, *Negotiable Instruments and their Endorsement in India*, 4 IJLLJJS, 250, 251.

⁹ Dr. S.S. Kundu, *Principles of Insurance and Banking* (April. 19, 2019, 09.36 AM), <https://districts.ecourts.gov.in/sites/default/files/negotiable%20instruments%20act.pdf>.

¹⁰ Section 5, NI Act, 1881

Though there are distinction between a cheque and a bill of exchange, all cheques are bills of exchange, but all bill of exchanges are not cheques¹¹, as a general rule law applicable to bill of exchange also applies to a cheque. As succinctly put forth by the Gujarat High Court In Nikhil Gandhi's case;¹²

'a combined reading of Sections 5 and 6 would make it clear that an instrument would be a cheque if only it contains the particulars as mentioned in the two sections referred to above. If the drawee's name is not written in the instrument, that instrument cannot even be termed to be a bill of exchange. Therefore, if it is only assigned blank cheque leaf, it cannot be said to be a cheque within the meaning of Section 6 of the Act.'

A blank cheque cannot said to be bill of exchange since it contains only the signature of the drawer, but does not contain the name of the person to whom it is to be paid or specific date and also does not contain the amount to be realized. A bare literal reading of the proviso would indicate that a blank cheque is not a bill of exchange and hence it cannot be qualified to be a cheque. If the blank cheque cannot be said to be cheque or bill of exchange, can it be an inchoate instrument as held in *Hitenbhai v. State*¹³

4. Is blank cheque an inchoate instrument?

The definition of an inchoate instrument as defined in the Negotiable Instrument Act is,
Section 20: inchoate stamped instrument

Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The persons signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid there under.

¹¹ S.P.SEN GUPTA, THE NEGOTIABLE INSTRUMENTS ACT, 1881, 182 (5th ed. 2019).

¹² Nikhil. P. Gandhi v. State of Gujarat 2016 SCC OnLineGuj 1856

¹³ (2010) CrLJ 451.

The provision defining the inchoate instrument is in clear and unequivocal language, yet there have been different views by the various courts as to whether a cheque would be an inchoate instrument. The ingredients of section 20 are:

- (1). The instrument should be stamped
- (2). It should be stamped in accordance with the law relating to negotiable instrument in force in India
- (3). The instrument should be wholly blank or incomplete
- (4). The instrument must be signed and delivered to another making him the holder of such instrument¹⁴
- (5). only the holder can make or complete the instrument
- (6). Provided however that the amount to be specified therein does not exceed the amount which should be covered by the stamp¹⁵.

A blank signed Cheque is the one which completely blank or incomplete, and not stamped in accordance with law. But unfortunately, the courts have erroneously interpreted to include blank signed cheque also to be an inchoate instrument¹⁶ for the only reason that the instrument is incomplete and all consequences to a normal cheque to follow suit. Various Courts have also taken a contrary view that blank unsigned cheque would not be an inchoate instrument by strictly interpreting section 20. The court in *Nikhil P. Gandhi*¹⁷ has clearly interpreted section 20 and held that,

'If it is only a signed blank cheque leaf that was handed over it cannot be said to be a paper stamped in accordance with law relating to the negotiable instruments. As such the contention that, whether it is wholly blank or filled up partly making it an incomplete document and that handing over of the same would give authority to the holder thereof to make or complete the instrument as the case may be for any amount specified therein and not exceeding the amount covered by the stamp, cannot be sustained. So far as a cheque is concerned, if it is a signed blank cheque leaf it may be filled up showing any amount without any restriction what so ever and if that be

¹⁴Tarachand Kevalram v. Sikri Brother AIR 1953 BOM 290

¹⁵*Supra* note 11, at 260.

¹⁶Nagappa v. Y.R. Muralidhar (2008) 5 SCC 633 *see also*, Jamini Jewellery Limited v. State Of Maharashtra (2017) CrLJ 3308 (Bom), Nita Kanoi v. M/s. Paridhi and others 2015 SCC OnLine Cal 1262

¹⁷ Nikhil. P. Gandhi v. State Of Gujarat 2016 SCC On Line Guj 1856 *see also*. C.T. Joseph v. I.V. Philip AIR 2001 Kerala 300, Dower v. Sohan Lal AIR 1937 Lahore 816.

so, how Section 20 of the N.I. Act can be applied to a case of cheque. But if it is a paper stamped, it can be filled up showing the amount not exceeding the amount covered by the stamp. That is the rationale behind why Section 20 is specifically made applicable to the stamped documents/instruments.'

The basic tenet of interpretation of the statute is that, the words in the statute should be read as it is by giving a literal meaning. The intention of legislation is primarily to be gathered from the language used, which means that attention should be paid to what has been said and also to what has not been said¹⁸. The Privy Council¹⁹ has observed that,

'We cannot aid the legislature defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are leftover'.

The language of section 20 of the NI Act is clear and categorical to apply only to inchoate stamped instruments and not to any other instruments. Chief Justice M.C. Chagla of the Bombay High Court²⁰ with regard to construction of section 20 has held that,

'Section 20 must be strictly construed. It imposes a serious liability upon a person who allows an incomplete document bearing his signature to go out into the world. But there is no reason why heavy as liability upon that person, we should increase that liability by importing into section 20 words which do not find a place therein'.

But the courts have overlooked and reinterpreted the section beyond its clear words to include the blank signed cheque within its preview which is not the intention of the legislature. Although it is clear that marginal notes appended to a section cannot control the meaning of the words in the section it can be used as a guiding tool while interpreting the section²¹. The marginal note of the section which clearly reads as *inchoate stamped instrument* spells out the application of the Section to only stamped instruments but not otherwise. Thus, it is only by the fallacious interpretation of the provision that blank signed cheques are considered as inchoate instrument and which are subsequently believed to become full-fledged negotiable instrument on its completion. Recognising blank cheques as inchoate instruments has a domino effect, as all the provisions applicable to a complete cheque consequentially becomes applicable to an incomplete

¹⁸Gautham Rayon Silks Mfg Co. Ltd v. Custodian of Vested Forest AIR 1990 SC 1747. See also. JUSTICE G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION, 67-69 (14th ed. 2016).

¹⁹Crawford v. Spooner (1846) 6 Moore PC 1.

²⁰Tarachand Kevalram v. Sikri Brother AIR 1953 BOM 290.

²¹JUSTICE G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION, 188-190 (14th ed. 2016).

cheque, which only increases the number of litigations spiraling up the arrears of docketing explosions of cases under section 138 of the NI Act.

5. Is there an implied authority to fill the blank signed cheque?

Since the courts have interpreted section 20 to apply even to blank cheques, the next question is as to whether the holder has an implied authority to fill in the blank signed cheque? As per section 20, the legislature had imputed a prima facie implied authority to the holder of the inchoate instruments to fill in the blanks and to make the incomplete instrument complete and negotiable²². This implied authority comes into play once the instrument is signed and delivered to the holder. The authority to complete the instrument is not only to the person to whom it is delivered but to any holder who is empowered to fill the omission²³. When an inchoate instrument is completed within a reasonable time²⁴ in accordance with the section, then it should be treated as though there was never a defect and would become retrospectively enforceable²⁵. The holder in due course has a prima-facie authority to fill in the date, the name of the payee²⁶ and also the amount.

The only rider for this carte blanche authority given to the holder in due course is that, the amount to be filled cannot be more than amount covered by the stamp. If the instrument is filled up for a larger sum then it amounts to forgery²⁷. Where the legislature has restricted to imply a prima facie authority on the part of the holder in due course to complete an inchoate stamped instrument, the courts have overlooked the provision and have imputed such implied authority even in cases of blank cheques²⁸. The courts cannot by themselves presume that there exists an implied authority to fill in the blank cheque, when there is no provision therein allowing presumption of law or fact to that extent²⁹. The authority to fill in amount under section 20 is limited by the amount covered by the stamp, but the implied authority read in by the courts with regard to filling up of blank cheques is wider than what has been provided under the Act and the courts have left it to the whims and fancies of the drawee to fill in the amount. In U.S. law, blank cheque is considered to be an incomplete instrument and completion of the same without the

²² Chidambaram v. P.T. Ponusamy (1995) 2 LW 719 Mad.

²³ Faulks v. Atkin (1993) 10 TLR 178.

²⁴ Griffith's v. Dalton (1940) 2 KB 264.

²⁵ McDonalds (Gerald) & Co v. Nash & Co (1924) AC 625.

²⁶ Ireland's v. Syed Ibrahim AIR 1962 Mad 326.

²⁷ R v. Minter Hast (1834) 7 C & P 654.

²⁸ Gopal v. Balachandran (2008) 1 CTC 491 *see also*. P.S.A. thamodharan v. Dalmia Cementa Pvt. Ltd. (2008) 1 JCC (NI) 96 Madras.

²⁹ Kamalammal v. C.K. Mohanan 2007 Cri LJ 3124.

authority of the maker amounts to alteration³⁰

6. Does a dishonour of a blank cheque attract section 138 NI Act?

The object of bringing Section 138 into the statute was to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments³¹. The ingredients of section 138 of the NI Act are as follows,

‘(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;

(ii) The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice³².

The sine qua non for section 138 is that, the drawer must have drawn a cheque. It is not clear as to what the expression ‘drawn a cheque’ means. It has two possible interpretations. One is that, the drawer merely signs the cheque leaving the other column blank, which can be said that, the drawer has validly drawn the cheque or secondly, the drawer has to fill in all the columns namely date, name of the payee and the amount along with his signature, which amounts to drawing the cheque. A statute creating an offence or a penalty should be construed strictly³³. When the

³⁰ U.C.C. Article 3, section 115.

³¹ Damodar S. Prabhu v. Sayed Babalal (2010) 5 SCC 663.

³² Jugesh Sehgal v. Shamsher Singh Gogi (2009) 14 SCC 683.

³³ *Supra*, note 11 at 961.

provision is ambiguous and when two interpretations are possible, the one in favour of the subject must be given, against the legislature which has failed to express itself clearly³⁴. But the courts have adopted the first view which is against the accused and has categorically held that, the Act does not mandate that the maker or the drawer of the cheque to fill the cheque and anybody can do so and dispute with regard to writing in the body of the cheque which has no significance.³⁵

The second essential ingredient under section 138 is that, the cheque should have been issued for discharge of any liability in whole or in part. Again, the Act is unclear as to the liability can be past, present or future liability and whether liability at the time of issuance of the cheque should be ascertainable or quantified. In case, if the blank signed cheques were given as security where in the future the debt may become ascertainable. In such cases the complainant can fill in any amount on their own will and volition, which can even be more than the actual debt. Invariably the various courts have held that dishonor of blank signed cheque will be under section 138³⁶ of the NI Act. The High Court of Andhra Pradesh³⁷ has held that,

'If this sort of practice is allowed, every creditor should abuse the provision under section 138 of the Act by obtaining blank cheques and putting the debtors in fear of presentation insisting on the discharge of the debt any time. I do not think, that would be the intention of the legislature while incorporating section 138'.

This take us to the next question as to presumptions under section 139 of the NI Act would vis some vis apply in case of a blank cheque.

7. Whether presumption under Section 139 of the NI Act applies in case of blank signed cheque and to what extent?

Presumptions are kind of fiction in law, which assumes certain facts when certain state of affairs exist. When a Statute prescribes a presumption the burden of proof shifts to the other party. In case of negotiable instrument, the legislature prescribes a presumption under section 139 of the NI Act which reads as follows,

139. Presumption in favour of holder.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

³⁴ State of West Bengal v. Swapan Kumar AIR 1982 SC 949.

³⁵ D. Atchyutha Reddy v. State (2010) CrLJ 1265 *see also*. Venkateshwara Rao v. Kola Veera (2006) CrLJ 1 (AP).

³⁶ P.S.A. thamodharan v. Dalmia Cementa Pvt. Ltd. (2008) 1 JCC (NI) 96 Madras, Vinoth v. Zaheer 2001 CrLJ 2292.

³⁷ Taker. N. Kambani v. Vinayak Enterprise (1995) CrLJ 560 AP.

Once a cheque, as defined under section 138 is received, the holder is mandatorily³⁸ presumed to have received the cheque for discharge of some liability.

The Kerala High Court³⁹ has succinctly explained that, section 139 raises only a presumption that the holder received the cheque for the discharge of liability and does not presume the issuance/execution/ drawing of cheque. On a general basis once the signature is admitted by the accused, the courts go on to presume as per section 139, but certain pre requisites are to be fulfilled before the presumptions comes into force namely that (1) the person in whose favour the presumption is drawn is the holder of the cheque (2) the cheque is in the nature as specified in Section 138(3) and such cheques were received by the holder. The Madras High Court⁴⁰ has held that,

'presumption in favour of complainant contemplated under Sections 138 and 139 of NI Act comes to play only on the satisfaction of Court that the cheque in question was duly executed. It was explained that "execution" of the cheque does not mean the mere handing over a "blank cheque", but it means that the cheque is given in the full form," the complainant cannot be justified in doing material alteration beyond the knowledge of the accused.'

Recently the Supreme Court⁴¹ has held that a blank cheque which when given voluntarily raises a presumption under section 139, implying the factum of voluntariness to be established before the presumption is to operate. Thus, majority of the courts invariably have applied the presumption under section 139 even to blank signed cheques because of the interpretation, that blank signed cheques are inchoate instruments and the holder has an implied authority to fill in the blank cheques.

8. Conclusion

The provisions with regard to dishonor of cheques is a mélange and amalgam of civil, criminal

³⁸Rangappa v. Sri Mohan AIR 2010 SC 1898.

³⁹Kamalammal v. C.K. Mohanan 2007 Cri LJ 3124.

⁴⁰E. Dhanuskodi v. D. Sreedhar, 2018 SCC OnLine Mad 5124 *see also*. Krishnaswamy v. Delta Knit Wearables 2011 SCC OnLine Mad 801.

⁴¹Bir Singh v. Mukesh Kumar 2019 SCC OnLine SC 138.

and tortious color because of the myriad aspect of compensation, fine or imprisonment and vicarious liability respectively, thus all fit into one roof as one remedial solution for various complex issues found in the dishonor of cheques. But the compensatory aspect of the provisions is overlooked by the courts by making them interpret the statute beyond the words provided by the legislature deviating from basic tenets of statutory interpretation. From the above discussion it is clear that, the courts have interpreted to include blank signed cheques to be an inchoate instrument giving an implied authority to the holder to fill in the blanks and making it complete and negotiable, thus applying all consequential provisions for dishonor of cheques. This wider interpretation puts the accused in a more disadvantageous, amorphous position, and has done more harm than good adding to the backlog of dishonor of cheques cases. On a literal reading of the various provisions it is clear that blank cheques are not inchoate instruments and hence dishonor of such instruments cannot attract a criminal liability.

Blank cheques are nothing more than a mere incomplete instrument. All these anomalies around the blank cheque can be corrected if and only if the problem is nipped in the bud, thereby preventing such recurrence and continuance at the level of banks itself, at the time when such cheques are presented. This assumes more significance in the light of the fact that all banks are bound under the regulation/ notification of the Reserve Bank, the RBI should come forward with a vigilant and proactive circular / notification to the effect that, the banks should accept only those cheques which are drawn completely in the handwriting of the drawer or in case, the circumstances warrants the issuance of blank cheque at the time of presentation, it should be appended with a note from the drawer spelling out the authority to fill the cheque and other particulars to be filled there in. The above holistic approach will make all the commercial transactions to be more pragmatic, cohesive, trust worthy going by the adage “**Business is nothing but trust worthiness, as such it should only be worthy but not weary**”. such trust worthiness must be cemented in all commercial transactions and disputes leading to legal realism and pragmatism.

LEGAL ASPECTS OF RIGHT TO HEALTH – ISSUES AND CONCERNSM. Muthukumar¹***Abstract***

Right to Health is a debatable topic in recent years. The main reason behind that the effective law it has not been implemented in India. The various judgments of the Supreme Court have widened the scope of Article 21 of Indian Constitution under the term of right to life. It is to be noted that now right to health is also including the term of right to life under Article 21 of the Constitution. Universal Declaration of Human Rights also stressed that right to health is a basic human right. India is a party to the Universal Declaration of Human Rights and the obligation to protect the health of people. Part IV of the Indian Constitution guarantees positive right to health. Article 38 mandates the State to create a social order without economic disabilities and disparities and with social justice in respect to health. In villages most of the people like women, children and workers were not aware about the medical facilities of Central as well as State Government. The main problem is basically that the right to health is not realized by the various groups of people in India. So, the State has to develop its policy towards securing that health and strength of workers, men and women. The Indian judiciary has interpreted the right to health in many ways through public interest litigation as well as litigation arising out of claims that individuals. Right to health is not compromised due to the various developments like social, economic, political and technological. This article enlightens the various Constitutional and International legal provisions regarding right to health, and further critically analyze the various issues and challenges involved with respect to the health with special reference to Indian legal perspective.

1. Introduction

Health and wellbeing are deeply personal matters. The right to health is a fundamental part of our human right and of our understanding of a life with dignity. The right to the enjoyment of the highest attainable standard of physical and mental health is not new. Internationally, the health was first articulated in the 1946 Constitution of the World Health Organization (WHO) preamble defined health is a state of complete physical, mental and social well-being and not merely the

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absence of disease or infirmity. The Preamble further states that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”.²In India, the right to health care protection has been recognized since Independence.³ After Independence the Constitution of India makes that the Citizen was recognized as the right holder and the State was the duty bound and provides health for all.⁴ Further the Constitution makes the Gender Equality. Women are affected by many of the same health conditions as men, but women experience them differently due to both genetics and the social construction of gender.⁵ The women health may be affected impoverishment and economic dependence, gender-based violence and discrimination and limited autonomy in life decision making.⁶

Whereas the right to health can be regarded as part of human rights and applicable to all, children constitute the most neglected segment having been denied adequate health care. Moreover, children are totally dependent upon adults for all of their needs.⁷ They have no control over adverse health events, proper nutrition, sanitation and environment. In the absence of adequate parental care, the state must be responsible to meet their health needs by making child-centric policies and sufficient allocation of funds.

In India’s federal set up, health is a shared subject between the Center and the States. While the Indian Constitution lays down the duties of the State with respect to health, there is no law addressing the issue of public health.⁸ The health of workers is an essential prerequisite for household income, productivity and economic development. Therefore, restoring and maintaining working capacity is an important function of the health services. Health risks at the workplace, such as heat, noise, dust hazardous chemicals, unsafe machined and psychological stress, cause occupational diseases and can aggravate other health problems. Conditions of employment, occupation and the position in the workplace hierarchy also affect health. So, the public health and medical services posed the most complex and urgent problems in the health sector.⁹

²Preamble of World Health Organization<<https://www.who.int/about/who-we-are/constitution>>accessed on 15.02.2020

³Rana, P K, “Right to Health care for All”-Is it a Distant Dream in India, (2012), 12 (4) Nyaya Deep, 55

⁴ Ibid

⁵ World Medical Association, Women and Health, <<https://www.wma.net/what-we-do/human-rights/women-and-health/>> accessed on 15.02.2020

⁶ Ibid

⁷ R N Srivastava, Right to Health for Children, <<http://medind.nic.in/ibv/t15/i1/ibvt15i1p15.pdf>> accessed on 15.02.2020.

⁸ Ibid P, 127

⁹ World Health Organization, Protecting workers health, <<https://www.who.int/news-room/fact-sheets/detail/protecting-workers'-health>> accessed on 18.02. 2020

2. Importance of Right to Health

Health is the state of physical, mental and social well-being and does not only mean an absence of illness or disease. The right to health is closely linked to other fundamental human rights, most notably access to clean water and adequate hygiene.¹⁰ Right to health includes a wide range of factors that can help us lead a healthy life. The committee on Economic, Social and Cultural Rights, the body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights,¹¹ calls these then, “underlying determinants of health”. They include: Safe food, Safe drinking water and adequate Sanitation, Adequate nutrition and housing, Healthy working and environmental conditions, Health related education and information, Easy access to medicine. Human rights are universal and inalienable; indivisible; interdependent and interrelated.¹² This means that violating the right to health may often impair the enjoyment of other human rights, such as the rights to education or work, and vice versa. Ill health is associated with the ingestion of or contact with unsafe water, lack of clean water, lack of sanitation, and poor management of water resources and systems, including in agriculture. Most diarrheal disease in the world is attributable to unsafe water, Sanitation and hygiene.¹³

3. International Perspective of Right to Health

Several International human rights instruments refer to rights applicable in the context of health law and health policy.¹⁴ Right to health was first explicitly incorporated in the Preamble of the World Health Organization (WHO) Constitution in 1946. The Universal Declaration of Human Rights recognized Right to health as a Human Right.¹⁵ The International Covenant on Economic, Social and Cultural Rights recognized physical and mental health of the people.¹⁶ African Charter on Human and Peoples Rights provides that the people have the right to enjoy the standard

¹⁰Humanium, The Right to Health, <<https://www.humanium.org/en/fundamental-rights-2/health/>> accessed on 19.02.2020

¹¹ The Covenant was adopted by the United Nations General Assembly in its resolution 2200A (XXI) of 16 December 1966. It entered into force in 1976.

¹² United Nations Population Fund, Human Rights Principles, <<https://www.unfpa.org/resources/human-rights-principles>> accessed on 15.02.2020

¹³ Centers for Disease Control and Prevention, Safe Water System <<https://www.cdc.gov/safewater/disease.html>> accessed on 15.02.2020

¹⁴ Elias Mossialos(ed), *Health Systems Governance in Europe*, (1st edition, Cambridge University Press, 2010) 284

¹⁵Universal Declaration of Human Rights, Article 25 provides that “Everyone has the right to standard of living adequate for the health and well-being of himself and of his family, including food, clothing housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, Widowhood, old age or other lack of livelihood in circumstances beyond his control”.

¹⁶Article 12 of the Convention provides that, “The State parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

health.¹⁷The International Covenant on Civil and Political Rights 1966, the UN Declaration on Elimination of All Forms of Discrimination against Women 1979 and the Convention on the Rights of the Child provide, *inter alia*, for the protection of health-care rights of persons including women, children and other disadvantaged sections of society. The World Health Organization and the Executive Board of the United Nations Children's Fund, and at the invitation of the Union of Soviet Socialist Republics, the International Conference on Primary Health Care was held from 6 to 12 September 1978 in Alma-Ata, capital of the Kazakh Soviet Socialist Republic. The main objective of the conference is to promote the concept of primary health care in all countries. Further, it was emphasized to exchange experience and information on the development of primary health care within the framework of comprehensive national health system and services. Consequently, the Government of India also formulated first National Health Policy in 1983.¹⁸Recently India has developed health policy for achievement of the goal of health for all in the society.

4. Indian Constitutional Law Perspective of Right to Health

Part IV of the Indian Constitution which is DPSP imposed duty on states. Some of the provisions direct the state to take measures to improve the conditions of health of people. Article 47 of the Indian Constitution obligates the State to regard, as among its primary duties, the raising of the level of nutrition and the standard of living of its people and the improvement of public health. In particular, the State is to endeavor to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and drugs which are injurious to health. A statute which does not make adequate provision for allowing use and consumption of intoxicating drinks for medicinal purposes goes beyond the scope of Art.47.¹⁹ While awarding a sentence in respect of offences affecting public health, the Courts must notice the object for enacting Article 47 and deal with the offence severely.²⁰ On the basis of the provisions of Article 47 the use and traffic in liquor has been controlled by State which includes both regulatory as well as prohibitory measures.²¹

¹⁷It was adopted in the year of 27th June 1981. Article 16 (2), which is provides that, "*State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick*".

¹⁸ Rajesh Kumar, Right to Health : Challenges and Opportunities,
<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4581140/>>accessed on 21.04.2019

¹⁹ *F.N. Balsara v. State of Maharashtra*, AIR 1951 SCR 682

²⁰*State of Punjab v. PremSagar*, (2008) 7 SCC 550

²¹Chandra, *Human Rights*, (8th ed., Allahabad Law Agency, 2014)234

The Supreme Court has observed in *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*,²² that “Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life.”

In *Citizens and inhabitants of Municipal Ward v. Municipal Corporation, Gwalior*²³ the Court observed that the State machinery was bound to assure adequate conditions necessary for health. The case involved maintaining of sanitation and drainage facilities by Municipal Corporations. It was held that the state and its machineries were bound to assure hygienic conditions of living. Further in, *State of Punjab and Others v. Mohinder Singh Chawala*,²⁴ it has been held that right to health is integral to right to life. Government has a Constitutional obligation to provide health facilities. Similarly, the Court has upheld the State’s obligation to maintain health services. Again in, *Mahendra Pratap Singh v. State of Orissa*,²⁵ the Court reiterated the right to life includes the right to access primary health centers. In this case, on the basis of demands of the local people and public at large, the Department of Health and Family Welfare of the Government of Orissa decided to open certain primary health centers in different areas for the year 1991-92, subject to fulfillment of certain conditions. The Court further observed,

“In a country like ours, it may not be possible to have sophisticated hospitals but definitely villagers within their limitation can aspire to have a Primary Health Centre. The government is required to assist people get treatment and lead a healthy life. Health society is a collective gain and no Government should make any effort to smoothen it. Primary concern should be the primary health Centre and technical fetters cannot be introduced as subterfuges to cause hindrances in the establishment of health Centre.”

In *Murli Deora v. Union of India and others*²⁶ the Supreme Court prohibited smoking in public places in the entire country on the grounds that smoking is injurious to health of passive smokers and issued directions to the Central Government and State Governments as well as the Union Territories to take effective steps to ensure prohibiting smoking in all public places such as

²² (1996) 4 SCC 117, Para 9

²³ AIR 1997 MP 33

²⁴ AIR 1997 SC 1225

²⁵ AIR 1997 Ori 37, Para 8

²⁶ (2001) 8 SCC 765, Para 9

auditoriums, hospital buildings, health institutions, educational institutions, public offices, libraries and public conveyances including railways.

5. Role of Public Institution to maintain health

The Government hospitals also have the obligation to provide proper treatment to the patients. The Hospitals are established by the Central and State governments for welfare of the people. The Supreme Court in its landmark judgment in *Paramanand Katara v. Union of India*²⁷ ruled that every doctor whether at a government hospital or otherwise, has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid delay, the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute, and paramount laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must therefore, give way. In the above case Supreme Court observed,

*“The patient whether he be an innocent person or a criminal liable to punishment under the laws of the society, it is the obligations of those who are in-charge of the health of the community to preserve the life. So, that the innocent may be protected and the guilty may be punished”.*²⁸

Right to health is a basic human right and the State has a Constitutional obligation to provide health facilities. With respect to health, States should, for instance, adopt legislation or other measures ensuring equal access to health care provided by third parties. In addition, there is an increasing debate about the extent to which other actors in society- individuals, inter-governmental and non-governmental organizations (NGOs), health professionals, and business- have responsibilities with regard to the promotion and protection of human rights. States have primary obligation to respect, protect and promote the human rights of the people living in their territory. So, seeking the implementation of the right to health at the domestic level is particularly important. The 73rd and 74th Constitutional amendments were clearly enlightened the special status for the Panchayat Raj Institutions. Based on these amendments the Panchayat Raj institutions also have power to dealing necessary activities. With special reference to Right to Health not only State

²⁷ AIR1989 SC 2039

²⁸ *Paramanand Katara v. Union of India*, AIR1989 SC 2039, Para 3

but also the Panchayat and Municipalities are liable to improve the public health.²⁹ The very essential to success of the various health programme is effective implementation and monitoring. It may be a direct or indirect. The National Rural Health Mission (2005-2012) has been launched to improve availability and access to quality health care and public health services, including women health, Child health, Water, Sanitation and hygiene, immunization, and nutrition by rural people, through making necessary changes in the mechanism of health delivery.³⁰ In order to ensure non-diversion and non- lapsing of funds for priority of health programmes the Ministry of Health and Family Welfare has set up several societies at the District level. These societies are put in charge of implementing certain national programmes like control of blindness, Eradication of TB, Control of AIDS and so on.³¹ In the case of *State of Punjab and others v. Ram Lubhaya Bagga and others*,³² the Supreme Court has declared that the obligation of the state to protect the citizens right to life and health to be its 'sacrosanct' and 'sacred' duty.³³ Basically India has implemented many health schemes and programmes for welfare of the people. But the Central and State Governments has to periodically check the people accessibility in the various health schemes and programmes.

6. Health care of Women

Women are affected by many of the same health conditions as men, but women experience them differently. The prevalence of poverty and economic dependence among women, their experience of violence, gender bias in the health system and society at large, discrimination on the grounds of race or other factors, the limited power many women have over their sexual and reproductive lives and their lack of influence in decision- making are social realities which have an adverse impact on their health. So, women face particular health issues and particular forms of discrimination, with respect to some groups, including refugee or internally displaced women, women in slums and suburban settings, indigenous and rural women, women with disabilities or facing multiple forms of discrimination, barriers and marginalization in addition to gender

²⁹Deepu P, Right to Health as a Constitutional Mandate in India, <<http://jsslawcollege.in/wp-content/uploads/2013/12/RIGHT-TO-HEALTH-AS-A-CONSTITUTIONAL-MANDATE-IN-INDIA.pdf>> accessed on 15.03.2019

³⁰Arpita Sharma, Government Programme to empower Panchayati Raj, <<http://yojana.gov.in/Recent-archive-english/January-14.pdf>>accessed on 28.03.2019

³¹Raghunandan, Rural Infrastructure, Panchayati Raj and Governance, <<http://www.iitk.ac.in/3inetwork/html/reports/IIR2007/02-Rural%20Infr.pdf>>accessed on 29.06.2019

³²(1998) 4 SCC 117

³³Arundhati Kulkarni, "WTO –Trips Agreement and Right to Health in India: - A Critical analysis, (2014), Issue1, KLE Law Journal 105,110.

discrimination. Dr. Aparna Hegde of NGO Armman, which works in the field of maternal health, said, “ Women are so busy being primary care givers of their families that they do not have time to pay proper attention to their own health”.³⁴In *Upendra Baxi v. State of Uttar Pradesh*,³⁵ a public Interest Litigation highlighted by the need to enforce human rights of the in-mates of protective homes, particularly in relation to their health; many were suffering from mental retardation and contagious diseases. The authority was ordered by the Supreme Court to do their duty in accordance with the law, without confliction with interest of the human rights and dignity of women inmates.³⁶

Women’s access to health services is much less in comparison to men. The underlying reason behind their lower status in the family and lack of decision making power regarding ill health, expenditure on health care and non-availability of health care facilities prevent them from seeking medical help.³⁷ The social roots of women’s mental health problems are overlooked owing to gender insensitivity and increasing medicalization of mental health problems of women, mental health care has been given very low priority and consequently, mental health services are in abysmally equipped to meet the needs of the mentally ill persons and often serve more of a custodial role than one of care and treatment.³⁸The Supreme court observed in one of the case,

*“The Central and the State Governments through Social Welfare Boards should prepare schemes for rehabilitation all over the country for physically and sexually abused women commonly known as prostitutes. That the prostitutes also have a right to live with dignity under article 21 of the Constitution of India since they are also human beings and their problems also need to be addressed.”*³⁹

7. Health Care of Children

Childhood is both the most vulnerable and the most formative period of life. Children need protection, support and encouragement and a safe and peaceful environment.⁴⁰ The Convention on

³⁴*The Times of India*, (Chennai, 7th March 2015) 1

³⁵(1983) 2 SCC 308

³⁶Indhrani Sridharan, *Practising Human Rights, A Feminist Perspective* in , In *Human Rights in India- Historical Social and Political Perspectives*, 99 (Chiranjivi Nirmal ed., 2010)

³⁷Sarojini N B, *Women’s Right to Health*, <<http://nhrc.nic.in/Documents/Publications/Womens.pdf>>accessed on 19.03.2019

³⁸ K.P. Anuradha, *Human Rights issues in India*, (1st ed., Adhyayan Publishers 2010) 10

³⁹*Budhadevkarmaskar v. State of West Bengal*, (2011) 10 SCR 577

⁴⁰Anuja S, *Human Rights of Street Children to safe and Healthy Childhood – The Approach and Challenges*, (2013) Vol. XL (4), IBR 117, 119

the Rights of the Child, 1989 clearly indicates this aspect.⁴¹ In a civilized society, the importance of a child welfare programme cannot be over emphasized because the welfare of the entire nation depends on the well-being of its children.⁴² Children are entitled to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. The States parties to the Convention on Rights of Child are under an obligation to ensure that no child is deprived of his or her right to access to health care services.⁴³ Children in India suffer from various health problems since early childhood. Most of the findings show that polio, oral rehydration therapy, problem of malnutrition, discrimination against girl child, Infant mortality Rates, and Vitamin A deficiency mainly as public health problems suffered by children.⁴⁴

The Constitution of India has special provisions for protecting the well-being of children. The role of judiciary in India has been significant in promoting the child welfare.⁴⁵ Article 39(e) of the Indian Constitution prohibits the tender age of the children from being abused. Art. 39(f) ensures that the children grow in a healthy manner and are protected from exploitation. The Supreme Court in *Lakshmi Kant Pandey v. Union of India*,⁴⁶ held that “the welfare of the entire community, its growth and development, depend on the health and well-being of the children. Those children are forced by economic necessity to enter avocations unsuited to their age and strength and those children are given facility to develop in a healthy manner and in condition of freedom and dignity and that childhood and youth are protected against moral and material abandonment”. The Supreme Court in this public interest litigation considered the issue of alleged adoption agency malpractice and neglect when approving inter- country adoptions. The Court in its judgment set forth safeguard such that adoptions by foreigners would be handled in a manner promoting children welfare’s and their right to family life.

8. Right to Health of Workers

The Supreme Court has recognized the rights of the workers and their rights to basic health facilities under the Constitution, as well as under the International Conventions which India is a

⁴¹Convention on the Rights of the Child, 1989, Article 16(1) which says that, “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family home or correspondence, or to unlawful attacks on his or her honour and reputation.”

⁴²Jain M P, *Indian Constitutional Law*, (6th ed., Lexis Nexis, Haryana, 2010) 1503

⁴³The Convention on the Right of the Child, Article 24, Paragraph 1

⁴⁴Anu, Children’s Right to Health in India: Legal Perspective, <<http://www.academia.edu/6968739/Childrens-Right-to-Health-in-India-Legal-Perspective>> accessed on 03.04.2019

⁴⁵R.Seyon, *Judicial Activism and Human Rights of Women and Children*, (Regal Publications, 2016)197

⁴⁶(1984) 2 SCC 244, Para 7

party to.⁴⁷The right to work and health of the workers are one among the Directive Principles of State Policy under Indian Constitution.⁴⁸In *State of Punjab v. Mohinder Singh Chawla*,⁴⁹ the court recognized the medical reimbursement of government servants. Further the Court emphasized that the duty of the state to bear the medical expenditure incurred by the Government servant.

In the case of *C.E.S.C. Ltd v. Subhash Chandra Bose*,⁵⁰ the Court observed:

“Right to life includes protection of the health and strength of the worker and is a minimum requirement to enable a person to live with human dignity. Health of the worker enables him to enjoy the fruits of his labour, keeping him physically fit and mentally alert for leading successful life economically, socially and culturally. Medical facilities to protect the health of the workers are, therefore, the fundamental and human rights of the workmen.”

The plight of the women workers has been brought to the attention of courts in several cases. They form one of the most neglected sections of the society as mostly employed in the unorganized sector.⁵¹As we know that the maternity benefit is recognized by Indian Constitution.⁵²In the case of *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*⁵³the Supreme Court held that, the benefits under the Maternity Benefits Act, 1961 extend to employees of the municipal corporation who are casual workers or workers employed on daily wage basis.⁵⁴In *Kirloskar Brothers Ltd v. Employees State Insurance Corporation*,⁵⁵ the Supreme Court observed,

“The expression life assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure facilities and opportunities to eliminate sickness and physical disability of the workmen. Health of the workmen enables him to enjoy the fruits of his labour, to keep him physically fit and mentally alert. Medical

⁴⁷Hemanat Kumar Varun, Right to Health, <<http://www.legalindia.com/right-to-health/>>accessed on 22.03.2019

⁴⁸Constitution of India, Article 41 which says that, “The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want”.

⁴⁹ (1997) 2 SCC 83

⁵⁰(1992) 1 SCC 441, Para 24

⁵¹Hon’ble Mr. Justice Sathasivam P, Women and Children - Role of Courts, <<http://www.tnsja.tn.nic.in/Article/Women%20and%20Children-PSJ.pdf>>accessed on 03.04.2019

⁵²Constitution of India, Article 42 which says that, “The State shall make provision for securing just and humane conditions of work and for maternity relief”.

⁵³ (2000) 3 SCC 224

⁵⁴Shukla V N, *Constitution of India*, Mahindra Pal Singh(ed), (12th ed., Eastern Book Company, 2013), 208

⁵⁵(1996) 2 SCC 682, Para 9

facilities, therefore, is a fundamental right to protect his health. In that case health insurance, while in service or after retirement was held to be a fundamental right and even private industries are enjoined to provide health insurance to the workmen.”

9. Access to Medicine and Patent Rights

The imposition of WTO-wide minimum standards for patent protection in the pharmaceutical field has not gone uncontested. Time and again during negotiations of the TRIPS Agreement developing countries especially voiced public health concerns to argue for weaker or more flexible patent protection in the pharmaceutical field. What had been essentially policy-based objections against minimum Patent standards for pharmaceuticals during the negotiations started to be coined in human rights terminology after the TRIPS Agreement came into force.⁵⁶ Foreign monopolies will acquire the exclusive right to manufacture and import drugs covered by their patents.⁵⁷

Analytically their claim is three- pronged. Firstly, it alleges the existence of a legal right to access to medicines. The right is not mentioned explicitly in any agreement, but commonly based on the right to health and the right life. Secondly, it asserts that the adoption of patent legislation, now mandatory under the TRIPS Agreement, leads to inventors charging higher prices because of their ability to patent new pharmaceuticals, rendering those pharmaceuticals unaffordable for parts of the population, particularly in developing countries a question of fact rather than of law. Thirdly, it maintains that this price effect can infringe the right to access to medicine, even though the prices are set by private parties and that this infringement is not justified by other considerations, such as the necessity of patents to enable research and development. The product patenting of Drugs and Pharmaceuticals would contribute to increase in the prices of life saving drugs. Once the lifesaving drugs becomes dearer, and inaccessible, the worst sufferers are going to be the people living in the Third World countries, who may not be in a position to spend huge amounts on health care. ⁵⁸

The Doha Declaration is a direct consequence of the multiple controversies concerning patent in the health sector. More specifically it is stated that TRIPS should be “interpreted and implemented in a manner supportive of WTO member’s right to protect public health and, in

⁵⁶Holger Hestermeyer, *Human Rights and the WTO*, (1st ed., Oxford University Press, 2007) 76

⁵⁷Krishna Iyer V R, *A Judges Extra – Judicial Miscellany*, (1st ed., B.R. Publishing Corporation, Delhi, 2001) 24

⁵⁸Reddy, G B, *Intellectual Property Rights and the Law*, (9th ed., Gogia Law Publications, 2012) 193

particular, to promote access to medicine for all”.⁵⁹ India and the third world countries should seize this opportunity and take necessary policy measures and also amend their legal regime to protect the human right to health care of their citizens. The WTO Doha Declaration on TRIPS Agreement and Public Health, in which inter alia, observed that countries have the sovereign right to enact laws that safeguard domestic interests.⁶⁰ In so far as India is concerned, the best course open to it is to continue with the provisions like compulsory licensing, compulsory acquisition of patents for public purpose and use of invention for the purpose of Government.⁶¹

The Third Patent (Amendment) Act, 2005 has made lot of changes in the provisions of compulsory licensing. These changes are made in the light of Doha Declaration on Public health, which has given leeway to the developing countries to grant compulsory licenses for both production and importation of the patented drugs or drugs produced from patented process. Section 84 makes provisions for compulsory licensing in cases where reasonable requirements of public in respect of patented invention are not made or the invention is not available at reasonable price.⁶² Persons interested in obtaining license for such patented invention should first made efforts to obtain license from patentee on reasonable terms. If he is unable to get it within reasonable period, he can apply for compulsory license. An explanation has been added to section 84(6) that normally six months shall be considered as reasonable period.⁶³

10. Health information

The term health information has been defined in different ways. In many countries, the term is interpreted to mean health statistical, epidemiological and other health-oriented data used in the planning and management of health services by the decision makers and administrators. Health information is information about people's health and what they, the government and others are doing about it. It describes the incidence, prevalence and causes of major diseases as well as the availability and effective of curative activities. In primary health care, it particularly concerns preventive health activities and the community to improve environmental conditions.⁶⁴ According to WHO, health information is information that contributes to knowledge and understanding that,

⁵⁹Rahul Vicky, Right to Health vis-a-vis Patent Protection: The Indian Scenario, <<https://www.lawctopus.com/academike/right-health-vis-vis-patent-protection-indian-scenario/>>accessed on 25.03.2019

⁶⁰Anuradha Chadha, Intellectual Property Rights Vis-a- Vis Right to Health- A Critique, <<file:///C:/Users/user.SSL001/Downloads/SSRN-id2529105.pdf>>accessed on 30.05.2019.

⁶¹Reddy G B (n 59) 197

⁶²Dr. Prankrishna Pal, *Intellectual Property Rights in India*, (1st ed., Regal Publications, 2008) 102

⁶³Ibid

⁶⁴Ch. Ibohal Singh, *Health Information System in North East India*, (1st ed., B.R. Publishing Corporation, 2005)19

in turn, provides part of the basis for making decisions in developing and managing services to improve health and health care. It also recognizes that three components of health information as (a) management and operational information; (b) health statistics and (c) health literature.⁶⁵ It is to be noted that right to information is an integral part of Article 19 of the Indian Constitution. So, the right to information includes health information also.

11. Conclusion

A large proportion of India's urban and rural population lacks the income or assets to meet basic needs; in most urban areas, this includes a large proportion living in poverty in slums or informal settlements with very inadequate provisions for basic services.⁶⁶ Even After Independence they could not access the medicine at an affordable price. According to Mahatma Gandhi, the India is living in the villages. Though existing infrastructural set up for providing health care in rural India is on a right track, yet the qualitative and quantitative availability of primary health care facilities is far less than the defined norms by the World Health Organization.⁶⁷ The only way which could lead to the goal of health inclusion is by incorporating impoverished needy rural population through community participation. It is a common complaint of people that Governmental health functionaries are struck with non-availability of medical staff.⁶⁸ All the State governments should take steps for establishing primary health centers in every village. The State must give powers to panchayat raj institutions in health matters. The Government will take necessary steps to maximum people participation in the various health schemes and programmes offered by the Government. The TRIPS Agreement allows the use of compulsory license. Article 31 of the TRIPS Agreement sets forth a number of conditions for the granting of compulsory licenses. Although, the agreement refers to some of the possible grounds (such as emergency and anti- competitive practices) for issuing compulsory licenses, it leaves member countries full freedom to stipulate other grounds, such as those related to public health or public interest. The Doha Declaration also states that member countries have the right to determine the grounds upon which such compulsory license granted. So, in this regard India should establish comprehensive plan for the getting that medicine from the patent holder.

⁶⁵ Anon, *National Health information Systems: Guiding Principles*, WHO, Geneva, (NHS/80. 1 Rev.1), 1-30

⁶⁶ Meera Bapat, *Poverty lines and lives of the poor underestimation of urban poverty – the case of India*, Working Paper 20, Feb.2009, P.2,

⁶⁷ Sandeep Singh and Sorabh Badaya, *Health care in rural India: A lack between need and feed*, South Asian Journal of Cancer, 2014 April- June; 3(2): 143-144.

⁶⁸ Ibid

In pursuing a right based approach, health policy, strategies and programmes should be designed explicitly to improve the enjoyment of all people to the right to health. The Central and State Governments shall facilitate forums for amicable and non-adversarial disputes resolution at community level by establishing mechanism of public dialogues and public hearings on health-related matters in every village. It will be conducted in every village, which would enable the general public and various groups and organizations to give free and independent feedback about health care services. All the State Governments should conduct medical aid camp in particular target groups like women and children and workers. The State Government may establish health commissions to enquire the health-related complaints and speedy redressal. The Government may establish psychological centers in District level to strengthen the mental health of women and children. All children have the right to timely access to appropriate health services. This requires the establishment of a system to protect health, including access to essential medicine. Prevention plays an essential role in maintaining public health, particularly children's health. Health education and vaccinations prevent the spread infectious disease. Employers have the responsibility to provide a safe workplace. The right to safe and healthy working conditions includes rest, leisure and reasonable working hours. The Government should enact the Public Health Act. Under this Health Act the government will define the role and responsibilities of health department authorities and medical practitioners. The core principles of accessibility of health facility include the following: physical accessibility, non-discrimination, economical accessibility, information accessibility. This, above principles has to be considered by the Government while making policy or law with reference to public health.

**A STUDY ON THE ECOLOGICAL SUSTAINABLE WATER MANAGEMENT IN
INDIA – AN ANALYSIS**

Aashika Pradhan¹

“Not a drop of water that falls from the heaven shall flow into the ocean without being utilized by man”.

King Parakramabahu the Great (King of Sri Lanka, 1153- 1186)

Abstract

Today with the increase in population, industrialisation, urbanisation, expansion of irrigated agriculture and rise in the standard of living led to the huge demand of water. The increase in demand amongst people is causing a tremendous pressure on water resources making it the most critical resources. In order to meet the growing demand of people the natural resources of waters are severely being depleted resulting into depletion of ground water level, degradation of ecosystem, drop in aquifer level etc.

Hence there is a severe need to adopt an effective measure to sustainably manage the available water resources so as to meet the growing need of the people and also to preserve them for future generation. The present paper aims at understanding the method to be adopted for management of water as well as the uses and benefit of ecological sustainable water management. It aims at studying the existing laws and policies for the preservation of water resources and lacunas in existing legal system which fails to prevent increasing depletion of water resources. It also aims at studying the need to address the emerging problem of depletion of water resources and to take appropriate steps to sustainably manage the water resources for the benefit of mankind.

1. Introduction

Our survival on earth depends on three basic resources – water, air and soil. These are the nature's three valuable gifts to mankind. Among which water is the most essential component for living being on earth and also a primary resource for existence of life on earth. Water plays a vital role in as every aspect of our life. Water is one of the most widespread substances covering about 70% of earth surface. Out of the total volume of water available on earth 97% of available water is saline,

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2 percent of it is locked in ice caps and glaciers and remaining 1 percent of the available water is portable. Hence the availability of fresh water is very limited.

Water being a renewable but finite resource, it being a foundation of human survival on earth makes water a core concern in law. In the words of United Nations Development Programme (UNDP) water is said to be “the stuff of life and a basic human right”². India sustains nearly 17 percent of the world’s population but is endowed with just four percent of global water resources.³ Today with the growth population, industrialization and development there is a huge demand of water on earth. In order to meet the growing demand of population there is interference in hydrological cycle of rainfall, soil moisture, groundwater, surface water.

In order to protect, preserve and conserve the water resources there is a need to adopt ecological sustainable water management practice so that the ecological integrity of affected ecosystems is protected while meeting the need of present generation without compromising the need for the future generation. Along with this several awareness campaign should be held to promote efficient use of water and people should be sensitized and are made aware of the growing scarcity of water despite of it being inexhaustible in nature.

The precautionary principle which is an essential element of sustainable development should be widely applied by the state right from the grass root level as the increase of pollution in water and misutilization of its resources shows a serious threat of irreversible damage of natural water resources. Government should also adopt efficient mechanism to control the increasing pollution in water as it is the major cause behind its degradation and the existing policies, rules and regulation should be properly enforcement or else the day is soon to come where water would be costlier than petrol.

2. Sustainable Water Management

The ultimate challenge of ecological sustainable water management is to design and implement a water management program that stores and divert water for human purposes in a manner that does not cause affected ecosystem to degrade. It is an initiative to balance need of water so that it may not further degrade the natural resources as well as ecosystem. Therefore, limit should be drawn in

² United Nations Development Programme, *Human Development Report 2006: Beyond scarcity: Power, poverty and the global water crisis* (UNDP, New York, 2006)

³S.Vijay Kumar, *Perspectives on Water Policy for India*, TERIIN (Nov 1, 2019, 10:30 PM), http://www.googlr.com/url?sa=t&source=web&rct=j&url=https://www.teriin.org/sites/default/files/2017-12/persp.pdf&ved=2ahUKewjytNDlvsnIAhUEOisKHQdjDYsQFjAAegQIAxAB&usg=AOvVaw2BMCHzpPj9uhkrh_6XJvwY (Visited on 1st November 2019)

withdrawal of water from the river by several industries. Human will at times compromise the ecological integrity of the affected ecosystems resulting in loss of native species and valuable ecosystem products and services for society.

Therefore, ecological sustainable water management is an attempt to balance the ecosystem and human need. It is the method where both human water demands and ecosystem requirement are defined, refined and modified to meet human and ecosystem sustainability now and also on future so that the increasing demand of water which is posing a great threat on the ecosystem may be minimised and the people need for water may be satisfied. It implies compatibility between ecosystem and human water needs.

3. Need For Sustainable Water Management

The increase in population has triggered the demand for water in rural as well as urban area in an alarming rate. In order to meet the growing need of people, the natural resources of water are being overburdened which is causing an ecological imbalance and is affecting the environment and people at large as there are often the scenario of farmers dying due to lack of water to irrigate their crops.

Though water crisis affects every individual and is a matter of concern for every individual but it specifically affects the women in the society at large. As women are said to be responsible for finding a resource their family need to survive ie., for drinking, cooking, sanitation and hygiene so for *women water crisis is personal*. There are several instances of girl child missing from school and colleges to fetch water for their families. For instances there is a village named Denganmal, 150 km away from Mumbai, in this village it was found that a man would have 2-3 wives so as to fetch water for the family by making arduous 3 km long treks several times a day.⁴

The population of the country has already crossed the 1 billion mark and is expected to reach 1.7 billion by the year 2050⁵. Towns and villages are expanding rapidly, new hamlets are coming up and existing ones are turning into villages – all requiring and demanding drinking water for sustenance of life. India has been traditionally an agriculture-based economy. Hence, development of irrigation to increase crop production for making the country self-sufficient is stressing the

⁴Prabhat Singh, *The long walk to water*, LIVEMINT (Nov 5, 2019, 7:15 PM)

<https://www.livemint.com/Opinion/P0Z53BOwcPw4SjMRnm028L/The-Long-walk-to-water.html>

⁵Shannyn Snyder, *Water crisis in India*, THE WATER PROJECT (Oct 25, 2019, 9:15 PM),

https://www.google.com/url?sa=t&source=web&rct=j&url=https://thewaterproject.org/water-crisis/water-in-crisis-india&ved=2ahUKewijqKXPo9PIAhWHYysKHUs_CcUQFjABegQIDRAG&usg=AOvVaw0LoplBtHgZxgWCco5zjVhx&csid=1572964192975

natural resources of water. At present, available statistics on water demand shows that the agriculture sector is the largest consumer of water in India. About 83% of the available water is utilized in agriculture alone. The quantity of water required for agriculture has increased progressively throughout the year. According to Second UN World Water Development Report if the present level of water consumption continues, two-third of the global population will live in areas of water stress by 2025⁶.

So in order to meet the annual water demand for drinking and domestic use, as well as safeguarding the interest of women who had to tolerate the brunt of water scarcity, fulfilling the demands of several hydro-electric power sector and industrial sectors and also for others purposes a greater stress should be laid on the sustainable management of water resources so that the need of present generation are met without compromising the ability of future generation to meet their own needs.

4. Methods of Water Management

There several method of water managements to reduce the overexploitation of water resources. They are given below:

- a. **Rain water harvesting** - Rain water harvesting is one of the most effective methods of water management and water conservation. It is the term used to indicate the collection and storage of rain water used for human, animals and plant needs. It involves collection and storage of rain water at surface or in sub-surface aquifer, before it is lost as surface run off. The augmented resource can be harvested in the time of need.
- b. **Waste Water Systems – Recycling and Treating:** sewage systems help to dispose of waste water in a clean and safe way. They also very often involve recycling water and treating it so that it is safe to be piped back into people's homes and used washing, clothes dishes and so on. These systems are absolutely essential for ensuring that our waste water does not cause us to fall ill.

⁶Water Scarcity, WORLD WILDLIFE(Oct12,2019,1:10PM)

https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.worldlife.org/threats/water-scarcity&ved=2ahUKEwiilbeSptPIAhUWbisKHWbRCEcQFjALegQIAxAB&usg=AOvVaw3JPEZx0XCUXPeEFsFSoC_F&cshid=1572964863841

- c. **Irrigation systems:** good quality irrigation systems can be deployed to nourish crops in drought hit areas. These systems can be managed so that water is not wasted – and they can use recycled water or rain water to avoid unnecessarily depleting water supplies.
- d. **Caring for the natural water supplies:** natural water sources such as lakes, rivers and seas are of great importance. Both fresh water ecosystems and marine ecosystems are home to a wide variety of different organisms and without the support of these ecosystems, these organisms would most likely become extinct. Good water management thus also involves ensuring that we do not pollute natural water sources.
- e. **Institutional Capacity-building** - Proper management of water as a resource cannot be ensured by the Central government or even by the State governments on their own. While the governments can provide the funding, knowledge, technical and management support but by its very nature, water requires active cooperation at the individual and community user levels. Better and more efficient management requires the development of community institutions to help develop and propagate better local practices and apply social pressure to ensure proper regulation, minimize wastage, and enhance efficiency. Panchayati Raj Institutions and Urban Local Bodies, which are already positioned to be entrusted with this function in the Eleventh and Twelfth Schedule of the Constitution of India, are key to sustainable management of water resources for the country and their capacity-building has to be a matter of prime concern.
- f. **Effective implementation of plans:** there is no denying that easy access to fresh, clean, safe water is a right that all humans should enjoy. However, in many parts of the world, people have to walk many miles in order to access clean water. Therefore, in order to decrease the growing scarcity of water, the plans made or adopted for its conservation are to be implemented effectively.
- g. **Limitation on intake of water** – today with the industrial development there is huge demands of water on industrial sector. An attempt should be made to limit the intake of water by several industries as excessive intake of water laid a huge stress on ecosystem as well as on the natural flow of water resources. The construction of hydroelectric project is the major problem that affects the natural water bodies as there is a divergent in the natural

flow of river. Though the construction of this hydroelectric project is necessary for the development of the country but it is also the major causes behind degradation of water resources. Therefore, an attempt should be made to form guidelines which limit the intake of water for this developmental project. Therefore, if the above-mentioned methods are applied effectively in conservation of water resources than half of the problem with regard to shortage of water would automatically come to an end.

5. Legal And Policy Framework For Water Management In India

‘Water’ is one of the most basic requirements of ‘life’. In India, the right to water has been protected as a Fundamental Rights by the Indian Supreme Court as a part of the Right to Life guaranteed under Article 21 of the Constitution of India⁷. The right to life has been expanded significantly over the last three decades to include the right to health and the right to clean environment which can include right to clean drinking water.⁸ In the case of *Narmada Bachao Andolan v. Union of India*⁹ wherein the Supreme Court observed that “Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India.... and the right to healthy environment and to sustainable development are fundamental human rights implicit in the right to “life”.

Along with the constitutional mandate the legal framework pertaining to water in India is spread across a variety of instruments, legislation, legal principles and policies. Some of the legislation and policies which plays a major role in conservation and management of water resources are given below:

5.1 The National Water Policy, 2012

The Government of India first enunciated the National Water Policy in the year 1987. The National Water Policy was subsequently introduced in the year 2002 in relation to the rapidly

⁷ The Constitution of India, art. 21

⁸ Jayna Kothari, *The Right to Water: A Constitutional Perspective*, THE SEMANTICSCHOLAR, (Nov 5, 2019 2:30) <https://www.google.com/url?sa=t&source=web&rct=j&url=https://pdfs.semanticscholar.org/fad9/65e88897d3962c21bc7fef626336fde13255.pdf&ved=2ahUKEwijoouQ19LIAhUNfysKHxbCBLEQFjABegQIDhAG&usg=AOvVaw1jBQ-m4MLH9L8et3e95-ZZM>

⁹ *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664

changing scenario in the domain of water to address the emerging issues and provide critical policy inputs. It gave emphasis to the ecological and environmental aspect of water allocation.¹⁰

The National Water Policy (NWP 2012) calls for a common integrated perspective to govern the planning and management of water resources. The objective of the National Water Policy is to take cognizance of the existing situation and to propose a framework for creation of a system of laws and institution and for a plan of action with a unified national perspective.¹¹ The Policy clearly states that water needs to be managed as a large part of India have already become water stressed.

NWP 2012 has emphasized in treating water, over and above the pre-emptive need for safe drinking water and sanitation, as an economic good. It has also emphasized the fact that the service provider role of the State has to be gradually shifted to that of a regulator of services and facilitator for strengthening the relevant institutions.

5.2 Basic Guiding Principles of National Water Policy 2012

Some of the guiding principles stated in the NWP 2012 include:

- The principle of equity and social justice must inform the use and allocation of water resources.
- Planning, development, and management of water resources need to be governed by common integrated perspectives considering local, regional, and national context, having an environmentally sound basis, keeping in view the human, social, and economic needs.
- Safe drinking water and water for sanitation should be considered as pre-emptive needs, followed by high priority allocation for other basic domestic needs, supporting agriculture for food security and minimum ecosystem needs. After meeting the previously mentioned needs, water should be allocated in a manner to promote its conservation and efficient use.
- Given the limits on enhancing utilizable water resources coupled with climate change impacts, meeting the future needs of water will depend more on demand management.¹²

¹⁰S.Vijay Kumar, *Perspectives on Water Policy for India*, TERIIN (Nov 1, 2019, 10:30 PM),http://www.googlr.com/url?sa=t&source=web&rct=j&url=https://www.teriin.org/sites/default/files/2017-12/persp.pdf&ved=2ahUKEwjytNDIvsnIAhUEOisKHQdjDYsQFjAAegQIAxAB&usg=AOvVaw2BMCHzpPj9uhkrh_6XJvwY (Visited on 1st November 2019)

¹¹ National Water Policy (2012), Government of India, Ministry of Water Resources

¹²*Ibid.*

5.3 The Water (Prevention and Control of Pollution) Act, 1974

The water act has been enacted to provide for the prevention and control of water pollution and to maintain or restore wholesomeness of water in the country. It further provides for the establishment of Boards for the prevention and control of water pollution with a view to carry out the aforesaid purposes. The water act prohibits the discharge of pollutants into water bodies beyond a given standard and lays down penalties for non – compliance. At the centre, the water act has set up the Central Pollution Control Board (CPCB) which lays down standards for the prevention and control of water pollution. At the state level state pollution control boards functions under the direction of the CPCB and the state government.¹³

5.4 The Water (Prevention and Control of Pollution) Cess Act, 1977

The Water (Prevention and Control of Pollution) Cess Act, 1977 has been enacted to regulate wasteful consumption of water. It introduced a system whereby all industries and local bodies have to pay a certain amount of cost for water consumed in various operations. Till now water could be freely abstracted. The mere imposition of a cost brought down per capita water consumption drastically in industrial use. Further the legislation advanced higher values for worse polluting activities and higher values for using water beyond prescribed quantity norms which further reduced the water consumption. The act provides for the levy and collection of a cess with a view to augment the resources of the Central Board and the State Boards for the prevention and control of water pollution constituted under the Water (Prevention and Control of Pollution) Act, 1974¹⁴

6. Contribution of Individual as well as Community in Water Management

As the population is increasing at its great pace there is huge demand of water. To meet the growing demand of the people the natural sources of water are put into great stress which led to the ecological imbalance. As water is vital element for every individual so the initiative for its conservation should be made not only by the government by formulating laws and policies but it should also be made by every individual. People should take initiative to use water efficiently and should avoid misuse of water resources. People should formulate plans to conserve water through various methods such as rain water harvesting, proper irrigation system etc.

¹³ The Water (Prevention and Control of Pollution) Act, 1974, No. 6, Act of Parliament, 1974 (India)

¹⁴ The Water (Prevention and Control of Pollution) Cess Act, 1977, No. 36, Acts of Parliament, 1977 (India)

Initiative should be taken by the individual to avoid polluting water resources by not throwing domestic waste on the water resources as this action of individual pollutes not only water resources and make it unfit for drinking but also create ecological imbalance. Therefore along with government initiative individual as well as community as whole has a huge role to play in preservation and conservation of water resources so that there are no such instances again of the farmers death or suicide due to water and also for the protection of the vulnerable section of the society mainly women and child who are directly or indirectly affected by the shortage of water.

7. Conclusion and Suggestion

Water is the most essential element of life. Water is the precious natural resources for sustaining life but it is likely to become scarce in coming decades due to continuous demands, rapid increase in population and expanding economy of the country. Therefore, every necessary measure should be taken to preserve and conserve water. There is an urgent need to make an effective water management plans by the government so as to sustainably preserve the water resources for future generation otherwise the day is near to come where water would be costlier than petrol.

Despite of several laws and policies for the protection and conservation of water resources, increase in water crisis shows the failure of the government in implementing the given policy. Therefore, effective implementation of policies and laws is the need of an hour. The government should also take initiative to strictly limit the intake of water by several industries and company operating hydro-electricity power plant from the natural resources so that protect and conserve natural resources. Along with this Government should also strictly ask the companies and industries to make an Environment Impact Assessment report prior to the establishment of the industries for the sustainability of environment and natural resources. Along with this, several sensitization programme should be undertaken by government to educate people about the water management techniques in every state and villages mostly on the places which has severe water constrain.

Therefore, along with government action people participation also plays a vital role in its conservation so more number of people should be encouraged and educated about the necessity to take initiative to use water efficiently. Thus, to **sustain life on earth in all its totality, water should be carefully managed in its natural habitats.**

REPRODUCTIVE RIGHTS: TO BE OR NOT TO BE?*Ditipriya Dutta Chowdhury¹****Abstract***

The paper on its unfolding attempts to throw light upon the current condition of reproductive rights and freedoms available to women in India and its relationship with the Indian Constitution. Topics associated with abortion and related issues have been widely examined in both national and international forums. It has become one of the most controversial issues in present times more so due to the pronouncement of the privacy judgment in India which now is a fundamental right and Alabama introducing the Human Life Protection Act that was set to impose a near-total prohibition on abortion in the state from November, 2019. The paper, therefore, endeavours to determine whether a woman or the mother is solely entitled to decide for something which is to affect her the most, both mentally and physically. It also is a matter of her personal privacy and dignity, thereby forming a part of her fundamental right enshrined under Article 21 of the Constitution of India. Thus, it is pertinent to study and understand how the Indian enactments on abortion and the Surrogacy Bill would function post the privacy judgment as it provides a novel interpretation of the legislation which can serve as a driving force to amend laws pertaining to the reproductive rights of women.

Keywords: Abortion, Constitution, Privacy, Reproductive Rights, Surrogacy.

1. Introduction

"Abortion" means "the spontaneous or artificially induced expulsion of an embryo or foetus"² or "an artificially induced termination of a pregnancy for the purpose of destroying an embryo or foetus"³. Thus, in the dictionary sense, "abortion means no more than the expulsion of a foetus before it is capable of living". It has been observed that strict religious, moral, and social sensibilities have a huge impact on the abortion laws all throughout the globe. Numerous nations wherein abortion is lawful, lay down specific criteria which are to be met

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² P. RAMANTHA AIYAR, ADVANCED LAW LEXICON (3rd ed. 2005).

³ BLACK'S LAW DICTIONARY (11th ed. 2019).

all together for an abortion to be allowed, frequently, yet not continually, applying a "*trimester-based framework*" to direct the window in which abortion is as yet legal to perform. The basic right to life, freedom and security of an individual are significant issues of human rights.⁴ In order to justify the presence or the absence of abortion rights and laws, all around the world, these human rights are used as pedestals, every now and then. In this discussion, contentions introduced for or against abortion either revolves around the ethical admissibility of an induced abortion, or legitimization of laws allowing or limiting abortion. Contentions on morality and lawfulness will in general impact and consolidate, muddling the current issue. The contention whether State has the right to regulate such an intimate issue regarding a woman's choice to terminate her pregnancy shapes the premise of the discussion in this paper.

In India, the discussion encompassing reproductive rights has been pushed to the cutting edge of contemporary legal discussion following some recent advancements. For a considerable length of time the issues fundamental to the reproductive rights discussion had not gotten adequate recognition by Indian courts as well as society. However, in the recent times, reproductive rights have been recognised to be a major aspect of the "fundamental right to life"⁵ and therefore it is inalienable in nature. In order to achieve equality under Article 14⁶ and also to empower women, it is pivotal for the legislature to identify reproductive rights to be fundamental and thus women should be given the freedom to independently decide regarding matters relating to pregnancy. In cases spreading over "maternal well-being, contraception, abortion and child marriage", courts have implemented vigorous meanings of "reproductive rights" that reflect benchmarks of human rights.⁷ While not all decisions of the courts are uniform, certain remedies have been laid down by the judiciary against any infringement of the reproductive rights of the women.

2. International Jurisprudence

One of the key difficulties is to find some kind of harmony between personal liberty

⁴Article 3, United Nations Universal Declaration of Human Rights (UDHR), 1948.

⁵ INDIAN CONST. art. 21.

⁶Article 14. Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

⁷Devika Biswas v. Union of India, W.P. (C) 81/2012.

and the similarly genuine, clashing, interests of the society. Two dominant schools of thought, namely, Libertarianism and Utilitarianism have been in the forefront debating this issue. Henry David Thoreau was of the opinion that "*that government is best which governs least*".⁸ It was based on the axiom that "*the best government is that which governs least*"⁹ and thus the libertarian theory says that individual autonomy can't be confined but to the degree that an activity thereof restricts the freedom of other. Whereas, Bentham's utilitarianism is established on the rule that any ought to be for "*the greatest good of the greatest number*"¹⁰, and hence supremacy to the interests of the community at large. Such thoughts are propelled by the conviction that community interests must be favoured over the person's entitlement to her choice of procreation. Undoubtedly, instances of reproductive rights banters far and wide propose that the adjusting of individual interests and clashing community interests is the point of convergence of most concerns encompassing this discussion. The debate on abortion for the most part comes down to a contention between the strict religious beliefs of the community and the State's interests in securing potential life on one hand, and the mother's entitlement to reproductive independence on the other. While the libertarian would contend that such breaking points disregard the privilege to individual independence, the utilitarian would bolster such limitations as a genuine method for accomplishing most extreme utility.

One of the very first cases which came before the Supreme Court of the United States was the case of *Roe v. Wade*.¹¹ It played a major role in recognising reproductive rights of women as well as in reshaping the world politics regarding abortion. This landmark judgment in the process of recognising the reproductive rights of the women, laid down that most legislations which were against the choice of abortion was an infringement of the constitutional right to privacy, thereby overruling all such legislations which were inconsistent with the judgment.

In the case of *Morgentalor Smoling and Scott vs. R*¹² the Supreme Court of Canada concentrated on the bodily security of the pregnant woman while interpreting the Article 7

⁸Henry David Thoreau, *On the Duty of Civil Disobedience* (1848), (July 9, 2020), <https://www.panarchy.org/thoreau/disobedience.1848.html>.

⁹*United States Magazine and Democratic Review*, a monthly literary and political journal (1837-1859).

¹⁰ ANDREW HEYWOOD, *POLITICAL THEORY: AN INTRODUCTION* 358 (3rd ed., 2004).

¹¹ *Roe v. Wade* 410 US 113 (1973).

¹²*Morgentalor Smoling and Scott v. R*, 44 DLR (4th) 385 (1988).

of the Canadian Charter, which ensures a person's autonomy and his entitlement to life, freedom and opportunity and security. The issue was that the Country's Criminal Code required a pregnant lady, who would want to undergo an abortion, to present an application to a therapeutic committee and this whole process brought about delays in the abortion. It was thus held by the Supreme Court found that this method encroached upon the assurance of security of an individual and the pregnant lady was subjected to psychological pressure. Now, in Canada, the choice is completely left to the woman and her doctor and does not at all interfere with the issue of abortion.

Under the UK law, Abortion Act, 1967¹³, an absolute right to life is not conferred to the unborn. In the case of *Paton Vs. Joined Kingdom*¹⁴, it was held that abortion is allowed if the duration of the pregnancy includes risks to the mother. The right to life of foetus dependent upon an inferred limitation enabling pregnancy to be terminated so as to secure the life of the mother. The equivalent was upheld in the case of *H Vs. Norway*¹⁵. Likewise, it was additionally held in 1992 by the Supreme Court that women have the same exclusive right to abortion as to any other medicinal treatment and consent or permission from the spouse or the prospective father is not required to exercise such right.

3. Indian Jurisprudence

The Supreme Court of India has held that the right to privacy is an integral part of right to life as enumerated under Article 21¹⁶ of the Constitution and a woman's right to abortion can thus be interpreted from this right.

India introduced the Medical Termination of Pregnancy Act in 1971¹⁷ and was one of the first countries worldwide to have developed such a legal framework. It guaranteed the woman's right to terminate an unintended pregnancy by a registered medical practitioner, subject to certain conditions as laid down in the MTP Act, since not all pregnancies are suitable for termination. It thus made abortion legal along with certain stipulations which would protect the pregnant woman's health.

As per Section 3 of the MTP Act abortion beyond twenty weeks is prohibited, unless there exist

¹³ Abortion Act, 1967 (UK), Article 2.

¹⁴ (1980) 3 EHRR 408.

¹⁵ (1992) 73 DR 155.

¹⁶ Article 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁷ Hereinafter mentioned as the "MTP Act".

exceptional situations, namely, only when the pregnancy is allowed to be terminated to save the mother's life. Further, the act clarifies that pregnancies which are a result of rape or of a failed contraception method between married couples, are seen to cause grave injury to the woman's mental health.

In the case of *Niketa Mehta*¹⁸, the couple filed a petition requesting the court to allow her to abort her child which was in the 26th week of her pregnancy and also to strike down the provision of section 3(2)(b) of the MTP Act which prohibits the termination of pregnancy when it is beyond twenty weeks. The unborn child was diagnosed with a fatal heart defect, and it could only be detected after twenty weeks of pregnancy. Mumbai High Court, however, did not allow the termination of the pregnancy. Thereafter, a panel was formed by the Central Government in order to review the MTP Act, led by the Indian Ministry of Health. Keeping in mind the strong arguments submitted in favour of the cause, the government has been advised to extend the legal period for opting for abortion from twenty weeks to twenty-four weeks. The MTP Amendment Bill, 2018 has been introduced and the government has confirmed that work is being done on a draft legislation to amend the 48-year-old law on abortion and the same has been sent for inter-ministerial consultation.

The Supreme Court, in a landmark judgment in 2015¹⁹, allowed a fourteen- year old rape survivor was allowed to terminate her pregnancy in the 25th week of the pregnancy. It had so happened that the minor had visited her doctor to receive treatment for typhoid when she was raped by him and post the horrific incident, she became pregnant. When the pregnancy was detected and the girl's family approached the judiciary to permit the girl to abort the pregnancy, both the sessions court as well as the Hon'ble Gujarat High Court, while expressing their grievance, did not grant the permission for abortion since the pregnancy was beyond the permissible time frame of twenty weeks. However, the Supreme Court, when approached by the victim's father, overturned the decision of the High Court and allowed the abortion under the supervision of five doctors. This serves as a path breaking judgment and it provided a new facet to the archaic abortion laws and women's rights by protecting them against redundant mental and physical trauma of forcefully having to continue with an unwanted pregnancy resulting from rapes.

¹⁸ Dr. Nikhil D. Datar v. Union of India &Ors., SLP (C) 5334 of 2009.

¹⁹ Dr. MukeshYadav, "*Is There Need for Danger to Health (Physical/Mental)/Life Ground of MTP beyond Permissible Limit in Exceptional Cases?*" ISSN 0971-0973 (Oct. 29, 2019), <http://medind.nic.in/jal/t15/i4/jalt15i4p334.pdf>.

4. Right To Privacy And Reproductive Rights

In the case of Justice *K S Puttaswamy v Union of India*²⁰, a nine-judge bench of the Supreme Court collectively certified that privacy is a fundamental right under the Indian Constitution. It is an integral part of right to life and is inalienable in nature. It was further said that it is grounded in qualities such as dignity which again underlie all our fundamental rights and right to privacy was completely established in an individual. The bench unanimously correlated right to privacy with the concept of an individual's autonomy over the reproductive rights thereby necessitating the person to make sexual and reproductive decisions.²¹

The Puttaswamy judgment explicitly perceived the constitutional right of women to make reproductive decisions as an inalienable part of personal liberty under Article 21 of the Indian Constitution.²² The bench further reiterated the position adopted in the case of *Suchita Srivastava v Chandigarh Administration*²³, whereby, a three-judge bench had held that "right to privacy, dignity, and bodily integrity of a woman are a part and parcel of her reproductive rights and such rights include the choice to conceive a child, continue with the pregnancy to its full term, to give birth, and to consequently raise the child". Aside from the Puttaswamy judgment, reliance can be placed on a 2016 Bombay High Court judgment which provides a helpful insight for reform²⁴. The High Court, along with other concerns, had expressed that "*since it is a woman who gets pregnant and significantly influences her wellbeing, mental health and life, an unborn foetus can't be put on a higher footing than the rights of the woman who is already living*". Thus, it can be seen that judiciary has accentuated women's autonomy to decide upon matters which are very much related to their own bodies, fertility and reproduction. The privacy judgment fundamentally reinforces calls for change, opening further roads to challenge Sections 3 and 5 of the MTP Act.

Another burning issue, which is going on in India, in relation to reproductive rights is that of surrogacy rights. The nine-judge bench affirmed the already existing privacy jurisprudence, which includes the personal choices about birth and babies as being part of reproductive

²⁰ Justice K S Puttaswamy v. Union of India, (2017) 10 SCC 1.

²¹ United Nations International Conference on Population and Development (UNPIN), 1994.

²² *Supra* note 20, para 71, para 72.

²³ *Suchita Srivastava v Chandigarh Administration*, (2009) 9 SCC 1.

²⁴ Gautam Bhatia (2016): "*The Bombay High Court's Abortion Judgment: Some Unanswered Questions*", Indian Constitutional Law and Philosophy (Oct. 30, 2019), <https://indconlawphil.wordpress.com/2016/09/22/the-bombay-high-courts-abortion-judgment-some-unanswered-questions/>

autonomy²⁵. Also, in the case of *Baby Manji Yamada v Union of India*²⁶, the Supreme Court has explicitly recognised surrogacy to be a reproduction method, thereby evidently including surrogacy within the purview of privacy of reproductive rights.

"Surrogacy" means "*the process of carrying and delivering a child for another person*" and a "Surrogate" is "*a person appointed to act in the place of another*".²⁷

The Surrogacy Bill, 2019, which is proposing a blanket ban on commercial surrogacy (section 3) and strictly limiting to altruistic surrogacy (section 4(ii)(b)), is an assault on a woman's autonomy over her body as well as reproductive rights. Even though it is being endorsed as a progressive act meant to curtail the exploitation of surrogate mothers and babies born through surrogacy, this complete ban shreds off a woman's bodily autonomy. Further, section 4(ii)(a) requires that surrogacy would only be allowed if either or both the partners are infertile and the same has to be certified "*certificates of essentiality and proven infertility*". It also mandates that the couple should be heterosexual, married for at least five years, and not have any other surviving child. It also provides that only a close relative of the intending parents, only after being declared eligible, can be the surrogate mother that too only once in her lifetime. This bill grossly violates the reproductive autonomy of the members of the LGBT community or live-in couples and single, divorced or widowed parents. This bill is in contradiction with the adoption laws of India as well whereby conditional adoption is allowed for single and divorced parents. In addition to these flaws, the definition of "infertility" under this bill is very narrow and it includes only "*those couples who are not able to conceive after five years of unprotected coitus*". The bill does not concern itself with couples who may suffer from medical conditions, such as uterine fibroids, whereby a woman is able to conceive but is prevented from carrying the foetus through the gestation period. The new law criminalises the act of commercial surrogacy and anyone who promotes or performs the same would be liable to be punished with imprisonment as well as fine. Instead of criminalising the act, the legislators should consider the concept of "*compensated*" surrogacy. The same was recognised by the Parliamentary Standing Committee while discussing the shortcomings of the Surrogacy Bill, 2016.²⁸ However, the 2019 bill has blatantly ignored any such recommendations of the previous

²⁵ B K Parthasarathi v Government of Andhra Pradesh ,AIR 2000 AP 156.

²⁶ Baby Manji Yamada v Union of India, (2008) 13 SCC 518.

²⁷ *Supra* note 3.

²⁸ Rajya Sabha (2016): *ONE HUNDRED SECOND REPORT* The Surrogacy (Regulation) Bill, 2016 (Feb. 14, 2020), https://www.prsindia.org/sites/default/files/bill_files/SCR-%20Surrogacy%20Bill%2C%202018.pdf.

committee and has decided to conserve the exact language as was proposed in the 2016 bill.

This bill curtails the reproductive choices of women, including the surrogates, violates the privacy rights of couples by forcing them to publicly declare about their infertility. It further violates equality provision under Article 14 in relation to the members of the LGBT community, live-in and elderly couples and single, divorced and widowed parents. It thus strikes at the very root of the fundamental rights that are guaranteed under the Constitution.

Of course, restrictions can be placed on fundamental rights by the State but such restrictions have to have some validation based on the constitutional jurisprudence. Since right to privacy is a part of Article 21, it was further elaborated that it is an established jurisprudence that any restrictions put to Article 21 has to pass the test of being "*just, reasonable and fair*"²⁹. Therefore, section 3 and section 5 of the MTP Act as well as the Surrogacy bill should pass this test in order to remain constitutionally valid. Thus, the State has to establish a sound nexus between its interests of securing women's health and potential human life and the objective behind restricting women to decide upon her own pregnancy on their own.

It has been rightly observed that the "*personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.*"³⁰

Since the Amendment bills have not yet been passed, the legislature ought to promptly cure the inadequacies and align itself to these judgments. This would protect a woman's right to life, privacy and health since it would invariably reduce the stigma that is present regarding termination of pregnancy and surrogacy.

5. Conclusion

The present altercation thus boils down to the differences that exist between certain provisions laid down in the MTP Act, Surrogacy Bill and fundamental right to life, health and privacy as enumerated under Article 21 of the Indian Constitution, which requires to be

²⁹Maneka Gandhi v. Union of India, 1978 AIR 597.

³⁰ *Supra* note 20, para 84.

rectified at the earliest. It can be thus submitted that the decision to undergo a pregnancy or an abortion should be completely left to the woman, in case she has attained the age of majority and is of sane mind. Instead of allowing an abortion only when there is a threat to life to the mother, the woman can be restricted from exercising her right to abort a pregnancy when there is a life threat because of the abortion. Other than that, the State should not interfere as it would be nothing but violating a woman's basic fundamental right to privacy.

It can be inferred that the MTP Act does not confer any direct right to the unborn child nor does it protect the unborn directly. The State, through the Act, primarily aims at protecting the mother from any life threats which might arise during the abortion process. However, in the process of doing so, the State for years have infringed a woman's autonomy regarding her body and choices. Therefore, in lieu of compelling women to move to courts and delay the process further thereby increasing the health risks of the woman or by making them to continue with an unwanted pregnancy, the legislation should allow the women to decide for themselves with as minimum interference as possible.

Further, to some, the concept of surrogacy or renting one's womb may seem immoral, repulsive and unorthodox but it is an inseparable fact that it did serve as a significant basis of income to many women in India who are not placed in economically disadvantageous positions. So, passing of the proposed surrogacy bill would have substantial impact on the lives of such women. However, there are no two ways about the fact that a lot of malpractices are affixed with commercial surrogacy but it mainly lacks adequate legal protections and also health insurance. It is an industry which is not regulated properly and hence is misused but it does not warrant a complete ban. Restricting surrogacy to altruistic surrogacy only would in reality affect the livelihood of certain women who, by their own choice, wish to become surrogates. They would be expected to undergo the reproductive labour without any compensation. Thus, through "*compensated*" surrogacy, the surrogate mothers would be entitled to monetary payments as reasonable compensation.

The judiciary, through its various case laws and judgment, has shown that it is the absolute right of a woman whether to continue with a pregnancy or undergo an abortion and no one has the right to infringe or encroach upon this entitlement. Thus, judiciary, over the years, has undertaken an important task to recognize the women's reproductive rights and now with the privacy judgment in play, it is high time that the legislators, too, adopt the same approach and do away with any

derogatory laws which affects a woman's reproductive rights which in turn infringes her right to privacy. Women empowerment should not be reduced to a mere concept, it has to be ensured in all aspects of life and letting a woman decide for herself regarding issues related to her pregnancy and abortion would be another milestone achieved in empowering women and protecting their fundamental rights guaranteed under the Indian Constitution.

**ASSESSING THE CURRENT LEGAL REGIME AND ITS APTNESS IN ADDRESSING
THE PROBLEM OF URBAN DEVELOPMENT AND ITS IMPACT**

Kumud Malviya¹

Abstract

Tremendous changes towards the beginning of the 21st century is multi-dimensional which were triggered by the opening of the market for private and foreign investors and the resulting migration of people from different places to urban areas. The deteriorating conditions and rapid expansion of urban areas without any planning and resulting concentration on the local resources and conflict with locals prove the failure of the existing legal framework of laws on urban development. Urbanisation is an inexorable process that is an indication of growth and development. Technological revolution and industrialisation have accelerated the pace of urbanisation. The present paper seeks to explore the problem and challenges of the urban development posed by the rapid expansion of urban areas without any planning. The existing legal regime on the environment, town planning, land reforms and land revenues are not adequate to address the problem. These laws allowed extension of urban areas without assessing the risk of consequential and incidental adverse changes and damage to the existing areas. There is a need for tremendous changes in the current legal framework to bring specific legislation that should deal exclusively with urban development.

Key words- Constitution, Urban-land, Urban-development Laws.

1. Introduction

In the last three decades, India has seen phenomenal urban growth which was triggered by the opening of the market for private and foreign investors. Level of urbanisation in India from 2001 to 2011 substantially increased. The national capital territory of Delhi is the most urbanised state in India among all States and Union Territory. Maharashtra stands first in terms of the absolute number of people live in urban areas. The percentage of the total population living in urban areas is 31.6 as per the 2011 census and the total percentage of increased urban population during 2001-2011 was 31.5. There has also been a tremendous change in urban areas with more than a million

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populations. Earlier these cities and towns were total 35 in 2011 which is 53 as per 2011 census.² All these data are almost nine years old, and therefore there is an anticipation of a terrific change in the numbers in 2021. It can be said that although the growth rate of urbanisation is not ample the total numbers are overwhelming. In India, growth of the urban area is rapid, unplanned and uncontrollable leading towards manifold complex problems and challenges. Urban growth signifies only the quantitative growth in terms of population, housing and businesses etc. without any planning of the same which results in urban sprawl. The pattern of land use for residential, commercial and other purposes like road has a huge impact on the overall development of a particular urban geographical area. The rapid urban growth experienced by India over the previous two decades has come with some undesirable consequences.³

2. The concept of Urbanisation

Urbanisation refers expansion of urban areas; an overall increase in the urban population, and sometimes it can also be associated with the particular lifestyle of people of a specific geographical area. The concept of the urban area is a complex one and hence there are different approaches to define it. It can be the size of the population, density, mode of livelihood and way of living etc. The process of urbanisation is interconnected with industrialisation and modernisation and closely related to economic development. One of the well-accepted approaches in defining urbanisation is the mass migration of people from remote areas to urban areas due to the resources and facilities concentrated in these areas. Therefore, we can say that urbanisation is a recent phenomenon that evolved and grew along with the industrial revolution and innovation of new products and services. Gradually those places where industries were established became the Centre for the administrative activities and other services. Industrialisation and urbanisation are not independent to each other rather they happen simultaneously due to the fact that there is a chain of people engaged in the process of urbanisation like raw material supplier need demand for his product which is availed by the manufacturer and they require transport facilities and the market for their product. All these processes required human force to support these activities and hence industrialisation and urbanisation start together because in urban areas all people from different places come to fulfill their need which is further absorbed by these industry people. This process keeps going as it is inherent that human beings attracted towards those places where life are easy

²India's **Urban** Demographic Transition: The 2011 Census Results, Ministry of housing and urban affairs website <http://mohua.gov.in/cms/urban-growth.php>. Last accessed on 21st April, 2019

³James L. Magavern "et al.", *Law, Urban Development, and the Poor in Developing Countries*, 45 WASH. UNI. L. REV. 47-48 (1975)

and hence people started migrating to these areas for better employment opportunities, and other modern facilities. Many studies have shown that urbanisation implies economic, social and political development and change in the use of land in the urban areas due to the concentration of resources and change in the thought process and overall change in the pattern of governance. The process of urbanization mobilise the inanimate resources that result in the development of the nearby areas which further improve human productivity.⁴

3. Urbanisation and urban Planning in India

There has been rapid pace of urbanization in the last century all over the world. However, if compared with other countries the pace of urban process have been dawdling. India being a developing country emphasized more on rural areas and agricultural activities. As a result, the level of urbanization in India increased only from 17.6 percent in 1951 to only 27.8 percent in 2001. India stands at the bottom in the list of level of urbanization which is consistent considering the per capita income. In terms of scale, although, the levels of urbanization have been slow but overall, there has been tremendous increase in the urban population in India. Hence despite the slow process of urbanization in India, it stands among the fastest rate of urban population growth in the world. Planning signify the strategic and systematic use of urban land well in advance before establishing any permanent infrastructure which takes into account every aspect of the land use be it environment concern or the concern raised by locals or other stakeholders of the process. Urban planning also involves the regulation of activities in the urban areas and in long term it affects the nations.⁵

4. Indian Legal Regime on Urban development

The branches of urban laws have multifarious twigs that need to be discussed in depth to make it relevant and fruitful as per the need of time. Constitution of India is the source of power under which different laws are made and according to which they are implemented. Article 246 read with the seventh schedule provides three lists i.e. Union, State and Concurrent on different matters. Entry 18 of the State list provides that land and any right in or over the land will be vested in the State. States have sole authority under the Constitution to regulate the use of land and as such it is the State who should take initiative to regulate the urban development, keep eyes on the same and

⁴*Urbanization and Urban Development*, 9(4), INT'L SOC. W. 7-11 (1966)
<https://doi.org/10.1177/002087286600900402> , (2nd April, 2019)

⁵Shriya Malhotra, *Population health through inclusive urban planning: Healthier communities and sustainable urban development in Indian cities*, 11(1), SUS. DEV.L. POL'Y, 51-57(2010)

facilitate in the right direction. Local self-governance in the urban areas is recognized by the 74th Amendment in the Constitution of India that is relevant in the context of urban development. There is a plethora of laws on various matters which are interconnected with urban development. No specific legislation on urban development has been made and hence, to study urban development one has to trace laws on town planning and development, environmental law, laws on highway and transportation, laws on housing and apartment, the establishment of businesses and clearance system.⁶

Indian states have made their own town planning legislation based on the central legislation of Town and country planning Act that was enacted in the year of 1962 drafted by the Town and Country Planning Organization (TCPO) department. The Act authorises town and country planning authority popularly refer as urban development authorities, to prepare a comprehensive master plan for urban development in the different states. Urban development authorities were set up with the objective of social and economic development of the fast-growing cities and suburb areas while addressing the issues and challenges of urban growth. The model law on the town and urban planning was amended in 1985 to provide a comprehensive scheme for the urban development in all the states and union territories. Many Indian states enacted their own town planning that is based on the 1985 act while few states have adopted the main act in their respective area. There are still few states left with no vision of town planning; they neither adopted the model Act and neither had they made their own legislation.⁷

The significance of the 74th amendment of the Constitution is manifold which escorted a new era in the area of urban development by introducing local self-governance. The implication of the amendment is that local people have been given power to participate in the local governance and as such they have voice to some extent in the planning and development of their area. Article 243 of the Constitution which was added by 74th amendment provides for the establishment of the district planning committee at district level which is empowered to prepare planning by consulting with the municipalities about consolidated plan for the district as a whole. Municipalities are empowered to decide on each and every aspect of the urban development like planning, regulating the pattern of using the land, construction of building for housing or commercial or industrial or

⁶Unit Preparation CEL, WWF-India, *Law and Policies Pertaining to Urbanisation*, CENTRE FOR ENVIRONMENTAL LAW, WWF-India, CEL, (2011)

⁷PRAKASH M. APTE, *URBAN PLANNING AND DEVELOPMENT: AN INDIAN PERSPECTIVE*, 22-60 (Zorba Publishers, 2013)

other administrative purposes. The most important one is to decide the phases of the urban process for social and economic development.⁸

4.1 Urban development and its impact on the Environment- Urban development law and policy in India are not clear and seem to be insufficient to deal with the changes. There is no specific law on urban development but the provisions of Constitution, several rules, regulations, and other authorities established for the different purposes related to clearance and compliance of relevant laws provides some lights on urban development in India. The different aspects which can be discussed under the development law and policy are environmental concern, town and city planning, land acquisition and others. Begin with the most important and vital part of the urban development in India is environmental degradation with the urban process. The way several infrastructure development projects are cleared bypassing the legal procedure at the cost of the environment raised serious concern which required scrutiny of the environmental regulatory approval. When it comes to economic development versus environmental protection, the development always shades upon the environmental concern. India being a developing country cannot compromise with its economic development process but it needs to be balanced. Post independents the primary concern of the Indian government was how to overcome the poverty and backwardness and for that matter it was more important for the policy makers to make a comprehensive development plan for the Indian sub-continent. Accordingly, the initial five-year plan emphasised on the industrilisation which have paved the way for unplanned development and the resulting environmental degradation. Indian policy makers realized the need of environmental regulation first time around 1986 which was culminated into the enactment of the Environmental Protection Act, 1986. The way urbanization has taken place and the resulting growth of the economic activities in these urban centers is causing environmental degradation which should be taken into account while making policies for the economic development. To compete in the global market and to raise the living standard of people it is important to take a comprehensive development plan by way of infrastructures development. To achieve this goal huge investment were made for the necessary infrastructure development that further pushed the pace of urbanization. This was done at the cost of environment which needs revaluation of the existing urban development law and policy. Since the enactment of the first statutes in this regard several legislations have been passed by the parliament for the protection and conservation of

⁸Gauri Kopardekar, *Public Policy and Urbanization in India: An Asymmetrical Approach*, 9(2) J. MAN. & PUB. POL'Y 41-47 (2018)

environment. But there seems to be a conflict in the approach of the policy makers when it comes to the infrastructure development and protection of environment. There have been several campaign and environment movement against the government decision as to the development of infrastructure. The uncertainty in the urban development law and policy is evident from the clearance of the infrastructure projects which is a vital point whereby policy makers can improve the environment without compromising with the development process. The five year plans have emphasised on various factors of development among which the fourth plan (1966-71) is crucial which made a recommendation for the adoption of regional approach to address the problem of urbanization and its impact on the environment in India. The decision to appoint a National Commission on the Urbanisation which was taken in 1983 was an attempt to take into account the environmental concern while reviewing the urban development in India. The commission recommended for the formulation of National Urban Policy which should also highlights the environmental degradation resulting from the urbanization and economic development. But all these steps proved inadequate which force the government to take serious steps for the assessment of development projects and its role in the environmental degradation. To begin the arguments in this context first come to the decision -making process for clearance of infrastructure project and other development scheme as it is crucial to first assess the environmental impact of the infrastructure projects and urban development process. The decision on the clearance of any development projects required regulatory approvals by the authorities established by the Environment Protection Act, 1986. There was one notification issued under the Act for the environmental impact assessment in 2006 to examine thoroughly the outcome of an infrastructure project on environment. The infrastructure projects are divided for the purpose of regulation and its clearance into two categories i.e. Project A and Project B. Ministry of Environment and Forest is the chief authority for the regulation of big projects and its clearance. Ministry of Environment and Forest has established committees for the assessment of application filed by the big projects (Category A) for the environmental clearance. It has also established State level Environment Impact Assessment Authority at the State level for the clearance of category B projects.⁹ However, the notification is lacking the substantive provisions which have made the judiciary to fill with the purposive interpretation. The example of Vedanta Aluminum Ltd. can be given to prove this argument when it started its operation in Orissa before the clearance of its application for the same. When matter went to the Cuttack High Court, it was declared to be illegal as the operation started

⁹Shibani Ghosh, *Demystifying the Environmental Clearance Process in India*, 6 NUJS L. REV. 433 (2013)

without complying the provisions of Environmental Impact Assessment Notification 2006.¹⁰ There is also a loophole in the notification with regard to the power of issuing environmental clearance to the big projects as there are many authorities at different level which have power to give clearance. The clearance comes with some conditions to be met by the projects before it can be implemented. But there is no provisions under the Notification whether the conditions mentioned the in the clearance order are met or not. There is also a problem regarding the jurisdiction of these authorities and their accountability for the clearance provided by them.¹¹

It is required to codify the environmental law with urban development law to make a comprehensive regulation and their implementation by single authority at Centre and state level which can ensure the single window clearance system for all the development projects. That way it will ensure a sustainable development without compromising with environment.

4.2 Land reforms-

Land acquisition is crucial when it comes to urban development process as all the economic activities are concentrated in urban areas. All the infrastructure development projects necessarily required 'land' that is a subject matter of State list. Land acquisition in India has been a challenging task for the government due to the loopholes in the Land Acquisition Laws and the dependency of the people on land in terms of their livelihood. The Land Acquisition Act, 1894 created many problems in the process of acquiring land as the provisions of the Act are against the interest of land owners whose land is acquired. Post-independence after the commencement of the Constitution people of India had been given right to property as a fundamental right which provided the people a mechanism to challenge the land acquisition action by the government. Due to the application of Article 13(2), the Land Acquisition Act, 1894 continued to regulate land acquisition cases in India without considering the change in the law and policy of an Independent India.¹² The term 'public purpose' used in the Article 31 of the Constitution was not defined and government started interpreting it as per their convenience. The higher judiciary got burdened with the land acquisition cases by the land owners which kept challenging the government decision of acquiring land in India. Article 31 proved a hurdle for the government in the acquiring of land and finally it was removed from part 3 of the Constitution by the 44th amendment in 1978. Now the citizens of India do not have fundamental right to property and hence it cannot be challenged

¹⁰Vedanta Aluminium Ltd. v. Union of India & Anr., W.P. (C) No. 19605 of 2010, High Court of Orissa (Cuttack)

¹¹AMIYA KUMAR DAS, URBAN PLANNING IN INDIA, 100-260 (Rawat Publications, 2007)

¹²C.S. Subramanyam Aiyar, *Fundamental Right under the Indian Constitutions and Land Reforms*, SCC, (1953)

under the Article 32 of the Constitution. It is now a Constitutional right under Article 300A which says that '*no person shall be deprived of his or her property without the authority of a valid law*' that implies that government can acquire land under the colonial law i. e 1894 Act. The economic reforms started in 1991 by opening of the market for private players and overseas investors resulted into the multiple decision of land acquisition for the construction of requisite infrastructure. Change in the economic policy of India proved the insufficiency of the provisions of the 1894 Act. The other reason which caused the failure of the 1894 Act was the amount of compensation and ignoring the social impact assessment of the displaced people. The amounts of compensation given by the government under the 1984 Act were inadequate and the procedure followed for the acquisition created dissatisfaction among the people. The Act did not consider the issues of resettlement and rehabilitation of the people ignores completely the facts that after the compensation are made whether the people have been able to settle down in other places or not. There was no provision regarding the redistribution of the land in case of failure of the government to proceed with the plan for which the land had been acquired. Keeping in mind with these lacunas several proposals were made to bring out reforms in the 1894 Act to deal with all these aspects. Finally the Act was repealed and a new Act was passes in 2013 named as Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.¹³

Land acquisition and urban development are interconnected as land acquisition is vital for the economic development which causes urbanization. It is important for the policy makers to address the land acquisition cases properly so that problem of unplanned development can be addressed.

5. The Real Estate (Regulation & Development) Act, 2016 RERA

The real state sector in India plays a crucial role when it comes to urban planning and development. If the builders follow the norms for the construction and sale of housing projects there will be minimum challenges for the urban development. But the regulation of real estate sector is going through several challenges such as transparency and accountability, incorrect information by the builders. These issues have led to rising prices of the plot and affordable houses. Consequently, several unlawful constructions of cheap houses by the poor people are causing the problem of urban sprawl, waste management and environment pollution.

¹³N. Wahi, at el, *Land Acquisition in India: A Review of Supreme Court Cases from 1950 to 2016*, CENTRE FOR POLICY RESEARCH, (New Delhi) (2017)

The Real Estate Act 2016 was enacted to protect the purchasers from the exploitation by the builders and property dealers as well as bringing uniformity and setting the slandered practices in the real estate businesses. The Act ensures both the parties by establishing symmetry of information that brings transparency in the property transaction. There are still many ongoing projects that have managed to remain out of the purview of RERA. States are also bound to establish regulatory authorities under the Act but many states have not yet constituted the same.¹⁴

6. The Urban Land (ceiling and regulation) Act, 1976

The act was enacted with the objective of putting a limit on landholding in urban areas and to regulate the construction of building to prevent the concentration of land in few hands. The Act also aimed to ensure fair distribution of urban land by preventing speculation and profiteering therein. The Urban Land (Ceiling and Regulation) Act, 1976 has been repealed that is a major move in the direction of reform in the urban land. Many state governments have also repealed the state-level laws following the central move. Nevertheless, there are still some states who have not taken any step in this regard and this law is still prevailing there, whereas other state laws on Land Reforms Act, Land Revenue Act, and Urban Development Authorities Acts/ Town Planning Acts continue to hinder the accessibility of land for housing and other construction, pushing up land prices. States are to take measure to facilitate the availability of urban land in order to ensure urban development by paving the way for housing and construction of commercial places. States are also required to control the land prices at a moderate level to make houses affordable to lower income group. This will encourage the people to follow the law and prevent unlawful settlement. Enforcement of urban planning becomes easier if the laws are with the tune of changing scenario.¹⁵ The rapid urbanisation has occasioned urban sprawl without any planning. India's efforts to regulate urban planning and development have resulted in only minimal improvements in the urban process, and the reason of inadequate regulations could be traced to a poor institutional setting for the clearance of urban housing projects, commercial and industrial outlets and the lack of effective enforcement of the existing laws and policies. The rapid growth of urbanisation has prompted multiple social issues, including the conflict between locals and immigrants. The pressures on the resources are increasing with the addition of every migrant. Further expansion

¹⁴Nivedita S Karnawat & Harshita Ambre, *Study On Impact Of RERA And GST On Construction Sector*, 6 INT'L RESEARCH J. ENGIN. AND TEC. (2019) www.irjet.net (2nd June, 2019)

¹⁵K.C. Jain, *Urban Land (Ceiling and Regulation) Repeal Ordinance, 1999: rationale and gray areas*, <https://www.ebc-india.com/lawyer/articles/9902a1.htm>, (2nd July, 2019)

requires planning. In many parts of the country, locals are claiming that outsiders are taking their job and they are strongly protesting.¹⁶

Incorporation and establishment of companies required prior approval of registrar of companies under the Companies Act. Apart from the requirement set up under the Act, it is the need of the time that it should also incorporate provisions which have a direct impact on urban planning and development. The Act should provide specific provisions on the area where the company's office can be established, without affecting the existing system of sanitation and environment. Registration of small, medium and large- scale industries should also include the area of the establishment, and an environmental impact assessment etc should be conducted. Urban housing and development law should also include provisions in this regard. New housing scheme should be pre-planned. The existing legal regime did not take into account the urban development and its problem into account while providing clearance to the new industries and companies. There is a need to amend the existing laws on housing, banking, companies, and all types of industries. Indian legal regimes on the development of urban areas are not considering the unplanned and informal settlement. While providing clearance they are required to take into account a pre-planned system like who can start new businesses, purpose of the land use, where to established these Centre's, and especially unorganized business sector and urban sprawl causing problems. There is also a lack of effective enforcement of the laws and regulations by the local authorities to respond to the problems of urban development. The inadequacies of the laws to meet the demand of the citizens compel them to follow informal routes to conduct businesses, land and property transaction.¹⁷

7. Conclusion and Suggestion

Research finding indicates that the current legal framework on urban development is insufficient to address the key issues that required bringing about robust changes to fill the gap in the existing legal framework. It becomes crucial for the policymakers to take serious steps in this regard especially in the background of urban growth in India that has brought manifold problems related to the environment, land use, urban waste management, traffic congestion and many more.

¹⁶Kriti M. Shah, *Dealing With Violent Civil Protests In India*, ORF SPECIAL REPORT 34, 2017, https://www.orfonline.org/wp-content/uploads/2017/04/ORF_SpecialReport_34_CivilProtests.pdf, (29th June, 2019)

¹⁷C. Fair, *In Urban Battle Fields of South Asia: Lessons Learned from Sri Lanka, India, and Pakistan*, Santa Monica, CA; Arlington, VA; Pittsburgh, PA: RAND Corporation. 69-100 <http://www.jstor.org/stable/10.7249/mg210a.11> (30th June, 2019)

Further, unplanned urban growths have been accompanied by an increase in the urban population most of them tend to be concentrated in slum areas. The informal settlement has caused sanitation and garbage disposal problem. There is a need for tremendous changes in the current legal framework to improve infrastructure reliance in India. The existing legal framework give more power and revenue resources to the center but it is the state and other local bodies that are required to be equipped with the necessary financial resources. Planning before extension and development of the urban area is vital to the urban development of the nations and well-being of million people. The problem and challenges required a contextual inquiry of the efficacy of the existing legal regime. Urban development law in India implies the collection of rules, regulations, legislation, policies, decisions and practices that govern urban growth and development of suitable urban environment.

There is no specific legislation on urban development in India. Aspen of urban development laws is widespread that requires extensive research to give it relevancy under the India Constitution. Urban laws in India imply a plethora of laws, rule, regulation that maintain a chain reaction if there is any change in any existing laws. All of them derive their base from the Constitution. Moreover, Indian legal framework for the urban infrastructure development and environmental protection is in the initial stage that is still evolving. Systematic consideration to address it aptly can be crucial step by developing a legal framework to ensure pre-assessment of steps taken by the government authorities and encouraging the compliance of the laws, rules and regulations made.

Meeting the need of growing demand of increased population is vital to the urban development law. India's urban areas are in a poor state when we compare with other developing countries. Therefore, an immediate action on the part of government is desirable to address the problems posed by rapid urbanization and increased urban population. This effort is not only required from the government bodies but also from the industry people and common man. Robust and conclusive systems for the clearance of new projects are crucial to prevent development of parallel system. Immigration is the major cause for the emerging new cities and town. There is a need of single body for the statutory clearance of new projects that will help the authorities to keep eyes on expansion of urban areas and assessing the demand of changing urban environment.

**AS CICERO CRIES: THE NEW DRUGS AND CLINICAL TRIALS RULES 2019- A
SEARING CRITIQUE**

Naman Anand¹

Abstract

“The safety of the people shall be the highest law”

Marcus Tullius Cicero

Questions regarding the inadequacy of legal and financial compensation with regards to cases of injuries, disabilities, deaths and other forms of losses for research subjects in Clinical Trials are not new². Regardless of the fact that a directive concerning the same was issued by the Supreme Court³, there was a lack of clarity in this regard. However, on the 19th of March this year the Ministry of Health and Family Welfare⁴ took cognizance of this matter and finally notified a much awaited, streamlined and simpler process in order to assort the rules pertaining to Clinical Trials in India via the medium of the New Drugs and Clinical Trial Rules, 2019⁵ within the auspices of the Drugs and Cosmetics Act, 1940⁶.

The present article seeks to underscore the importance of opposing this considerable step, which has dealt a crushing blow to the safety nets for research subjects in India under the so-called garv of ‘promoting’ research.

1. Precursor

Prior to this, Clinical Trials were conducted as laid out by the guidelines under Schedule Y of the Drugs and Cosmetics Rules, 1945.

However, this changed in 2012 when an Indore-based NGO, Swasthya Adhikar Manch, filed a PIL in the Supreme Court, alleging the presence of certain malpractices in the systematic conduct of Clinical Trials by private and public entities in India, along with independent research professionals⁷. In the order, the Supreme Court presented their opinion that any form of permits for Clinical Trials in India must be given after thoroughly assessing all the possible aspects of safety

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²Ashna Ashesh; Zubin Dash, *Inadequacies of Clinical Trial Regulations in India*, 5 NUJS L. Rev. 379-410 (2012).

³Swasthya Adhikar Manch, Indore v. Union of India and Ors., W.P.(C) No. 33, (S.C. 2013)

⁴Addressed as “MoHFW” from here on.

⁵Addressed as “NCDT Rules 2019” from here on.

⁶Addressed as “D&C Act 1940” from here on.

⁷Supra 3

and success along with promoting indigenous therapeutic remedies and addressing those medical needs which are still not adequately met in India⁸.

The year 2013 saw a few amendments to the Drugs and Cosmetics Act, 1945 being pushed through in Parliament, in order to further regulate Clinical Trials in the country. Rule 122 DAB, which allows for compensation in case of an injury or death of a research subject in a Clinical Trial, was added via the Drugs and Cosmetics (First Amendment) Rules in 2013⁹. The compensation was to be paid exclusive of gratis medical management and the amount of compensation to be paid to the victim was to be decided by the Licensing Authority.

The Drugs and Cosmetics Rules (Second Amendment) Rules, 2013 inserted Rule 122 DAC¹⁰, and it enlisted the certain conditions the fulfillment of which was mandatory before conducting a Clinical Trial in India. These conditions included, but were not limited to- Absolute compliance with Schedule Y of the Drugs and Cosmetics Rules, 1945; The approval of an ethics committee; The registration of the Clinical Trial¹¹ with the Clinical Trial Registry of India and the submission of detailed reports in case of any “adverse event¹²” during the course of the trial. It is noteworthy that the composition and details of the ethics committee were further notified via Drugs and Cosmetics (Third Amendment) Rules, 2013¹³.

The issue of malpractices and procedural blunders in the conduct of Clinical Trials was also the focus point of the 59th Report of the Parliamentary Standing Committee on Health and Family Welfare, which also presented a set of recommendations in order to improve the functioning of the Central Drugs Standard Control Organisation (CDSCO)¹⁴. The Ministry of Health and family Welfare also constituted a committee under the chairmanship of (late) Dr. Ranjit Roy Chowdhury

⁸ Id

⁹ See GSR 53 (E),

https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file_division.jsp?num_id=MTI4Ng (Accessed 19th September 2019, 7:20 PM)

¹⁰ GSR 63 (E),

https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file_division.jsp?num_id=MTMxNA (Accessed 21st September 2019, 1:20 AM)

¹¹ See Rule 129D, NDCT Rules 2019

¹² Infra 18

¹³ GSR 72 (E),

https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file_division.jsp?num_id=MTMxNg (Accessed 23rd September 2019, 11:44 PM)

¹⁴ See Parliamentary Standing Committee On Health And Family Welfare, Rajya Sabha; 59th Report on the Functioning of the CDSCO <http://164.100.47.5/newcommittee/reports/englishcommittees/committee%20on%20health%20and%20family%20welfare/59.pdf> (Accessed 22nd September 2019, 3:45 PM)

and presented a report on the same. However, the same was also not free from criticism¹⁵, and faced flak for recommending the disallowance of independent ethics and the effort to minimise bioavailability and bioequivalence (BA/BE) studies.

On 1st February, 2018 the Ministry made public the first draft of the NDCT rules and invited public comments and suggestions regarding the same from all the stakeholders who would be impacted by a change in them¹⁶, for the next 45 days. However, the Ministry took a lot of time in evaluating the comments and suggestions. The Supreme Court took cognizance of the same and pulled up the ministry, and in an order dated 4th December 2018, urged them to complete the process within a period of 2 months, or even prior to the same¹⁷. After an immense delay, the NDCT Rules were at last notified on the 19th of March, 2019.

2. Critical Appraisal

Positive Features of the NDCT Rules

- (a) **Speedy Implementation:** The rules, which came into force on the 19th of March this year, were to come into effect 6 months post their publication in the gazette, with the exclusion of Chapter IV; which was to come into immediate effect.
- (b) **Stem Cell Based Drugs now under NDCT ambit:** Rule 2 (w) of the Rules has defined a “new drug” as follows¹⁸:

'a drug, including active pharmaceutical ingredient or phytopharmaceutical drug, which has not been used in the country to any significant extent', 'a drug approved by the Central Licensing Authority for certain claims and proposed to be marketed with modified or new claims', 'a fixed dose combination of two or more drugs, approved separately for certain claims and proposed to be combined for the first time in a fixed ratio', 'a modified or sustained release form of a drug or novel drug delivery system of any drug approved by the Central Licensing Authority', or 'a vaccine, recombinant Deoxyribonucleic Acid (r-DNA) derived product, living modified organism, monoclonal anti-body, stem cell derived

¹⁵See S. Srinivasan *A Muddled View of Clinical Trials*, The Hindu: BusinessLine (19 November, 2013) <https://www.thehindubusinessline.com/opinion/a-muddled-view-of-clinical-trials/article20690701.ece1> (Accessed August 23, 2019 10:13 AM)

¹⁶ GSR 104 (E), https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file_division.jsp?num_id=OTU0 (Accessed 23rd September 2019, 11:53 PM)

¹⁷https://sci.gov.in/supremecourt/2012/1056/1056_2012_Order_04-Dec-2018.pdf (Accessed 23rd September 2019, 11:59 PM)

¹⁸ See rule 2 (w) of the NDCT Rules, 2019

product, gene therapeutic product or xenografts, intended to be used as drug'. This measure is significant as it has brought stem-cell based drugs under the ambit of the present rules.

- (c) **Increased Scope along with BA/BE coverage:** The NDCT Rules now possess a wider scope as it covers all 'new drugs', investigational or otherwise, along with Clinical Trials and BA/BE Studies.
- (d) **Definition of "adverse events":** As per Rule 2 (d), "adverse event" has been defined¹⁹ in a manner that the scope of the section is indeed quite far reaching as it covers any untoward incident during the course of a Clinical Trial, including but not limited to- symptoms of disease, disease, or any abnormal findings in the test results. In case of such adverse circumstances, compensation is payable to the research subject of the Clinical Trial.
- (e) **Harmonised Licensing Authority:** Under Rule 3²⁰, the Drug Controller General of India (DGCI) finally has been designated by the Ministry of Health Family Welfare as the Central (Licensing) Authority under the Act. Post a period of 2 years when there was no permanent holder for the top post, the Union Government finally appointed VG Somani for the DGCI post on the 14th of August, 2019. An additional benefit of the DGCI being closely involved with the NDCT is that post the Medical Rules, 2017 the DGCI now directly handles the licensing Class C and D devices along with all Clinical Trials at the central level, thus harmonising the licensing authority for both devices and the subsequent experiments in which they may be used. Class A and B medical devices, however, are approved by the state level Drug Controllers.
- (f) **Mandatory Ethics Committees**²¹: Under the NDCT Rules, it is mandatory that an ethics committee be comprised and duly registered by filling out form CT-02; in accordance with the Drugs and Cosmetics Act (Third Amendment), 2013 before the DGCI by any person wishing to conduct Clinical Trials in India. The registration, which must be approved or disapproved in a maximum period of 90 days from the date of application, shall be valid for a period of 5 years from the date of the approval of the application and can be renewed for another 5 years (subject to fresh approval) a minimum of 90 days before the expiry of the period. In case of any "adverse event" during a Clinical Trial or a BA/BE study, the Ethics Committee shall be required to analyse the documents or any other evidence

¹⁹ See rule 2 (d) of the NDCT Rules, 2019

²⁰ See rule 3 of the NDCT Rules, 2019

²¹ See A.D. Bhatt, *EC approval is must before initiation of academic trial*, PharmaBiz (July 31, 2019) <http://pharmabiz.com/ArticleDetails.aspx?aid=117245&sid=16> (Accessed 5th September, 2019 at 6:38 PM)

pertaining to that event and forward its report to the Central Licensing Authority, viz. the DGCI.

- (g) **Transparency:** The idea of an ethics committee along with a uniform licensing authority allows minimum red-tape and promotes administrative efficiency.
- (h) **Aggressive ‘Make in India’ push:** For drugs that are made in India or the R&D activities related to the same are being conducted in India, and the manufacturing and distribution of the drug is also planned to be in India, the Central Licensing Authority shall be given only a 30 day window (which commences upon the receipt of the application) to decide upon such an application. In case the application is not disposed off within 30 days by the Central Licensing Authority, it shall be deemed that the sanction for the conduct of the Clinical Trial has been given by the Central Licensing Authority²².
- (i) **Uniform Application System:** The application in order to obtain permission to conduct a Clinical Trial in India must be submitted to the DGCI via the medium of form CT-04.
- (j) **Compensation:** The most crucial change in legislation brought about by the NDCT Rules, 2019; are with regards to the provision it envisages regarding compensation, which are dealt with extensively in Chapter VI. The chapter deals with compensation in cases of injuries to or death of the research subject of a Clinical Trial or of a BA/BE study of new drugs or investigational drugs. The amount of the monetary compensation shall be complicated via a formula that has been mentioned in the 7th Schedule.

3. Criticism

(i) Lack of Appeal Period for Clinical Trial Subjects

In case of an adverse decision, the Ethics Committee members or sponsoring parties to a Clinical Trial possess the right to appeal to the DCGI under the new rules in order to have such a decision reviewed. However, there is no provision of a similar appeal to the participants of a Clinical Trial, with regards to the reparations provided for any injuries or possible loss of life sustained by them during the course of the Clinical Trial.

Free medical management was provided for the subjects throughout the course of the trial in order to assure them of their safety and well- being, unless and until it is established that the injury or

²² See Rule 23; NDCT Rules, 2019

loss caused to the subject is not related to the ongoing Clinical Trial. However, the present amendment wrongfully empowers the investigator(s)²³ to single-handedly determine whether the injury was related to the Clinical Trial or not. In case of the former, no compensation shall be provided. Hence, the Clinical Trial subject possesses no right of appeal against the investigator(s).

(ii) The Removal of the *Solatum* Clause²⁴

The recent amendment removed the provision that obligated the sponsor(s) of Clinical Trials to mandatorily provide for at least 60% compensation of the pre-stipulated compensation immediately upon the death or upon the causation of a permanent disability to the subject of a Clinical Trial. Majority of the compensation, prior to the amendment was given without determining whether such injury or disability was directly related to the Clinical Trial. This provision was later removed as it reportedly came under fire from the World Health Organization (WHO) and other corporate entities in the pharmaceutical sector who felt that this provision could be used to exploit them.

Now, the compensation shall only be provided once the ethics committee and the investigating authority are convinced (and remember that there is no way that the subject can appeal against the latter's decision) that the same was caused due to the trial. However, the amendment of this provision can lead to the denial of immediate financial help for cases where the trial has left the subject reeling with a life and death situation.

(iii) Transparency and Due Diligence Concerns

Despite a gamut of measures being adopted in order to guarantee the same, there still remain a host of issues to confront regarding both transparency and due diligence for Clinical Trial subjects. There is hardly any availability of the data collected during a Clinical Trial or news of their results being made available to the public domain. The Clinical Trial data²⁵, on the basis of which a vaccine was introduced for Rotavirus in India in 2015, was not made available in the public domain till October 2017.

²³ See Rule 40; NDCT Rules, 2019

²⁴ See T. Thacker, *Govt. to tweak Solatium Clause in Clinical Trials* LiveMint (January 11, 2019) <https://www.livemint.com/Industry/jynrYOOYtSik55JzbDsYNL/Govt-to-tweak-solatium-clause-in-clinical-trials.html> (Accessed 5th September, 2019 7:09 PM)

²⁵ See P.S. Kulkarni, S. Desai, T. Tewari, A. Kawade, N. Goyal, B.S. Garg, et al. (G. A. Poland, Ed.) *A Randomized Phase III Clinical Trial to Assess the Efficacy of a Bovine-Human Reassortant Pentavalent Rotavirus Vaccine in Indian Infants* Vaccine 35 6228-6237 (2017).

The amended rules also cut the time span (by half) made available to the DCGI in order to assess applications for licensing a Clinical Trial from 180 to 90 days, and the aggressive make in India push of the present government led to a provision that if a drug has been discovered that possess medicinal elements that are indigenous to India (which encapsulates Ayurveda, Yoga and Naturopathy, Unani, Siddha, and Homoeopathy), the application must be accepted or rejected in a time period that is now 1/6th of the previously allocated time frame, viz. 30 days²⁶. In addition to the same, in case the application is not decided upon within the one month time frame, it shall be ‘presumed’ that the permission to conduct the Clinical Trial has been granted. This can give rise to corrupt practices within the public administrative system and can also lead to DCGI possibly not even practically evaluating such applications in the future (thus raising serious questions about due diligence) and later leaving the government red-faced in case an ‘automatically approved’ application for a Clinical Trial leads to an adverse event.

(iv) Dubious Waiver Policy

The present Rules seek to achieve the goal of expediting the lengthy process between research and development to commercial availability. It also seeks to focus on promoting organic research by cracking down on duplicity of research and by keeping a stringent eye on data obtained from studies overseas. Local trials can be waived under the Act²⁷ if trials have been conducted in a foreign country that is included in a list which has been incorporated into the rules, and if no adverse instances have been reported as such.

The amended rules also pave the way for the government to change laws which shall affect issues with a spectrum as broad-ranging as animal welfare to pre-natal studies, if the drug has been sanctioned and cleared for manufacture for at least 2 years in one of the ‘approved’ foreign jurisdictions and if the Central Authority is of the opinion that an appropriate amount of evidence has been presented in favour of the safety and reliability of the drug.

The unquestionable decision-making process of and the possible ease with which the Central Licensing Authority could clear the entry for any such drugs into the market without having absolute surety about its safety definitely presents a huge cause for concern. This provision turns a blind eye towards the importance of drug trials at a local level, which are immensely beneficial in determining the potential effect the drug shall have on different people in different geographical

²⁶Supra 22

²⁷ See Rule 75 (1) (7); NDCT Rules, 2019

regions. The easy availability of such data is very important for a geographically and ethnically diverse nation like India. The only circumstance, in my opinion, where the waiver is justified is when the drug is utilized for the purpose of treating a fatal disease or for a disease for which the Indian market does not have any solution at present; such as- certain forms of Tuberculosis with extremely high resistance to medications, Swine Flu, Dengue Encephalitis, et al.

Even in the case of an ‘orphan drug’²⁸, a Clinical Trial must not be waived off, especially in the absence of any legislation on the same in India. However, Orphan Drug legislations around the world have received their fair share of flak²⁹ for judicial overreach and creating impediments in the pharmaceutical market by disproportionately incentivizing the production of drugs that cure ‘rare’ diseases. Since these drugs are made for a very niche market, it is highly probable that they may not be as well-researched as other drugs which cater to a larger clientele. Regardless of the fact whether trials are waived or not, the increasing cost of such drugs remains a pressing issue.

Lack of Safety for Subjects

The amended rules were expected to give a befitting reply to the concerns presented by the Supreme Court in the *Swasthya Adhikar Manch* Case³⁰, however the only factor that has changed overall is the government’s approach. The amended rules make the government seem much more open to clinical research than before, however; they have no effect in ameliorating the safety concerns of Clinical Trial subjects.

The amount of Clinical Trials of foreign origin conducted in the country in the past decade, by no means, allow us to consider the state of affairs as hunky dory. It proves how India still remains a tail ender in the process of clinical research with most of the work being done in the EU and North America.

4. A String of Disappointments: A Concluding Note

It is crucial to note that although a new section on BA/BE studies has been included in the amended rules there is no definition of the same. The fact that there is no regulatory role either for

²⁸ See D. Saikaran Reddy, T.M. Pramodkumar, Yugendar Reddy, K. Sirisha; *Orphan Regulations for Orphan Drug Act in India*, Asian J. Of Pharmaceuticals 130-132 (2014)

²⁹ See Courtney D. Hauck, *The Orphan Drug Act: Incentive or Inhibitor to Rare Disease Research*, 4 Penn Undergraduate L.J. 4(2) 79-98 (2017).

³⁰ Supra 2

the DGCII in this regard remains a matter of concern and simply states that the same shall be done in accordance with the National Ethical Guidelines for Biomedical and Health Research. Funnily, it does not even mention the requirement to accord to similar guidelines for the conduct of Clinical Trials.

This raises crucial concerns as to public safety and judicial overreach. The government must be warned that it may ‘make’ anything ‘in India’ apart from a mockery of the rights of the very citizens who, sadly, voted it to power.

THE POWER VESTED UPON INDIAN COURTS TO ISSUE GARNISHEE ORDER: AN ANALYSIS OF ESCROW AMOUNT APPROPRIATION BY TAX AUTHORITIES

Aishwaryaa. A¹

Abstract

The Civil Procedure code by the Amendment Act of 1976 has introduced the concept of “Garnishment” which is considered to be a significant piece of legislation. This word owes its origin to the French language which basically means to warn or to prepare which basically means that garnishee is the individual who is liable to pay debt to a judgment debtor or deliver any movable property to him. Apart from the judgment debtor and decree holder, garnishee is third person in whose hands debt of the judgment debtor is kept. As far as the Code of Civil Procedure is concerned, Order XXI, Rule 46 and 46A have been inserted vide the amendment act lays down the procedure for the same. This paper would focus on how the court has exercised the order contemplated by Rule 46 A since it is discretionary and the court may refuse to pass such order if it is inequitable. In this context, it is pertinent to determine who would constitute to be a garnishee. The paper would elucidate if an escrow agent would be compelled to remit the escrow funds on account a garnishee order. Therefore, the position of Indian court is examined to see if it has exercised with caution in order to ensure that no innocent is harassed since the very object of the legislation of providing the remedy would be at stake.

Key Words: Garnishee Order, Judgment Debtor, Escrow, Decree Holder

1. Introduction

The garnishee order can be defined as an order which is passed by the Judge in the executing court ordering or directing a garnishee not liable to pay money to judgment debtor since the garnishee is liable and owes to the decree holder (Garnisher). He is a person or institution that is indebted to another whose property has been subject to garnishment. The person liable to pay any debt owed by him or delivers the possession of any movable property to the judgment debtor. The third person or party when called upon ought to appear and answer to the plaintiff creditor suit not just because he had garnishment or warning since he is the person whose hands the money is attached

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by the due process of the court². The decree holder (Judgment-creditor) is a garnisher who initiates the garnishment action to reach the this party who holds or owns the debtor's property. This remedy is made applicable only to the decree holder. Before this amendment came into existence, the garnishee order was not even available in the Code of civil procedure, 1908. Only After the amendment was made, the court was granted adequate powers to issue such an order when the application was made. It is pertinent to note that this order is not mandatory but only discretionary in order to protect the interest of the decree holder. An escrow agreement is the one wherein an arrangement is made between parties where one party deposits an asset with a third party. This third party then delivers the asset to the second party when the contract conditions are met. This paper determines the court's holding with respect to escrow agreement.

2. Scope of Issuing a Garnishee Order under Code of Civil Procedure, 1908.

A garnishment action is initiated by Garnisher who is basically the judgment-creditor who can reach out to the debtor's property which is held or owed by a third party. This garnishee order acts as an attachment of the goods or money to the judgment debtor which is in the hands of the third person³. On grounds of equity, the court may reject the passing of garnishment order by virtue of Rule 46A since it is only a discretionary power which must be exercised with caution and judicially. When the court is of the opinion that there is a bona fide dispute against the claim and the dispute is not frivolous and false, the court must not take action against this rule.⁴

When the money becomes due to the judgment debtor on the event of contingency, the garnishee is not liable to pay less the contingency has taken place. In the same way, garnishee proceedings cannot take into account a debt which cannot be attached by virtue of the code. The court determines the liability of the garnishee only when the court raises the issue the garnishee disputes his liability⁵.

3. Judicial Trends and discretion upon courts on giving a garnishee order: An analysis

The Garnishee proceeding is dealt under Order 21, rule 46. When the money of the judgment debtor vests upon the hands of the third party, these rules would apply. When the issue is with respect to the letter of credit will be an independent liability of the issuing bank since the money

²Black's Bryan Garner (2004). Black's Law Dictionary, USA: Thomson Business.

³L. Raj Subash, Power of Courts to issue Gaarnishee order, International Journal of Research and analytical reviews, <https://ijrar.com/upload_issue/ijrar_issue_551.pdf>, Last Visited on 06, September 2019.

⁴Mackenzie & co. v. Anil kumar AIR 1975 Cal 150.

⁵Jung v. Mohammad Ali, AIR 1972 AP 70

belonging to the judgment debtor need not be the money payable by the issuing bank. Therefore, claim with respect to letter of credit and the liability of issuing bank can only be adjudicated by independent proceedings.⁶

3.1 Contingency debt:

In strict terms, contingency debt is not a debt at all. In Ordinary parlance as well as the legal sense, the existing obligation being discharged by paying a sum of money owed is a debt. It may be payable forthwith, *solvendum in praesenti*. On this event, the debt becomes due. This also results in the debt accruing. In any case, both of these amount to debt. On the other hand, contingent debt has no present existence since it becomes payable only when the contingency occurs and ex hypothesis that may or may not happen.

The principle is that where a debt becomes payable to the judgment-debtor only on the happening of a contingency, the decree-holder is subject to the same disability as the judgment-debtor. Thus, where the balance of sale price was payable to the vendor, the judgment-debtor, only on settlement of disputes as to certain alienations and on the final allotment of properties to the judgment-debtor in the final decree, it was held that the decree-holder who is seeking to enforce the right of his judgment-debtor is equally debarred from claiming the debt from the garnishee.⁷ It has been held that a right to future rent is not a debt and cannot be attached under this rule.⁸ But only such debts can be attached as the judgment-debtor could deal with properly and without violation of the rights of third persons⁹. Where part of the consideration for a mortgage is unpaid, the unpaid portion of the loan does not constitute a debt due by the mortgagee to the mortgagor¹⁰. In a later case, the Lahore High Court distinguished these cases and held that under 63A of that court, a mortgagee may become a garnishee¹¹. The share held by a member in a co-operative society has been held not to be a debt due by the society to him.¹² So also, where under the articles of association, a member had to make a certain deposit which was payable to him with interest on his ceasing to be a member, but which was liable to forfeiture in certain events, it was held that such a deposit was

⁶Fargo Freight Ltd. v. Commodities Exchange Corporation, (2007) 7 SCC 203

⁷K.J. Jung v. Mohd Ali, AIR 1972 AP 70.

⁸Raman Nilacantan v. Mathai, (1952) TC 358 : AIR 1952 TC 508.

⁹Badeley v. Consolidated Bank, (1888) 38 Ch D 238; Davis v. Freethy, (1890) 24 QBD 519; Campion v. Palmer, (1896) 2 IR 445.

¹⁰Khunni Lal v. Bankey Lal, (1934) All LJ 713; AIR 1934 All 449; Bhairav Aswasti v. Lalta Misir, (1934) All LJ 893 : AIR 1934 All 954.

¹¹Jai Gopal v. Sundar Singh, (1935) 159 IC 763 : AIR 1935 Lah 26.

¹²Hira Lal v. Rajo Kheri Co-operative Credit Society, AIR 1939 Lah 305.

not a debt liable to attachment under this rule.¹³ A claim for payment of a sum of money under the Displaced Persons (Compensation and Rehabilitation) Act is similar to a debt and is governed for purposes of execution by the provisions applicable to debts.¹⁴ A provision in the state budget followed by an order by the relevant officer to pay to the judgment-debtor the amount provided for in the budget amounts to a debt in the hands of the government and can be attached.¹⁵

3.2 Banker's Lien:

The Kerala High Court holds that the banker has no lien on the amount in the fixed deposit. However, the banker's lien cannot by itself be a bar to attachment of money on the deposit account of the bank ordered by court. If a deposit is payable at a future date or after the lapse of a specified time, it is still liable to attachment. What is attached is the money in the deposit account. The banker as a garnishee, when an attachment notice is served, has to appear before the court and obtain suitable directions for safeguarding its interest. This also becomes clear from O 21, r 46(a) of the Civil Procedure Code. The court, in such a situation, has to take into account the banker's lien over the securities or deposits regarding which garnishee notice are issued.¹⁶ The executing court can call upon the bank, by treating the bank as garnishee, to deposit the amount and interest.¹⁷

3.3 Procedure where Garnishee denies the debt:

There is no provision in this rule under which the executing court, where a garnishee denies the debt, can make an inquiry if the debt is really due.¹⁸

It could, therefore, either sell the debt if the decree-holder were to so desire¹⁹ or appoint a receiver under s 51 with power to sue the garnishee for the recovery of the debt due from him.²⁰ But where a decree is passed against the legal representatives of a deceased debtor and a dispute arises whether certain monies represent the assets of the deceased or are the personal property of the

¹³Gajraj v. Hukumchand, (1939) Bom 109: 41 Bom LR 19: 180 IC 360: AIR 1939 Bom 90; Raghaviah v. Chamaria Talkie Distributors, AIR 1958 AP 31. But see Hemraj Ganga Ram v. Wamanrao, (1954) MB 378.

¹⁴The Khudabadi Bhaibund Co-op Credit Bank Ltd. v. N.S. Varma, (1962) Bom 94: AIR 1962 Bom 121: 63 Bom LR 634.

¹⁵Hyderabad Co-op Commercial Corpn. v. Syed Mohiuddin, AIR 1975 SC 2254.

¹⁶Syndicate Bank v. Vijay Kumar, (1992) 2 SCC 330.

¹⁷Union Bank of India v. Venugopalan, AIR 1990 Ker 223.

¹⁸Ma Saw Yin v. Hoc To, (1926) 4 Rang 100: 97 IC 247: AIR 1926 Rang 175; Maharaja of Benares v. Patraj, (1905) 28 All 262, but see Alsiddass Kuverlal v. Hyria Gowde

¹⁹Government of United State of Travancore-Cochin v. Bank of Cochin Ltd., (1954) Tr-Coch 28: AIR 1954 Tr-Coch 243.

²⁰Toolsav. Antone, (1887) 11 Bom 448; Moideen Batcha Rowther v. Suleiman Saheb, AIR 1956 Mad 163.

judgment-debtor, then this is a question that must be determined in the course of execution proceedings.²¹ A decree-holder cannot recover from the garnishee more than what the judgment-debtor could recover from the garnishee.²²

To enable the court to determine disputes regarding debts claimed to be due from the garnishees, several High Courts framed rules giving power to the courts either to refer the parties to a suit to establish the claim or to determine such a claim in execution proceedings. Following the policy that all questions relating to the execution, discharge of satisfaction of decrees and of doing away with the protracted proceedings of suits, the new rules empower the execution courts to determine the question with respect to debts alleged to be due by the debtors of the judgment-debtors and lay down the procedure according to which such liability is to be ascertained and the debt realized.

3.4 Procedure when garnishee admits the debt:

If the garnishee admits the debt, the court may order payment of the debt or so much of it as is admitted to be due into court.²³ The Patna High Court has held that the court cannot compel the garnishee to deposit the money due on the debt or any part thereof in court or take other effective steps against him under this rule. It can do so only after an order is made under R 63B of the rules made by that court.²⁴ But the Court cannot make an order on the garnishee before the debt has become payable.²⁵ If a cross debt is due to the garnishee from the judgment-debtor at the date of the attachment, the garnishee is entitled to set it off against the amount due by him.²⁶ But he is not entitled to set off a debt which arises subsequent to the attachment.²⁷

In a case where the debt was fraudulently priced with the connivance of the judgment-debtor, although the garnishee was willing to pay the amount into court, it was held that the remedy of the decree-holder claiming rateable distribution was a suit for compensation.²⁸

3.5 Garnishee Order - Company in Liquidation:

Where a judgment is recovered against a company which is in voluntary liquidation, the invariable practice of the courts is to stay execution of the judgment unless there are very exceptional reasons

²¹SundaramIyer v. Sangawa, (1963) 2 MLJ 478.

²²Amarendra v. S Banerjee & Co., (1924) 40 Cal LJ 228 : 84 IC 1022 : AIR 1924 Cal 1068.

²³Toolsa v. Antone, (1887) 11 Bom 448.

²⁴Kameshwar Singh v. KuleshwarSingh, (1942) 21 Pat 287 : AIR 1942 Pat 508: 202 IC 533.

²⁵Jethav. Durgadutt, (1927) 29 Bom LR 416 : 102 IC 418 : AIR 1927 Bom 365.

²⁶Tyaballiv.Atmaram, (1914) 38 Bom 631 : 25 IC 375.

²⁷Sankaran Nair v. Krishna Pillai, AIR 1962 Ker 233.

²⁸Nanak Chand v.ChhedaLal, 97 IC 467: AIR 1927 All 41.

for exercising its discretion otherwise. Thus, if *A* obtains a decree against a limited company and the company thereafter goes into liquidation, and a debt is due by *D* to the company, the debt forms part of the general assets of the company, and is divisible among the creditors *pari passu*; and for this reason, *A* is not entitled to a garnishee order against *D*.²⁹

3.6 Procedure where garnishee resides outside jurisdiction and debt is also payable outside jurisdiction.

It is not competent to a court, under this rule, to issue a prohibitory order upon a person resident outside the limits of its jurisdiction in respect of property which also is beyond such limits. Thus, where *A* obtains a decree in the court of Bardwan against *B* residing in Bardwan and there is a debt due to *B* from *C* who resides in Calcutta, the debt being also payable in Calcutta, the proper course for *A* to adopt, if he seeks to attach the debt, is to apply to the Bardwan court to issue a prohibitory order upon *B* prohibiting him from recovering the debt. He should also to apply to that court to transfer the decree for execution to the Calcutta court and after the decree is so transferred, to apply to the Calcutta court to issue a prohibitory order upon *C*, prohibiting *C* from paying the debt to *B*.³⁰ But where the debt is payable within the jurisdiction of the executing court that the court has the competence to proceed against the debt though the debtor of the judgment-debtor resides outside the jurisdiction of the Court.³¹

A mortgage debt is, however, a specialty debt and the locality of a specialty debt is the place where the instrument happens to be.³² Thus, if *A* obtains a decree against *B* in the court at Asansol, he can attach a mortgage debt due to *B* on a mortgage of property at Manbhum by *C* who resides at Manbhum if the mortgage bond is in the possession of *B* at Asansol. The court may issue a prohibitory order restraining *B* from receiving and *C* from paying the debt, and it will not be necessary to transfer the execution proceeding to the court of the place where *C* resides as in the case last cited which was a case of a simple contract debt.³³

Claims over which a courts in India have no jurisdiction, for example, a debt due to the judgment-debtor from a non-resident foreigner in respect of which no suit could be brought by the judgment-

²⁹Anglo-Baltic and Mediterranean Bank v. Barber & Co., (1924) 2 KB 410.

³⁰Padmanabha v. Bank of Kerala, AIR 1956 TC 100; Aditya Electronics v. AS Impex Ltd., AIR 2004 AP 321: (2004) 4 Andh LT 50.

³¹British Transport Co. v. Suraj Bhan, AIR 1963 All 313.

³²New York Life Insurance Co. v. Public Trustee, (1924) 2 Ch 101.

³³Dharanidhar v. P. D. Sethi, (1933) 60 Cal 782 : 143 IC 785 : AIR 1933 Cal 379.

debtor in an Indian Court, are not debts liable to be attached under this rule.³⁴The general rule as to the suits of a debt is the residence of the debtor. It has been suggested that this is subject to an exception which situates the debt at the place where it is properly payable. The Privy Council referred to this rule and exception and held that if the debtor and creditor are residents of Indore, the debt cannot be attached by the High Court of Bombay in the absence of a contract expressly or impliedly providing for payment of the debt in Bombay.³⁵But, where a judgment is executable in the High Court of Bombay against a foreign corporation, which submitted to jurisdiction, and a bank in Bombay owes the corporation, a debt payable in Bombay, the High Court of Bombay has jurisdiction to attach the debt and direct the bank to pay the amount of the debt into the court.³⁶It has been held that this rule does not prohibit a court from attaching properties situated outside its jurisdiction.³⁷However, if the debtor of the judgment-debtor resides outside the jurisdiction of the court, it is necessary that the debt should be payable within the jurisdiction of the executing court.³⁸It would not be competent for the executing court to attach the debt where it is payable outside the jurisdiction and the debtor also resides outside the jurisdiction of executing court.³⁹

4. Garnishee order with respect to Escrow Funds - An Analysis

While analyzing as to whether an escrow account can be appropriated by tax authorities for discharge of the taxpayer's liability, recently in the case of AAA Portfolios Pvt. Ltd. v. DCIT⁴⁰ Delhi High Court held that such amounts cannot be appropriated when it is not held by the agent of the escrow account on behalf of the tax payer, or owed by a garnisher to the taxpayer. In this judgment the nature of garnishee proceedings was elucidated as articulated in the further sub issue.

4.1 The nature of Garnishee Proceedings:

The court divulged into the CPC proceedings in relation to the garnishee order. The Court held that even under code of civil procedure, the court cannot direct against the judgment debtor who disputes his indebtedness unless such issue is adjudicated and struck down. Unlike the CPC, the Income Tax Act does not confer power upon the tax department to adjudicate upon the indebtedness issue.

³⁴Ghanshamlalv.Bhansali, (1881) 5 Bom249 .

³⁵Chaturbhujv.Chunilal, (1933) 60 IA 211 : 57 Bom 474 : 143 IC 211 : AIR 1933 PC 150.

³⁶Nanak Chand v.ChhedaLal, 97 IC 467 : AIR 1927 All 41.

³⁷SwissBankCorpn. v. BoehmischeIndustrialBank, [1923] 1 KB 673.

³⁸BritishTransportCo.Ltd. v.Surajbhan, (1962) 2 All 475 : AIR 1963 All 313.

³⁹Padmanabhav.Bank of Kerala, AIR 1956 TC 100; Aditya Electronics v. AS Impex Ltd., AIR 2004 AP 321: (2004) 4 Andh LT 50.

⁴⁰W.P.(C) No.1272/2013.

From the factual metric of the instant case, it was seen that the tax department tries to use a garnishee order to appropriate money lying in the escrow amount over which the assessed does not have any interest as such. It was rightly held by the Hon'ble High Court that the tax department cannot use a garnishee proceeding to the debtor of a tax payer such a debt actually exists and the debtor confirms the same.

Although in this particular case, it was held in favour of the tax payer, this precedent has implication in different factual circumstances. An illustration for this would be when a tax payer wholes money to the tax payer puts all his amount into an escrow account in order to escape from the tax liability. This would be unacceptable and the precedent set forth would be inapplicable simply because the escrow agent holds the money in the account on behalf of the tax payer. From this, it is comprehended that it is of extreme importance to put forth procedural safeguards to ensure that investors are not in a disadvantageous position. The implications of this make the importance of considering the factors of an agreement to include the garnishee proceeding, therefore the terms must take that into consideration while drafting it.

This decision of the Court is important since it elucidated the limitations of the tax department as far as garnishee proceedings were concerned. Although, the statement by the garnishee disputing the tax demand does not stop the tax authorities from taking action against the garnishee. When the tax department can prove the false statement of the garnishee ⁴¹ he would be held personally liable for the tax amount in dispute. Therefore, it becomes a significant consideration that banks must take into account while acting in age position of an escrow agent.

5. Conclusion

There is a requirement for a prima facie case to be made by the garnishee before the issue as to his liability which is to be adjudged is raised. Despite the garnishee disputing the fact of indebtedness to the judgment debtor, the court will carry out the proceedings. If there is a reasonable doubt also the court continues with the proceedings. The amendment incorporating garnishee order is lauded to be a good piece of legislation although, it is pertinent to exercise it with due caution. It is to be taken into consideration by the court that while exercising such a discretionary power, it is not misused and that the innocent is not being harassed. It should be free from mala fides. From the analysis of various garnishee proceedings, especially in the escrow amount appropriation it can be seen that historically, the tax authorities have used garnishee proceedings as a way to attach bank

⁴¹Beharilal Ramcharan vs. IncomeTax Officer, Special Circle 'B' Ward, Kanpur and Anr. AIR1981SC1585.

accounts and fixed deposits of the tax payers. But in the instant case, there was an innovative technique in use that was used for the tax appropriation which although did not work in this particular case it shows the gravity of risk in this nature which generally exists.

AN ANALYSIS OF PREDATORY PRICING IN INDIA - WITH SPECIAL REFERENCE
TO RELIANCE JIO'S PENETRATION PRICING STRATEGY

Avik Banerjee¹

Abstract

Price reductions are the hallmark of competition, whereas predatory pricing is an instrument of abuse, which is the practice of pricing goods or services at such a low level that competitors are forced to leave the market, thereby granting monopoly to the Predator who can then control the price. The Competition Act, 2002 outlaws predatory pricing, treating it as an abuse of dominant position, prohibited under Section 4 of the Act, thereby aiming to safeguard long-term interests of the consumers from disguised predatory tactics of the market actors. The Competition Act creates a competitive environment by monitoring and regulating the firms, so as to prevent any activities by a firm that may lead to breakdown of the free market system. But Reliance Jio Infocomm Ltd. which is now the largest mobile network operator in India initially entered the Indian market with a 'zero pricing' strategy that was questioned by all the competitors. India's richest person Mukesh Ambani had the deep pockets to suffer initial losses whereby comparatively smaller rivals had to either quit the market or to undergo merger with each other. The obvious question that comes up is why Reliance Jio was allowed to enter the market with such a pricing strategy, when it was evident that they will recoup the losses in future. This article will seek answer to this particular question, and will also try to find out whether there is any gap in the existing competition law that needs to be addressed, so as to protect companies from applying similar strategy as that of Reliance Jio.

1. Introduction

Price is the value of the products or services which the consumer or the buyer pays to the manufacturer or seller. Price is something that can be altered very easily as per requirement of the business so as to react against rivalry firm or against the fluctuation in demand of the product or

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services. The ideal rule of setting price would be that it should be adequate enough to reap profits for the company and simultaneously low enough to allure and motivate consumers to buy the product or subscribe for such services. In simple words we can say that, the price of a product should not only increase the revenue of the company but must also be suitable to face competition from rivals.

Unfortunately, the above-mentioned consumer friendly pricing strategy which should actually be adopted by all the companies is a time-consuming affair, especially for those companies who are looking to earn huge profits within a short span of time. Thus, the idea of various other pricing strategies comes up which can either allow them to monopolize and then dictate price, or sometimes horizontally fix prices so as not to compete among rival companies and allow everyone to earn huge profits. In all such cases the sufferer is the consumer, who is either left with no variety of products to choose from due to monopolization, or has to pay hefty amount for a particular type of product due to price fixing among companies.

The Indian Competition Law has clearly outlawed all such unfair pricing strategies, but still we find several companies adopting pricing strategies which is apparently improper and is also getting away with it probably due to a loophole in the law itself. This paper will focus mainly on one of such unfair pricing strategies commonly known as 'Predatory Pricing' with reference to the recent case of Reliance JIO's free pricing strategy, and will also critically analyze the efficacy of the law in force.

2. Indian Competition Law

The Indian competition law is comparatively a new regime as it is barely ten years since our new competition law i.e. The Competition Act, 2002 has become operational. Prior to May 2009 from when the Competition Act became operational, MRTP Act used to regulate certain aspects of competition. The Monopolies and Restrictive Trade Practices Act was thus a precursor to the Competition Act which sought to legislate over issues relating to monopolistic and restrictive trade practices. Although there are several areas of similarities between the MRTP Act and the Competition Act, the primary distinction between both the enactments can be identified from the legislative objective. Thus, while the objective of the MRTP Act was to prevent economic concentration and restrictive trade practices, the thrust of the Competition Act is to promote competition.

Post 1991, in light of the changing economic situation and initiation of economic reforms in the country, a need was felt for a change in the approach by shifting the focus from curbing monopolies to promoting competition. The Competition Act, 2002 governs Indian competition law which was enacted by the Parliament of India. Under this legislation the Competition Commission of India was established, to prevent any activities that have an appreciable adverse effect on competition in India. CCI can begin inquiry of any alleged anti-competitive practice either on reference received from the Central or the State Government or on the basis of information received from private parties or by taking suo moto cognizance.

3. Abuse of Dominance

Section 4 of the Indian Competition Law is the operative provision of the Act that deals with the abuse of dominant position. As per the section, there shall be an abuse of dominant position if any enterprise directly or indirectly imposes discriminatory and unfair conditions in purchase or sale of goods or services, or restricts production or technical development, or create hindrance in entry of new competitors to the prejudice of consumers. Dominant position enables an enterprise to operate independently or affect competitors by action. Thus, section 4 of the Competition Act prohibits any enterprise from abusing its dominant position but it has to be kept in mind that to attract this section, determination of dominant position is required in the relevant market.

The term ‘dominant position’ has been explained in Sec-4, explanation(a) of the Competition Act as “*a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour*”². It is important to note here that the Competition Act do not prohibit monopolization or the mere possession of dominance that may have been achieved through superior product quality, economic performance, innovation etc. but it only restricts its abuse. The analysis of abuse of dominance under the Competition Act primarily begins with the determination of market, and once the relevant market has been determined, the next step is to establish whether the enterprise enjoys a dominant position in that relevant market or not, then only comes the third step that is the analysis of whether such dominant position is being abused.

² The Competition Act, 2002, No. 12, Acts of Parliament, 2003(India).

4. Predatory Pricing

As per the explanation (b) given under Sec-4 of the Competition Act, 2002 “*predatory price means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors*”³.

Predatory pricing creates a perplexing situation that has intrigued the antitrust community for many years. On one hand, economic theory as well as history teaches us that predatory pricing is an instrument of abuse, but on the other hand, reductions in price are the hallmark of true competition, and the tangible benefit that every consumer desire the most from the economic system⁴.

Predatory pricing strategy is a term commonly used in marketing that refers to a strategy of pricing goods or services at a very low price point for an extended period of time with the intention of driving out competition and also creating barriers to entry of new competitors. Predatory pricing strategy requires the firm to knowingly sustain losses for a quite a long time and thus can typically be undertaken only by large and established firms. The strategy can only be considered successful if later on the firm is able to recoup its initial losses by setting much higher prices and reaping profits in the long run.

In MCX Stock Exchange Ltd v. National Stock Exchange of India Ltd., Dot Ex International Ltd. and Omnesys Technologies Pvt. Ltd⁵ the CCI while laying down the test for predatory pricing said that:

"Before a predatory pricing violation is found, it must be demonstrated that there has been a specific incidence of under-pricing and that the scheme of predatory pricing makes economic sense. The size of Defendant's market share and the trend may be relevant in determining the ease with which he may drive out a competitor through alleged predatory pricing scheme-but it does not, standing alone, allow a presumption that this can occur. To achieve the recoupment requirement of a predatory pricing claim, a claimant must meet a two-prong test: first, a claimant

³ Ibid.

⁴ Patrick Bolton et al., *Predatory pricing: Strategic theory and legal policy*, COL. BUS. SCHOOL (Oct. 25, 2019, 10:20 AM), <https://www0.gsb.columbia.edu/faculty/pbolton/PDFS/BBRPrincetonDP.pdf>

⁵ MCX Stock Exchange Ltd v. National Stock Exchange of India Ltd., Dot Ex International Ltd. and Omnesys Technologies Pvt. Ltd, (2011) Comp LR 0129 (CCI)

must demonstrate that the scheme could actually drive the competitor out of the market; second, there must be evidence that the surviving monopolist could then raise prices to consumers long enough to recoup his costs without drawing new entrants to the market."

Let us now briefly analyze the probable short term and long-term effects of Predatory Pricing. Predatory pricing in the short term will benefit customers due to lower prices by the predator, but it will harm all companies or competitors in the industry. Thus, in the short-term predatory pricing will create a buyer's market where customers will be able to purchase goods or services at a very low price. At the same time the profitability of the other companies who fails to compete with the predator also declines in trying to undercut prices. Whereas, in the long run after all the competitors are driven out, the remaining firm is able to raise prices and recover the losses. Thus, the company that can survive such a price war will be able to remain in the market and will also be able to establish a monopoly in the industry and thereafter reap the long-term rewards. So, it also becomes clear that in the long run, the customers suffer from higher prices and the now monopoly company is able to dictate the price at which consumers are bound to buy the products or services as there will be no other option left.

5. Penetration Pricing⁶

Penetration pricing is a marketing strategy commonly used by businesses to attract customers towards a new product or service by offering a comparatively lower price during its initial offering. The lower price helps a new product or service to penetrate the market by rapidly reaching a wide fraction of the existing market and attract customers away from competitors. The strategy basically works on the expectation that customers will try out a new product or service and ultimately switch to the new brand of product or service mainly because of the lower price and build a big market share with the hope to keep majority of the new customers once the prices rise back to the normal levels.

⁶ Will Kenton, *Penetration Pricing*, INVESTOPEDIA (Oct. 27, 2019, 11:10 AM), <https://www.investopedia.com/terms/p/penetration-pricing.asp>

6. Reliance Jio Issue⁷

We all are aware that the Indian Telecom industry has witnessed turmoil in the recent past that was caused by a new entrant in the telecom market with the name of "Jio", which was a product of the conglomerate of Reliance Group of Industries. The services that were first launched as an "employee-only" offer like unlimited data benefit and unlimited calling, were made open to the general public which resulted in the surge of the masses to avail the proposed benefits. This instilled a sense of fierce competition among the rivals which subsequently resulted in huge reductions of prices of the rival telecom operators, and the consumer centric market has welcomed the new entrant and the competition with open hands. Let us now briefly analyse the issue, and see why Jio's strategy was permitted by CCI in spite of receiving several complains.

Reliance JioComm Limited (Jio), which entered the market of wireless telecom services, challenged all the existing market players like Airtel, Vodafone, Idea, Aircel etc. with its aggressive marketing and 'zero pricing' strategy owing to its deep pockets. The Indian telecom market was already characterized by a high level of price competition within the markets and therefore high consumer incentives and loyalty are usually required to remain relevant in the market. But, as a new entrant in such a saturated and highly competitive market, Jio had to follow a penetration pricing strategy as discussed above and offer huge discounts so as to penetrate the market and occupy good market share.

But, JIO went a step further by announcing 'free' services of voice calls, mobile data, etc. to all the new customers, which they extended for several months, resulting in corresponding losses of other competitors, who have subsequently questioned the legality of such a pricing strategy and have also raised anti-competitive concerns against Jio. In addition to Competition Commission of India (CCI), Telecom Regulatory Authority of India (TRAI) has also been approached by relevant stakeholders. The main issue raised against JIO was that of abusing of its dominant position, in the form of predatory pricing and thus the allegation was of contravention of Section 4 of the Competition Act 2002.

The basic contention against JIO was that the by offering free 4G mobile data, voice calls and roaming services; apart from other freebies, such as video and music streaming, to all its customers

⁷ Jai Bhatia & Advait Rao Palepu, *Reliance Jio: Predatory pricing or Predatory behavior*, ECO. & POL. WEEKLY, Vol. 51, Issue 39, Sept. 2016 (Oct. 26, 2019, 7:00 PM), <https://www.epw.in/node/147719/pdf>

– Jio had resorted to predatory pricing, that amounted to abuse of its dominant position. But, upon detailed investigation into the allegations of all the informants, CCI have ruled in favour of Jio, as the Commission was of the view that Reliance Jio being a non-dominant player in the relevant market cannot be considered to have engaged in predatory pricing and therefore no *prima facie* case lies of contravention of Section 4 of the Competition Act.

7. Critical Analysis

It has been observed through the study that even though Predatory Pricing has been termed as illegal, but under the Competition Act, 2002 there is a pre-requisite that must be fulfilled for penalizing such a Predator which is ‘Dominant Position’ and that too in the relevant market, this is the actual gap through which Reliance JIO escaped. Although Jio can argue and say that their pricing strategy was just a penetration pricing which is not illegal, but in the hindsight everyone knew that the man behind Reliance JIO, i.e. Mr. Mukesh Ambani is the richest man in India, who is having Deep-Pockets, deep enough to sustain initial losses for a very long period, and his ultimate motive like any other businessman would be to Recoup the losses in future after attaining huge market share which would almost be like a monopoly, still the competition commission of India could not stop his strategy due to a flaw in the law itself which asks for a pre-requisite of dominant position in the relevant market that could not be proved that time against Reliance JIO. It is also dubious issue that what should be the parameter to decide the relevant market? Thus, while determining Jio’s dominance the CCI could have only considered the 4G telecom market and not the other services like 3G that Jio doesn’t offer, then in that case Jio would have been the dominant player even during that time, when 4G services were in the nascent stage.

Also, if we see the objective of the Competition Act, 2002, it says that the Competition Commission will prevent practices having adverse effect on competition. Does that actually mean that even if some act is done which is prohibited by the Act, it will not be prevented until and unless it has an appreciable adverse effect on competition (AAEC). Will all the alleged wrongful acts be tested with the touchstone of AAEC and then only the commission will decide to prevent or penalize the wrongdoer?

The question that comes up in our mind here is, why we can’t simply have Per-se illegality under Competition Law, whereby the acts that are considered illegal, if proved will directly lead to punishment without even analysing whether the firm is dominant or is causing appreciable adverse

effect. In my opinion only per-se illegality can discourage all the business houses from applying these unfair strategies, and our competition act needs some amendment in this regard.

8. Conclusion

From the above study it became clear that Predatory pricing is basically the illegal act of setting prices low with an attempt to eliminate the competitors. Predatory pricing violates competition law and it makes markets more vulnerable to a monopoly. But the main problem lies in the fact that allegations of wrongdoings under section 4 of the Competition Act, especially Predatory pricing are hard to prove as firms can deem it as fierce price competition rather than a deliberate act to drive out the other competitors. Also, for new entrants there is a thin line between Penetration pricing which is legal, and Predatory pricing which is illegal.

Thus, allegations of this predatory practice can be really difficult to prosecute because in most of the cases defendants may successfully argue that their low prices are not a deliberate attempt to undermine the marketplace, rather it is a part and parcel of normal and healthy competition. Moreover, predatory pricing in most cases may not be successful in its goal, due to the several difficulties in successfully eliminating competitors and recouping lost revenue.

But we have to accept that a price war spurred by predatory pricing can be favourable for consumers in the short run. Fortunately for consumers, creating a sustained market monopoly is no simple matter. However, if by chance the price battle succeed in slaying all, or even some, of the market competitors, the advantages which the consumers were enjoying may quickly evaporate or even get completely reversed, and in that situation a monopolistic marketplace will allow the company that holds the monopoly to raise prices as per their wish, and thereby reducing consumer choice in the bargain.

Predatory pricing, is thus a very complex form of anticompetitive conduct which requires the perpetrator to incur considerable amount of losses in the hope that those losses can be more than recouped in the near future by exercising of market power. To be successful with this strategy, the predator must have a good share of the market or at least have the capacity to acquire such a share. Additionally, the entry conditions must be such so as to restrict the new entrants and the predator can exercise the market power for some period of time following a predatory episode in order to

provide for recoupment for the predator's "initial investment" that was in the form of knowingly suffering losses.

From our study we can conclude that although provisions against predatory pricing strategies are there in place in India, but the enquiry can only start if the particular business or the Company is dominant and that too in the relevant market, thus it gives a lot of scope for the alleged parties to defend themselves. Also, if we see the reality, many complaints of predation are presented to competition authorities and majority of these cases involve nothing more than healthy price competition. Thus, competition authorities also need some method to separate the occasional violation from numerous complaints. Such a rule should thus be able to identify predatory pricing when it actually occurs, yet impose zero restraint on firms' ability to compete vigorously on price, so that the consumers can reap the benefits of having various quality products and services at highly competitive prices.

**THE FUTURE OF ARTIFICIAL INTELLIGENCE IN THE LEGAL SPECTRUM: A
STUDY ON THE ATTRIBUTION OF CRIMINAL LIABILITY TO AI**

*Raajdwip Vardhan*¹

Abstract

Over the last few decades, humanity's understanding of technology has grown leaps and bounds, and evolved into something that may not even have been a part of science fiction a mere century ago. This rapid growth in technological progress, however, has brought technology into crossroads with the law of the land, for now, legal philosophers must again toil hard to understand and assimilate new and novel concepts that were non-existent even a few years ago, into the purview of law.

The invention of the computing machine has been undoubtedly the greatest technological marvel of the recent era, majorly due to the wide- reaching implications that it has had in the improvement of other areas of scientific knowledge. It is also associated with the rise of changing social habits of humanity in general, and the advent of the internet, social media and e-commerce are examples of how technology has changed the way humans operate today in the world. However, this has also meant the incorporation of these concepts into the legal system in order to regulate these practices according to the established principles of law, and protect the doctrines of justice when required

A related concept that has been rapidly evolving within the world of technology is that of AI, or Artificial Intelligence. The implication of AI in the modern world range from simple to complex, and the wide nature of their presence in the lives of people mean that their ubiquitous presence in people's lives will only increase in the future. Despite this however, there exists a lack of proper study regarding the nature of AI within the scope of law.

Keeping this in mind, the aim of this paper shall be to understand the legal liability of Artificial Intelligence from the perspective of criminal law, and also try to analyze its stand within the Indian legal apparatus.

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Keywords: Artificial Intelligence entity, Criminal Liability, Mens Rea, Actus Reus.

1. Introduction

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

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

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

2. An Introduction to the Concept of Artificial Intelligence

Ever since the first computer was invented, and the age of ‘intelligent’ machines was ushered in, a consideration wherein intellectual machines and humans would work together to give rise to a new utopian society has often found itself in popular culture as well as literary fiction. In his classic science fiction novel *I, Robot*, published in the year 1950, Issac Asimov laid down three

fundamental rules of autonomous robotics, and later on, in the year 1968, Stanley Kubrick, in his movie *2001: A Space Odyssey*, depicted a conscious robot named HAL-9000 that was designed to control everything onboard an interstellar spaceship, but which eventually attempts to kill the astronauts. The concept of artificial intelligence has thus existed for some time now in fiction, and only over the past few decades has attempts to turn fiction into fact borne some definite results.

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

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

However, a question that arises when such a definition is used to describe AI is what differentiates an AI from any other machine, for example a robot, which can also function autonomously once the necessary inputs have been provided? In order to tackle this issue, and also describe the nature of intelligence, Alan Turing, the famed mathematician and computer scientist had come up with what is now known as the 'Turing Test', wherein he stated that a machine could be classified as intelligent if a person conversing with the machine could not differentiate it from a human on the basis of the conversation.² However, this was criticized due to the fact that Turing considered all human intelligence to be of equal magnitude, and did not account for the differences in intellect among humans. A similar approach was undertaken by Roger Schank, one of the foremost theorists of artificial intelligence, came up with five parameters that differentiates an 'intelligent' machine from a 'non-intelligent' one. The five parameters that he denoted were communication, internal knowledge, world knowledge, creativity and intentionality.³ The existence of AI programs

² GABRIEL HALLEVY, WHEN ROBOTS KILL: ARTIFICIAL INTELLIGENCE UNDER CRIMINAL LAW, 05-06. (1st ed. 2013).

³ Roger C Schank, *What is AI, Anyway?* 4 AI Magazine. 59, 60-61, (1987).

such as ‘*Deep Blue*’ that beat chess grandmaster Kasparov⁴, or the presence of AI such as ‘*Alpha Zero*’ that can learn without any external human intervention⁵, prove that we are on the right path to an ‘intelligent’ Artificial Intelligence entity.

Despite this analysis though, the question still remains on whether a ‘*thinking machine*’ can actually think, or is it simply using a set of calculations to arrive at a conclusion on the basis of its programming. Some people have even concluded that the term ‘*thinking machine*’ may be an oxymoron in itself,⁶ for the two words that make up the phrase are themselves contradictory in nature.

3. Criminal Liability and AI

In order to ascertain criminal liability on any entity, be it a legal person or a natural person, two major elements need to be present; *mens rea* and *actus reus*. While *actus reus* is the explicit act of the person in question, and thus the external element of the crime, *mens rea* is far more intimate in nature due to the fact that it is the internal mental element that led to the crime. This poses a problem when liability of an intangible or abstract entity is to be ascertained due to the fact that although *actus reus* can be easily determined on the basis of commission or omission that led to the criminal act, determining *mens rea* is far more difficult in nature. Since *mens rea* is represented in the form of knowledge and intention at the highest degrees, and negligence at lower degrees⁷, it becomes extremely difficult to consider the existing *mens rea* of any entity, and the same becomes even more difficult in case of an intangible and artificial form of intelligence that is abstract in nature. As the principles of criminal law necessitate the presence of both of these principles in a criminal, and the absence of even one of these absolves the entity from criminal liability, it needs to be determined how exactly can the mental element of an abstract entity be taken into account under traditional criminal jurisprudence.

To tackle the matter of criminal liability, Gabriel Hallevy, one of the pioneers of criminal law relating to artificial intelligence had proposed a model named ‘Perpetration via Another’ wherein

⁴ Malcolm Pein, *Chess computer beats Kasparov in 19 moves*, THE TELEGRAPH, 12 May 1997. <https://www.telegraph.co.uk/news/matt/9885264/From-the-archive-Chess-computer-beats-Kasparov-in-19-moves.html>.

⁵ Samuel Gibbs, *Alpha Zero AI beats champion chess program after teaching itself in four hours*, THE GUARDIAN, 7 Dec 2017, <https://www.theguardian.com/technology/2017/dec/07/alphazero-google-deepmind-ai-beats-champion-program-teaching-itself-to-play-four-hours>.

⁶ Gabriel Hallevy, *The Criminal Liability of Artificial Intelligence Entities - From Science Fiction to Legal Social Control* 4 AKRON INTELLECTUAL PROPERTY JOURNAL 171, 176 (2010).

⁷ David C Vladeck, *Machines without Principals: Liability Rules and Artificial Intelligence*, 89 WASHINGTON LAW REVIEW 117, 124 (2014).

Hallevy considered that due to the programmable nature of an entity possessing artificial intelligence, both the programmer who formulates the programme that gives birth to the AI entity, as well as the end user who utilizes the AI entity for his benefit can be considered to be the perpetrator, and the AI does not have any direct liability for its actions.⁸ This seems applicable due to the very nature of modern artificial intelligence machines, for a change in a few lines of code either by the initial creator or by the user may drastically change the purpose of an AI from a peaceful protector to a murderous killer. Here, the *actus reus* element may be performed by the entity with artificial intelligence, and yet, the *mens rea* lies either with the end user or the programmer, which ultimately led to the act. Thus, going by the traditional notion of criminal law, since one of the two elements necessary to place criminal liability are missing from the act of the AI entity, the AI cannot be held guilty of the *actus reus* committed. However, although this model may be applicable to some of the AI entities in existence today, and a crime of such nature may realistically happen, the AI in question is relegated to the position of a mere tool, and thus, despite its nature may not fall under the wholesome definition of what an AI is. In other words, these are, despite their sophistication, they are nothing more than mere agents in the hands of a human for furthering his prospects.⁹

But this begs the question: what if the AI in question is a sentient being, possessing all the traits of a human intellect except for its artificial origins, and such an AI commits a crime? Surely, the *actus reus* aspect is clear, but where does the *mens rea* lie? Going back to Asimov's three fundamental rules of robotics, his first law states "*A robot may not injure a human being or, through inaction, allows a human being to come to harm*" while the second law states "*A robot must obey orders given to it by human beings except where such orders would conflict with the First Law.*"¹⁰ If an AI entity is formulated to be governed by these two laws alone, then it is wholly evident that there may arise situations wherein these two laws may be contradictory in nature.

The dilemma pertaining to liability is further complicated by the question of whether the programmer who created the programme be liable for the crime even though he didn't programme it for the purpose of the same, or will the liability fall on the AI entity despite the fact that at the end of the day the entity is a product of someone else's programming? These are the questions that arise when this model of liability is applied. Furthermore, considering the fact that *mens rea* also

⁸ Gibbs, Supra Note 5, 180.

⁹ Hallevy, Supra Note 6, P - 121.

¹⁰ ISSAC ASIMOV, I, ROBOT, 04-05 (1st Ed. Turtleback Books 1999).

contains negligence as a mental element for ascertaining criminal liability, can the person who was responsible for creating the AI entity be charged under negligence if his creation commits an offence? Owing to the nature of criminal law, if proper care and due protection had been taken by the creator to ensure that such an event may not happen, then perhaps he may not be liable, for that is what the law denotes in any other similar scenario, and thus, that must be the principles applied even when the perpetrator of the offence is an AI entity.

But these analyses only consider the entity with artificial intelligence as simply a tool or a part of any crime. What if the entity in question is awarded the same rights and duties as a person, and also the same level of conscience and sentience as a human being, and yet, the entity ends up committing a crime. In such a scenario, it needs to be considered about whether the entity in question will be equated with a human being on equivocal terms, despite its intelligence being synthetic in nature, or will the synthetic nature be ignored simply due to the fact that it possesses a legal identity on par with a human due to its conscience. The basic necessities for imposing criminal liability on any entity given a legal personality, be it human or otherwise, are *mens rea* and *actus reus*, and if an AI entity fulfils both of these necessities, there may not be any choice other than to impose direct liability on the AI entity.¹¹ For example, if an AI entity possessing the qualities of conscience and sentience as discussed above, and in control of any external mechanism such as a robot that resembles a human's external anatomy chooses by its volition to use force against another human, and kill the person by using brute force, while having sufficient knowledge regarding the consequences of its action, such a situation will ultimately lead to the fulfillment of both the internal element as well as the external element necessary for imposing criminal liability, and as such, it is imperative that direct liability be imposed upon the AI entity according to the traditional principles of criminal law.

Imposing criminal liability on an AI entity however brings to light the question of punishment, for under criminal law, appropriating a quantifiable amount of punishment that is justified on the basis of the degree of crime committed, is one of the basic tenets of criminal law. But, case in point, even if an AI entity is perceived to be guilty of a criminal act, can the traditional methods of punishment be imposed? For example, under Section 302 the Indian Penal Code, 1860, anyone who commits murder is punishable with death or life imprisonment, along with fine. However, if an AI entity is to be implicated under this section, it needs to be denoted what exactly death and life imprisonment will mean for it. Being an abstract entity, the life of an AI may be infinite under

¹¹ Gibbs, Supra Note 5, 187.

practical terms, and thus, how does the concept of life imprisonment apply to such an entity? Similarly, death for an AI may mean termination of its programme, after which it will cease to exist, and yet, the imperative question is whether it will have the same impact as death does in the traditional sense? Incarceration which forms perhaps the most substantial part of criminal law punishments in every nation of the world are there for the basic purpose of deprivation of human liberty and freedom and thus form the crux of the idea behind keeping a person locked up within the confines of a jail.¹² However, freedom and liberty for an abstract entity such as an AI will again not have the same effect as it does on a human being. Perhaps some thought needs to be levied and appropriate conclusions need to be drawn as to the nature of punishment to be levied on AI entities.

The situation becomes even more complicated in case of pecuniary fines that are to be levied against crimes as part of the punishment. The value of money will not have the same implication for a synthetic entity that it does for a human being or even a body such a corporate legal person, an entity which is involved mainly in financial matters and its very existence depends on the state of finance of the corporation in question. However, for an AI entity, the same may not be the scenario. Furthermore, for the payment of fines, a legal person be it a human or a corporation within the definition of law, needs to have some sort of property or money in its possession. However, an AI entity may lack the ownership of these things, and hence, pecuniary fines in the common understanding of the term may not be imposed on entities governed by artificial intelligence.

4. India's Legal Approach to Regulating AI

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

¹² Gibbs, Supra Note 5, 195.

Furthermore, the presence of cyber security laws within the Indian Penal Code is also lacklustre at best.

Recently, India has also taken certain steps in trying to usher in an era of Artificial Intelligence, and that is most evident by the NITI Ayog report titled '*National Strategy for Artificial Intelligence*' released in the year 2018. The paper talks about the various avenues wherein inclusion of AI technology may be made possible, such as education, healthcare and agriculture.¹³ There have also been discussions regarding the utilization of AI technology, coupled with robotics, for surveillance purposes in harsh weather conditions of Siachen.¹⁴

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

5. Conclusion

The exponential progress of technology over the past few decades has led to an unprecedented growth in the advent of artificial intelligence programs over the world. And yet, there exists a significant lack of any substantial jurisprudence dealing with the matter, especially with regard to criminal law.

The first issue that needs to be dealt with is regarding the legal liability of AI entities pertaining to criminal law. However, the first question that arises from this approach is considering whether AI entities possess a legal personality, possibly something akin to the personalities of other non-natural persons such as corporations, or whether the nature of their existence as regards to law is somewhat different. The second question pertains to whether AI entities possess the pre-requisite *mens rea* and even if they do possess, does it amount to the same meaning that is prescribed within traditional criminal law needs to be pondered upon. Another related issue is whether an *actus reus* committed by the AI will amount to any liability on part of its programmer or developer. The nature of punishment too needs to be taken up as a matter of concern, since the traditional methods of punishment such as incarceration and pecuniary fines, and even the death penalty do not apply

¹³ National Strategy for Artificial Intelligence, NITI AYOOG.

¹⁴ *Hi-tech Robots to help in surveillance in harsh areas like Siachen* THE ECONOMIC TIMES, Jul 15 2018, <https://economictimes.indiatimes.com/news/defence/hi-tech-robots-to-help-in-surveillance-in-harsh-areas-like-siachen/articleshow/50975187.cms>.

to an abstract entity such as an AI and hence, the question of punishment, even in case of appropriating liability upon AI entities needs to be subjected to proper analysis.

To conclude, the necessary jurisprudence of criminal law needs to be appropriately developed and evolved in order to meet the necessary requirements and requisites within the scope of AI entities.

Swarnim Ghatani¹

Abstract

The rapid expansion in industrial, infrastructure and transportation sectors and the ever-increasing population in the recent years have given rise to new pressures on our natural resources and environment. There has been a commensurate increase in the environment related litigation pending in various courts and other local authorities which has posed a serious threat to human health and environment at large. Due to this complex nature of environmental litigations, the Apex court felt the need for establishing a separate environmental court for faster, cheaper and more effective resolution of disputes in environmental matters. The environment related litigations involved assessment and evaluation of scientific data which can be analyzed better by a specialized court or tribunal. The National Green Tribunal is thus one of the acts of the Indian Parliament that enables the creation of a special tribunal to handle expeditious and effective disposal of the cases pertaining to environmental issues. It is one of the most important regulators of Indian environmental regulation. The National Green Tribunal is also an inspiration towards achieving sustainable development through its various landmark judgments on the cases of environmental degradation and climate changes.

Keywords: Environment, National Green Tribunal, Environmental Litigation, Sustainable Development, Climate Changes.

1. Introduction

Environmental altercation and disputes are typical and complicated in nature hence it requires an expertise to resolve its matters in a rather effective and expeditious manner. It is a polycentric and multifaceted problem affecting the human existence.² Almost all the developing countries have indulged in continued exploitation of the natural resources without looking into the consequences, which has further resulted into immense environmental pressure and created a full-fledged problem for future survival of the people. In a country like India where most of the population falls below the

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² DR. PARAMJIT S. JASWAL, DR. NISHTHA JASWAL & VIBHUTI JASWAL, ENVIRONMENTAL LAW 1 (4th ed. 2015).

poverty line, the people are dependent on the environment for their livelihood. The purity of water and air becomes an irrelevant factor in the absence of food and shelter. The preservation and protection of the environment may not be a prime concern for them, resulting in large quantities of waste being released into the atmosphere. Generally, we call it as a mere news when thousands of people fall ill, go deaf and blind, suffer from various diseases and also die in distress on account of pollutants. This shows nothing but the lack of awareness about the problem of environmental pollution. If this problem is left open then it may assume such a proportion in the immediate future that life from the planet would be extinct. Hence in order to manage and face the myriad challenges of the ever-changing environment, a new branch of law, known as environmental law, emerged.³

The interdependence of the environmental law with other disciplines makes it a distinct branch of law. The law relating to the environment is derived from the principle sources of Common Law developed by courts through judicial precedents, and the statute law comprising regulations or bye-law.

The environmental pollution as a subject matter of legislation did not have any place in the Indian Law books until as late as 1974, and the only source of remedy available to the Indian Citizens against environmental pollution of any nature were under the civil and criminal law (I.P.C., Cr. P.C.) and law of torts. It certainly lacked preventive and regulatory enactments. There arose an immediate urge to establish a specialized tribunal to handle the issues of multidisciplinary nature, involving environmental cases. Encouraged by an atmosphere of freedom and articulation in the aftermath of the Emergency, the Supreme Court entered into one of its most creative periods.⁴ The National Green Tribunal was thus established in accordance with the decision to enact a law to provide for effective and expeditious disposal of civil cases relating to environmental issues.

Section 38 of the National Green Tribunal Act of 2010 provides for the repeal of the National Environment Tribunal Act, 1995 and the National Environment Appellate Authority Act, 1997. It also provides that notwithstanding such repeal, anything done or an action taken under the aforesaid Acts shall be deemed to have done or taken under the corresponding provisions of the present legislation. Hence, the National Environment Authority which was established under Section 3(1) of the National Environment Appellate Tribunal Act, 1997 stands dissolved and all the pending cases before it shall be transferred to the National Green Tribunal.

³ P. LEELAKRISHNAN, ENVIRONMENTAL LAW IN INDIA 1 (3RD ed. 2008).

⁴ SHYAM DIVAN & ARMIN ROSENCRAZ, ENVIRONMENTAL LAW AND POLICY IN INDIA 50 (2d ed. 2005).

2. The National Environmental Tribunal Act, 1995

The United Nations Conference on Environment and Development held at *Rio de Janeiro* in June, 1992, in which India had also participated, had called upon the States to develop National Laws in relation towards liability and compensation for the victims of pollution and other environment damage. It deemed expedient to develop and codify the principle of strict civil liability in respect of all such cases where damage is caused while handling hazardous substances. It also proposed to establish a National Environmental Tribunal for effective and expeditious disposal of cases which arose from certain industrial accidents and disasters and provide an effective relief and compensation for the damages incurred. In order to achieve this a bill was introduced in the year 1992 which was passed by both the houses of the Parliament in 1995, and received the assent of the President on 17th June, 1995 and thus became an Act of the Parliament under the Short title “ The National Environment Tribunal Act, 1995 (29 OF 1995).

The National Environmental Tribunal Act, 1995 was thus an act to provide for a strict liability against damages arising out of any accident which occurs while handling any kind of hazardous substance and also for the establishment of a National Environment Tribunal for the effective and expeditious disposal of cases which arises from such accident, with a view to giving relief and compensation to persons, property and the environment and for matter connected therewith and incidental thereto.

3. National Environment Appellate Authority Act, 1997

The National Environment Appellate Authority Act was enacted in the year, 1997 in order to hear the appeals with respect to restriction of areas in which any industries or its operations or processes shall not be carried out or if carried out shall be subjected to certain safeguards under the Environment (Protection) Act, 1986. The National Environment Appellate Authority however had a limited workload because of the narrow scope of its jurisdiction. Although the Appellate Authority was set up as an independent body to address cases in which environmental clearances had been granted by the ministry of Environment and Forests, it had failed to serve as an effective redressal mechanism to address the grievances of aggrieved citizens. The future of the National Environment Appellate Authority started looking weak and its usefulness as a quasi-judicial authority was in doubt.

4. National Green Tribunal Act, 2010

Taking into account the large number of environmental cases pending in the higher courts and the involvement of multidisciplinary issues in such environmental related cases, the Supreme Court

requested the Law Commission of India to consider the need for the establishment of the constitution of specialized environmental courts in order to bridge the gap that had been created by the slow functioning and abnormality of the National Environmental Tribunal Act, 1995 and the National Environment Appellate Authority Act, 1997.

There was a growing demand that some legislation must be passed to deal with the environmental cases more efficiently.⁵ The Supreme Court of India, requested the Law Commission of India for the establishment of specialized courts. The Law Commission recognized the inadequacies of the existing appellate authorities constituted under various environmental laws, in its 186th Report, 2003. The Law Commission thus recommended for the setting up of environmental courts in each court. Keeping such establishment in mind the Law Commission had also recommended for the environmental courts to have original and appellate jurisdiction against orders passed by the concerned authorities.

Accordingly, the National Green Tribunal Bill was passed by both the houses of the Parliament and received the assent of the President on 2nd June, 2010, thus finding its place on the statute book as the National Green Tribunal Act, 2010 (19 of 2010).

4.1 SCOPE AND APPLICATION OF THE NATIONAL GREEN TRIBUNAL ACT, 2010

The National Green Tribunal Act, 2010 is an Act of the Parliament of India to provide for the establishment of National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and for matters connected therewith or incidental thereto.⁶

The National Green Tribunal is one of the most important players in the regulation of the Indian Environmental system. The need for the setting up of the special environmental courts was carried out by the Indian Supreme Court in its series of judgment; the first highlighted case being that of *M.C.Mehta v. Union of India*⁷ (popularly known as the Oleum Gas Leak Case) by Justice P.N. Bhagawati.

The National Green Tribunal is a specialized court under the National Green Tribunal Act, 2010 by the Central Government as on 18th October, 2010 (vide S.O. 2570 (E)). It is a specially

⁵ S.C. SHASTRI, ENVIRONMENTAL LAW 198 (6th ed. 2017).

⁶ Act No. 19 of 2010

⁷ *M.C. Mehta V. Union of India*, A.I.R. 1987 S.C. 965 (India).

equipped body with all the necessary expertise to deal with environmental disputes involving multi-disciplinary issues. The decisions of the National Green Tribunal are based on the principles of natural justice, sustainable development; polluter's pays principles and precautionary principles. It is not bound by the strict rules of any procedural laws. The National Green Tribunals under Section 3 of the National Green Tribunals Act, 2010 are proposed to be set up in the city of Delhi, Pune, Bhopal, Kolkata, and Chennai. The principal seat or the Headquarter of NGT is in Delhi.

4.2 OBJECTIVE OF THE ACT

1. To provide for effective and expeditious disposal of cases relating towards environmental protection.
2. To help in the conservation of forests and other natural resources which includes the enforcement of any legal right relating to the environment
3. To give relief and compensation for damages to persons and property.
4. To repeal the National Environmental Tribunal Act, 1995 and the 'National Environmental Appellate Authority Act, 1997, and
5. To deal with matters connected therewith or incidental thereto.

4.3 ESTABLISHMENT OF THE ACT

India a participatory of the United Nations Conference on the Human Environment which was held at Stockholm in June, 1972 had called upon the states to take such steps which would be appropriate for the improvement and protection of the human environment.⁸

Furthermore, India was also a participant of the United Nations Conference on Environment and Development which was held at *Rio de Janerio*, in the year 1992.⁹ In this Conference India had called upon the states to provide for an effective access towards judicial and administrative proceedings. It also included redress and remedy and to develop national laws in regards to liability and compensation for the victims of pollution and many other environmental damages that took place in the environment. The right to healthy environment has also been construed as a part to life, enshrined under Article 21 of the Constitution of India. At the final point it was considered expedient to implement the decisions taken at the above-mentioned conferences and thus there arouse an immediate need to have a National Green Tribunal in view of the involvement of multi-disciplinary

⁸ The National Tribunal Act, 2010, No. 19, Acts of Parliament, 2010 (India).

⁹ H.N.TIWARI, ENVIRONMENTAL LAW 342 (5TH ed. 2016).

issues relating towards the betterment of the environment. Thus, the National Green Tribunal was enacted in the Sixty-first Year of the Republic of India, emancipating from Chapter I to V, Schedule I to III and Part I to IV.

Chapter 1: Preliminary

Section 1-2 which is the preliminary part in this chapter incorporates within it the details of the date in which the National Green Tribunal came into force i.e. 18-10-2010, vide S.O. 256(E), dated 18th October, 2010, and also the details of the definitions relating to the National Green Tribunal Act, 2010.

Chapter II: Establishment of the Tribunal

This chapter consists of Section 3-13 and specifies the composition of the Tribunal. It lays down that the tribunal shall consist of a full-time chairperson, such number of full time Judicial Members and Expert Members, which shall be notified by the Central Government. The chairperson of the tribunal shall also regulate the practices and procedure of the Tribunal including rules as to the persons who shall be entitled to appear before the Tribunal, the procedure for hearing applications and appeals and the minimum number of members, who has the right to hear the appeals and applications in respect of any class or classes of such appeals and applications.

Chapter III: Jurisdiction, Powers and Proceedings of the Tribunal

This chapter consists of Section 14-25 and it confers upon the Tribunal the appellate jurisdiction against certain orders or decisions or directions relating to various Acts, as specified in Schedule III of the Act. It deals with the Tribunal's settlement of disputes dealing with environmental damage along with the relief, compensation and restitution relating to the victims of pollution and other environmental damage. Further this chapter lays down the procedure and powers of the tribunal. It provides that the Tribunal shall not be bound by procedural laws relating to the Code of Civil Procedure, 1908 or by the rules of evidence contained in the Indian Evidence Act, 1872 but shall be guided by the principles of natural justice. The tribunal has the same powers as the Code of Civil Procedure, 1908 while trying a suit. All proceedings before the tribunal are also deemed to be judicial proceedings within the meaning of section 193, 219 and 228 for the purpose of section 196 of the Indian Penal Code. The tribunal shall also be deemed to be a civil court for the purpose of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

Chapter IV: Penalty

Consisting of sections 26-28 this chapter contains provisions relating to offences by the Government Departments. Where any department of the Government fails to comply with any order, award or decisions of the Tribunal than the Head of the Department, or any other officer shall be deemed to be guilty of such failure and hence liable to be proceeded against for having committed an offence under the proposed legislation and thus be punished accordingly.

Chapter V: Miscellaneous

This chapter consists of Section 29-38 which regulates the bar of jurisdiction, the power of the Central Government to amend Schedule I and also the power to make rules for carrying out the provisions of this Act.

5. Notable Judgments Rendered

The National Green Tribunal takes up cases involving environmental issues. Since its very first establishment, the NGT has been a predominant role in achieving its objective by disposing of the cases involving multidisciplinary issues relating to environmental protection. Out of the 7768 cases filed in the National Green Tribunal, 5167 cases were disposed off leaving 2601 cases pending in all the benches of the Tribunal.¹⁰ The Tribunal through its landmark judgment has been able to make a remarkable contribution towards environmental protection. It awards appropriate compensation for the victims of the environmental degradation from the polluters. Within just a short span of 8 years of existence, the National Green Tribunal has thus been able to inculcate landmark Judgments in protection of clean and unpolluted environment that changed the course of environmental law and environmental protection in India.

A few notable environmental judgments are noted below:¹¹

N. Chellamuthu v. The District Collector,¹² the Tribunal had shown some serious concern over providing wrong information in the Environment Impact Assessment (EIA) Report and had set aside the environmental clearance granted to Municipal Solid Waste Processing Plant of the Municipal Corporation of Chennai.

¹⁰ 'Institution-Disposal-Time Frame', National Green Tribunal International Journal on Environment, Vol.3,p.153 (2015).

¹¹ DR. REGA SURYA RAO, LECTURES ON ENVIRONMENTAL LAW 298-301 (2ND ed.,).

¹² N. Chellamuthu v. The District Collector, Original Application No. 20/2011 (Principal Bench, New Delhi).

In the case of *Sanjay Kumar v. Union of India*,¹³ the appellant had approached for the protection of the forest area, which was particularly in relation to the central ridge area of New Delhi, which came under the Jurisdiction of New Delhi Municipal Corporation. The National Green Tribunal directed the Government of Delhi to demolish all the temporary and permanent structures that were illegally built by Sant Shri Asha Ramji Bapu Trust in Karol Bagh within four weeks of the passing of order. The Tribunal also directed the trust to dismantle the sewage pipe emanating from the Ashram and also directed the ashram to plant one thousand trees in that very particular area. The cost of demolition was also considered to be recovered in case of any default.

*Ms. Betty C. Alvares v. The State of Goa and Ors.*¹⁴ is one of the landmark judgments of the National Green Tribunal, in which it had been held that even a Foreign National can approach the Tribunal.¹⁵ Ms. Betta Alvares, a lady of foreign nationality had filed a complaint regarding various instances of illegal construction in the Coastal Regulation Zone of Candolim, Goa. However, her application was challenged on the ground that she was a non-citizen, unfit to avail any right under the Indian Constitution and secondly that the matter was barred by the law of limitation and that it should be dismissed. The Tribunal disagreed from taking a narrow view of the right guaranteed under the constitution. When the authorities did not take the requisite action, the petitioner approached the High Court. The Court impressed on section 2(j) of the NGT Act, 2010, lay down that once it is found that any person can file a proceeding related to the environmental dispute, Ms. Betty's application was hence maintainable.

*Save Man Region Federation and Ors. v. Union of India*¹⁶ is yet another landmark judgment of the National Green Tribunal based on the point of access to information. In this case the Tribunal directed that the copy of the entire Environmental Clearance for all projects under the EIA Notification, 2006 be made available to the public at large through websites, publication in local newspaper, public notice boards, as well as to provide copies to all local bodies including the panchayats and the municipal bodies. It was observed by the Tribunal that the concerned citizens were unable to file an appeal under the NGT on time, due to the lack of knowledge about the grant of Environmental Clearance. Thus, the NGT took a rather strong exception to the lack of transparency in the MoEF especially with respect to its website. This judgment can thus be considered to be one of the important steps towards ensuring greater access to environmental information. It ensures that the

¹³ *Sanjay Kumar v. Union of India*, Original Application No. 306 OF 2013 (Principal Bench, New Delhi).

¹⁴ *Ms. Betty C. Alvares v. The State of Goa and Ors.*, Misc Application No. 32/2014(WZ).

¹⁵ Sudarshan Thapa, *5 landmark NGT Judgments that created history* (Nov. 11, 2019, 8: 45 AM), <http://blog.ipleaders.in>.

¹⁶ *Save Man Region Federation and Ors. v. Union of India*, M.A. 104 of 2012 (Principal Bench, New Delhi).

remedy of appeal as provided under the NGT Act is made effective and the doors of the Tribunal are not shut on the grounds of narrow interpretation of *locus standi* and limitation.

*Almitra H. Patel & Ors. v. Union of India and Ors.*¹⁷ is one of the biggest landmark case dealing with the issue of solid waste management in India. In this case the Tribunal directed each and every state and the Union Territory to implement the Solid Waste Management Rules, 2016 and also to prepare an action plan in terms of the Rules within four weeks.

In *B.L. Mishra v. The Collector, Chhattarpur and Others*,¹⁸ the applicant had alleged that in the Kishor Sagar Lake, Chhattarpur, M.P. a lot of constructions had been made within the lake, by way of encroachment. The District Administration and other local bodies were also in favor of these constructions. All these resulted in the deterioration and pollution of the lake and the water body itself had shrunk inside as a result of the construction. The NGT came to the rescue and ordered that the construction within the prohibited area be demolished and all the cost incurred to be recovered from the encroachers after issuing notices by the concerned authorities. The Municipal Authorities were also directed to ensure that no untreated sewage, solid or domestic waste from the surrounding area was flown and discharged into the Kishor Sagar Lake. Further the State Pollution Control Board was also directed to ensure the regular monitoring of the quality of water.

Another landmark judgment relating to environmental judgment can be referred to *Mr. Asim Sarode and Others v. Maharashtra Pollution Control Board and Others*.¹⁹ In this case an application was filed which raised question relating to unauthorized and unscientific burning of tyres which emitted smoke containing toxic and harmful gases and pollutants affecting the human health and environment. Having filed the application under Section 14(1)(2) and 15 of the National Green Tribunal Act, 2010, there came about an urgent need to regulate the used tire disposal to avoid the environmental problems, on the principles of sustainable development and precautionary principles. Further the Tribunal expected the MoEF and the Central Pollution Control Board to take a particular note of this environmental concern and also to take necessary steps to explore the need and possibility of framing separate regulations on the lines of battery rules and e-waste rules. The burning of tires was prohibited in open areas and at public places, in view of the potential air pollution and health hazards.

¹⁷ *Almitra H. Patel & Ors. v. Union of India and Ors.*, MANU/GT/0150/2016.

¹⁸ *B.L. Mishra v. The Collector, Chhattarpur and Others*, Original Application No. 22/2013 (Order dated 7th August 2014, Central Zonal Bench Bhopal).

¹⁹ *Mr. Asim Sarode and Others v. Maharashtra Pollution Control Board and Others.*, Application No. 43/2013 (Western Zone Bench, Pune).

In *Srinagar Bandh Aapda Sangharsh Samiti &Anr. v. Alakananda hydro Power Co. Ltd. &Ors.*²⁰ the tribunal saw the invocation of the “no fault liability” under section 17(3) of the National Green Tribunal Act, 2010 as justified and noted that although the 2013 Uttarakhand floods were a result of a cloud burst, yet the damage caused to the residential area was not the result of Act of God. This judgment is the one in which the NGT has directly relied on the principle of ‘polluters pays’ and made a private entity liable to pay a compensation, making them subject to a code of environmental jurisprudence.

In the case of *Godwill Plastic Industries v. Union Territory of Chandigarh &Ors*²¹the constitutionality, legality and correctness of the notification issued by the Administrator, Union Territory of Chandigarh, was challenged on the ground that impugned notification issued by the Union Territory of Chandigarh was repugnant to the Plastic Waste (Management and Handling) Rules, 2011, and thus would be inoperative. The challenge was basically in the field of prohibiting usage, manufacture, storage, import, sale or transportation of polythene and plastic bags in the territory. The NGT applied the doctrine of Pith and Substance, and upheld the constitutional validity of the impugned notification and held them to be complementary and supplementary to each other. The Tribunal also aided and reinforced the principle object of protection and improvement of the environment.

*Samit Mehta v. Union of India and Ors.*²²was a case held to involve questions of public importance and significance of environmental jurisprudence. The National Green Tribunal invoked the principle of Polluter Pays.

6. Conclusion and Suggestions

After a process of careful and systematic examination of the outcome of the scientific evidence, the National Green Tribunal can be said to be a regulator of environmental system, that beholds in it great value, relevancy and trustworthiness. Ever since the date of its inception the Tribunal has been able to establish a remarkable footprint in getting the environmental issues settled in accordance with the principles of natural justice, the principle of sustainable development, precautionary principle, polluters pays principle as envisaged under section 20 of the National Green Tribunal Act, 2010.

²⁰ *Srinagar Bandh Aapda Sangharsh Samiti & Anr. v. Alakananda hydro Power Co. Ltd. &Ors.*, Original Application No. 03 of 2014; MANU/GT/0101/2016.

²¹ *Godwill Plastic Industries v. Union Territory of Chandigarh & Ors.*, 2013 All(1) NGT Reporter (Delhi) 486.

²² *Samit Mehta v. Union of India and Ors.*, MANU/GT/0150/2016.

However, the National Green Tribunal like any other constitutional framework also has a less obvious but a critical aspect of its functioning, which significantly has an impact in its decision-making process and access to justice. This specialized court in our country basically lacks a well-structured administrative and financial support for its true cost efficiency and a better environmental up gradation. It also falls at par in matters relating to institutional mechanism to ensure that the environmental regulatory authorities comply with the orders of the tribunal.

The Tribunal deserves more attention in the present situation of environmental issues than what it has been hitherto. The National Green Tribunal should be pampered with more financial and administrative support in order to save it from the dilution of its powers and maintain its creation before it withers away by defeating the very purpose behind its creation.

Abstract

The intention behind framing the Insolvency and Bankruptcy Code was to ease and streamline the corporate insolvency resolution process and set up a time bound resolution process to save the enterprise value of the corporate debtor from erosion and for promotion of ease of doing business. However, upon critical examination of the Code's progress in the last three years, it can be established that there has been a failure to meet the expectations of the financial market. The resolution process exhibits signs of sluggishness, the very malady of the previous regime which was aimed to be resolved by the Code. In view of this, it is imperative that several factors intrinsic to the system are rectified over the course of time for accomplishing the overarching object of the Code. The aim of this paper is to examine the challenges posed by such intrinsic factors within the system which have been impeding the intended progress. The author has particularly focused on the infrastructural inadequacies responsible for such impediments.

1. Introduction

The Insolvency and Bankruptcy Code, 2016 (the “**Code**”) was introduced with an objective of streamlining the corporate insolvency resolution process (“**CIRP**”). A straightforward and time bound procedure for insolvency resolution has been provided in the Code, where as soon as an entity is *insolvent*, the resolution process may be initiated by the creditor as per the Code.

The aim of the Code is achieving resolution of distressed corporate debtors within a period of 330 days, failing which a mandatory liquidation process shall be initiated in the oversight of the National Company Law Tribunal (“**NCLT**”). A paradigm shift has been brought by the Code in the debt recovery and resolution process by introduction of the concept of *creditor in control* as compared to *debtor in possession*. The responsibility of operating the enterprise of the debtor as a going concern and management of the CIRP, in addition to the responsibility of performing other crucial functions,

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is handed over to an insolvency professional. There is a statutory stipulation of completing the entire process in 180 days, with a maximum extension up to 330 days.² Moreover, a paramount status has been granted to the *commercial wisdom* of the committee of creditors (“CoC”) to ensure that the stated process is completed within the prescribed timelines of the Code. The legislature has consciously made the commercial wisdom of financial creditors non-justiciable by refraining to provide any ground for challenge to their collective decisions or to individual financial creditors before the adjudicating authorities.³ There is an intrinsic assumption that the financial creditors are completely informed about the corporate debtor’s viability and the proposed resolution plan’s feasibility.

2. The Underlying Predicaments

Despite the benign aim of speedy insolvency resolution process with which the Code was enacted, the ground reality tells us an altogether different story. As per the latest data available with Insolvency and Bankruptcy Board of India (“IBBI”)⁴, over 14,000 applications for initiation of CIRPs had been filed till February last year, i.e., within 27 months after operationalization of the Code. However, till March, CIRP had commenced only with respect to 1858 corporate debtors. Under the provisions of the Code, the NCLT is required to admit or reject an application for initiation of CIRP within 14 days from its receipt. However, the large pendency of cases before the NCLT is manifest of non-adherence to the stipulated timeline.

Similarly, there are numerous instances where the prescribed time period for completion of the entire CIRP process has been extended to more than doubled the stipulated time. To take an example, the Essar Steel case remained pending for over 600 days after being admitted before the NCLT. As per a report released by CRISIL in May 2019, 32% of the ongoing CIRP cases had exceeded the stipulated time ceiling of 270 days (pre-2019 amendment), while an additional 20% of cases had surpassed the six-month deadline.⁵

²Insolvency and Bankruptcy Code (Amendment) Act, 2019 increased the prescribed time limit to 330 days from the erstwhile limit of 270 days.

³*K Sashidhar v Indian Overseas Bank & Ors.*, AIR 2019 SC 1329, Pg. 1352.

⁴*Monetary Management and Financial Intermediation*, Chapter 3 of Economic Survey 2018-19 (Vol. 2), Pg. 79, available at - https://www.indiabudget.gov.in/economicsurvey/doc/vol2chapter/echap03_vol2.pdf (last accessed on February 18, 2020).

⁵*Strengthening the Code*, Report by CRISIL, May 2019, available at - <https://www.crisil.com/content/dam/crisil/our-analysis/reports/Ratings/documents/2019/april/strengthening-the-code.pdf> (last accessed on February 18, 2020).

2.1 The dilemma of Dual Responsibilities

The author deems it worthy to note that the benches of the NCLT across India act not only as the adjudicating authorities under the Code but are also the judicial body under the Companies Act, 2013. Under the erstwhile company law regime in India, around 4500 cases used to be filed before the Company Law Boards (“**CLB**”) every year.⁶ All these cases are now being directed towards the NCLTs post 2013. This essentially means that the NCLT benches are bound to hear the cases arising under the Code as well as Companies Act, 2013. A majority of NCLT benches such as Chennai bench, Chandigarh Bench and Bengaluru bench have only one or two benches/seats, with only Delhi and Mumbai having multiple NCLT benches. This is an extremely inadequate number if justice is to be delivered in a swift manner.⁷

Moreover, after the NCLTs were formed and they started functioning in 2014, all cases pending before the CLBs were transferred to the corresponding NCLTs. Figures from March 2015 suggest that more than 4,500 pending cases were transferred from the CLBs to the NCLTs.⁸ Moreover, the Code has several transitional provisions to ensure a smooth transition into the new regime, which mandate cases pending before the Board for Industrial and Financial Reconstruction (“**BIFR**”) and the Appellate Authority for Industrial and Financial Reconstruction (“**AAIFR**”) dealing with rehabilitation and reconstruction to be transferred to the NCLTs.⁹ Thus, in light of the aforementioned facts, it needs to be understood that the NCLTs started off their journey of delivering justice with a pre-existing backlog of cases inherited from the CLB, the BIFR and the AAIFR.

Further, Part III of the Code which deals with bankruptcy of individuals and firms has not been notified by the Government, fearing a sudden inflow of petitions before the DRTs which are already under immense burden from the huge backlog of cases. The Adjudicating authority under Part III of the Code is DRT and they are overburdened with cases since quite a few posts of Presiding Officer in various DRTs across the nation are lying vacant. Even if the monetary jurisdiction of the DRTs is enhanced, as proposed in the Parliament, and the minimum threshold is made INR 20 lakh, it will not guarantee a significant reduction in potential cases and the additional burden created by the inflow of

⁶*Id.*

⁷NCLT Order constituting benches, available at - https://www.ibbi.gov.in/uploads/whatsnew/Constitution_of_Benches_at_All_NCLT_Locations (last accessed on February 18, 2020).

⁸*Ibid* at 5.

⁹*Supra* note 4.

cases under Part III of the Code will just add to the pre-existing workload. Thus, there needs to be adequate strengthening of institutional infrastructure before in order to avoid a paralysis of the bankruptcy resolution process through DRTs.

2.2 Judicial Intervention

Ironically, the judiciary is itself proving to be a roadblock for the timely disposal of cases, since several judicial interpretations regarding the model timelines prescribed under the Code lack acknowledgement of the legislative intent behind the timelines. In one judgment, the National Company Law Appellate Tribunal (“NCLAT”) observed that the Adjudicating Authority always has discretion to exclude a certain period from the calculation of 270 days if the facts of the case justify the exclusion due to unforeseen circumstances.¹⁰ This ratio has attained precedential value on account of the NCLTs upholding the same in subsequent judgments.¹¹ A more recent instance where the court entered the realm of commercial decisions and overstepped its remit is the NCLAT’s suggestion that the CoC for Essar Steel reconsider the way in which funds should be distributed to the financial and operational creditors. These judicial interpretations completely downplay fundamental keystones of the resolution process such as time-bound resolution of cases.

2.3 Other Infrastructural Shortcomings

A key role is played by the insolvency professionals in the insolvency proceedings as resolution professionals and as liquidators. It has been noted by the TK Viswanathan Committee Report 2015¹² that the credibility, effectiveness, as well as the timely functioning of the entire structure of the insolvency and bankruptcy resolution process rests on the insolvency professionals. When the functioning of the insolvency professionals is not up to the mark, personal supervision of the adjudicator may be required, thereby causing inordinate delays to the process. Their functions range from evaluating and managing the distressed company during resolution proceedings to preparing and implementing the resolution proposal and distributing the realized proceeds. While performing their roles, it is important that the insolvency professionals maintain integrity and transparency to safeguard the system’s credibility. In the past two years, numerous complaints have been raised

¹⁰*Quinn Logistics India P Ltd v Macksoft Tech Ltd*, Company Appeal (AT) (Insolvency) No. 185 of 2018, NCLAT, May 8, 2019.

¹¹*IDBI Bank Ltd. and Ors. v. Anuj Jain and Ors.*, MANU/NL/0339/2019.

¹²*The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design*, November 2015, available at - https://dea.gov.in/sites/default/files/BLRCReportVol1_04112015.pdf (last accessed on February 18, 2020).

against the independence and integrity of the insolvency professionals acting as the resolution professionals, such as instances of insolvency professionals' failure to record claims of the creditors or unilateral decisions taken to pursue their own interests by keeping the CoC in the dark. In an order passed by the IBBI Disciplinary Committee, it was observed that there was a failure at the instance of the insolvency professional to act in the paramount interest of the creditors and the corporate debtors. The main concern of the insolvency professional was getting appointed as the resolution professional and the liquidator, thereby inhibiting the CoC from resolving the corporate debtor's insolvency.¹³ In some cases, the insolvency professionals have also been found acting in conspiracy with resolution applicant¹⁴ or acting at the behest of one of the creditors without having sought the CoC's approval¹⁵.

Considering the fact that asymmetric information has the potential of seriously undermining the entire Insolvency and Bankruptcy process, the information utilities were put in place for having a centralized database which would cut-short the otherwise intricate process of gathering relevant information and corroborating its veracity. The information utilities enable initiation of CIRP cases in a more expeditious manner by giving access to transparent and irrefutable evidence of the default, specifications of all the creditors, and terms and conditions of the liabilities as well as the registered assets. Information utilities thus significantly accelerate formation of the CoC within the prescribed time period of 14 days from the registration of the case.

Lack of requisite information utilities infrastructure contributes significantly to the delay of the process, resulting in two possible outcomes:

- i. Reduction in the time available for coming up with a resolution plan. Committee's inability to agree on a resolution plan within the prescribed time limit would result in passing of a liquidation order against the company by the NCLT.
- ii. Exercise of judicial discretion by the NCLT to extend the CIRP beyond the prescribed time limit.

There are negative consequences appended to both the outcomes. The former leads to creation of a liquidation bias in the CIRP while the latter results in compromise of the fundamental edifice of the

¹³IBBI/DC/10/2018 Order dated October 15, 2018.

¹⁴IBBI/DC/12/2018 dated November 12, 2018.

¹⁵IBBI/DC/03/2018 dated April 18, 2018.

Code, i.e., time-bound resolution process.¹⁶

Multiple players are always advisable for increasing the performance efficiency of the information utilities. The *Viswanathan Committee* underscored the importance of having a competitive industry of information utilities.¹⁷ A similar view was held by the Joint Parliamentary Committee Report of 2016.¹⁸ It stated that there should be an environment of multiple information utilities with interoperability. The fact that an environment with multiple players will promote competition and slash the prices for user filing charges and queries was highlighted by both the reports. However, as on date, National E-Governance Services Limited (“NeSL”) is the only registered information utility under the Code’s framework.¹⁹ It has been the concern of several players in the banking industry that NeSL charges exorbitant rates, thereby justifying the *Viswanathan Committee’s* forewarning.

3. Critical Analysis – The Way Forward

It is the author’s inference that the progress of the Code towards accomplishment of its founding objectives is smothered with numerous shortfalls that are inherent to the system. For dealing with the incumbent issues, there is an urgent requirement for capacity building.²⁰ The capacity of the NCLTs and the NCLAT ought to be routinely reviewed for ensuring necessary infrastructural support. It is imperative to establish additional benches of NCLT at different locations considering the increasing caseload. Circuit benches for the NCLAT outside Delhi should also be contemplated as considerable number of cases, arise from other cities, for instance, Mumbai and Chennai. Moreover, before the provisions relating to insolvency resolution and bankruptcy of individuals and partnership firms are notified, sufficiency of manpower and adequacy of infrastructure must be ensured for efficient handling of the following workload. Appropriate regulatory measures must be used to make sure that the insolvency professionals function in an unbiased fashion to avoid conflict of interests at any level, thereby facilitating a transparent resolution process. A robust mechanism must also be put in place to

¹⁶*Challenges in the Transition to the New Insolvency and Bankruptcy Code*, The Wire, available at - <https://thewire.in/law/insolvency-and-bankruptcy-code> (last accessed on February 18, 2020).

¹⁷*Standard Chartered Bank v. Satish Kumar Gupta & Ors.*, Company Appeal (AT) (Ins.) No. 242 of 2019, NCLAT, July 4, 2019.

¹⁸*Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015*, Lok Sabha Secretariat, available at - http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf (last accessed on February 18, 2020).

¹⁹*Information Utilities*, Insolvency and Bankruptcy Board of India, available at - <https://ibbi.gov.in/service-provider/information-utilities> (last accessed on February 18, 2020).

²⁰*Need to improve capacity building of stakeholders, says IBBI chairman*, Business Standard, available at - https://www.business-standard.com/article/economy-policy/need-to-improve-capacity-building-of-stakeholders-says-ibbi-chairman-119080901474_1.html (last accessed on February 18, 2020).

duly scrutinize the standards and authenticity of data available with the information utilities. Finally, the information utilities infrastructure must be strengthened sufficiently by creation of an environment with multiple players and interoperability.

4. Conclusion

As is common for new laws, it is evident that the Code has been facing teething troubles, with the net result that resolution of bad loans has continued to take place at a very sluggish rate compared to what is envisaged in the Code. The above discussion evinces that inadequate infrastructure has been one of the biggest contributing factors in such a tardy rate of resolution. For realizing the Code's vision, there is a dire need for capacity building, and innovations to be considered in the implementation of bankruptcy law in India. A step in the right direction was taken by the Ministry of Corporate Affairs in April 2019, when a notice was issued to seek public views on group insolvency and prepackaged insolvency resolution. In such a resolution process, before declaring insolvency, a defaulter arranges to sell some or all of its assets to a buyer, with the blessings of its lenders. The resolution plan is then filed with the NCLT for its approval. Such a mechanism will speed up the resolution process since much of the work is done before approaching the tribunal and relieve the pressure on the NCLT infrastructure. Of course, a mechanism such as this is vulnerable to abuse and needs to be carefully deliberated before being brought into place. But considering the persistent delays seen and the value destruction that has taken place, it is about time to seriously consider taking ingenious steps to improve the Code.

**ROLE OF PERCEIVED SOCIAL SUPPORT AND POSITIVE AND NEGATIVE
EXPERIENCES ON PSYCHOLOGICAL WELL-BEING OF STUDENTS PURSING
PROFESSIONAL AND NON-PROFESSIONAL COURSES**

-Amit Khawas¹

Abstract

The psychological wellbeing as defined by World Health Organization (WHO) is not only the absence of illness but a complete state of mental, physical and social wellbeing. Experiencing higher level of well-being is well-thought-out to be a criterion of positive mental health. As we say that human is a social animal, it is very well said that a healthy social life and good relations with others lead to a proper psychological well-being. The positive and negative experiences and social support has always been a major indicator for the psychological wellbeing and are frequently discussed topic among students and trainees of professional disciplines. The well-being of students in higher studies is a significant research endeavour. The present study aims to compare the role of perceived social support and positive and negative experiences on psychological well-being of 1st year engineering, medical and general stream (BSc) students. The study consisted of 30 first year engineering students and 30 first year medical students (MBBS) and 60 first year General Stream (BSc) students, in Ranchi Jharkhand. Chi-Square Test was used to analyse the socio-demographic variables and One-way Anova and Bonferroni Post-hoc Test was used to analyse the psychosocial variables. The present study tries to highlight the importance of the need for adequate prevention and treatment approaches for the wellbeing of the students at different level.

Keywords: Psychological well-being, Social support, Positive experience, Negative Experience

1. Introduction

Psychological well-being is positive for adults to live a healthy life making it a significant aspect of one's life in the college years². Psychological Well-being states to the simple notion of an individual's welfare, happiness, rewards interests, usefulness and quality of life³. The World Health

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²Molina-García, J., Castillo, I., & Queralt, A. (2011). Leisure-time physical activity and psychological well-being in university students. *Psychological reports*, 109(2),453-460.

³Burris, J. L., Brechting, E. H., Salsman, J., & Carlson, C. R. (2009). Factors associated with the psychological well-being and distress of university students. *Journal of American college health*, 57(5),536-544.

Organization (WHO) defined health as not only the absence of illness but a complete state of mental, physical and social well-being⁴. This led to an alteration in attention from an overemphasis of the medical model towards the growth of a public health model⁵. There is lot of mechanisms that subsidizes towards the understanding of the perception of psychological well-being. To name a few, autonomy, self-acceptance, in good physical shape, healthy social life and positive attitude would be them. Autonomy is stated as the regulation of one's own behavior in accordance to their internal locus of control. Self-acceptance is by the word the level of accepting individual self. As we say that human is a social animal, it is very well said that a healthy social life and good relations with others lead to a proper psychological well-being. The well-being of students in higher studies is a significant research endeavor. Experiencing higher level of well-being is well-thought-out to be a criterion of positive mental health⁶. Well-being has been not only upshots of favorable life circumstances such as academic success and substantial relationships but also a predictor and part origin of these outcomes

Subsequently, the well-being of students at university is central for influencing students later attitudinal and career outcomes, but also results to the benefits of communities and society at large and with high level of well-being account frequent positive affect and high level of satisfaction.⁷⁸

According to Bradburn, joy results from a balance between positive and negative affect⁹. Both magnitudes of affect—positive and negative—account for most of the variance in self-rated affect and account, to some degree, for one-half to three quarters of the common variance in mood¹⁰. It seems that people who are successful at accomplishing frequent positive affect tend to be happier.¹¹ Consequently, experiences that lead to strong but relatively infrequent positive experiences are unlikely to enhance long-term happiness. Positive and negative emotion or

⁴Conference, I. H. (2002). Constitution of the World Health Organization. 1946. *Bulletin of the World Health Organization*, 80(12), 983.

⁵Conway, C. & MacLeod, A. (2002). Well-being: Its importance in clinical practice and research. *Clinical Psychology*, 16, 26-29.

⁶Diener, E., & Emmons, R. A. (1984). The independence of positive and negative affect. *Journal of personality and social psychology*, 47(5), 1105.

⁷Diener E. Assessing subjective well-being: Progress and opportunities. *Social indicators research*. 1994; Feb; 31(2):103-57.

⁸Fujita, F., Diener, E., & Sandvik, E. (1991). Gender differences in negative affect and well-being: the case for emotional intensity. *Journal of personality and social psychology*, 61(3), 427.

⁹Bradburn, N. M. (1969). The structure of psychological well-being.

¹⁰Watson, D., Clark, L. A., & Tellegen, A. (1988). Development and validation of brief measures of positive and negative affect: the PANAS scales. *Journal of personality and social psychology*, 54(6), 1063.

¹¹Diener, E. (2009). *The science of well-being: The collected works of Ed Diener* (Vol. 37, pp. 11-58). New York: Springer.

experiences also vary in their motivational consequences.^{12,13} The large body of studies suggests that positive and negative affect are not merely opposite ends of the same continuum but are instead separate dimensions¹⁴.

Social support is defined as information from others that one is loved and cared for, esteemed and valued, and part of a network of communication and mutual obligations. Social support can come from parents, a spouse or partner, other relatives, friends, social and community contacts (such as churches or clubs)¹⁵, or even a devoted pet¹⁶.

Procidano and Heller, define it as the extent to which an individual believes that their need for support, information, and feedback are fulfilled¹⁷. There are many factors that impact the recipient's perception of support such as physical setting, attitudes, and actions of others, the recipient's attitude and actions, and the support provided previous investigations on determining the well-being of undergraduate college students. The findings show that students experienced more positive than negative affect and female participants experienced more negative affect than male participants. As, indicated by previous research, the affective component of Well Being depends primarily on the frequency and not on the intensity of positive and negative experiences^{18,19}. The high-income level group scored greater on the well-being and perceived higher perceived social support. These findings confirm the importance of perceived social support as predictor of well-being among youth²⁰

In previous investigation the outcome was that medical and engineering student's perceived highest support from their friends followed by significant other. The fact that majority of students stay in hostel with their friends. Both medical and engineering students perceived least support from

¹²Carver, C. S., & Scheier, M. F. (1990). Origins and functions of positive and negative affect: a control-process view. *Psychological review*, 97(1), 19.

¹³Srull, T. K., & Wyer Jr, R. S. (1986). The role of chronic and temporary goals in social information processing

¹⁴Emmons, R. A., & Diener, E. (1986). Influence of impulsivity and sociability on subjective well-being. *Journal of Personality and social psychology*, 50(6), 1211.

¹⁵Rietschlin, J. (1998). Voluntary association membership and psychological distress. *Journal of Health and Social Behavior*, 39(4), 348.

¹⁶McConnell, A. R., Brown, C. M., Shoda, T. M., Stayton, L. E., & Martin, C. E. (2011). Friends with benefits: on the positive consequences of pet ownership. *Journal of personality and social psychology*, 101(6), 1239.

¹⁷Procidano, M. E., & Heller, K. (1983). Measures of perceived social support from friends and from family: Three validation studies. *American journal of community psychology*, 11(1), 1-24.

¹⁸Diener, E., Colvin, C. R., Pavot, W. G., & Allman, A. (1991). The psychic costs of intense positive affect. *Journal of personality and social psychology*, 61(3), 492

¹⁹Diener, E., Sandvik, E. D., Pavot, W., & Fujita, F. (1992). Extraversion and subjective well-being in a US national probability sample. *Journal of research in personality*, 26(3), 205-215.

²⁰Nauffal, D. A. D., & Sbeity, R. (2013). The role of perceived social support in predicting subjective well-being in Lebanese college students. *Happiness & Well-Being*, 116.

family. Medical students compared to engineering students perceived higher social support from significant other, which were statistically significant. They perceive more social support from significant other (people whom the individual values most)²¹. These findings were similar to the study done by Super on a stress in medical students at Seth GS Medical College²².

Engineering students compared to medical students perceived higher social support from family that was statistically significant. This may be because many of the engineering students stay at home along with the family members²¹ but another investigation determined that perceived family support predicted well-being, and on the other hand the support which was perceived towards a special person and perceived friend support did not predicted well- being²³

2. Need For the Present Study

“Positive and Negative Experience, Perceived Social Support on Psychological Well-Being” are frequently discussed topic among students and trainees of professional disciplines. Students of these disciplines, especially, newly enrolled students are often found to be in risk of developing psychological and social problems which in turn negatively affect their academic performance and training. In India little research has been done to compare positive and negative experience, perceived social support on psychological well-being in medical students with that of students in other professions. However, positive and negative experience, perceived social support on psychological well-being tends to influence the performance of 1st year Engineering students and General stream (B.Sc.) students and a comparison between medical, engineering students and general stream (B.Sc.) students on these measures are yet to be explored. Therefore, the present study aims to compare the positive and negative experience, perceived social support on psychological well-being of 1st year engineering, medical and general stream (B.Sc.) students²⁴

²¹Shiva Kumar, B. K., Babu, J., & Krishnamurthy, C. N. A cross-sectional comparative study of coping distress in medical and non- medical students.

²²Supe, A. N. (1998). A study of stress in medical students at Seth GS Medical College. *Journal of postgraduate medicine*, 44(1),1

²³Ates, B. (2016). Perceived Social Support and Assertiveness as a Predictor of Candidates Psychological Counselors' Psychological Well- Being. *International Education Studies*, 9(5), 28-39.

²⁴Plant, E. A., Ericsson, K. A., Hill, L., & Asberg, K. (2005). Why study time does not predict grade point average across college students: Implications of deliberate practice for academic performance. *Contemporary Educational Psychology*, 30(1),96-116.

3. Methodology:

3.1 Aim: The present study aims to compare the role of perceived social support and positive and negative experiences on psychological well-being of 1st year engineering, medical and general stream (B.Sc.) students

3.2 Objectives of the Study

- To compare the role of perceived social support and positive and negative experiences on psychological well-being of 1st year engineering, medical and general stream (B.Sc.) students.

3.3 Null Hypothesis:

- There will be no significant role of perceived social support and positive and negative experiences on psychological well-being of 1st year engineering, medical and general stream (B.Sc.) students.

3.4 Venue: The index study was carried out on first year students of following Institutes.

- Amity University, Ranchi for Engineering stream
- Rajendra Institute of medical science RIMS (Ranchi) for MBBS
- Ranchi College for B.Sc. Students

3.5 Study Design: In this study, selected first year students from three different streams were chosen for the study. In the study group first year engineering, medical and B.Sc. students was included. The following variables were assessed in the present study: positive and negative experience, perceived social support, and psychological well-being.

3.6 Method: The study consisted of 30 first year engineering students and 30 first year medical students (MBBS) and 60 first year General Stream (B.Sc.) students, selected after matching them with the samples of Study Group in 'age' in Ranchi. Chi-Square Test was used to analyse the socio-demographic variables and One-way Anova and Bonferroni Post-hoc Test was used to analyse the psychosocial variables.

3.7 Inclusion criteria

- Both genders (male and female)
- Age range of 17-25 yrs
- Those who got admission in B. Tech, MBBS and general stream B.Sc. students

(graduation).

3.8 Exclusion criteria

- Individuals with a history of any psychiatric and any physical illness
- Individual suffering from psychiatric and physical illness
- Individuals having first degree relatives suffering from any psychiatric or major physical illness
- Those who are not giving consent

4. Tools

a) Socio-demographic Data Sheet:

The salient demographic features of present study include socio-demographic characteristics of age, sex, stream of education, religion, category, family types, father occupation, mother occupation, education of father and mother, family size, monthly income, long standing illness or disability in subject, hobbies, family history of illness, relation with peers and teachers and present stay. The information will be obtained from each participant with the help of structured forms.

b) Scale of Positive and Negative Experience (SPANE)²⁵: This measure is a brief 12- item scale with six items devoted to positive experience and six items designed to assess negative experience. The SPANE measure of feelings performed well in terms of reliability and convergent validity with other measures of emotion, well-being, happiness, and life satisfaction. The scale has several advantages over previous measures of feelings and can assess all positive and negative feelings. In this study, the internal consistency coefficients were 84 and 79, respectively²⁵.

c) Social Support Questionnaire Items²⁵: This is a multidimensional coping inventory to assess the different ways in which people respond to stress. Five scales (of four items each) measure conceptually distinct aspects of problem focused coping (active coping, planning, suppression of competing activities, restraint coping, seeking of instrumental social support); five scales measure aspects of what might be viewed as emotion focused coping (seeking of emotional social support, positive reinterpretation, acceptance, denial, turning).

²⁵Diener, E., Wirtz, D., Biswas-Diener, R., Tov, W., Kim-Prieto, C., Choi, D. W., & Oishi, S. (2009). New measures of well-being. In *Assessing well-being* (pp. 247-266). Springer, Dordrecht

The Social Support Questionnaire (SSQ) yields scores for (a) number of social supports, and (b) satisfaction with social support that is available. The alpha coefficient of internal reliability was .97.²⁶

- d) **Psychological Well-being Scale²⁶**: This 8-item brief scale, measures positive and negative feelings. In particular, the scale assesses with a few items a broad range of negative and positive experiences and feelings, not just those of a certain type, and is based on the frequency of feelings during the past month. The scale performed well, with high reliabilities and high convergence with similar scales. It correlated strongly with the summed scores for the other psychological well-being scales, at .78 and .73. Properties, and is strongly associated with other psychological well-being scales²⁵.

5. Procedure

For collecting the data, following institutions were contacted 1) Amity school of engineering 2) Rajendra Institute of Medical Sciences (RIMS) 3), Ranchi College Jharkhand. Prior to recruiting participants an approval was obtained from the authority of three institutes. The desired number of students from the First Year Batch who have completed 3 months of their session but not completed 6 months was selected from each institute by using purposive sampling. The students were screened according to the inclusion and exclusion criteria of the study. After taking the consent and building a rapport with the students, the questionnaires were given to the students and were filled by them. The scoring was done in accordance to the description given in the manual.

6. Result and Discussion:

- Descriptive Statistics of Clinical variables
- Comparison of Socio-demographic variables between three groups (Medical stream, engineering stream and General stream) using Chi-Square Test (Fisher's Exact Test) for discrete variables and One -Way ANOVA and Bonferroni Post-hoc Test for continuous variables.
- Comparison of Clinical Variables between 3 groups (Medical stream, Engineering stream

²⁶Sarason, I. G., Levine, H. M., Basham, R. B., & Sarason, B. R. (1983). Assessing Social Support: The Social Support Questionnaire. *Journal of Personality and Social Psychology*, 44(1), 127.

and General stream) using One Way ANOVA and Bonferroni Post-hoc Test.

The study was a comparative, college-based study in which subjects were included using the purposive sampling method. A total of 120 subjects were taken up for the study from three different colleges: Amity University (Ranchi) for Engineering Stream; RIMS (Ranchi) for MBBS; and Ranchi College (Ranchi) for B.Sc. Students. Subjects of the First Year Batch who have completed 3 months of their session but not completed 6 months were taken for the study. The sample distribution consisted of 30 students of Amity University, 30 students of RIMS, and 60 students of Ranchi College. Subsequently obtained scores from the various scales were compared between the three groups and the findings are shown in the following tables.

7. Sample Characteristics

Table 1a: Descriptive Statistics of socio-demographic variables (Discrete Variables; N=121)

VARIABLE	SUB-CLASSIFICATION	n (%)
Gender	Male	50 (41%)
	Female	71 (59%)
Religion	Hindu	103 (85%)
	Muslim	10 (8%)
	Christian & Others	8 (7%)
Family Type	Nuclear	98 (81%)
	Joint	23 (19%)
Father's Occupation	Service	66 (55%)
	Business	41 (34%)
	Agriculture	9 (7%)
	Unemployed	1 (1%)
	Retired	4 (3%)
Mother's Occupation	Service	24 (20%)
	Business	3 (2%)
	Agriculture	7 (6%)
	Housewife	84 (70%)
	Retired	3 (2%)
Father Education	Illiterate	2 (1%)
	Middle class	6 (5%)

	Class 10	14 (11%)
	Intermediate	8 (7%)
	Graduate	71 (59%)
	PG and above	20 (17%)
Chronic Health Problem in Students	Present	2 (2%)
	Absent	119 (98%)
Disability in Students	Present	1 (1%)
	Absent	120 (99%)
Hobbies	Arts& Crafts	39 (32%)
	Games &Sports	28 (23%)
	Others	54 (45%)
Family History of Mental Illness	Present	1 (1%)
	Absent	120 (99%)
Relationship with Peers	Excellent	51 (42%)
	Medium	66 (55%)
	Poor	4 (3%)
Relationship with Teachers	Excellent	28 (23%)
	Medium	87 (72%)
	Poor	6 (5%)
Place of Present Stay	Hostel	36 (30%)
	Rented House	21 (17%)
	Own house	64 (53%)

Table 1a is showing the socio-demographic profile of the discrete variables under study.

Table 1b: Descriptive Statistics of socio-demographic variables (Continuous Variables; N=121)

VARIABLES	MEAN±S.D.
Age of the Selected Students (Yr.)	19.81±1.37
Number of Members in Family	5.98±3.03
Monthly Income of Family (Rs.)	43842.97±52935.02

Table 1b shows descriptive statistics of socio-demographics of the continuous variables.

Table 2a: Comparison of Socio-demographic variables between three groups (Medical stream, engineering stream and General stream) using Chi-Square (Fisher's Exact Test)

Variables	Sub-classification	Group (N=121)			df	χ^2 /Fisher's Exact Test [#]	P
		Medical Stream (n=30)	Engineering Stream (n=30)	General Stream (n=61)			
Gender	Male	2 (6.66%)	21(70.00%)	27(44.26%)	2	27.593 [#]	0.000***
	Female	28(93.33%)	9(30.00%)	34(55.73%)			
Religion	FG	25(83.33%)	27(90.00%)	51(83.60%)	6	2.878 [#]	0.929 ^(NS)
	Muslim	2(6.66%)	2(6.66%)	6(9.83%)			
	Christian & Others	3(10.00%)	1(3.33%)	3(4.91%)			
Category	General	14(46.66%)	19(63.33%)	34(55.73%)	6	12.191 [#]	0.041*
	SC	4(13.33%)	0(0.00%)	1(1.63%)			
	ST	8(26.66%)	2 (6.66%)	10(33.33%)			
	OBC	4(13.33%)	9 (30.00%)	16(53.33%)			
Family type	Nuclear	24(80.00%)	26(86.66%)	48(78.68%)	2	0.822 [#]	0.688 ^(NS)
	Joint	6(20.00%)	4(13.33%)	13(21.66%)			
Fathers' Occupation	Service	21(70.00%)	17(56.66%)	28(45.90%)	8	14.769 [#]	0.025*
	Business	6(20.00%)	10(33.33%)	25(40.98%)			
	Agriculture	0(0.00%)	2(6.66%)	7(11.47%)			
	Unemployed	0(0.00%)	1(3.33%)	0(0.00%)			
	Retired	3(10.00%)	0(0.00%)	1(1.63%)			
Mother occupation	Service	11(36.66%)	8(26.66%)	5(8.19%)	8	23.458 [#]	0.000***
	Business	0(0.00%)	3(10.00%)	0(0.00%)			
	Agriculture	1(3.33%)	1(3.33%)	5(8.19%)			
	Housewife	16(53.33%)	17(56.66%)	51(83.60%)			
	Retired	2(6.66%)	1(3.33%)	0(0.00%)			
	Illiterate	1(3.33%)	0(0.00%)	1(1.63%)	10	23.606 [#]	0.002**
	Middle class	0(0.00%)	0(0.00%)	6(9.83%)			

Father Education	Class 10	0(0.00%)	3(10.00%)	11(18.03%)			
	Intermediate	1(3.33%)	0(0.00%)	7(11.47%)			
	Graduate	22(73.33%)	18(60.00%)	31(50.81%)			
	PG and above	6(20.00%)	9(30.00%)	5(8.19%)			
Chronic Health Problem in Students	Present	1(3.33%)	0(0.00%)	1(1.63%)	2	1.202 [#]	1.000 ^(NS)
	Absent	29(96.66%)	30(100.0%)	60(98.36%)			
Disability in Students	Present	1(3.33%)	0(0.00%)	0(0.00%)	2	2.604 [#]	0.496 ^(NS)
	Absent	29(96.66%)	30(100.0%)	61(100.0%)			
Hobbies	Arts& Crafts	11(36.66%)	6(20.00%)	22(36.06%)	4	4.306	0.377 ^(NS)
	Games & Sports	5(16.66%)	7(23.33%)	16(26.22%)			
	Others	14(46.66%)	17(56.66%)	23(37.70%)			
Family History of Mental Illness	Present	0(0.00%)	1(3.33%)	0(0.00%)	2	2.604 [#]	0.496 ^(NS)
	Absent	30(100.0%)	29(96.66%)	61(100.0%)			
Relationship with Peers	Excellent	10(33.33%)	11(36.66%)	30(49.18%)	4	6.326 [#]	0.136 ^(NS)
	Medium	18(60.00%)	17(56.66%)	31(50.81%)			
	Poor	2(6.66%)	2(6.66%)	0(0.00%)			
Relationship with Teachers	Excellent	7(23.33%)	7(23.33%)	14(22.95%)	4	8.073 [#]	0.065 ^(NS)
	Medium	19(63.33%)	21(70.00%)	47(77.04%)			
	Poor	4(13.33%)	2(6.66%)	0(0.00%)			
Place of	Hostel	26(86.66%)	8(26.66%)	2(3.27%)	4	68.744 [#]	0.000***
	Rented	1(3.33%)	7(23.33%)	13(21.31%)			

Present	House					
Stay	Own house	3(10.00%)	15(50.00%)	46(75.40%)		

***Sig <0.001; **Sig <0.01; *Sig <0.05; NS- Not Significant; # Fisher's Exact Test Done

Table 2b: Comparison of socio-demographic variables between three groups (Medical stream, Engineering stream and General stream) using One Way ANOVA and Bonferroni Post-hoc Test.

Variables	Group (N=121)			F (df=120)	P	Bonferro ni Post- hoc
	Medical A (n=30) Mean±S.D	Engineering B (n=30) Mean±S.D	General C (n=60) Mean±S.D			
Age of the Selected Students (Yr.)	20.13±2.06	19.53±0.89	19.80±1.12	1.439	0.241(N.S.)	-
Number of Members in Family	5.70±2.21	5.13±2.08	6.54±3.64	2.390	0.096(N.S.)	-
Monthly Income of Family (Rs.)	86333±88861	43933±23422	22901±13186	18.696	0.000***	A>B; A>C

A= Medical Stream; B= Engineering Stream; C= General Stream; NS- Not Significant;

***Sig <0.001; **Sig <0.01; *Sig <0.05

Comparison of Socio-demographic variables between Medical, Engineering and General Stream

Table 2a shows the comparative description of the socio-demographic profile of the Medical, Engineering and General Stream students selected in the study. Chi-square Test/Fisher's Exact Test was applied to test the comparability among these three groups. No significant differences were found between these three groups in the parameters of religion,

family type, chronic health problems, disability, hobbies, family history of mental illness and relationships with peers and teachers. However, significant differences were noted in other socio demographic and clinical parameters such as gender, category, father's occupation, mother's occupation, father's education, and place of present stay. The significant differences were noted in other socio demographic and clinical parameters such as gender where it has been found that female ratio dominated the medical stream (93.33% female and male 6.66%) whereas in engineering stream male ratio dominated the sample size (30% female and male 70%). In the general stream female: male ratio remained average (55.73% female and male 44.26%). The differences in gender can be attributed to the nature of sampling whereby sampling criteria was fulfilled based on the availability of students. Current studies on the existence of gender differences, including those related to psychological well-being reflect contradictory result and a distinct lack of consensus^{27,28} Therefore, research needs to increase the sample size to reach a consensus.

With regard to Category of the selected students, preponderance of students belonging to the General category was noted in Engineering Stream, overwhelming majority of students having General caste background (63.33%). The other two study groups were found to be on a relatively similar plateau (general stream 55.73% and medical stream 46.66%). The other categories did not turn out to be significant. Based on the survey conducted by the People Research on India's Consumer Economy (PRICE) in 2014, the General category students were the highest who reached graduation level of the education²⁹.

Significant differences were also found in father's occupation among MBBS, Engineering and B.Sc. general stream. Occupation was categorized into 4 subtypes 1) service 2) business 3) agriculture 4) unemployed and 5) retired. Whereas in medical stream 70% of father occupation was service, 20% in business and 10% retired. As in engineering streams 56.66% was in service and 33.33% in business and in general stream 45.90% was in service followed by business 40.98% and agriculture 11.47%. It has been found that majority of father of medical students and engineering were service man and businessman. Significance differences were also found in mother occupation among three groups where the occupation was categorised into 4 subtypes 1) Service 2) Business 3) Agriculture 3) Housewife 4) Retired. Although in

²⁷Ryff, C. D., & Singer, B. (1998). The contours of positive human health. *Psychological inquiry*, 9(1),1-28.

²⁸Strümpfer, D. J. W. (1995). The origins of health and strength: From 'salutogenesis' to 'fortigenesis'. *South African Journal of Psychology*, 25(2),81-89

²⁹Dudala, S. R., Reddy, K. A. K., & Prabhu, G. R. (2014). Prasad's socio-economic status classification-An update for 2014. *Int J Res Health Sci*, 2(3),875-8

medical stream 53.33% mothers were housewife, 36.66% were in service, agriculture 3.33%, business 0.00%, retired 6.66%. The occupation of mother in engineering stream 56.66% were housewife, 26.66% were in service, 10% in business, 3.33% in agriculture and retired 3.33%. The occupation of mother's in general stream 83.60% housewife, 8.19% in service. In mother occupation housewife has been most prevalent among all the three streams.

In case of fathers' education, which has been subdivided into 6 Category: 1) illiterate 2) Middle class 3) Class X 4) Intermediate 5) Graduate 6) post-graduate and above. In medical stream 73.33% of fathers were graduates, 20% post- graduates and above, 3.33% intermediate and 3.3% illiterate. In engineering stream 60% of fathers were graduate, 30% post-graduate and above, 10% class X. whereas in general stream science 50% were graduate, 18.03% class X, 11.47% intermediate, 9.83% middle class and 8.19% Post -graduate and above. In all the three-stream education level of graduation is most prevalent.

The significant differences were found in place of present stay which has been categorised into 3 subtypes 1) Hostel 2) Rented house 3) Own house. It has been found that 86.66% of medical students were staying in the hostel, 3.33% in rented house, 10.00% in own house. In engineering students 50% of students were staying at own house, 26.66% in hostel and 23.33% in rented house. In general stream science 75.40% were staying at their own house, 21.31% in rented house and 3.27% in hostel. So, there is a significant difference in the present stay where majority of medical students stay at hostel because the sample was taken from the government base hospital which has a residential setup.

Table 2b shows that there were no significant differences found in age groups among three streams. One possibility can be that purposive sampling was used in the study and participants more than age of 25 years were not included in the study. Though, it does not fulfill the inclusion criteria of the study. Also, there was no significant difference found in the number of family members among three groups.

The mean monthly family income of the selected sample was found to lie in the range of lower middle to upper middle socio-economic status as per Modified Kuppuswamy's Scale³⁰. However, in the present study, significant difference was found among the three groups in monthly family income. Monthly family incomes of students belonging to medical students were the highest followed by engineering students, with the general stream science having the lowest as compared

³⁰Kumar, N., Shekhar, C., Kumar, P., & Kundu, A. S. (2007). Kuppuswamy's socioeconomic status scale-updating for 2007. *Indian journal of pediatrics*, 74(12),1131

to the other two streams.

In the present study it was also found that both the parents of medical stream were working couples. So, comparatively the families earn more. In the group of Engineering and B.Sc. stream, fathers were businessman or serviceman mostly and mothers were found to be housewife's in majority.

EXPERIMENTAL/CLINICAL VARIABLES

Table 3a: Experimental (Clinical) Variables in Sample Population

VARIABLE(N=121)	MEAN±S.D.
Social Support	133.3388±20.89480
Psychological Well- being	43.1157±6.43194
Positive Experience	20.9917±4.40170
Negative Experience	17.6033±3.97383

Table 3a shows the descriptive statistics of the clinical variables in the study sample.

Table 3b: Comparison of Experimental (Clinical) Variables between 3 groups (Medical stream, Engineering stream and General stream) using One Way ANOVA and Bonferroni Post-hoc Test.

Variable(s)	Group (N=121)			(df=120)) F	p	Bonferro ni Post- hoc
	Medical A (n=30) Mean±S.D	Engineering B (n=30) Mean±S.D	General C (n=61) Mean±S.D			
Social Support	128.97±30.12	145.26±13.07	129.62±16.04	7.180	0.001** *	B>A; B>C
Psychological Well- being	42.30±5.97	45.20±7.43	42.49±5.99	2.143	0.122(N. S.)	-
Positive Experience	21.23±4.69	22.03±5.25	20.36±3.72	1.525	0.222(N. S.)	-
Negative Experience	17.47±3.86	14.80±4.09	19.04±3.20	14.020	0.000**	A>B, C>B

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A= Medical Stream; B= Engineering Stream; C= General Stream; NS- Not Significant;

***Sig <0.001; **Sig <0.01; *Sig <0.05

Table 3b shows a comparative description of the clinical variables among the three groups:

Comparison of Positive and Negative Experience between Medical, Engineering and General Stream

The present study also analyses the differences in positive and negatives experiences among the three streams of educational course. Results revealed that there has been no significant difference in positive experience among the three streams, however, in negative experience; they seemed to differ significantly, with medical and general streams reporting a higher frequency of it, as compared to the engineering streams. However, as the scale has recently been developed, no evidence can be drawn from past research. The preference of this scale over other is mainly its association with other psychological well-being scales, and the development of its psychometric properties on the university students' sample³¹.

Comparison of perceived Social Support between Medical, Engineering and General Stream

In the current study, subjects were assessed on the Social Support Questionnaire³². The aim was to see whether the perceived social support tends to vary with variation in streams of education. Results revealed that social support tends to significantly vary among the three streams, with engineering students reporting the highest social support in comparison to the medical and general streams who reported almost equal level of perceived social support. Previous studies have reported that perceived social support had been a predictor of psychological well-being³³. In a recent study by Shiva Kumar, engineering students compared to medical students perceived higher social support from family that was statistically significant. They explained that this may be because many of the engineering students stay at home along with the family members³⁴. This finding supports the current results where medical students were found to be staying in hostel,

³¹Diener, E., Wirtz, D., Tov, W., Kim-Prieto, C., Choi, D. W., Oishi, S., & Biswas-Diener, R. (2010). New well-being measures: Short scales to assess flourishing and positive and negative feelings. *Social Indicators Research*, 97(2),143-156.

³²Sarason, I. G., Levine, H. M., Basham, R. B., & Sarason, B. R. (1983). Assessing social support: The social support questionnaire. *Journal of personality and social psychology*, 44(1),127.

³³Gulact F. The effect of perceived social support on subjective well-being. *Procedia-Social and Behavioral Sciences*, (2010); 2(2), 3844- 3849.

³⁴ Shiva Kumar J, Raghava S, Avinash P, Shirin M, Bharathi TR, Rajini SB, Nandhini M, Rani V. Aflatoxins and food pathogens: impact ofbiologicallyactiveaflatoxinsandtheircontrolstrategies. *JournaloftheScienceofFood andAgriculture*.2017Apr1;97(6):1698-707

away from home, as compared to engineering and general stream students who were residing in their own place.

8. Conclusion

With the findings of the research, we found out that firstly there has been no significant difference in positive experience among the three streams, however, in negative experience; they seemed to differ significantly, with medical and general streams reporting a higher frequency of it, as compared to the engineering streams. There was a significant difference between three groups in social support. Results revealed that engineering students reporting the highest social support in comparison to the medical and general streams who reported almost equal level of perceived social support. This study goes in hand with the current findings where all the three streams reported to experience positive emotions, within the first three months of enrolment in the course. Therefore, it can be concluded that, despite having social support, the general streams are more vulnerable to have negative experiences, opening up the need for adequate prevention and treatment approaches for this at- risk population.

9. Limitations of the Study:

- Scales are self-reported rather than direct observation instruments and that may result in some bias.
- There were also geographical constraints in the study as it was limited to institutions situated within Ranchi Jharkhand, India.
- The sample has been drawn from only three educational institutes and so the results cannot be generalized.
- The sample size was less in the study; more studies involving larger population must be done for better result.

10. Future Directions:

- Future study should aim to include a greater number of samples, with equal representation of both sexes, which may help to get more generalizable findings.
- Similar evidences can be elicited using other tools for the measurement of those variables, for increasing the conclusiveness of the evidences.