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2	Dr. Chandrashekara K.L	Recent trends of Environmental Protection in India	The Environmental Protection- Role of Legal mechanism in India	NIL	2022	ISBN:978-93-90734-96-2
3	Dr. Chandrashekara K.L	Infringement of Human Rights in the era of Digital Crimes	Indian Perspective of Right to Privacy and Freedom of Speech in Cyber Space	NIL	2023	ISBN 98-93-5485-604-4
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Socio - economic and Political Vision of Dr. B.R. Ambedkar - A Revisit

Editor
Dr. Shivakumaraswamy

DEEKSHA PRAKASHANA
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Dr. B.R. AMBEDKAR'S IDEAS OF SOCIAL JUSTICE

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Introduction

The concept of social justice takes within its sweep the objective of removing inequalities and affording equal opportunities to all citizens in social, economic and political affairs.India, while passing through the process of development is in the quest for finding our ways for a better and just socio-economic order. The search for a new model of socio-economic order is the need of the hour. Recent trends in Globalization, Urbanization, Privatization, Mobilization of the poor in search of better life conditions and social justice movements compel us to think afresh.

Social justice is an application of the concept of distributive justice to the wealth, assets, privileges and advantages that accumulate within a society or state because the essence of justice is the attainment of the common goods as distinguished from the

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goods of individuals even of the majority. There have been two major conceptions of social justice one embodying the nation of merit and desert, the other those of needs and equality. The first conception involves ending of hereditary privileges and an open society in which people have the chance to display their desert. It is expressed in equality of opportunity and careers open to talents. The second conception implies that goods should be allocated according in each person's varied needs. As it aims to make people materially equal, it entails an idea if equality.

Social justice in India is the product of social injustice; our Caste system and social structure is the fountain head for social injustice. It is unfortunate that even seventy years after independence social justice is still a distant dream not within the reach of the masses.

The Scheduled Castes, Scheduled Tribes and women under the traditional Hindu Caste hierarchy had suffered for centuries without education and opportunities for advancement in life. Social justice is compensatory justice to offset the accumulated disabilities suffered by these historically disadvantaged sections of society and absorb them educationally and occupationally in the mainstream of national life. If opportunities are not given to develop their neglected talents there will be social imbalance and tension resulting in anarchy and disobedience to the rule of law.

The concept of justice is an abstract one, therefore justice cannot be defined rather it could be described. The purpose of Social Justice is to maintain or restore equilibrium in society and it envisages equal treatment of equal or essentially equal circumstances. Social justice enables social solidarity. Aristotle was one of the earliest philosophers to enunciate the principles of 'distributive justice,' which for him meant the distribution of goods and honours to each according to his place in the community, and 'the equal treatment of those equal before law.' 'Distributive justice' is part of social justice and the distribution of material goods has always been of concern when the

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concept of social justice was discussed. For Hume, another influential thinker on what we now know as 'distributive justice.' Property alone is the subject matter of justice. Through this article I wish to reflect the thoughts of Dr. B.R. Ambedkar's idea of social justice and how his idea is relevant in the present day scenario.

Ambedkar's Idea of Social Justice

Ambedkar is also one of the proponents of social justice in modern India. According to Ambedkar, the term "social justice" is based upon equality, liberty and fraternity of all human beings. The aim of social justice is to remove all kinds of inequalities based upon Caste, race, sex, power, Position, and wealth. The social justice brings equal distribution of the social, political and economical resources of the community. The contents of Ambedkar's concept of social justice included unity and equality of all human beings, equal worth of men and women, respect for the weak and the lowly, regard for human rights, benevolence, mutual love, sympathy, tolerance and charity towards fellow being. Humane treatment in all cases dignity of all citizens, abolition of Caste distinctions, education and property for all and good will and gentleness, He emphasized more on fraternity and emotional integration. His view on social justice was to remove man-made inequalities of all shades through law, morality and public conscience; he stood for justice for a sustainable society[1].

According to Dr. Ambedkar the root cause of social injustice to the Scheduled Castes and Scheduled Tribes is the Caste system in Hindu society. He observed, Castes are enclosed units and it is their conspiracy with clear conscience that compels the ex-communicated to make them into a Caste. He further maintained that the root of untouchability is the Caste system and the root of the Caste system is religion, the root of the religion attached to Varnashrama and the root of the Varnashrama is the Brahminism, the root of Brahminism lies with the political power[2]. justice is

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normally described as distributive justice and corrective justice. Ambedkar concept of distributive justice is based on the idea of casteless society.As per Ambedkar equality means not equal status of Varna's, but equal social, political and economic opportunity for all.

The views of Ambedkar concerning social justice for the depressed, underprivileged and scorned, it may be worth recalling to knowing what social justice means? What is its genesis? What is its grammar? And what does it aspire for? In this connection to answer the said questions Ambedkar has traced back the origins of socio economic disparities and inequalities of the untouchables to the laws of Manu Smriti[3].

In view of the aforesaid observation of Ambedkar on the idea of social justice it is worth to mention an interesting note has stated by W.N. Kuber[4]. The contours of Ambedkar's social justice vision are two-fold, first, before the independent Constitution of Independent India, and second, as reflective in the constitution of India. In the first case, Ambedkar's endeavours were directed towards the awakening of the Depressed Classes, their increasing consciousness of basic human rights, and securing the political, social and educational safeguards to the untouchables.

The preamble to the Constitution is an abridged version of the 'Objective Resolutions' moved by Pandit Jawaharlal Nehru in the Constituent Assembly on December 13, 1946. The concept of social justice adumbrated in the preamble was taken from the objective resolution. The objective resolution stated that: *'This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future Governance a Constitution; wherein shall be guaranteed and secured to all the people of India Justice, Social, Economic and Political; equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship,*

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vocation, association and action, subject to law and public morality.'

The above Resolution received overwhelming support from the members of the Constituent Assembly. However, Ambedkar was disappointed at the content of the Objective Resolution relating to socio-economic justice, for he wanted clear enunciation of doctrine of social justice and argued for the inclusion of a specific provision for nationalization of industries and land to achieve economic justice.

To sum up the idea of social justice as per Ambedkar it may be submitted that in fact, he intended to reconstruct the existing unequal social order into a just, egalitarian and homogenous social order based upon justice, liberty, equality and universal brotherhood; forbidding discrimination on the grounds of religion, caste, sex or place of birth etc.

Ambedkar and the Constitution of India

The concept of social justice has been enshrined in the Indian Constitution. The father of the Indian Constitution had the dream of a new social, economic and political order, the soul of which was social justice. Ambedkar was the chief architect of the Indian Constitution. He was fully aware of the pattern and problems of the society and their conflicting interests. The Constitution is a monumental example of social engineering. Social justice is not defined in the Indian Constitution but it is relative concept taking in its wings the time and circumstances, the people their backwardness, blood, sweat and tears[5].

The preamble of our Constitution declares that we the people of India, having solemnly resolved to constitute India into a "sovereign, socialist, secular, democratic, republic" and to secure to all its citizens justice, social, economic, political, liberty of thought and expression, belief, faith and worship, equality of status and of

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opportunity and to promote among them all fraternity assuring the dignity of the nation. This indeed is social justice guaranteed by the Constitution of India because it strives to create a *"balancing wheel between freedom, political and economic indeed, makes the survival of democracy"*[6]. Dr. Ambedkar concluded the debate on the preamble in these words *"I say that this preamble embodies what is the desire of every member of the house that this Constitution should have its roots its authority, its sovereignty from the people, that it has"*[7].

Part III of the Constitution as fundamental rights is related to the social justice. The fundamental rights inculcate the sense of reconstruction and foster social revolution by generating equality amongst all, prohibiting discrimination on the grounds of Caste, religion, sex, creed, place of birth, abolishing untouchablity and making its practice punishable by law, banning trafficking in human beings and forced labour. Moreover, the Indian Constitution has empowered the states to make special provisions for the advancement of any socially, educationally backward classes and also for the Scheduled Caste and Scheduled Tribes[8].

The Constitution of India brings a renaissance in the concept of social justice when it weaves a trinity of it in the preamble, the fundamental rights, and the directive principles of state policies and this trinity is the "the core of the commitments to the social revolution"[9].

Ambedkar: the Crusader of Oppressed

With the onset of the imperialist-dictated policies of liberalisation, privatisation and globalisation by the ruling classes of our country during the last decade and a half, the problems of dalits, adivasis, other backward castes and the working people as a whole have greatly hit reservations for the SCs and STs. The closure of thousands

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of industries, mills and factories have rendered lakhs jobless and this has also hit dalits and other backward castes. The ban on recruitment to government and semi-government jobs that has been imposed in several states has also had an adverse effect. The growing commercialisation of education and health has kept innumerable people from both socially and economically backward sections out of these vital sectors. In this background, reservation in private sector has become very important because the joblessness among the SCs and STs has witnessed a steady increase in the recent period.

Ambedkar contemplated various means for raising the socio-economic status of SCs and STs.[10] However, it was primarily through the numerous safeguards incorporated into the Indian Constitution, of which he himself was the chief architect, that he hoped to arm them with political power, to improve their socio-economic, educational and cultural condition, and to actualise their gradual deliverance from rhetoric to reality, from deprivation to development, from social stigma and suffering to social respect, solace and equality.[11]

The specific constitutional provisions intended to safeguard the interests of the SCs and STs are[12]:

1. **Art. 17** –Abolition of untouchability and prohibition of its practice in any form;
2. **Art. 23** –Prohibition of 'begar', or forced or bonded labour;
3. **Art. 335** –Reservation for SCs and STs in appointments to services and posts in connection with the affairs of the Union or State; and
4. Reservation of seats in proportion to their numbers for the SCs and STs in the Lok Sabha (**Art. 330**) and in the Vidhan Sabhas (**Art. 332**).

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Some of the other provisions also sought to reinforce the status of the SCs and STs as a 'protected weaker section'. They include the anti-discriminatory and formal equality provisions of the Constitution, empowering the State to make any provision for the advancement of any socially and educationally backward class of citizens –**Art.15(4)**, and for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented –**Art.16(4)**. Also included the Directive Principles of the State Policy, where in **Art.46** that the State shall promote with special care of the educational and economic interests of the weaker sections of the people, and in particular, of SCs and STs, and that it shall protect them from social injustice and all forms of exploitation.[13]

The Welfare of Industrial Labour

Ambedkar was the Chief Architect of our Constitution and the leader of depressed classes. He has been stamped as a Pro-British and parochial caste leader. But very few have studied him as a traveller of though and as a patriot with ultimate loyalty to his motherland.[14]

Keeping the welfare of poor, depressed especially workers, in August, 1936, Ambedkar founded a new political party called ***'The Independent Labour Party'*** and drew up comprehensive programme which answered all the immediate needs and grievances of the landless, poor tenants, agriculturists and industrial workers.

The party believed that the fragmentation of holdings and the pressure of population over them were the causes of the poverty of the agriculturists and the way out was rehabilitation of old industries and starting new ones. In order to raise the efficiency and productive capacity of the workers, the party declared itself in favour of an extensive programme of technical education and the principle of

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State management and State ownership of industries where necessary.

In the past, there were no harmonious relations between labour and management due to lack of understanding. Like in Capitalistic Economics, in India also Ambedkar observed exploitation of labour, to avoid exploitation, Ambedkar advised:

1. The industries which are key industries or which may be declared to be key industries shall be owned and run by the State; and
2. The industries which are not key industries but which are basic industries shall owned by the State and shall be run by the State or Corporations established by the State.[15]

Emancipation of Indian Women

The reforms introduced by Dr. Ambedkar through 'Hindu code Bill' have been adhered to and have been accepted by and large. He by codifying Hindu law in respect of marriage, divorce and succession, rationalized and restored the dignity to women. It is needless to say, the Bill was a part of social engineering via law, sharp criticism of this Bill in and outside parliament led many to belief that it might inflict heavy damages on the Hindu society[16].

Ambedkar championed the cause of women as well as the miserable plight of Scheduled Castes and Scheduled Tribes throughout his career. He discussed a number of problems of Indian women and sought for their solutions in Bombay Legislative Council, Constituent Assembly as the Chairman of the Drafting Committee and also in the Parliament as the first Law Minister of Independent India.

At the All India Depressed Classes Women's Conference held at Nagpur on 20th July, 1940, Ambedkar emphasised that there could not be any progress without women. He spoke, *'I am a great*

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believer in women's organisation. I know what they can do to improve the condition of the society if they are convinced. In the eradication of social evils they have rendered great services.'[17]

The impassioned appeal to cast off evil practices and customs among certain sections of the depressed classes was made by Ambedkar at a meeting at the Damodar Thackersey Hall, Bombay in 1936. The meeting was largely attended by men and women belonging to the Devadasi, Patraje, Bhute, Aradhi and Jagiti communities, and was held to accord support to the mass conversion move inaugurated at Yeola. Ambedkar made a fervent appeal, especially to the women:

"Whether you change your religion along with us or not, it does not matter much to me. But I insist that if you want to be with the rest of us, you must give up your disgraceful life. Youmust marry and settle down to a normal domestic life as women of other classes do. Don't continue to live under conditions, which inevitably drag you into prostitution."[18]

The Political Ideology of Ambedkar

To Ambedkar, political parties are indispensable in parliamentary democracy, for democracy without a party system is unconceivable. At least, two parties are necessary in democracy for its success. He says, *'A Party is necessary to run Government. But two parties are necessary to keep Government from being despotism. A democratic government can remain democratic only if it is worked by two parties –a Party in Power and a Party in Opposition.'*[19]

Ambedkar refused to be a party to methods which were crude, cruel and corrupt. His political thought has a deep faith in fundamental human rights, in the equal rights of man and woman, in the dignity of the individual, in the social and economic justice, in the promotion

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of social progress and better standards of life with peace and security in all spheres of human life.

Ambedkar Ideas on Land Reforms

Ambedkar's views on land reforms are presented in his paper on ***'Small Holdings in India and Their Remedies'*** published in the journal of Indian Economic Society. In this paper he makes original and practical contributions to land reforms in India. He believed that land reforms are very much needed in India from the point of stepping up the agricultural production. Small and scattered holdings, according to him, were greatly responsible for low agricultural productivity. The evil of small holdings in India was not fundamental but was derived from the parent evil of the maladjustment in her social economy.

When we look at Ambedkar's views from the perspective of contemporary experience, we find Ambedkar prophetic in many ways. Though it has been the declared policy of the Government of India that the 'land reforms should be recognised to constitute a vital element both in terms of anti-poverty strategy and for modernisation and increased productively in agriculture.'

Ambedkar had expressed his views on land reforms, mode of farming and industrialisation on different occasions. The underlying motive of all his thinking was to lift the untouchable classes who were predominantly landless or small peasant cultivators. His views were thoroughly progressive.

Conclusion

The fundamental meaning of this concept of 'Social Justice' is to bring a just society. The main objective of this concept is to uplift the women, Scheduled Castes and Scheduled Tribes in the society and pull them to the main stream of the society. This concept also prevents unjust enrichment at the cost of the weaker sections.

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So far as Dr. B.R. Ambedkar vision of 'Social Justice' is concerned, he is real earnest, sacrificed his whole life for the amelioration of the women, Scheduled Castes and Scheduled Tribes in the society. He strongly fought against the prevalent Caste system and Gender discrimination in the society and ventured to secure social justice to these sections of the society. His struggle for social justice could be visualized in the ideals and philosophy of the Indian Constitution.

Dr. B.R. Ambedkar played a crucial role in drawing the attention of the India and the world at large to the pitiable social and economic conditions of a large segment of the Indian population and in highlighting the need for providing social and economic justice to them. As a man of action Ambedkar's achievement is by no means small. As a thinker his position is still greater. As a man of thought and action he influenced immensely India's political and constitutional development. He devoted more time to more fundamental issues of politics and political thinkers of the world. Through his writings and utterances on Indian problems, from time to time, Ambedkar has carved out a definite place for himself in the national history of modern India.

Thus the Constitutional ethos of the social revolution running through the 'preamble', fundamental Rights and the directive principles expressly emphasize the establishment of an egalitarian social order and based on human values of justice, Social, economic and political, equality of status and of opportunity and fraternity assuring human dignity. Thus Dr. B.R. Ambedkar created a social revolution by awakening the women, Scheduled Castes and Scheduled Tribes.

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The Environmental Protection: The Role of Legal Mechanism In India

-Dr. K.L.Chandrashekhara[132]

Abstract

The environmental awareness needs to be cultivated in any society to be an ideal society, or rather to be more precise, in other words, an ideal society means, the society which has the environmental awareness. The dictionary meaning of the word 'environmental' is surrounding objects, region or circumstances and the phrase environmental awareness' will mean that one should be aware of his surrounding so that this surrounding is not disturbed. The Supreme Court and the High Courts have played an active role in the enforcement of constitutional provisions and legislations relating to environmental protection. The fundamental right to life and personal liberty enshrined in Article 21 has been held to include the right to enjoy pollution free air and water. A law is usually enacted because the legislature feels that it is necessary. It is with a view to protect and preserve the environment and save it for future generations and to ensure good quality of life that the legislature has enacted anti-pollution laws and incorporated many statutory provisions for the protection of the environment. Violation of anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and degradation of environment, the adverse effect of which has to be borne by the future generations. The judicial response to almost all environmental litigations has been very positive in India. The primary effort of the Court while dealing with the environmental related issues is to see the enforcement agencies, whether it be the State or any other authority, take effective steps for the enforcement of the laws.

Keywords: Environment, judiciary, laws and acts, protection, punishment.

Introduction

Over the years, together with a spreading of environmental consciousness, there has been a change in the traditionally held perception that there is a trade-off between environmental quality and economic growth as people have come to believe that the two

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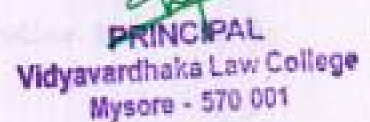
are necessarily complementary. The current focus on environment is not new environmental considerations have been an integral part of the Indian culture. The need for conservation and sustainable use of natural resources has been expressed in Indian scriptures, more than three thousand years old and is reflected in the constitutional, legislative and policy framework as also in the international commitments of the country.

Even before India's independence in 1947, several environmental legislations existed but the real impetus for bringing about a well-developed framework came only after the UN Conference on the Human Environment.[133] Under the influence of this declaration, the National Council for Environmental Policy and Planning within the Department of Science and Technology was set up in 1972. This Council later evolved into a full-fledged Ministry of Environment and Forests (MoEF) in 1985 which today is the apex administrative body in the country for regulating and ensuring environmental protection. After the Stockholm Conference, in 1976, constitutional sanction was given to environmental concerns through the 42nd Amendment, which incorporated them into the Directive Principles of State Policy and Fundamental Rights and Duties.

Since the 1970s an extensive network of environmental legislation has grown in the country. The MoEF and the pollution control boards (CPCB i.e. Central Pollution Control Board and SPCBs i.e. State Pollution Control Boards) together form the regulatory and administrative core of the sector.

A policy framework has also been developed to complement the legislative provisions. The Policy Statement for Abatement of Pollution and the National Conservation Strategy and Policy Statement on Environment and Development were brought out by the MoEF in 1992, to develop and promote initiatives for the protection and improvement of the environment. The EAP (Environmental Action Programme) was formulated in 1993 with the objective of improving environmental services and integrating environmental considerations in to development programmes.

Other measures have also been taken by the government to protect and preserve the environment. This chapter attempts to highlight only legislative initiatives towards the protection of the environment.



[133] Stockholm, 1972.

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The Role of Legal Mechanism in India

The 73rd and 74th Constitutional amendments of 1992 recognized the three-tier structure of the government by devolution of power to the local bodies namely, panchayats in rural areas and municipalities in urban areas. With the passage of bills by the state legislatures and devolving powers and allocating revenue sources, these local bodies can become institutions of self-government. The eleventh schedule contains environmental activities such as soil conservation, water management, social forestry and non-conventional energy that panchayats can undertake. The twelfth schedule lists activities such as water supply, public health and sanitation, solid waste management and environmental protection which the municipalities can undertake. These grass root level institutions can facilitate greater participation by the people in local affairs, promote better planning and implementation of developmental and environmental programmes and be more responsive to the needs of the people.

The Supreme Court and the High Courts have played an active role in the enforcement of constitutional provisions and legislations relating to environmental protection. The fundamental right to life and personal liberty enshrined in Article 21 has been held to include the right to enjoy pollution free air and water. In *R.R. Delavoi v. The Indian Overseas Bank* case, 1991, the Madras High Court pointed out: *'Being aware of the limitations of legalism, the Supreme Court in the main and the High Courts to some extent for the last decade and a half did their best to bring law into the service of the poor and downtrodden under the banner of Public Interest Litigation. The range is wide enough to cover from bonded labour to prison conditions and from early trial to environmental protection'*. This is a new remedy available to public spirited individuals or societies to go to the court under Article 32 for the enforcement of the fundamental right to life (including clean air and water) contained in Article 21.

The Judicial Activism

The interpretation of Article 21 of the Constitution to include the right to clean air and water by the Supreme Court and the High Courts, the remedy available to any citizen to go to the court under the banner of public interest litigation for the enforcement of the right to clean air and water, and the growing public awareness evident in the formation of NGOs and welfare organizations for the promotion of environmental quality,

radically altered the situation in the nineties. A summary of selected Supreme Court judgement is mentioned below.[134]

In *Rural Litigations and Entitlement Kendra v. State of Uttar Pradesh*, the Supreme Court directed the closure of mining operations though blasting in the Doon Valley. It held that closure would cause hardship to the affected parties, but it was a price that had to be paid for protecting and safeguarding the rights of the people to live in healthy environment with minimal disturbance of ecological balance. It further directed the affected areas to be reclaimed and afforestation and soil conservation programmes to be taken up so as to provide employment opportunities to the affected workers.[135]

In *M.C. Mehta v. Union of India* case, the Court directed the stopping of the working of tanneries which were discharging effluents in River Ganga and which did not set up primary effluent treatment plants. It held that the financial incapacity of the tanners to set up primary effluent treatment plants was wholly irrelevant. The Court observed the need for:

- Imparting lessons in natural environments in educational institutions;
- Group of experts to aid and advise the Court to facilitate judicial decisions;
- Constituting permanent independent centre with professionally public spirited experts to provide the necessary scientific and technological information to the Court, and
- Setting up environmental courts on regional basis with a right to appeal to the Supreme Court.[136]

A law is usually enacted because the legislature feels that it is necessary. It is with a view to protect and preserve the environment and save it for future generations and to ensure good quality of life that the legislature has enacted anti-pollution laws and incorporated many statutory provisions for the protection of the environment. Violation of anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and

[134] For details reference may be made to All India Reports, Supreme Court, for different years. Summaries of court decisions are published in Down to Earth.
[135] A.I.R. 1985 S.C.652.
[136] A.I.R. 1987 S.C. 965, 1086 and 1988 S.C.1037 and 1135.

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degradation of environment, the adverse effect of which has to be borne by the future generations.[137]

The Judicial Response

The judicial response to almost all environmental litigations has been very positive in India. The primary effort of the Court while dealing with the environmental related issues is to see the enforcement agencies, whether it be the State or any other authority, take effective steps for the enforcement of the laws. Even though it is not the function of the Courts to see the day-to-day enforcement of the law, that being the function of the executive, but because of the non-functioning of the enforcement agencies to implement the law, the courts as of necessity have to pass orders directing them to implement the law for the protection of the fundamental right of people to live in healthy environment. Passing of the appropriate orders requiring the implementation of the law cannot be regarded as the court having usurped the function of the legislature of the executive.[138]

Though the judicial development of environmental law has been vigorous and imaginative, yet at times it may be found wanting. It has certain limitations of its own. For example, in some cases frivolous or vexatious writ petitions are filed in the name of public interest litigation involving environmental matters. It has been noticed that such litigations are filed mala fide and arise out of enmity between the parties.[139] Sometimes the judicial order is not fully obeyed by the parties concerned. Even the government and its agencies like Pollution Control Board (PCB) have been issuing directions contrary to the orders of the court.[140]

The courts also do not have any scientific and technical expertise in environmental cases and thus it has to depend upon the findings of various commissions and other bodies.[141] It is because of this reason that the courts have suggested for setting up of environmental courts to deal with environmental matters.[142] The government has set up the National Environment Appellate Authority in 1998 to hear the appeals with respect to restrictions

[137] *Indian Council for Enviro-Legal Action Vs. Union of India*, (1996) 5 SCC 281 at 293.
[138] *Indian Council for Enviro-Legal Action Vs. Union of India*, (1996) 5 SCC 281 at 294 (popularly known as Coastal Protection Case).
[139] *Subhash Kumar Vs. State of Bihar*, (1991) 1 SCC 598; and ChhetriyaPradushan Mukti Sangharsh Samiti Vs. State of U.P., (1990) 4 SCC 449.
[140] *Vineet Kumar Mathur Vs. Union of India*, (1996) 7 SCC 714; and *Vineet Kumar Mathur Vs. Union of India*, (1996) 11 SCC 119.
[141] *M.C. Mehta Vs. Union of India*, AIR 1987 SC 965 (popularly known as Oleum Gas Leakage case).
[142] Ibid., at 982. See also *Vellore Citizens Welfare Forum Vs. Union of India*, (1996) 5 SCC 647 (popularly known as *T.N. Tanneries case*).

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of area in which any industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986.[143]

In view of the above scenario, following fundamental questions arise for consideration:

- How are the environment and sustainable development defined?
- How has the concept of sustainable development been developed at the international and national levels?
- What are the constitutional provisions in India for the protection and improvement of the environment?
- What is the existing legal mechanism ensuring environment protection and sustainable development?
- Is the existing legal mechanism foolproof to ensure environment protection and quality of life for all?
- What has been the response of the people and NGOs for the protection and improvement of the environment?
- What role has the judiciary played in providing impetus to the movement of environment protection and sustainable development in India?
- Is it only a cosmetic approach by way of public interest litigation or is there any substance in it?
- What is the impact of socio-economic problems such as poverty, illiteracy, over population on the environment?
- How to protect the victims of the environmental harm? And how the basic principles of sustainable development help in this regard?

Environment Protection under Law of Torts

A Common law action under the law of torts is perhaps the oldest of all legal remedies for protection of the environment. Effective remedies exist in this branch of the law to tackle the problem of environment pollution mainly under three categories of tors, namely, nuisance, negligence and strict liability, which was converted into absolute liability by the Supreme Court in the wake of the Bhopal Tragedy. The law of torts allows the plaintiff to sue for damages (including exemplary damages) or for an injunction or both.

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143 See infra chapter on "Environment (Protection) Act, 1986 and the National Environment Appellate Authority Act, 1997."

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Recent Trends on Environmental Protection in India

As held by the Supreme Court in *M.C. Mehta V. Kamal Nath,*[144] environmental pollution amounts to a tort committed against the community in general. In the words of the apex court:

"Pollution is a civil wrong. By its very nature, it is a tort committed against the community as a whole. In addition to damages, the person guilty of causing the pollution can also be held liable to pay exemplary damages, so that it may act as a deterrent for other not to cause pollution in any manner."

Nuisance

Perhaps the deepest doctrinal roots of modern environmental law are to be found in the common laws doctrine of nuisance. The law of torts recognizes two categories of nuisance, private nuisance and public nuisance. Whereas private nuisance causes a substantial and unreasonable interference with the use and enjoyment of the plaintiff's property, a public nuisance is one which is an unreasonable interference with a general right of the public by causing an injury or annoyance to persons in the general or a class of persons, as for instance, residents of a particular locality or neighbourhood.

In an English case which is as old as it is famous, *Soltau V. De Held*[145] the court restrained a Catholic Church from ringing bells at all hours of the day and night and thereby put an effective end to noise pollution in that neighbourhood.

Perhaps the first reported case of environmental pollution in India is the judgment delivered by the Calcutta High Court in 1905 in *J.C. Galstaun V. Dunia Lal Seal.*[146] In this case, the plaintiff who owned a gardened-house barely 200-300 yards away from the defendant's factory complained that the refuse-liquid discharged from the factory into a municipal drain was not only foul smelling and noxious to the health of the neighbouring residents, but had also reduced the market value of his property. The Subordinate Judge granted a perpetual injunction against the defendant and awarded damages of Rs.1,000 to the plaintiff. This order was confirmed in an appeal filed in the Calcutta High Court.

Similarly, in *Raj Singh V. Babulal,*[147] the plaintiff, a doctor, succeeded in restraining the defendant from using a brick-grinding machine which generated lots of dust, which not

[144] (2000) 6 SCC 213.
[145] 1851 2 Sim NS 133.
[146] (1905) 9 CWN 612.
[147] AIR 1982 All 285.

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only entered his consulting rooms and caused inconvenience to him and his patients, but also polluted the atmosphere in general.

However, in *Kuldip Singh V. Subhash Chandra Jain*,[148] litigation stretching into twenty years failed to assist the plaintiff in his endeavor to prevent a possible pollution in the future. In this case, although the trial court restrained the defendant from constructing a baking oven with a 12 foot chimney, as it would cause a nuisance once the bakery commenced operations, the Supreme Court took a contrary view. Distinguishing between an existing nuisance and a future nuisance, the court observed that a mere possibility of injury does not entitle the plaintiff to any relief.

Negligence

Where there is a failure of the duty to take care and this results in environmental pollution, a suit can, in a fit case, be filed for the tort of negligence.

Thus, where chemical pesticides were stored in a go down in residential area, and fumes emanating from such pesticides found their way into an adjoining property, killing three children and an infant in its mother's womb, it was held that this was a clear case of negligence.[149] In another case, a textile mill was held guilty of negligence because it caused environmental pollution in the following circumstances:

The factory used to store molasses in tanks. One day, a tank collapsed, emptied into a water channel and ultimately polluted the paddy field of the neighbour, causing great damage to his crop. The court held that the mill was under a duty to take reasonable care of maintaining the tanks since it stored such huge quantities of molasses in them. When this duty is not performed, it amounts to actionable negligence. Moreover, as such damage could be reasonably foreseen, the mill was liable under the law of torts.[150]

Rule of Strict Liability and Absolute Liability

The English rule of strict liability is illustrated in its most classic form in the judgment passed in *Rylands V. Fletcher*,[151] where the court held that a person who keeps intrinsically dangerous things on his land is liable if such things escape and cause loss or damage to others. It was, therefore, held that a person who builds a reservoir on his own

[148] 2000 (2) SCALE 582.
[149] *Naresh Dutt Tyagi V. State of U.P.*, 1995 Supp. (3) SCC 144.
[150] *Mukesh Textile Mills V. Sastri*, AIR 1987 Kar. 87.
[151] 1868 LR 3 HC 330.

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land is liable to compensate his neighbour if the water escapes from such a reservoir and damages the neighbour's property. Under the Rule in *Rylands V. Fletcher*, the question of negligence is not relevant at all.

This rule of strict liability has been followed in India and also applied to cases of environmental pollution. Thus, for instance, in the case of *Mukesh Textile Mills V. Sastri*,[152] when a tank belonging to mill storing molasses collapsed and the contents polluted the paddy filed of a neighbour, the mill was held liable to compensate the neighbour for the loss caused to him.

However, the English law of torts recognizes several exceptions to the Rule in *Rylands V. Fletcher*, as for instance, an act of God, an act of a third party, the fault of the plaintiff, etc. Therefore, the rule cannot be applied in cases where any such defense is available to the defendant.

Environment Protection under the Indian Penal Code

Long before environmental legislation founds its way into the stature book in our country, the Indian Penal Code had, as far back as 1860, made several provisions which could be invoked to protect the environment. Thus, for instance, the object of Chapter XIV of the IPC (Sec. 268 to Sec. 294A) is to safeguard public health, safety and convenience by punishing acts which pollute the environment or threaten people's lives. Thus, these provisions can be sued if there is escape of gas, filth, water, germs –or even noise.

In this connection, the most important provisions are those dealing with public nuisance. Sec. 268 defines "public nuisance" as under:

"A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage."

[152] AIR 1987 Kar. 87.

Although any citizen can initiate a prosecution under Sec. 268 of the IPC by a complaint to the Magistrate (as for instance, when an offensive trade carried on by one person pollutes the air or continuous noises interfere with the health, comfort and sleep of the neighbouring residents), here the biggest lacuna is that the Magistrate can fine the offender a paltry sum of Rs. 200 only!

Section 269 of IPC covers negligent acts that are likely to spread infection of disease which are dangerous to life. Section 270 of IPC covers a malignant act likely to spread infection of disease which is dangerous to life.

The aim of Section 269 and 270 is to convict the people who commit such acts either with the knowledge or having reasons to believe that their acts might lead to the spreading of an infection of disease that is threatening to life.

It has been provided under Section 269 of IPC the person punished with imprisonment for a term that may extend to six months, or fine, or both, while under section 270 of IPC that such people will be punished with imprisonment of either for a term that may extend to two years, or fine, or both, as Section 270 is an aggravated form of the offence under Section 269. The term 'malignantly' used in Section 270 connotes the mens rea of the accused who acted maliciously by deliberately spreading the infection. Thus, severe punishment is prescribed under Section 270 as compared to Section 269.

In *Sanjay Goel V. Dongsan Automotive India Pvt. Ltd.*, 2016, the High Court of Madras handled a case which was related to contaminated effluents and dust particles emitted from a factory were thrown into neighbouring land, thus harming the health of the people living in that area and also allowed breeding of mosquitoes. It was held by the court that it was a prima facie case under various offences, which includes Section 269 of IPC.

In *Ramkrishna Baburao Maske V. Kishan Shivraj Shelke*, 1974, the Bombay High Court said if a commercial sex worker who is suffering from a disease of syphilis, communicates the disease to another during sexual intercourse, then she will not be held liable under Section 269.

Fouling water of public spring or reservoir

Section 277 of IPC deals with the person who voluntarily contaminates any public spring or reservoir that belongs to every member of the community. This act must be

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done in order to render it less fit to be utilized for the purpose for which it is generally used. The act must be done voluntarily.

The term 'corrupts or fouls' is used in this section connotes the act of physically deteriorating or defiling the condition of water from any public spring. Thus, someone taking a bath in a private tank will constitute an offence under this section.

The use of the expression 'less fit' rather than using 'unfit' is deliberate as the water may not have been rendered totally unfit for use, but even if it has been turned less fit, the accused is held to be guilty. The word 'voluntarily' has the same meaning as given under Section 39 of IPC.

Punishment

A person under this section shall be punished with either simple or rigorous imprisonment which may extend up to three months, or with the fine maximum five hundred rupees, or both.

The offence under this section is bailable, non-cognizable and non-compoundable, and it is triable by the Magistrate of the first class.

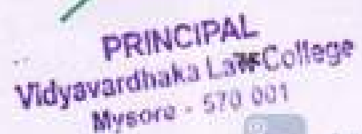
Making atmosphere noxious to health

Section 278 of IPC deals with the punishment for making the atmosphere noxious to health and due to such noxious atmosphere health of the general public is affected.

Section 278 applies to such trades which produce noxious and offensive smells. Trades such as making candles by boiling stinking stuff, a factory for making Sulphur spirit, vitriol etc., or a tannery where skins are steeped into water thus, making the atmosphere vitiated. Even from burning bricks lime in a kiln produces smoke which is noxious. The setting up of a noxious trade in the vicinity of a populated locality is always considered as a nuisance.

Punishment

A person under this section shall be punished with a fine extending up to five hundred rupees.



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The offence under Section 278 is a bailable, non-cognizable and not compoundable, and is triable by the Magistrate. Offence and summons should ordinarily be issued in the first instance.

The provisions of Sec. 290 of the IPC (which provides punishment for public nuisance) have been invoked in the past if any act or omission of a person causes injury to another person by polluting the environment. Even cases of noise pollution can be tackled under this provision.

Similarly, sec. 426 to sec. 432 of the IPC deal with the offence of "mischief", if any pollution is caused as a result thereof, these provisions can be usefully invoked in fit cases.

Conclusion

We have more than 200 Central and State legislations which deal with environmental issues. More legislation means more difficulties in enforcement. There is a need to have a comprehensive and an integrated law on environmental protection for meaningful enforcement. It is not enough to enact the legislations. A positive attitude on the part of everyone in society is essential for effective and efficient enforcement of these legislations.

The Environment Protection Laws have failed to bring about the desired results. Consequently, for the purpose of efficient and effective enforcement of these laws, it is necessary to set up the Environment Courts; with one Judge and two technical experts from the field of Environmental Science and Ecology. These Courts should be allowed to adopt summary proceedings for speedy disposal of the cases. To begin with we may have such Courts at the State and National levels that may later be extended to district level on need-based principle. In order to discourage prolonged litigation, the provisions should be confined to single appeal.

In order to enforce the environmental laws stringently, mere mis-description and technical flaws should be disregarded by the Courts. The creative role of judiciary has been significant and laudable. The jurisdiction of the Courts has been expanded by way of Public Interest Litigation. The Supreme Court of India has played a vital role in giving directions from time to time to the administrative authorities to take necessary steps for improving the environment.

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Recent Trends on Environmental Protection in India

Finally, protection of the environment and keeping ecological balance unaffected is a task which not only the government but also every individual, association and corporation must undertake. It is a social obligation and fundamental duty enshrined in Article 51A(g) of the Constitution of India.

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TEXTBOOK ON

INFRINGEMENT OF HUMAN RIGHTS IN THE ERA OF DIGITAL CRIMES

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TEXTBOOK ON

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Textbook on infringement of human rights in the era of digital crimes

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INDIAN PERSPECTIVES OF RIGHT TO PRIVACY AND FREEDOM OF SPEECH IN CYBER SPACE

By

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Abstract

The right to privacy underpins other rights and freedoms, including freedom of expression, freedom of association and freedom of belief. The ability to communicate anonymously without governments knowing our identity, for instance, has historically played an important role in safeguarding free expression and strengthening political accountability, with people more likely to speak out on issues of public interest if they can do so without fear of reprisal. At the same time, the right to privacy can also compete with the right to freedom of expression, and in practice a balance between these rights is called for. Striking this balance is a delicate task, and not one that can easily be anticipated in advance. For this reason, it has long been a concern of the courts to manage this relationship.

The diversity of those claims is remarkable, not just for its own sake, but because each of them bears directly on different notions of freedom of speech. One of the distinctive characteristics of the Internet, as compared with other media, is that it has become a strong focal point for debate on the nature and scope of freedom of expression itself. Cyberspace is virtually an uncensorable form of media. Short of impounding computers, it is technically impossible to prevent information being posted onto the Internet and then downloaded from it.

Key Words: Privacy, Cyberspace, Freedom of speech, Internet, Expression

Introduction

Privacy is a fundamental right, even though it is difficult to define exactly what those right entails. Privacy can be regarded as having a dual aspect – it is concerned with what information or side of our lives we can keep private; and also, with the ways in which third parties deal with the information that they hold – whether it is safeguarded, shared, who has access and under what conditions.

Understandings of privacy have long been shaped by the technologies available, with early concerns about privacy surfacing with newspapers in the nineteenth century. So, the Internet, in turn, inevitably reshapes what we understand privacy to be in the modern world.

The right to privacy underpins other rights and freedoms, including freedom of expression, freedom of association and freedom of belief. The ability to communicate anonymously without governments knowing our identity, for instance, has historically played an important role in safeguarding free expression and strengthening political accountability, with people more likely to speak out on issues of public interest if they can do so without fear of reprisal. At the same time, the right to privacy can also compete with the right to freedom of expression, and in practice a balance between these rights is called for. Striking this balance is a delicate task, and not one that can easily be anticipated in advance. For this reason, it has long been a concern of the courts to manage this relationship.

The Internet presents significant new challenges for protecting the right to privacy. In broad terms, the Internet:

- Enables the collection of new types of personal information – technological advances have resulted in tools for collecting and understanding types of information which in the past would have been impossible or unfeasible.
- Facilitates the collection and location of personal information – each computer, mobile phone or other device attached to the Internet has a unique IP address, which provides unique identifier for every device and which means in turn that they can be traced. The ability to locate any device creates significant new privacy challenges.
- Creates new capacities for government and private actors to analyse personal information. Increased computing power means that vast quantities of information, once collected, can be cheaply and efficiently stored, consolidated and analysed. Technological advances allow databases of information to be connected together allowing even greater quantities of data to be processed.
- Creates new opportunities for commercial use of personal data. Many of the services provided by these companies are free and their business models rely on collecting user information and using it for marketing purposes.
- Creates new challenges for regulation given the transnational nature of the Internet. Despite the emergence of international best practice standards for data protection, there is still much progress to be made towards the harmonization of national laws. Online companies still find it hard to navigate the complex patchwork of national privacy laws when operating international Internet services that span national boundaries, with legal ambiguity undermining privacy protection.

A range of threats to privacy which have developed through the Internet are:

1) The opportunities and challenges for maintaining control over personal data online,
2) A range of initiatives to protect privacy and anonymity online,
3) The roles and responsibilities of service providers and intermediaries,
4) The specific challenges posed by different applications, communications platforms and business models including cloud computing, search engines, social networks and other different devices,
5) The problems posed by e-government and other government approaches, and
6) The threats posed by different mechanisms of surveillance and data collection including: Unique Identifiers; Cookies (and other associated forms of user identification); Adware; Spyware and Malware conduct covert data logging and surveillance; Deep packet inspection (DPI); and data processing and facial recognition and surveillance technology, finally,
7) The module explores international law and the practice of other States, in terms of respecting privacy on the Internet, taking into account potential conflicts with other rights, in particular freedom of expression.

Freedom of Speech Issues in Cyber Space

A great deal has been claimed for the Internet that it can extend and enhance democracy, giving previously marginalized viewpoints unprecedented access to a broad audience; that it is a tool of liberation, particularly for those people living in societies where information is tightly controlled; that it provides a genuinely free market in ideas. At the same time the internet has also become a stock cliché for the media, who have demonized it as a haven for pornographers, terrorists and political extremists who can ply their poisonous trades with impunity, corrupt our children, and all for the cost of a local phone call. On this view, the Internet encapsulates all that is wrong with Western post-industrial society.

The diversity of those claims is remarkable, not just for its own sake, but because each of them bears directly on different notions of freedom of speech. One of the distinctive characteristics of the Internet, as compared with other media, is that it has become a strong focal point for debate on the nature and scope of freedom of expression itself. Cyberspace is virtually an un-censorable form of media. Short of impounding computers, it is technically impossible to prevent information being posted onto the Internet and then downloaded from it. The Internet is already beginning to subvert some archaic forms of censorship in British society such as the use of injunctions and seizure of publications. At the same time the increasing ease of communicating highlights the weakness of our current statutory protection of individual privacy, equal opportunities and the right of groups in society not to be subject to harassment and intimidation.

Exercising the right of freedom of expression carries with its special responsibilities, such as respect for the rights of others, as set out in Article 19 of the International Covenant on Civil and Political

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Rights,[56] but the principles of 'publish and be damned' have been recognised as important to generations of radicals. If people break the law, then they should face the consequences after the event. There is no place for book burning in a democratic society.

As the implications of this become more apparent, it is likely that other forms of media will begin to demand parity of treatment, pointing the way towards possible law reform. However, existing laws on pornography, race hate, libel, breach of confidence, contempt of court and so on still mean that people can be held accountable for information that they have posted.

However, if Cyberia should be subject to the same forms of regulation as other forms of speech, it is important to clarify what type of media it is. The law is different as it applies to the written, spoken and broadcast word, and it also applies with different degrees of rigour in different contexts. The broadcast media are already subject to considerable regulation and restriction. The publishing industry is subject to fewer restrictions, which are principally to be found in the civil and criminal law in relation to obscenity, libel, blasphemy, state security, court proceedings and the incitement of racial hatred. However, these are subject to considerable variations. For example, people can be prosecuted in Britain for inciting racial hatred but prosecutions are rare and usually only take place if there is a likelihood that violence will be stirred up. Prosecutions can only be mounted with the permission of the Attorney-general and successful defences have been mounted on the grounds that racist comments were 'humorous', were not 'threatening, abusive and insulting', or would not affect their target audience.

Prosecutions on the grounds of obscenity are much more frequent and literature is often seized, by police or customs officers, on the grounds that it is obscene. Britain's laws on libel and restricting information on grounds of national security are amongst the toughest in the world and there is considerable evidence that overt censorship, prior restraint, and other restrictions have inhibited freedom of expression in British society in an unjustifiable way.

Freedom of expression is guaranteed by Article 10 of the Convention[57] in the following terms:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for*

[56] Art. 19, Part III ICCPR, Adopted on 16 December 1966, by General Assembly resolution 2200A (XXI).
[57] *Ibid.*

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the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Internet publications fall within the scope of Article 10[58] and its general principles, but the particular form of that medium has led the Strasbourg Court to rule on certain particular restrictions that have been imposed on freedom of expression on the Internet.

Indian Context

The freedom of expression is guaranteed under Article 19(1) (a) of the Indian Constitution.[59] Restrictions on the exercise of the freedom of expression are embedded in Article 19(2)[60] and can be enforced by the State in the interests of Sovereignty and Integrity of the State, the security of the state, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. When considering the freedom of expression and privacy, there is a fundamental question about the relative weight of privacy and expression. An open democracy values a person's right to express opinions even when in derogation of another's desire for secrecy – everything from who donated to whose campaign to which celebrity is getting married where. It is further embodied when truth is a defence to libel, etc., because the two values are in tension a choice to protect privacy is often a choice to limit expression, and a choice to protect expression limits privacy. At the same time, restrictions like National security, or public interest serve as a derogation of both expression and privacy. Broadly, the right to the freedom of expression intersects with the right to privacy in negotiating:

1. To what categories of data should the freedom of expression be limited in an act that protects privacy?
2. Under what circumstance can the freedom of expression be limited and privacy be invaded for the purpose of protecting greater interests such as national security or public interest,
3. In which context will allowing freedom of expression impinge on privacy or having privacy restrict the freedom of expression.

Information Technology Act, 2008

The new amendments to the Information Technology Act, 2000 got passed by the Lok Sabha in the December of 2008.[61] There are a number of positive developments, as well as many which dismay. Positively, they signal an attempt by the government to create a dynamic policy that is technology neutral. This is exemplified by it embracing the idea of electronic signatures as opposed to digital

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[58] *Ibid.*

[59] Article 19(1) in The Constitution of India 1949, *(1) All citizens shall have the right, (a) to freedom of speech and expression;*

[60] Article 19(2) in The Constitution of India 1949, Safeguards for Freedom of Speech and Expression under Article 19(2), The Constitution of India guarantees *freedom of speech and expression to all its citizens, however, these freedom are not absolute because Article 19 (2) of the constitution provides a safeguard to this freedom under which reasonable restrictions can be imposed on the exercise of this right for certain purposes.*

[61] The Information Technology Act, 2000 was enacted by the Indian Parliament in 2000. It is the primary law in India for matters related to cybercrime and e-commerce. The act was enacted to give legal sanction to electronic commerce and electronic transactions, to enable e-governance, and also to prevent cybercrime.

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signatures. But more could have been done on this front (for instance, section 76 of the Act still talks of floppy disks). There have also been attempts to deal proactively with the many new challenges that the Internet poses.

Freedom of Expression

The first amongst these challenges is that of child pornography. It is heartening to see that the section on child pornography (s.67B)[62] has been drafted with some degree of care. It talks only of sexualized representations of actual children, and does not include fantasy play-acting by adults, etc. From a plain reading of the section, it is unclear whether drawings depicting children will also be deemed an offence under the section. Unfortunately, the section covers everyone who performs the conducts outlined in the section, including minors. A slight awkwardness is created by the age of 'children' being defined in the explanation to section 67B[63] as older than the age of sexual consent. So, a person who is capable of having sex legally may not record such activity (even for private purposes) until he or she turns eighteen.

Another problem is that the word 'transmit' has only been defined for section 66E.[64] The phrase 'causes to be transmitted' is used in sections 67,[65] 67A,[66] and 67B.[67] That phrase, on the face of it, would include the recipient who initiates a transmission along with the person from whose server the data is sent. While in India, traditionally the person charged with obscenity is the person who produces and distributes the obscene material, and not the consumer of such material. This new amendment might prove to be a change in that position.

Section 66A[68] which punishes persons for sending offensive messages is overly broad, and is patently in violation of Art. 19(1)(a) of our Constitution.[69] The fact that some information is 'grossly offensive'(s.66A(a))[70] or that it causes 'annoyance' or 'inconvenience' while being known to be false (s.66A(c))[71] cannot be a reasons for curbing the freedom of speech unless it is directly related to decency or morality, public order, or defamation (or any of the four other grounds listed in Art. 19(2)).[72] It must be stated here that many argue that John Stuart Mill's harm principle provides a better framework for freedom of expression than Joel Feinberg's offence principle. The latter part of s.66A(c),[73] which talks of deception, is sufficient to combat spam and phishing, and hence the first half, talking of annoyance or inconvenience is not required. Additionally, it would be beneficial

[62] The Information Technology Act, 2000, Section 67B provides punishment for publishing or transmitting of material depicting children in sexually explicit actin electronic form. Sections 13 to Section 15 of the Protection of Children from Sexual Offences (POCSO) Act also provide for stringent punishment provisions against child pornography.
[63] The Information Technology Act, 2000.
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*
[69] Article 19(1) in The Constitution of India 1949, (1) All citizens shall have the right, (a) to freedom of speech and expression;
[70] The Information Technology Act, 2000.
[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid.*

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if an explanation could be added to s.66A(c)[74] to make clear what 'origin' means in that section. Because depending on the construction of that word s.66A(c)[75] can, for instance, unintentionally prevent organisations from using proxy servers, and may prevent a person from using a sender envelope different form the "from" address in an e-mail (a feature that many e-mail providers like Gmail implement to allow people to send mails from their work account while being logged in to their personal account). Furthermore, it may also prevent remailers, tunnelling, and other forms of ensuring anonymity online. This doesn't seem to be what is intended by the legislature, but the section might end up having that effect. This should hence be clarified.

Section 69A[76] grants powers to the Central Government to *'issue directions for blocking of public access to any information through any computer resource'*. In English, that would mean that it allows the government to block any website. While necessity or expediency in terms of certain restricted interests are specified, no guidelines have been specified. Those guidelines, per s.69A(2),[77] 'shall be such as may be prescribed'. It has to be ensured that they are prescribed first, before any powers of censorship are granted to anybody. In India, it is clear that any law that gives unguided discretion on an administrative authority to exercise censorship is unreasonable.[78]

Privacy and Surveillance

While the threat of cyber-terrorism might be very real, blanket monitoring of traffic is not the way forward to get results, and is sure to prove counter-productive. It is much easy to find a needle in a small bale of hay rather than in a haystack. Thus, it must be ensured that until the procedures and safeguards mentioned in sub-sections 69(2)[79] and 69B (2)[80] are drafted before the powers granted by those sections are exercised. Small-scale and targeted monitoring of metadata (called 'traffic data' in the Bill) is a much more suitable solution, that will actually lead to results, instead of getting information overload through un-channelled monitoring of large quantities of data. If such safeguards aren't in place, then the powers might be of suspect constitutionality because of lack of guided exercise of those powers.

Very importantly, the government must also follow up on these powers by being transparent about the kinds of monitoring that it does to ensure that the civil and human rights guaranteed by our Constitution are upheld at all times.

[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] *Venugopal, AIR 1954 Mad 901.*
[79] The Information Technology Act, 2000.
[80] *Ibid.*

Encryption

The amending bill does not really bring about much of a change with respect to encryption, except for expanding the scope of the government's power to order decryption. While earlier, under section 69,[81] the Controller had powers to order decryption for certain purposes and order 'subscribers' to aid in doing so (with a sentence of up to seven years upon non-compliance), now the government may even call upon intermediaries to help it with decryption (s.69(3)).[82] Additionally, s.118 of the Indian Penal Code[83] has been amended to recognize the use of encryption as a possible means of concealment of a 'design to commit [an] offence punishable with death or imprisonment for life'.

The government already controls the strength of permissible encryption by way of the Internet Service Provider licences, and now has explicitly been granted the power to do so by s.84A of the Act.[84] However, the government may only prescribe the modes or methods of encryption *'for secure use of the electronic medium and for promotion of e-governance and e-commerce'*. Thus, it is possible to read that as effectively rendering nugatory the government's efforts to restrict the strength of encryption to 40-bit keys (for symmetric encryption).

Other manifestations of right to privacy:

Along with the provisions for the breach of communications privacy, the Privacy Bill, 2011 also prescribes various safeguards for the other forms of privacy which are mentioned under Sec. 3(2). For example, the right to use of materials collected at a police station, health insurance privacy, privacy relating to data, etc.

Bodies under the Privacy Act, 2011 are-

1. Data Protection Authority of India

The Data Protection Authority of India has been set up as a regulatory body to administer the Privacy right created under the Privacy Bill, 2011. The Bill provides for 13 functions that the Authority performs. These include, ensuring compliance with the provisions with respect to data under the Bill by the bodies to which it applies, monitor developments in science and technology and policy to keep them upbeat with the rights, maintain appropriate network with respect to data controllers and the Registry, to attempt to increase and spread literacy in this aspect and involve public and also includes its power to investigate any data breaches, etc. The Authority has power to pass three types of orders, those seeking, disclosure, inquiry or inspection.

[81] *Ibid.*
[82] *Ibid.*
[83] The Indian Penal Code, 1860.
[84] The Information Technology Act, 2000.

2. National Data Controller Registry

This is in the form of an online database in order to facilitate the efficient and effective entry of particulars by data controllers. A data controller has the permission to process any personal data of any data subject, only after the data controller has made an entry in the registry. The database shall contain details of the purpose with which a data controller seeks to process any data. This shall be available to public free of cost. Appropriate data protection protocols and correction procedure are proposed to be prepared.

3. Cyber Appellate Tribunal

Civil disputes such as claims for compensation under the Privacy Bill, 2011 are proposed to be referred to the Cyber Regulations Appellate Tribunal which is established under Section 48 of the Information Technology Act, 2000. The jurisdiction of the Tribunal conferred under Section 67 of the Privacy Bill, 2011 confers two types of jurisdictions. Firstly, original jurisdiction with respect to any dispute arising between an individual and a data controller. Secondly appellate jurisdiction with respect to any appeal from any order or direction or decision of the Authority [Data Protection Authority of India]. It is of interest that this Appellate Tribunal through this Bill will be given original jurisdiction where earlier it only sat as a court of appeal.

Offences that are committed relating to cybercrime can be penalized by way of fine ranging from Rs.50, 000 to 10 lakh or imprisonment or both depending on the gravity of the crime or offence.

Remedies under the Privacy Act:

The Bill recognises the right to privacy, in its various ambits. Hence, it also provides what all can be pursued in case of its violation. The following remedies are available to an aggrieved person.

a) Compensation

Any person who suffers damage can claim for compensation any damage caused to him by any data controller, under section 76. The damage must be due to any contravention on part of the data controller. Here it is sought to be clarified that the amounts described in the table are with respect of penalties. These penalties operate as fines. They are intended to deter illegal conduct. However, compensation which is provided under Sec. 76 acts as a remedy aims to restitute the loss of the person complaining of damage.

b) Civil Remedies

Section 84 provides that the individual, whose right to privacy has been adversely affected, may bring a civil action against such persons have caused such violation. This is addition to any criminal proceedings existing against such person (violator).

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c) Criminal Remedies

Chapter XIV provides for various offences that may be committed under the nature of right provided for under this bill. But the rider is provided for under Section 82, where any Court may take cognizance of offence under this Bill, solely on the compliant made by the Authority.

Conclusion

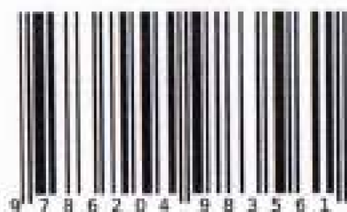
The rights to privacy and freedom of expression relate to each other in complex ways. In many instances, respect for the right to privacy supports the right to freedom of expression, as it does other democratic rights. To give an obvious example, respect for privacy of communications is a prerequisite for trust by those engaging in communicative activities, which is in turn a prerequisite for the exercise of the right to freedom of expression.

The legal concepts of privacy and of data protection differ from their socio-economic and ethical counterparts, since they must be derived from the classical sources of law that bind the legal practice when it states the law through adjudication. Hence, a description of the legal construction of privacy and data protection must draw from an analysis of the pertinent case law, as it develops within the pertinent legislative framework, drawing inspiration from the interpretative and systematising work of legal scholars – the 'legal authorities' or the 'legal doctrine'.

This book is a part of the National Conference organized by Faculty of Law, Kalinga University. The authors who have contributed the papers in the book have explored different rights of differently abled persons in India. This book covers almost all the aspects of the lives of differently abled persons where they need support from the society as well the government of the Country. In India there is a legislation titled The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The Act, which catalogs the rights of people with disabilities in India, was passed by the Parliament of India on December 12, 1995, and notified on February 7, 1996.

But there are few categories of disability which are still not included in the legislation and it needs to be worked upon. This book has highlighted the rights which disabled persons have and also highlights the issues which they have been facing due to lack of facilities available in public domain for the persons with disabilities.

The editors of this book work as Assistant Professors at the Faculty of Law, Kalinga University, Raipur, Chhattisgarh, India. They have pursued their masters degree in constitutional law, criminal laws and personal laws. They have published and presented papers in various national and international journals, seminars and conferences.



Rights of Differently abled Persons

Shrivastava, Chandrakar , Sharma (Eds.)

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Rights of Differently Abled Persons in India

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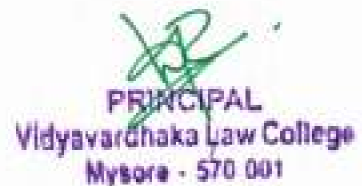

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AN EXAMINATION OF RIGHTS OF PERSONS WITH DISABILITIES AS A HUMAN RIGHTS PERSPECTIVE

Dr. K.L. CHANDRASHEKHARA[1]

Abstract

The Constitution of India provides hope and source to millions of its citizens. Through a highly democratic process the Constitution attempts to provide relief to every class of persons. It provides for the equality and also how equality can be achieved for those who have been suppressed for centuries. The process of achieving equality is not easy. When for centuries and centuries people have suffered and kept in a state of utter backwardness. It will take sometime for total equality to be achieved in India. Under Article 14 of the Constitution, 'Right to Equality' is provided to all citizens in the form of equality before law and equal protection of laws. Articles 15 and 16 of the Constitution discrimination on grounds of religion, race, caste, sex, place of birth or any of them is prohibited.

The enforcement of the Protection of Human Rights Act, 1993 has opened the door for treating disability as a Human Rights issue. India has ratified the International Covenant on Economic, Social and Cultural Rights and also the International Covenant on Civil and Political Rights which together lay down the foundation of protecting Human Rights in India. The National and the State Human Rights Commissions have done their best to ensure that the rights of the disabled person are taken very seriously and the State does its best to help in employment, health and professional training.

Key Words: Persons with Disabilities, Human Rights, Equality, International Covenant.

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Introduction

As per the National Sample Survey Organization (NSSO) Census, 2001 there are approximately 21 million people in India are suffering from one or other kind of disabilities. As per the statistics reveled by Ministry of Social Justice and Empowerment Government of India in its National Policy Document on persons with disabilities mention that there are 93.01 lakh women with disabilities in India.[2] As per the Census of India 2001 out of 21 million population of disabled persons, 12.6 million are male and 9.3 million are female suffering from one or other type of disability which includes blindness, speech impairment, hearing impairment, mental illness and locomotor disability. If the total population of disabled persons are split into disability category wise the survey report[3] states that blindness 48.5%, locomotor disability 27.9%, mental illness 10.3%, speech impairment 7.5%, and hearing impairment 5.8%.

India enacted the Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act.[4] However, in view of a new international convention on rights of persons with disabilities 2008 adopted by India, a Bill known as The Rights of Persons with Disabilities Bill[5] is introduced in the Lok Sabha. All this signifies that India has not lagged behind in the community empowerment of the persons with disability by way of providing them various entitlements in the fields of education, employment, culture, sports, welfare and social securities aspects. The above referred 2014 Bill list out around 18 types of Disabilities as per the scheduled annexed to the Bill.

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Concept of Human Rights

The meaning of Human Rights in common man language may be human rights are those rights which are applicable to human rights. While their applicability to human beings, there is no distinction on the basis of Caste, Creed, Colour, Sex, Gender, etc., thus human rights are said to be Universal.

It is not easy to provide a precise definition of human rights. The author is of apprehension that none of International Instruments have defined the term Human Rights. However, the definition of Human Rights could be found in the Protection of Human Rights Act, 1993 of

[2] National Policy for Persons with Disabilities, 2001.
[3] Census of India, 2001.
[4] 1995 of India.
[5] 2014 of India.

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India. The said Act defines[6] 'Human Rights' means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India.

The Persons with Disabilities Right as a Human Rights

The language of Human Rights was unknown in context with disabled persons in different International and Regional Covenants up to 2006. However, for the first time when United Nation adopted the standard rules for the persons with disabilities,[7] the rights of persons with disabilities were treated as human rights by thus providing a thought to treat the persons with disabilities not as objects but as subjects of rights and duties. The said standard rules however were not binding, therefore it may be submitted authoritatively the rights of disabled persons were not treated as human rights. A significant boon came to the persons with disability when the United Nation adopted the International convention to (protect and promote) the Rights and Dignities of Disabled persons, 2006 according to which, authoritatively the rights of the persons with disabilities were treated as human rights. By this the language of human rights was specifically used to refer persons with disabilities in the afore said UN convention.

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International Humanitarian Law and the Human Rights of the Persons with Disabilities

Though International Law, International Humanitarian Law and Human Rights are distinct on their border lines yet the broad objectives of the three laws remains the same for protecting the human dignity and for sustainable peace and development throughout the world. There is one or the other way a nexus or relation amongst these three laws.

From the plain reading of major sources of International Humanitarian Law, it may be submitted that none of the convention of the protocols have special mention about the language of human rights of disabled persons yet, the author argues though there is no specific mention of the rights of disabled persons in International Humanitarian Law, but still there is a relationship that could be established, while referring to Art.11, 12, 18 and 38 of the recently adopted UN Convention for persons with disabilities, 2008.[8] The said convention came into force[9] when it was ratified by 20 countries as required by the provisions of said

[6] Section 2 (1)(d) of Human Rights Act, 1993 of India.
[7] Adopted by UNESCAP at Beijing on December, 1992.
[8] www.un.org/disabilities/dafault.asp?id=150.
[9] 3rd May 2008.

international convention to promote and protect the rights and dignities of Persons with Disabilities. India was one of the earliest country to ratify[10] the said convention.

Art.11 of the UN Convention for the Disabled Persons states that States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety or persons with disabilities in situations of risk, including situations or armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Thus, it may be submitted that in one way or other the International Humanitarian Law and Human Rights of disabled persons are related to each other by further reading of Art.12, 18 and 38 of UN Convention of disabled persons.

Poverty and Disability

Having mentioned the profile of disability statistics in the introduction, it would be appropriate to discuss the relationship between poverty and disability. Firstly, it would be necessary to know the main causes for disabilities in human beings.

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Causes of Disability

The causes of disability are poverty, malnutrition, occupational hazards, wars, crimes and traffic hazards. For the purpose of this article emphasis is laid on poverty as a root cause for disabilities in human beings. Then question arises what do we mean by poverty? Of course, the answer to the above said question depends upon who asks the question? How the question is understood by the respondent? And what is the response of the respondent?

Meaning of Poverty

Meaning of poverty as per UNDP International Poverty Center (December 2006): As per this publication there are five clusters for the meaning of poverty:

1. Income poverty

2. Poverty due to material lack or want

3. Poverty due to capability deprivation derived by Amartya Sen

4. Poverty due to multi-dimensional view of deprivation

[10] 30th October 2007.

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For the purpose of this article the meaning of poverty as laid down by a great noble laureate Dr. Amartya Sen establishes the relationship between poverty and disability. According to him capability deprivation means *"refer to what we can or cannot do, can or cannot be. This includes but goes beyond material lack or want to include human capabilities, for example skills and physical abilities, and also self-respect in society."*

In general, people with disabilities are estimated to make up to 15 to 20% of the poor in developing countries.[11] A survey of people with disabilities in India found that the direct cost of treatment and equipment varied from three days to two years income, with a mean of two months.[12]

Problem of Poverty in Persons with Disabilities

Before discussing the UN model and legislative model of concept of reasonable accommodation at workplace for Persons with Disabilities herein after referred as PWDs. The author submits that the utilitarian approach[13] which uses calculation of consequences in terms of additional costs and comparison of policies to determine which reform will achieve the best result for the least input to address the problem of poverty in persons with disabilities.

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The meaning of the term 'reasonable accommodation' at workplace is understood differently in different countries. In USA it is called as reasonable accommodation. While in UK it is called as 'reasonable adjustments.' Whereas, in Australia it is called as 'reasonable adaptation.'

Reasonable Accommodation at Workplace for PWDs in USA

The term 'Reasonable Accommodation at Workplace' for PWDs in USA is defined under the Americans with Disabilities Act, 1990 as per sec. 101 (9) under Title I (Employment). The United States Equal Employment Opportunity Commission (EEOC) has provided guidelines to understand the meaning of reasonable accommodation and defined it as *"Adapting the jobs site or job functions for a qualified person with a disability to enable an individual with a disability to enjoy equal employment opportunities."*[14]

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[11] Regional trends impacting on the situation of persons with disabilities: United Nations Economic and Social Commission for Asia and the Pacific, 2002.
[12] Susan Erb & Barbara Harrias –White, Outcast from social Welfare: adult disability, incapacity and development in rural south India, Books for Change, A Unit of Action Aid Karnataka Projects 2002.
[13] Coined by Sir Jeremy Bentham in his work on Theory of Legislations.
[14][29] C.F.R $ [1630.9] Appendix: Interpretative Guidance.

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In USA the term reasonable accommodation means and includes as follows:

Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Reasonable Accommodation at Workplace for PWDs in UK

The United Kingdom Disability Discrimination Act of 1995 legislates upon the duty of the employers to make "Reasonable Adjustments". This duty applies where any arrangement or any physical feature on the premises of the employer; place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. In such a case it is the duty of the employer, to take such steps as it is reasonable in all the circumstances of the case so as to prevent the arrangement or features leading to that effect.

Sub Section 3 of Paragraph 6 of the Act[15] specifies examples of steps which an employer is required to take and comply with his duty:

(i) Making adjustments to premises

(ii) Allocating some of the disabled persons duties to another person;

(iii) Transferring him to fill an existing vacancy

(iv) Altering his working hours

(v) Assigning him to a different place of work

(vi) Allowing him to be absent during working hours for rehabilitation, assessment or treatment

(vii) Giving him or arranging for him to be given training

(viii) Acquiring or modifying equipment;

(ix) Modifying instructions or reference manuals

(x) Modifying procedures for testing or assessment

[15] The United Kingdom Disability Discrimination Act of 1995.

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(xi) Providing a reader or interpreter

(xii) Providing supervision

It can be seen that the failure of an employer to comply with the duties imposed on him in relation to a disabled person constitutes discrimination against the disabled person; unless the employer can show his failure to comply was justified.

Reasonable Accommodation at Workplace for PWDs in India

The author of this article humbly submits that the term 'Reasonable Accommodation at Workplace' is not defined in the persons with disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 herein after referred as PWD Act, 1995. However, it may be submitted that the concept of 'Reasonable Accommodation at Workplace' can be construed inherently as per the provision sec. 47 of the PWD Act, 1995.

The term 'Reasonable Accommodation at Workplace' however, is defined under the provisions of 'The Rights of the Persons with Disabilities Bill' 2013 hereinafter referred as the RPD Bill 2013.

Section 2(30) the proposed Rights of Persons with Disabilities Bill, 2013 is very important for the reason that said section defines the term 'Reasonable Accommodation' which means:

a. where a provision, criterion or practice puts a person to whom one or more prohibited grounds apply at a disadvantage in relation to a relevant matter in comparison with other persons, to take such steps as it is reasonable to have to take to avoid the disadvantages;

b. where a physical feature puts a person to whom one or more prohibited grounds apply at a disadvantage in relation to a relevant matter in comparison with other persons, to take such steps as it is reasonable to have to take to avoid the disadvantage;

c. where a person to whom one or more prohibited grounds apply would, but for the provision of an auxiliary aid, be put at a disadvantage in relation to a relevant matter in comparison with other persons, to take such steps as it is reasonable to have to take provide the auxiliary aid;

d. where clause (i) or (iii) above relates to the provision of information, the steps which it is reasonable to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

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Limitation upon the concept 'Reasonable Accommodation at Workplace' through the concept of 'Undue Hardship' on employer

The legal duty to provide 'Reasonable Accommodation at Workplace' for PWDs at workplace is subject to the concept of 'undue burden/undue hardship' in USA, UK and India upon the employer performing the duty. If the employer successfully demonstrates that it would be a huge financial or cost burden for providing the facility of 'Reasonable Accommodation at Workplace' for PWDs, the employer will be legally exempted from discharging the duty of providing 'Reasonable Accommodation at Workplace'.

Judicial Response to Reasonable Accommodation at Workplace

It will be appropriate to discuss few judicial decisions delivered across jurisdictions for further understanding the concept of 'Reasonable Accommodation'. In a case that arose in Canadian Jurisdiction of British Columbia, the Supreme Court determines the relevance of 'reasonable accommodation' in context with undue hardship.

British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union,[18] this case dealt with a grievance by a female forest fire fighter, Tawney Meiorin, who was dismissed from her job because she failed one aspect of a minimum fitness standard established by the Government of British Columbia for all fire fighters. After Ms. Meiorin had been performing the duties of a fire fighter for three years, the respondent adopted a new series of fitness tests, including a running test designed to measure aerobic fitness. After failing the test and losing her job, Ms. Meiorin complained that the aerobic standard discriminated against women in contravention of the British Columbia Human Rights Code, as women generally have lower aerobic capacity, and she had sufficiently demonstrated she could perform the duties of her job safely and effectively. The Government of British Columbia argued that this aerobic standard was a Bona Fide Occupational Requirement Test (BFOR) of the fire fighter position.

On appeal, the Supreme Court determined that the aerobic standard was not a valid BFOR. In reaching this conclusion, the Court considered the traditional approach, which analyzed cases differently depending on the initial determination of whether the discrimination was direct or adverse effect. The Court found the differing analysis in the traditional approach was inappropriate. It concluded that the distinction between direct and adverse effect

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[18] B.C.G.S.E.U, 1999 (3) S.C.R.3.

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discrimination was artificial, difficult to characterize accurately and inconsistent with the purpose of human rights legislation. The Court also indicated that the old approach led to inconsistent outcomes, legitimized systemic discrimination, and created a dissonance between human rights legislation and the Charter of Rights and Freedoms. The Court therefore rejected the traditional approach and established a unified test for BFOR defenses to be applied in all cases of direct or adverse effect discrimination.

This unified test asks the following questions:

- Is there a standard, policy or practice that discriminates based on a prohibited ground?
- Did the employer adopt the standard, policy or practice for a purpose rationally connected to the performance of the job?
- Did the employer adopt the particular standard, policy or practice in an honest and good faith belief that it was necessary in order to fulfill that legitimate work-related purpose?
- Is the standard, policy or practice reasonably necessary in order to fulfill that legitimate work-related purpose?

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This last element requires the employer to show that the standard, policy or practice adopted is the least discriminatory way to achieve the purpose or goal related to the job at issue. It includes the requirement to demonstrate that it is impossible to accommodate individual employees without imposing undue hardship on the employer.

In a case that arose from United States namely ***Carolyn Cambbell v. North Carolina Department of Transportation Division of Motor Vehicles***[17] petitioner was employed by the respondent employer to work with stolen vehicle records are kept in open files and files were kept on the shelves not in filing cabinets.

The petitioner as suffering from Asthma right from her childhood. The petitioner due to the nature of job was exposed to severally allergetic to dust and paint fumes. Doctors treating to petitioner advised her to use face mask while at work, however, the petitioner refused to follow the advice. The petitioner re-allotted the respondent employer to transfer her to other job. Whereas the employer respondent offered the petitioner that she could be provided a heap filter machine for which the petitioner refused. The petitioner conducted she was a

[17] [155] Nic. App [652,575] S.E. 2nd 5 L, C, 2003.

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qualified individual with a disability and was discriminated by the employer leading to her termination. While the employer contended he had provided reasonable accommodation at work place to the petitioner. The Court of appeal on the basis of facts and evidence deposed came to the conclusion that the respondent had failed to reasonably accommodate the petitioner since the employer did not transfer the petitioner to other job.

In another case ***Borksky v. Valley Central School District***[18] the plaintiff was a teacher who experienced memory and concentration problem. She asserted that she could do her work well if she was provided with a teacher aid to assist in maintaining classroom control. The Court granted the request, since the employer had refused to provide the necessary teacher aid as measure of reasonable accommodation.

Again in ***Mentolete v. Bolgar***[19] the ninth Circuit Court reversed a District Courts holding in favour of a decision by the postal service to prohibit a woman with epilepsy from working with a letter sorting machine. The Court observed that the women had done her work well safely and efficiently and the epilepsy was controlled with medication, hence the woman was reinstated.

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In yet, another case of ***Marryfield v. Bevan***[20] supervisor referred to female subordinate as "crazy and insane" and said that she went to psychiatric unit of a hospital because she suffered from nervous breakdown. The Court felt that this language was not sufficient to terminate the services of the employee.

In a fast changing and a complex world, one is prone to believe that mental problems will be on the increase and it will make the task difficult to determine whether it is mental break down or reaction arising out of work place to determine whether accommodation is possible or not.

In an interesting case that arose from British jurisdiction was demonstrated in the case of ***Archibald v. Fife Council***[21] In brief, the facts of this case were that Susan Archibald was a road sweeper for Fife Council. After routine surgical procedure she became unable to walk and was unable to do her job. She was placed on the Council's redeployment list. She needed to be redeployed to an office-based job because of her disability. The Council's redeployment policy allowed redeployment without competitive interview to posts of the same, or a lower

[18] [63] F.3d [131] 2nd Cir 1995,
[19] 767 F.2d 1416 9th Cir.1985.
[20] 3AD Cas. (BNA) 1584,1588 N.D.I (11).1993.
[21] 2004 IRLR (651) H L.

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pay grade. Mrs. Archibald's pay was a slightly lower rate than the lowest grade of pay for office-based jobs, which meant that she was technically seeking a promotion. Consequently, she had to undergo competitive interviews in respect of her applications for office-based jobs. The applicant applied for a large number of jobs but, despite having the necessary skills for office work, she was unsuccessful in obtaining a position. She attributed this to her manual work background, not her disability. Mrs. Archibald's Case was that when she becomes unable to do her existing job, consideration should have been given to transferring her to an office-based job that she could do. This did not happen because of the redeployment policy. She was eventually dismissed because she was incapable of carrying out her job. Consequent to her dismissal Mrs. Archibald brought a disability discrimination claim in the Employment Tribunal for failure to make reasonable adjustments and less favorable treatment for a reason related to disability. The Employment Tribunal dismissed her claim on the ground that reasonable adjustment proposed constituted more favorable treatment and this was not permissible under the Disability Discrimination Act, 1995, she then appealed to the Scottish Employment Appeal Tribunal. There also her appeal was dismissed. Further she appealed to the Court of Session. This Court decided that if someone becomes disabled and is no longer able to carry out the essential functions of their post that does not constitute "an arrangement made by or on behalf of an employer" for the purpose of reasonable adjustment provisions of Disability Discrimination Act, 1995. She ultimately knocked at the doors of House of Lords and to her great surprise and to the surprise of all tribunal earlier House of Lords unanimously allowed her appeal and laid down the following important principles;

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Right to Food as Human Right to address Malnutrition

By now sufficient jurisprudence has evolved transforming different models and rights for protecting the life and dignity of persons with disability at the United Nations level. This is evidence from the fact that the approach for protecting the rights, life and dignities of persons with disability transformed from charity model to medical model and from social model to right based model so also the transformation began with right based model to human rights model ultimately leading for treating the issue of 'disability as a human right'.

There is a close nexus between right to food and addressing the problem of poverty. When a man is fed well in society 60% of his poverty is solved. When the problem of poverty is solved the problem of malnutrition is also solved to greater extent. Therefore, there is a need

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to focus and throw light on international and domestic standards for providing right to food in context with disability.

Right to Food as a Human Right issue

The right to food is guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW Convention), and the Convention on the Rights of the Child (CRC). Article 11(1) of the ICESCR includes adequate food as a component on an adequate standard of living and Article 11(2) refers to 'the fundamental right of everyone to be free from hunger.' The CEDAW includes adequate nutrition as part of an adequate standard of living in Article 14. Article 24 (2) (c) of the CRC specifically mentions rights to both food and water.

In General Comment No.12, the ICESCR confirms that the right to adequate food applies to everyone without discrimination and 'is of crucial importance for the enjoyment of all rights.'

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Though the above said International Standard provision do not use the word persons with disabilities in their provisions but still it could be construed that the provisions do apply to persons with disabilities. For example, the general comment on ICESCR not only ensure right to food without any discrimination but also signify that there should be physical access to the right to food for infants and young children, elderly people the physically disabled the terminally ill and persons with persistent medical problems including the mentally ill.

As earlier mentioned right to food by now is a human right issue, so also by adopting the United Nations Convention (to promote and protect the rights and the dignities) of persons with disabilities 2008, the rights of persons with disabilities are treated as human rights issue. In this context it is worth to discuss how the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) promotes the right to food, and livelihood, right to health for addressing the problem of malnutrition.

Article 7 of UNCRPD: Children with Disabilities

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1. *States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.*
2. *In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.*
3. *States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.*

Article 10: Right to Life

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

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Article 25: Health

One of the highlights of the aforesaid article no. 25 of UNCRPD is that the state should *Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.*

India is one among the earliest countries in the world to sign[22] and ratify[23] the UNCRPD. By doing so, India has taken a lead in fulfilling the obligation set by UNCRPD at domestic level. It will be now appropriate to focus the Indian response on the implementation of policies, laws and programmes in addressing the issue of malnutrition.

Yet another significant development in the area of persons with disability jurisprudence is by way of enacting the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 hereinafter referred as PWD Act, 1995. At domestic level malnutrition is an age-old problem in our country. The problems arising out of malnutrition lead to different elements both in children and adults. The cause of disability is due to the problem of malnutrition. The PWD Act, 1995, obligates upon the State to take care of both the mother and child before and after the delivery. Section 25(f) of the PWD Act, 1995,

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[22] India signed UNCRPD on 30th March 2008.
[23] India signed UNCRPD on 30th October 2008.

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makes it incumbent upon the appropriate Governments and local authorities to 'take measure for pre-natal, peri-natal and post-natal care of mother and child.'

Another significant development in the area of Persons with Disability jurisprudence was by way of introducing The Rights of Persons with Disabilities Bill, 2014[24] for the purpose of fulfilling the implementation of United Nations Convention on Rights of Persons with Disabilities, 2008. Sec. 23 of the said Bill, 2014 provides that the appropriate Government shall, within the limit of its economic capacity and development, formulate necessary schemes and programmes to safeguard and promote the right of persons with disabilities for adequate standard of living. Further the said Bill, 2014 seek to protect the children and women for seeking support from the government for making a meaningful living.

Conclusion

In the present era, the human rights refers to more than mere existence with dignity. The International Institute of Human Rights in Strasbourg divides the human rights into three generations. First-generation human rights are fundamentally civil and political in nature, as well as strongly individualistic in nature; the Second-generation human rights are basically economic, social and cultural in nature, they guarantee different members of the citizenry with equal conditions and treatment; the Third-generation human rights refers to the right to self-determination and right to development.

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As a consequence, with the expansion of scope of human rights, the ambit of safeguarding the rights of Persons with Disabilities also increases, as a result, the judiciary should toil more to prevent the violation of human rights committed against PWDs.

Ultimately after many ups and downs the Indian judiciary is playing a role incomparable in the history of judiciaries of the world. It must, therefore, prove itself worthy of the trust and confidence which the public reposes in it. The judiciary must not limit its activity to the traditional role of deciding dispute between two parties, but must also contribute to the progress of the nation and creation of a social order where all citizens are provided with the basic economic necessities of a civilized life, viz. employment, housing, medical care, education etc. as this alone will win for it the respect of the people of the country.

[24] February, 2014 in Rajyasabha.

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The judiciary has always made concrete efforts to safeguard Persons with Disabilities against the exploitative tendencies of their employer by regularizing their working hours, fixing their wages, laying down rules about their health and medical facilities. The judiciary has even directed the states that it is their duty to create an environment where the PWDs can have opportunities to grow and develop in a healthy manner with full dignity in consensus of the mandate of our constitution.

The Supreme Court made laudable directions and suggestions in many instances to protect basic rights of PWDs, unfortunately these directions and suggestions are not followed and implemented by the government machinery effectively. In this regard, the performance of the Indian Judiciary stands out as a signal contribution to the implementation of human rights generally and that of rights of PWDs.

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This book is a part of the National Conference organized by Faculty of Law, Kalinga University. The authors who have contributed the papers in the book have explored different rights of differently abled persons in India. This book covers almost all the aspects of the lives of differently abled persons where they need support from the society as well the government of the Country. In India there is a legislation titled The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The Act, which catalogs the rights of people with disabilities in India, was passed by the Parliament of India on December 12, 1995, and notified on February 7, 1996.

But there are few categories of disability which are still not included in the legislation and it needs to be worked upon. This book has highlighted the rights which disabled persons have and also highlights the issues which they have been facing due to lack of facilities available in public domain for the persons with disabilities.

Rights of Differently abled Persons

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Rights of Differently Abled Persons in India

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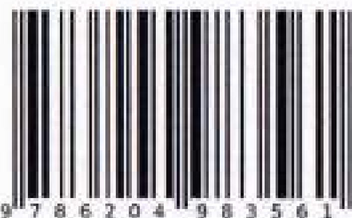

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A STUDY ON LEGAL RIGHTS OF DISABLED PERSONS IN INDIA

Dr. Boregowda S.B[1]

Abstract

Persons with disabilities, especially those who live on the intersection of different socio-cultural identities, face an extra layer of challenge that erodes away at least a part of whatever other privileges they may have been born with. In the absence of proper implementation of existing laws and guidelines, their disabilities, both physical and mental, pose many hurdles to their day-to-day activities, and impact different elements of their lives ranging from education and employment to transportation and accessibility. Our Government enacted plenty of legislations especially to provide rights for disabilities. Without rights it's very difficult to survive in the universe, because we are human beings. Therefore now days for protection of disabilities government provide several rights through legislation. Constitution treated as a supreme law of the land; even some provisions of Indian constitution also protect the rights and interest of disabled persons. The main aim of this article is to find to who is called disabilities, what are the rights are available to disabilities, what are the legislations are there for protection of disabilities and role of judiciary for protection of disabilities in India.

Key Words: Disabilities, Legislations, Rights, Judiciary, Constitution.

Introduction

Today where we cannot reach out every normal child, how can we reach out to every person with disability? It is thus that provides an inspiration with great significance to do research on the persons with disabilities who have been excluded and segregated from main stream of society. The doctrine of pity and care became irrelevant when the families especially the joint families disintegrated due to the emergence of industrial revolution. The members of the joint family who showed concern to people with disabilities had to migrate from rural areas to urban and city areas in search of employment in factories, ultimately leaving the persons with disabilities in the rural areas. The disintegration of the joint family system leads to the treatment of the persons with disabilities as a social problem. Human Rights jurisprudence

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has played a pivotal role in transcending traditional prejudices into meaningful statutory rights.

Employment of persons with disabilities and application of various aspects of labour and human rights laws is studied in depth for carrying out the research to examine whether the existing labour legislations and human rights laws under special enactments are in consonance with international standards to promote employment and to ensure a measure of reasonable accommodation at work place for the disabled persons across jurisdictions.

According to the census, conducted in 2001, India has 2.19 crore disabled persons. However, according to some experts the number of Indians with temporary and permanent disability could be as 50 million. This indeed poses a great challenge to the Indian society to provide work and opportunities to the disabled persons. The author of this book himself being a visually challenged person depicts to what extent UNO directions have been accepted and applied in India and other democratic countries of the world for promoting equality, equal opportunities and full participation of persons with disabilities in different spheres of activities.

The National Human Rights Commission of India has brought out a very useful material in the form of the Disability Manual in 2005[2]. This manual provides a very useful material for understanding the Indian Law and the deam efforts met in giving us sufficient knowledge about the development of the subject in our country.

Indian Constitution Laws

The constitution of India provides hope and source to millions of its citizens. Through a highly democratic process the constitution attempts to provide relief to every class of persons. It provides for the equality and also how equality can be achieved for those who have been suppressed for countries. The social engineering which the constitution of India attempts to achieve covers, the scheduled caste and scheduled tribes the backward classes, the minorities and all others who have been not received justice for many years given the unequal status of individual and suppression of some by others in the quest for achieving superiority in the

[2] Disability Manual, 2005 Details

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society. The sources of hope of every citizen in this country is laid down thus, "secure to all its citizen's, justice, social economic and political, liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the nation".

The process of achieving equality is not easy. When for centuries and centuries people have suffered and kept in a state of utter backwardness. It will take some time for total equality to be achieved in India. Under Article 14 of the constitution, right to equality is provided to all citizens in the form equality before law and equal protection of laws. Under Article 15 and 16 of the constitution discrimination on grounds of religion, race, caste, by providing powers to the state to frame any law or make provisions for reservation of appointments or posts in favour of backward class of citizens. Over the years the supreme court of India and other courts have been strived their best to interpret the provisions of the constitution in such a way so as to provide maximum benefits to the deprived classes. The same can be applied to the case and to the cause of disabled persons. They too have suffered from centuries for no fault of theirs just as the other unfortunate suffering classes. The disabled persons too require support and encouragement to give their best to their country.

The decision of the supreme court of India in *Indra Sawhney and others v. Union of India*[3], is highly relevant and important for persons with disability in the context of Article 14 of the constitution, which does not specifically cover reservation in favour of disabled persons. The court held follows:-

Mere formal declaration of the right would not make unequal equal. To enable all to compete with each other on equal plane, it is necessary to take positive measure to equip the disadvantaged and the handicapped to bring them level of the fortunate advantaged. Article 14 and Article 16(1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality. In contrast to the above cases the Supreme Court decision in *Narendra Kumar Chandla and other v. State of Haryana*[4] did not come up to the expectation of person suffering from disability. In this case a person who acquired disability during his service was reduced in rank because of the disability. He challenged this before the Punjab and Haryana High Court, which dismissed his petition. He then filed a

[3] AIR 1993 SC 477: 1992 Supp. (3) SCC 217
[4] AIR 1995 SC 519: (1994) 4 SCC 460: 1994 SCC (L&S)882

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Special Leave Petition before the Supreme Court, the court justified the act of reducing his rank but retained the higher scale which he was drawing earlier. Though this decision gave some relief to the person with disability, the Supreme Court had a great opportunity to expound the law in favour of disabled person. It should have taken this opportunity to ensure that disabled persons are not made to suffer because of disability suffered during a course of employment.

The directive principles of state policy have also the fundamental duties that provide the right direction to the state to protect the of the disabled person. Article 14 declares 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. Article 46 lays down an obligation on the state to promote with special care the educational and economic interests of the weaker sections of the people, and protect them from social injustice and all forms of explanation.

The enforcement of the protection of Hunan Rights Act, 1993 has opened the door for treating disability as a Human Rights issue. India has ratified the international covenant on Economic, social and cultural rights and also the international covenant on civil and political rights which together lay down the foundation of protecting human rights in India. The National Human Rights Commission and also the State Human Rights Commissions have done their best to ensure that the rights of the disabled person are taken very seriously and the state does its best to help them in employment, health and professional training. Under the Constitution the disabled have been guaranteed the following fundamental rights:

"The Constitution secures to the citizens including the disabled, a right of justice, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and for the promotion of fraternity."

In India, for a long time, disabled individuals were considered a liability and were subjected to stigmatization and discrimination. However, around the 1980s, it was felt that disabled people must be provided with an opportunity to participate in societal development. Governments, NGOs, and society at large realized that disability was a medical condition which could be addressed through appropriate rehabilitation. With the UN declaring the 1982-1992 periods as the Decade of Disabled Persons, the rehabilitation movement got a

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further boost. The Decade of Disabled Persons played a key role in improving the status of disabled people. Emphasis was laid on improving educational and employment status and raising more funds for the disabled.

The Indian Government set up the Rehabilitation Council of India in 1986 with the aim of facilitating the rehabilitation of disabled people. Furthermore, the National Policy on Disability was adopted in 2009. This comprehensive policy focuses on critical areas such as education, employment, social security, etc., for the disabled. The Rights of Persons with Disabilities Act, 2016 aims to provide certain rights to disabled people and protect them from social stigmatization and discrimination.

Objectives of Rights of Persons With Disabilities Act, 2016

- The primary objective of the Act is to ensure that disabled people enjoy their right to equality and ar
- e able to live a dignified and respectful life.
- The Preamble of the Act provides that it is aimed at protecting disabled people from all sorts of discrimination. The Act seeks to ensure the full social, political, and economic participation of disabled people.
- This Act promotes inclusive education and provides employment safeguards for disabled people. Thus, it aims at empowering disabled people through inclusive growth and active societal participation.

Rights of Disabled Persons

Chapter II of the Act deals with the rights of disabled people. Disabled people have been conferred with the following rights:

1. They have a right to equality and protection from discrimination. They cannot be discriminated against due to their disability. The appropriate government is responsible for ensuring that the dignity and integrity of the disabled persons is not violated.
2. The disabled persons have a right to live in the community and the government is responsible for protecting them from being forced into living in any specific arrangement.

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3. The disabled persons enjoy equal rights and cannot be forced into undergoing infertility medical procedures.
4. The Central as well as the state elections commissioners are responsible for ensuring that the polling booths are accessible to disabled people.
5. The disabled persons are to be protected from violence and exploitation. They cannot be subjected to any degrading or cruel treatment. Disabled people cannot be forced to be the subject of research without their consent. In case of any natural disaster or emergency, they have equal rights to safety and protection. Section 7(2) of the Act provides that if any registered organization believes that an act of violence or abuse is likely to be committed against a disabled person, then the registered organization must give such information to the Executive Magistrate having the requisite jurisdiction.
6. Section 38 of the Act provides that where a person suffering from benchmark disability believes that he is in need of high support, he can make an application for such high support to the notified authority. An application in this regard can also be made by any other person or organization on behalf of the disabled person. Such an application is to be forwarded to the Assessment Board, which will assess the application and submit a report to the concerned authority. The disabled person would then be provided high support on the basis of the report and the relevant government schemes.
7. The Act also provides that if an employee acquires a disability while he is in service, he may not be dismissed or removed from employment. He may be transferred to another suitable post but the pay scale cannot be reduced.

Educational Safeguards For Disabled Persons

Chapter III of the Act deals with the education of disabled children. Section 16 of the Act imposes a duty on government funded educational institutions to provide inclusive education to disabled children. Educational institutions are prevented from discriminating against children suffering from disabilities and are required to provide education, sports and recreation facilities to the disabled children, provide them with reasonable accommodation, make the campus more accessible to them, ensure that dead and blind children are imparted education using appropriate means of communication and suitable pedagogic means, provide them with transport facilities and monitor their participation and progress.

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Section 17 aims at promoting inclusive education. It provides that the government and the local authorities are responsible for setting up training institutes and for training staff and professions on how to promote inclusive education. Children with a benchmark disability are entitled to free books and other learning materials until they attain the age of 18 years.

Section 32 provides for a 5% reservation in all government higher education institutes and those educational institutes that are beneficiaries of government funds.

Skills, Development and Employment of Disabled Persons

The Act makes special provisions for the promotion of skill development and employment of disabled people. Under Section 20, discrimination against disabled people in matters related to employment is specifically prohibited. The government establishments are mandated to provide them with reasonable accommodation and are prohibited from reducing the ranks of those employees who acquire disability during the work. Disabled people cannot be denied promotion merely on grounds of disability.

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Section 21 mandates every establishment to notify an equal opportunity policy and the same has to be registered with the Chief or State Commissioner.

Section 23 requires every establishment to appoint a grievance redressal officer and to inform the chief commissioner or the state commissioner about the same. Any person can approach the officer and complain about the discrimination done by the establishment on the grounds of disability. The redressal officer has to maintain a register of complaints and the enquiry into every complaint has to be completed within two weeks of registration.
India is known all over the world for her trust in democracy and human values. Though India has been influenced by international and regional disability law reforms but still the role of the Indian family cannot be ruled out for reason that family was the very first basic unit that protected and promoted the rights of the disabled persons. We can also draw some inference of pity shown by some kingdoms that ruled our country for example, Kautilya, the renowned political economist of the maurya period and author of Arthasastra enjoined the king to provide the orphans, the aged, the infirm, the afflicted and the helpless with maintenance. In the history of rights of persons with disabilities in India, the right to food features for the first

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time in *People's Union for Civil Liberties union of India and Others*[5]. In its interim order dated 23rd July, 2001 the court asked the Government to include persons with disabilities in all schemes targeted at poorer sections of the society.

While disabled people have the right to take their own legal decisions, this Act also envisages a situation where a disabled person might face difficulty in making legally binding decisions. For such a case, Section 14 provides for the concept of a limited guardian. The limited guardian is to help the disabled person and can take legally binding decisions on their behalf. Limited guardianship implies joint decision making between the disabled person and the guardian on the basis of mutual trust and understanding. Such a guardian can be appointed by the District Court or any such authority notified by the State Government. The disabled person has a right to appeal against such an appointment by the designated authority. No person including the disabled irrespective of his belonging can be treated as an untouchable. It would be an offence punishable in accordance with law as provided by Article 17 of the Constitution. Every person including the disabled has his life and liberty guaranteed under Article 21 of the Constitution. Persons with disabilities face a range of barriers to employment opportunities, most significantly discrimination and stigma, lack of accommodation, lack of accessible transport, and denial of education and/or vocational training. Persons with disabilities have the same rights as all people to non-discrimination, access, and equality of opportunity, inclusion and full participation in society. These are the basic principles underlying the Americans with Disabilities Act and the Convention on the Rights of Persons with Disabilities.

Conclusion

People with disabilities are also more likely to look social separation, which carries its own health risks, including increased risk of death. "When a person's disability includes flexibility damage, one issue that can arise is increased physical and social isolation. At modern era our government enacted different laws for protection of disabled person's rights and their interest, but not only from the law we cannot protect the disabled persons and give the justice. Today government should make new schemes for disabled persons for their benefit. When they enjoy their life according to common man, then only we can give the justice for Article

[5] AIR 2001 SC 530

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14 of the constitution of India, it means Right to Equality. Now a day's disabled person's faces lack of availability of special schools, access to schools, trained teachers, and educational materials for the disabled. Even though many disabled adults are capable of productive work, disabled adults have far lower employment rates than the general population. To come out from this problem Government or state should put lot of effort to remove lack of problems of disabled person, because even disabled person is also valuable human beings in the society.

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Foreword

There has been a sweep change not only in India but also in the International Arena in regard to International Arbitration. There have been many statistics and surveys from highly recognized institutions such as the Queen Mary International Navigation Service, the Singapore International Arbitration Centre's Report which recommend International Arbitration to resolve the Cross-Border Disputes. International Arbitration is one among the most exciting and fascinating field promoting the conversant Law Practitioners to be in. India is among the fastest growing economies and one of the most favoured Foreign Direct Investment destinations. It is thus also a jurisdiction from which a fair bit of International Arbitration work emanates.

In this context, I am very happy to see such an excellent Indian Book covering the full spectrum and International Arbitration with a special focus on the Indian Perspective. The Book balances the Practical and the Theoretical aspect which will help demystify the inner workings of Arbitral Institutes. I am sure, that the Book will be well received not only within the Domestic four corners but internationally as well. It provides a Comprehensive coverage of the Basic Principles and Legal Doctrines and the practice of International Arbitration. It contains a systematic and concise treatment of all the aspects of the Arbitral Process including the International Arbitration Agreement, Law of Limitation in Arbitral Proceedings and Judicial Intervention in Arbitral Awards etc. The Book addresses both International Commercial Arbitration and the related fields of Investment and the state-to-state arbitration and is an essential reading for any Practitioner, Academician and the Student of International Arbitration seeking a complete introduction to the field.

A Critical Study on Advantages of International Commercial Arbitration

Dr. Boregowda S.B[1]

Assistant Professor, Vidyavardhaka Law College, Mysuru

Introduction

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. Rapid globalization has meant a corresponding growth in the volume of international contracts with clauses providing for international arbitration. In international trade and commerce, arbitration has become exceptionally strong and widely accepted as a means of resolving disputes. In modern era more than 90% of all international contracts are governed by an arbitration clause. In this article discussed about role of arbitrator in solving disputes, merits, demerits of international commercial disputes and importance of international arbitration in 21st century. As the focus of the world economy has tilted towards the higher growth economies in emerging markets, the disputes brought to international arbitration are increasingly drawn from trade with and between emerging economies. While national courts and systems of national law are confined within national boundaries, the danger is that a dispute relating to modern global business will be subject to the courts of different countries engaged in parallel proceedings, or having difficult and lengthy proceedings concerned with the question of which courts have jurisdiction. All of that, with appropriate forethought, can be avoided with well-drafted arbitration clauses giving an international arbitral tribunal as wide a jurisdiction as

[1] Dr. Boregowda S.B., Assistant Professor, Vidyavardhaka Law College, Mysuru.

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possible. In that way, there is scope for exploiting the enormous advantage of having all relevant aspects of the dispute considered in one arbitral forum, and for the arbitral tribunal to have appropriate powers over the entirety of the issues in dispute.

In modern era the market has globalized more and more and as a result of the growth of international business, the number of international transactions has increased and gained a significant importance in the last decades. Even if a transaction or a contract is planned well, still it is possible to face some disputes. Parties should consider this possibility beforehand and therefore there is a considerable need for including dispute resolution mechanisms in a commercial contract.

The main forms of commercial dispute resolution are; negotiation, arbitration, litigation and alternative dispute resolution mechanisms such as conciliation, mediation and mini-trials. Each method of dispute resolution has its own distinct features and advantages. This article will only deal with one type of commercial dispute resolution: arbitration. Arbitration is a consensual private process, in which parties refer their disputes to a third person, an independent arbitrator, which they have selected to make a decision based on the evidence and argument presented before them.

International commercial arbitration treaties have been collected in a number of resources. The Electronic Information System for International Law (EISIL) maintains a section on International Commercial Arbitration containing links to the texts of several major treaties and other resources on international arbitration, including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the European Convention on International Commercial Arbitration, the Inter-American Convention on International Commercial Arbitration, and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards. ASIL's Electronic Resource Guide to International Commercial Arbitration also contains a section on International Agreements, Conventions, and Treaties that includes links to the texts of a number of treaties, including regional multilateral and bilateral investment treaties. The International Council for Commercial Arbitration provides links to regional and international arbitration treaties.

International commercial arbitration is a method of resolving disputes through an arbitration proceeding heard by one or more arbitrators, instead of pursuing resolution of the dispute through an applicable court system. There are many reasons why parties may prefer arbitration to litigation. One, parties may wish to avoid the high costs of litigation, the uncertainty of proceedings in foreign (to the party) court systems and laws, and the potential difficulties in enforcing foreign judgments. Two, arbitrations are normally binding and usually do not allow for an extensive appeal process. Three, arbitral awards are normally confidential, unlike most court decisions issued in litigation. Finally, the parties to the dispute traditionally select the arbitrators to hear the dispute--which allows for the selection of arbitrators well versed in the subject-matter of the dispute at issue.

International commercial arbitration is defined not only by whether arbitration is involved, but also whether the arbitration is "commercial". Therefore, Part 1 continues by discussing the development of "commerce" in the context of international commercial arbitration and why the concept of commerce is important in investment arbitrations. You will then learn what makes arbitration international, particularly in the context of the UNCITRAL Model Law on International Commercial Arbitration.

Parties normally choose ICA to resolve disputes when drafting contracts and other agreements--a clause selecting the institution or arbitral rules to be used in any future disputes can be added to the agreements during negotiations.

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Historical Development of International Commercial Arbitration

The concept of arbitration as a method of dispute resolution was historically a simple self-regulated system. It was very common that two or more traders, in dispute over their commercial relationship, would turn to another person to act on their behalf in finding a solution to their dispute. However, international commerce cannot stay within national boundaries and international commercial arbitration crosses borders.

The Geneva Protocol of 1923, which was the first protocol on arbitration clauses, provided a basis for the international enforcement of arbitration agreements and arbitral awards. The Geneva Protocol of 1927 extended the scope and the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') of 1958, which was the first major contribution made by the United Nations to international arbitration, strengthened these provisions. The establishment of these international treaties, most importantly the New York Convention, was influenced considerably by arbitral institutions such as the London Court of International Arbitration founded in 1892.

The New York Convention has been ratified by many trading states, by 142 of the 192 United Nations Member States, and it obliges them to recognize and enforce both international commercial arbitration agreements and arbitral awards. In recent years, there have also been efforts to harmonize national laws relating to international arbitration. The UNCITRAL Model Law which was adopted by the United Nations Commission on International Trade Law in 1985 is the other important contribution made by the United Nations to international arbitration and it provides a simple and clear form for the arbitral process from the beginning to the end.

It is generally agreed that arbitration is a particularly suitable method for the resolution of disputes arising out of commercial relationships. Accordingly, there have been many developments in terms of the Arbitration Law both in national laws and in the international area in the last decades.

A growing number of international contracts provide for disputes to be referred to arbitration. In light of this trend, several countries (including India) have undertaken a rapid expansion and development of their arbitral law to make it more accessible and flexible for foreign investors. Since one of the purposes of arbitration is more or less to provide for greater party autonomy, parties are generally more free to agree the procedures governing their arbitrations, including the seat of that arbitration.

Principally, arbitrations are either institutional (i.e., adhering to institutional rules), or ad-hoc (i.e., governed by the statutory regime of the arbitral seat). Certain mandatory (statutory) rules still apply to an arbitration governed by institutional rules. Popular institutions that provide a procedure for international arbitration are the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), and the Singapore International Arbitration Centre (SIAC).

Arbitration must be founded on the agreement of the parties. Not only does this mean that they must have consented to arbitrate the dispute that has arisen between them, it also means that the authority of the arbitral tribunal is limited to that which the parties have agreed. Consequently, the award rendered by the tribunal must settle the dispute that was submitted to it and must not pronounce on any issues or other disputes that may have arisen between the parties. As provided in Article V of the New York Convention.

India

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In the Indian legal system in an arbitration containing a foreign

element, there are three different systems of law which govern the arbitration[2]:-

1. The law governing the substantive law of the contract. This is also referred to as "substantive law", "applicable law", or "proper law of the contract".
2. The law is governing the existence and proceedings of the arbitral tribunal, which is the law governing the conduct of the arbitration proceedings. It is also referred to as the "curial law" or the "lex arbitri". This is the law which is derived from the seat of arbitration.
3. The law governing the recognition and enforcement of the award is the law which governs the enforcement, as well as filing or setting aside of the award.

In the absence of any other stipulation in the contract, the proper law is the law that the arbitral tribunal itself will apply. The same applies to the *lex arbitri* and the law governing recognition and enforcement, in absence of an intention/stipulation to the contrary. The seat of the arbitration specified in a contract generally determines the seat of arbitration, unless clear contrary intention is apparent from the contract.

In most cases arbitration is only semi-consensual. Most arbitration agreements are in the form of an arbitral clause in the principal contract. The arbitral clause will provide for the settlement of disputes that may arise in the future. If a dispute does arise, the parties may no longer be in agreement that the dispute should be submitted to arbitration. Two consequences follow. - The claimant in the dispute may wish to turn to the courts. However, it can be precluded by the respondent from doing so and forced to proceed in arbitration. As stated in Article II of the New York Convention, Arbitration is not part of the State system of courts. As already noted, it is a consensual procedure based on the agreement of the parties. Nevertheless, it fulfills the same function as litigation in the State court system. The end result is an award that is enforceable by the courts, usually following the same or similar procedure as the enforcement of a court judgment. Consequently, the State has an interest in the conduct of arbitration beyond the interest it has in the settlement of disputes by other procedures that are also alternatives to litigation. In the past this led some countries to exercise strict control over arbitration. In many countries the close connection between arbitration and litigation is illustrated by the fact that the law of arbitration is found in the Code of Civil Procedure.

Advantages and Disadvantages of International Commercial Arbitration: Advocates of a more frequent use of ADR point out that both litigation and arbitration are backward looking and have as their principal function to allocate the responsibility and the cost for something that went wrong in the past. ADR techniques in general are said to be forward looking and to have as their principal goal the resolution of the dispute in such a way that the parties can continue their relationship in harmony. While this difference is largely true, ADR often serves as well as a means of allocating the cost of what went wrong in the past. Critics of ADR point out that when the procedures do not lead to a solution that is satisfactory to the parties, they still have to resort to litigation or arbitration and the ADR procedures will have only increased costs and delay in the final resolution of the dispute.

Advantages of International Commercial arbitration: Arbitration is preferred by many as a way to resolve commercial disputes. In international trade and commerce, arbitration has become exceptionally strong and widely accepted as a means of resolving disputes. Exactly how widely accepted is probably impossible to know, but some commentators have suggested that a figure as high as 90% of all international contracts are governed by an arbitration clause.

Rapid globalization has meant a corresponding growth in the

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volume of international contracts with clauses providing for international arbitration. In turn, the availability and effectiveness of international arbitration has been seen by many as a spur to cross border commerce and investment. As the focus of the world economy has tilted towards the higher growth economies in emerging markets, the disputes brought to international arbitration are increasingly drawn from trade with and between emerging economies. Although the traditional centers of international arbitration in Western Europe and North America are busier than ever, they are facing strengthening competition from elsewhere.

In particular, an increasing number of countries have modernized their arbitration laws and supporting judicial practices and an ever widening choice of arbitral institutions worldwide now offer their services to potential customers. Meanwhile in some jurisdictions the courts themselves are fighting back and making attempts to attract international disputes away from arbitration.

This exciting but increasingly complicated legal landscape presents an array of choice to international parties as to how they manage and resolve their disputes. Business needs will always vary depending on the context, but some general guidance can be drawn from an analysis of those aspects of international arbitration which have typically been seen as most advantageous for international parties while minimizing perceived disadvantages of international arbitration. It has many advantages. They are

International Commercial Arbitration has not been a completely ideal way to resolve international disputes yet, but Born suggests that it is the least ineffective way and comparatively better than the alternatives. (1994) Even though in domestic disputes litigation in national courts may be preferable to arbitration depending on the circumstances in each particular case, in international disputes opinions are strongly in favour of international commercial arbitration as the nature of international disputes differs from domestic disputes in many aspects.

Arbitration is mostly referred to as contradictory to litigation. Under the process of Arbitration, the use of a neutral third party or panel of third parties known as Arbitrator(s) is hired to settle the dispute between parties in conflict, it is a process of resolving the dispute outside the court. The arbitrators listen to the arguments made by the parties in conflict and on the basis of that they make a unbiased decision beneficial for both the parties.

Generally, people prefer arbitration over litigation because it is less expensive, quicker, and secure and offers more privacy to the parties. And among its different benefits most distinguishable benefit of arbitration over litigation is its cost and time efficacy[2].

1. Arbitration is considered to be more flexible than Litigation. Laws related to the process of litigation are more complex as compared to arbitration, litigation must follow law of civil court, it involves following CPR rule book whereas Arbitration rules are much simpler and smaller in number. In arbitration there is no code of procedure, it is agreed by the parties, they can agree and settle to whatever they want.
2. Arbitration can provide better quality justice than many courts of the country as they already overloaded with cases. Arbitration in international disputes also provide better quality decision as compared to domestic courts.
3. Arbitration as compared to litigation is less time consuming as well as less expensive. Arbitration aims at providing expeditious resolution than the normal court proceedings, similarly, it is less costly than the court proceedings.
4. Arbitrators tend to provide greater level of expertise as compared to a judge, because Arbitrators are appointed from the bunch of the professionals who have specialized

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[2] https://www.clydeco.com/clyde/media/files/library/International_ Arbitration_15_Chapter_ClydeCo on 17-12- 2021 at 11:30am.

knowledge of particular trade or business thereby boosting confidence and trust of businessmen in proceedings and the resulting award likely in insurance disputes where arbitrators chosen in that field rather than more general judges.

5. An Arbitration award is ultimate and permanent, and there are very limited chances of further appeal, even if the arbitrator makes a error of fact or mistake of law. International Commercial arbitration is also unbiased plus arbitration also guarantees privacy and confidentiality of the matter in dispute and unlike court proceedings does not disclose the identity of the parties involved in it.

Though arbitration has many advantages, it is wise to consider all of the options when preparing to begin arbitration. Knowing the major differences between arbitration and litigation can be a valuable asset and a great time and money saver.

Disadvantages of International Commercial Arbitration

Disadvantages of Arbitration are: Arbitration is a favoured method of dispute resolution in the international forum, especially in cases of international commercial arbitration which differ from domestic disputes in many ways.

No Appeals: The arbitration decision is final. There is no formal appeals process available. Even if one party feels that the outcome was unfair, unjust, or biased, they cannot appeal it.

- Cost: While arbitration is generally a more cost-efficient legal settlement option, it might not make sense in cases when minimal money is involved.
- Rules of Evidence: A judge in a traditional court setting has specific regulations to follow when it comes to accepting evidence. Arbitrators, however, can utilize any information that is brought to them.
- Lack of Cross-Examination: The arbitration process generally includes documents and not witnesses, voiding the ability to cross-examine.
- Limited Discovery: In the event that arbitration is not filed until litigation has already begun, both parties lose the cost-saving advantage of limited discovery.
- Lack of Consistency: There are no set standards for arbitration, making it difficult to find consistency. It is possible that an arbitrator can be biased, which is sometimes the case in mandatory arbitration contracts.
- Lack of Evidence: Because arbitration is not evidence-based, you entrust the experience of the arbitrator to make the right legal decision.
- Not Public: The level of confidentiality involved in arbitration cases could potentially be disadvantageous to one party. There is also a lack of transparency, which is not the case in public courtrooms[3].

Conclusion:

Arbitration involves settling a legal dispute without going to trial. Going to trial can be expensive and time-consuming, meaning arbitration can be advantageous to many people. Arbitration is a favored method of dispute resolution in the international forum, especially in cases of international commercial arbitration which differ from domestic disputes in many ways. It is preferred over court litigation in some cases. International commercial arbitration is a means of resolving disputes arising under international commercial contracts. The parties can specify the forum, procedural rules, and governing law at the time of the contract. However,

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[3] https://www.lawteacher.net/free-law-essays/commercial-law/advantages-and-disadvantages-of-international-commercial-arbitration-commercial-law-essay.php on 17-12-2021 at 12:45pm.

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• Shri Abhishek Sharma Padmanabhan

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an important role for protection of components of environment, because without components of environment it's very difficult to sustain. Therefore people should participate in decision making process and government should implement the decision and principles made by the Judiciary.

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Climate Change and Migration

*** Mrs. Bhavana Chandran**

****Dr. Rashmi G**

ABSTRACT

Climate change is a change in the pattern of weather, and related changes in oceans, land surfaces and ice sheets, occurring over time scales of decades or longer.[118] There are several reasons for the climate change Natural disasters have always been regarded as the reason for sudden displacement or migration of population. But over the past few decades there have been serious probing into the role of climate change — a long period of change that fundamentally alters the coordinates of human existence, such as rain, water availability and sea level — in large-scale human migration[119].Media outlets, think tanks, researchers, and advocacy groups are increasingly raising the specter that climate change will cause mass migration via its spiralling impacts on agriculture, water resources, and infrastructure, particularly in the developing world. More than just speculation about the future, however, environmental migration is already here[120]. The migration may take place within the state as well outside the territory but the issues faced by the migrants is always of a concern. The paper is a doctrinal study trying to write back to the interrogatories such as: The reason for the climate changes and factors leading to climate changes? Is Climate Changes persuading Migration? and what are the various international institutions and National level panels that are combating the issue of migrants?

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Introduction:

Migration is not new or a recent development. The evolution of human race started with the nomadic settlements based on the availability of water, food, etc,. Eventually

[118]*The science of climate changes, feb2015,https://www.science.org.au/learning/general-audience/science-climate-change/3-are-human-activities-causing-climate-change,Australian Academy of science*

[119]Migration out of climate changes,22may2020,https://www.downtoearth.org.in/news/climate-change/migration-out-of-climate-change-71291,Mahapatra and Sangomla

[120]Climate Impacts as drivers of migration,23oct2020, https://www.migrationpolicy.org/article/climate-impacts-drivers-migration,Alex de Sherbinin.

generations and developmental projects should not affect the lives of the people working or living near them. Thus, the need for such environmental consciousness should always be there in all socio-economic structures.

Role of Judiciary In Protection Of Environment

***Dr.Boregowda S.B.**

Abstract:

In contemporary years, there has been a constant focus on the role played by the judiciary in planning and observing the application of measures for pollution control, protection of forests and wildlife protection. These legal involvements have been activated by the tenacious unintelligibility in policy-making as well as the lack of capacity-building amongst the policymaking agencies. This paper begins with the meaning and essential for environmental laws. It also studies the legal remedies available for environmental protection and some remarkable principles and doctrine propounded by the Indian judiciary. This chapter will lead to a more expressive and inclusive understanding of the environment law and the policy along with the role of judiciary in present context to the new developing threat which need to be battle successfully.

Introduction:

In the modern world most dangerous crises is constantly increasing pollution of the environment. The idea of environmental protection is not a new phenomenon; it can be seen in antique civilization. It is stated in Ancient texts that it is each individual's dharma to protect the natural sources such as soil, water, trees and animals that are of great significance to us. In the modern age, the world is influenced by advancement of technology & technologies such as thermal power plants, atomic power plants etc. Global warming & climate change etc. has thus become a global problem.

Today we are living in technological era. We cannot disregard the damage done to the atmosphere by the atom bombs in Hiroshima and Nagasaki in 1945 world war-II. Owing to day to day creativity & development of technology, it's become part of development but apart from this it spread the risk to human life. Climate & growth is means that they will not end in themselves. Environment & development is for the people, not environment & technology people.

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Environment is living and non-living things which surround us. It consists of plants and animals and non-living objects like water, air, light, soil, temperature, etc. Section 2(A) of the Environment protection Act, 1986 defines Environment[96]. It includes water, air and land and human beings, other living creatures, plants, micro-organisms and property. It means and includes all factors, which directly or indirectly have bearing upon the natural surroundings of human being. It is the sum total of all conditions and influences that effect the development and life of all organisms.

Environment is also defined as Man's total environmental system which includes not only the biosphere but also his interactions which his natural and man-made surroundings. Environment is also the entire range of external influences acting on an organism. Both the physical and biological i.e., other organism, Forces of nature surrounding an individual.

Quality of environment is necessary for all organisms to lead a quality life and also sustain their life and existence qualitatively. Even a child in mother's womb needs a quality environment for example, quality of air, quality of food and hygienic water. It is not only the duty of State to protect the environment but it is increasingly felt that it is an international and global issue[97].

The inter-connected oceans, the blowing winds, the soil connections, etc., have great effects between one country and another. Environment is responsible for our genetic composition, our existence and the existence of animals and plants.

It is therefore important that the environment is preserved and protected from degradation and to enable us to maintain the ecological balance. Natural resources are the basis of all our activities whether it is agriculture, industry, science or technology, etc. The protection of natural resources and their conservation both qualitatively and quantitatively is very much essential.

Judicial Contribution to Protect Environment:

The protection of environment was not significant in post-independence period of India, because of need of business development and civil disturbances. Post-independence, the key concern was to setup markets, trades, to make different jobs for the citizens. However, after the Bhopal Gas tragedy, Environment protection became importance.

[96] S. Shanthakumara's, Introduction to Environmental Law, Lexis Nexis, 2nd ed, 2012 p-151.
[97] P. Leelakrishnan, Environmental law in India, Lexis Nexis, 3rd ed, 2015, p-202.

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After this instance, the area of Environmental law broadens in the state and judicial movement also rises.After 1986, when major act related to the environmental protection was accepted, publics exposed some concern about it. The chief purpose of the act was to implement the decisions of the United Nations Conference on the Human Environments. The Act is like a safe guard for the environment from the newly emerged industries and the development. Before this act of 1986, a major enactment was come out just after 2 years after the Stockholm Conference in 1974. The Indian Parliament makes important change in the area of environmental management to implement the decisions that were taken at the conference. It was this time when environmental protection was granted a Constitutional status and environment was included in DPSP by the 42nd Constitution Amendment[98]. The constitution also provides obligations under Article 48 A[99] and Article 51 A (g)[100] to both the State and citizen to preserve and protect the environment. These provisions have been extensively used by courts to justify and develop a legally binding fundamental right to the environment as a part of Right to life and personal liberty under Article 21[101]. Parliament enacted nationwide comprehensive laws; like The Wildlife Protection Act, 1972 and Water (Prevention and Control of pollution) Act, 1974. In modern era, environmental rights are considered as third age group rights[102].

In contemporary world utmost hazardous crises is continuously growing pollution of the environment. The environmental danger is more severe problem than as compare to others for which urgent attention is now being paid in most of the universe. Perfect natural balance may be impossibility in the wake of growing economic development, industrialization and modernization. The irony of situation is that the more the economic and industrial development in the more is the danger to environment. Currently we are breathing in technical and scientific age. We cannot neglect the injury done to the atmosphere by the nuclear bombs in Hiroshima and Nagasaki. Due to day to day creativity & development of technology, it's become part of development but apart from this it spread the risk to human life. Climate & growth is means that they will not end in

[98] S.C.Shastri, Environmental law, Eastern Book Company, 5th ed, 2015, p-78-80.
[99] The State shall endeavor to protect and improve the environment and to safeguard the forest and wildlife of the country.
[100] It shall be duty of every citizen of India to protect and improve the natural environment including forests, lakes,, and wildlife and to have compassion for living creature.
[101] No person shall be deprived of his life or personal liberty except according to the procedure established by law.
[102] environment protection.pdf dated on 28-10-2021 at 2:30pm

themselves. Environment & development is for the people, not environment & technology people.

Doctrines and Principles Developed by the Indian Judiciary:

The principles and doctrines developed by judiciary are an important input to the ecological jurisprudence in India. Article 253[103] of the Indian Constitution shows the way on how decisions made at universal agreements and discussions are incorporated into the legal system. Invention and use of the principles & doctrines in the court procedure for ecological protection are notable landmarks in the path of environmental law in modern India[104].

Doctrine and Principles are

- **Public Trust Doctrine**
- **Doctrine of Sustainable Development**
- **Polluter Pays Principle**
- **Precautionary Principle**
- **Public Trust Doctrine:**

this is the principle that certain resources are conserved for civic or public use or purpose, and that the government is required to maintain resources for public's reasonable purpose. The ancient romans developed a legal theory known as the Doctrine of public trust. In fact this doctrine is a part of the principle of sustainable development, and it lays down that certain resources like air, sea, water, forests, etc. can never be the subject-matter of private ownership. Such resources are a gift of nature and should therefore be available to all- irrespective of a person's cultural, religious, social or financial status[105]. In *M.C. Mehta v. Kamalnath*[106], the state government leased a riparian forest land for commercial purpose to a private company which had a motel located at the bank of river bias. The motel management's activities affected the natural flow of the river bias. The court held that the state is a public trust of certain resources

[103] Legislation for giving effect to international agreements notwithstanding anything in the foregoing provisions of this chapter, parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or body.
[104] Stuart Bell and Donald MC Gillivray, Introduction to Environmental Law, oxford university press, 2nd ed, 2004, p-5
[105] S. Shanthakumara's, Introduction to Environmental Law, Lexis Nexis, 2nd ed, 2012 p-108.
[106] (1997) 1 SCC 388.

like air, sea, water and the forests which are public importance and so they should not be made as a subject of private ownership. Here, state had committed a breach of public trust. In *M.I.Builders v. Radhey Shyam Sahu*[107], the Supreme Court held that if an underground shopping complex is allowed to be constructed underneath a public park, it would be a violation of the public trust doctrine. The court, therefore, directed the demolition of the structures and the restoration of the park.

In the Spam Motel case[108] the Supreme Court held that the public trust doctrine is part of Indian law and it implies the following three restrictions on the authority of the government, namely,

(a) Such property must not only be used for a public purpose, but it must also be made available for use by the general public.

(b) Such property cannot be sold to a private user, even for a fair cash equivalent.

(c) The property must be maintained for particular types of uses only.

This doctrine also found a staunch in the form of Mahatma Gandhi.

- **Doctrine of Sustainable Development:** the judiciary in India has not lagged behind in this regard and several landmark of the Supreme Court have enthusiastically supported and applied the principles of sustainable development in cases involving public interest litigation.

  Any development, whether economic, social or political must not harm or affect the environmental interests. While development is necessary, it should not be at the cost of environmental pollution. The development should be continuous process for which natural resources must be continuously in existence.

  One generation should not totally exploit the natural resources, which must be continuously kept for the benefit of future generations. The aim of sustainable developement is the integration of developmental activities and environmental protection. In other words, development must possess both economical sustainability and ecological sustainability. The developmental plans must be such that it takes into account the environmental factors also[109].

  Sustainable development is development that meets the needs of the present without compromising the ability of the future generations to meet their own

[107] AIR 1999SC 2468.
[108] (1997) 1 SCC 388
[109] Dr. Vinay N. Paranjape, Environmental Law, central law agency, 2nd ed, 2016, p-82-83.

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needs. Sustainable development is a new concept of economic growth. It involves progressive transformation of economy and society. All policies must aim for sustainable development in economic, social and ecological fields. All factors responsible for preventing sustainable development like poverty etc., must be eradicated.

The first case before the Supreme Court which brought into sharp focus the conflict between development and conservation was the Dehradun Quarrying Case[110]. The Supreme Court in this case emphasized the need for reconciling the two concepts in the larger interests of society[111]. The principles laid down in this case were applied by the High Court of Himachal Pradesh in *Kinkri Devi v. State of H.P*[112]. In this case court observed that "if industrial growth is sought to be achieved by reckless mining resulting in loss of life, loss of property, loss amenities like water supply and creation of an ecological imbalance, there may be ultimately be no real economic growth and no real prosperity. In *Vellore Citizens Welfare Forum v. Union of India*[113]the Supreme Court adopted the principle of sustainable development as a balancing concept, rejecting the traditional view that development and ecology are opposed to each other. The courts observed that the precautionary principle and the polluter pays principle are essential features of sustainable development and that they have been accepted as part of the law of the land in India.

- **Polluter Pays Principle:** now it is widely accepted by most countries in the world, including India. The policy statement for abatement of pollution, issued by the ministry of environment and forests, Government of India, accepts the polluter pays principle as a fundamental objective of Government policy to abate pollution. The 'polluter pays' principle is the commonly accepted practice that those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment[114]. The polluter pays principle was applied for the first time by the Supreme Court in the Bichhri Case[115], where remedial and clean-up costs to restore the environment was ordered to be recovered from the polluter under the writ jurisdiction of the court. The court

[110] AIR 1987 SC 359
[111] S. Shanthakumars's, Introduction to Environmental Law, Lexis Nexis, 2nd ed, 2012 p-111.
[112] AIR 1988 HP 4.
[113] (1996)5 SCC 647
[114] Shyam Divan, environmental law and policy in India, oxford university press, 1st ed, 2001, p-26
[115]AIR 1996 SC 1446.

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referred to this rule as a universal rule to be applied to all polluters. The polluter was, therefore, directed to pay compensation for the harm caused to the affected villagers, to the soil and to the underground water supply. Although the polluter pays principle has been vigorously applied since more than thirty years, there is still some dispute about the exact scope of this rule and in particular, the limits of such payment. In M.C. Mehta v. Kamalnath[116], the Supreme Court directed the Motel which had made constructions which interfered with the natural flow of the River Beas, to pay compensation for restitution of the environment and ecology.

- **Precautionary Principle:** Environmental scientists play a key role in society's responses to environmental problems, and many of the studies they perform are intended ultimately to affect policy. The precautionary principle, proposed as a new guideline in environmental decision making, has four central components: taking preventive action in the face of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possibly harmful actions; and increasing public participation in decision making[117]. The precautionary principle today has been accepted by most countries of the world, including India. In the Vellore Citizen's Welfare Forum's case, the Supreme Court had no hesitation in lying down that precautionary principle is now part of the law of the land. The principle was also applied in the Taj Mahal Case to protect the Taj Mahal from environmental pollution.

Conclusion:

People have also applauded judicial activism in the field of environmental protection. It is important to remember, however, that judicial activism has significant limitations, and that executive laxity and environmental apathy cannot be remedied solely by judicial activism. *In recent years, there has been a sustained focus on the role played by the higher judiciary in devising and monitoring the implementation of measures for pollution control, conservation of forests and wildlife protection. Many of these judicial interventions have been triggered by the persistent incoherence in policy-making as well as the lack of capacity-building amongst the executive agencies. Devices such as Public Interest Litigation (PIL) have been prominently relied upon to tackle environmental problems, and this approach has its supporters as well as critics. Today judiciary plays*

[116] (1997) 1 SCC 388
[117] S. Shanthakumars's, Introduction to Environmental Law, Lexis Nexis, 2nd ed, 2012 p-107.

TEXTBOOK ON

INFRINGEMENT OF HUMAN RIGHTS

IN THE ERA OF

DIGITAL CRIMES

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ANALYSIS OF HUMAN RIGHTS IN THE CONTEXT OF EXTRADITION

By

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Abstract

Human Rights are valuable rights and basic rights for every individual. Extradition is also a weapon which simplifies the administration of criminal justice and when dealing human right of a person come because extradition involves the surrender of a person, from one nation to another, it has been suspect or sentenced of an crime beyond the territory and thereby exposes to the concerned. Extradition means surrender of criminal for prosecution. The purpose of extradition is to prevent criminals who flee an authority to escape from sentence for a crime they have been suspect or sentenced of. Now a days states extradite the criminal or accused on the basis of bilateral treaty between requesting and requested state. International human rights law does not to be extradited. On the contrary, it is an instrument which enables States to obtain custody of, and prosecute, the alleged perpetrators of human rights violations. Extradition can make a important role to the fight against impunity for such crimes. Human rights law does, however, impose certain limitations and conditions on the freedom of states to extradite, by prohibiting the surrender of the wanted person. This chapter is focused on what are the conditions for extradition, whether conditions and procedure for extradition of criminal is violation of human rights and linkages between extradition law and human rights.

Human being has peculiar features such as power of thought, speech and choice. These features are not seen in any other animals. But the ordinary person attributes these characteristics to god, angels, devils and so forth. In uncivilized society there was no criminal law. The person attacks either surrendered or over-powered his opponent. "A tooth for a tooth, an eye for an eye, a life for a life" is the indication of criminal justice. As time advanced, the injured person agreed to accept compensation, instead of killing his enemy. Such a system gave birth to ancient criminal law. Everyone has the right to enjoy his freedom and property in lawful manner but no one has the right to violate the rights of another. Every state or authority has the right to restrict the rights and freedom of others. Crime caused damage not only to individual and also affected to whole community. In case of crime, State or legal authority has the power to punish the criminals. Through by punishment only we can change the conduct or behaviour of people and it will create fear in the minds of individuals. Generally, crime is an offence punishable by a State or other

authority. In *Mohd. Shahabuddin v. State Bihar*[23], Supreme Court Judge Dalveer Bhandari has said, "Every criminal act is an offence against the society. The crime is a wrong done more to the society than to individual. It involves a serious invasion of rights and liberties of some other person or persons. It means crime is not only affected to particular person but it is against the whole society and also grave attack on rights and freedom of the people.

Each state exercise complete jurisdiction over all the persons with in its territory. If a person committed a crime within the territory of the state, a state can punish the criminal under municipal law or law of the land. But difficult problems arise when a person after committing crime ran away to another country, in such a situation how injured state can punish the criminal. Through international cooperation/treaties state can punish the criminals; otherwise such criminal become a dangerous person to the entire world. Further, with the advent of information technology and computerization, jurisdiction of the states has lost their values and significance. Terrorism is also increasing across the globe. In modern era crimes have no boundaries but criminal law and states had its own jurisdictions. Territorial jurisdiction plays an important role to bring the criminal before judiciary. Therefore if a criminal flees from the territorial jurisdiction of the state after committing an offence, the law of extradition plays an important role to bring back such fugitive. Extradition is the legal process by one country hands over a fugitive to another country where that person has been accused or convicted of a crime. From olden period to till today several states adopted and accepted the extradition. Extradition is not a rule but it depends upon the will of the state.

Meaning of Extradition

The term extradition is derived from the Latin word 'Ex Traditio', it means to 'give up', to 'surrender', and 'deliver of criminals' or 'handed over' of fugitive. Generally, extradition means Surrender of criminal for prosecution. Extradition is the legal process by one country hands over a fugitive to another country where that person has been accused or convicted of a crime[24].

The Indian Extradition Act 1962 does not define what Extradition is? But it is a mechanism to bring back the fugitive to the state where he escaped after committing a crime/ after being convicted. Generally, extradition means the surrender by one state to another state at its request. A person accused of or convicted of certain kind of criminal offence an individual after committing a crime in a state may run to another state in order to escape prosecution by the state where he committed the crimes. The escape of an offender may thus frustrate the effort of a state to punish the offender.

In the words of Prof Oppenheim "*extradition is the delivery of an accused or a convicted individual to the state on whose territory he is alleged to have committed or to have been convicted of a crime, by a state on whose territory the alleged criminals happens to be for the time being*"[25].

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[23] Mohd. Shahabuddin v. State Bihar (2010)4 SCC 653.

[24] Dr. S.K. Kapoor, International Law & Human Rights, 166, (Central Law Agency. Allahabad, 16th Edn. 2012).

[25] Prof. Oppenheim, International Law, 631 (Cambridge University Press, Cambridge, 7th Edn.).

According to Starke the term extradition denotes the process whereby under treaty or upon a basis of reciprocity one state surrenders to another at its request a person accused or convicted of criminal offence committed against the laws of the requesting state[26].

Edward Collins says, Extradition is the delivery of an accused or a convicted individual to the state on whose territory he is alleged to have committed or to have been convicted of a crime, by the state on whose territory the alleged criminal happens to be for the time being.

When we see the definition of extradition given by scholars and judges we can understand, generally extradition is a surrender of a fugitive by one state to another in pursuance to a treaty while a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled ,and it has been said that it is under a moral duty to do so , the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty. Extradition is carried on primarily under bilateral treaties, at the time of enter into treaty parties of the states specify a list of extraditable crimes. Extradition is an accepted legal process, which is generally adopted by the states to bring such criminals back and acquire jurisdiction over fugitives in order to preserve peace, law and order, and security within their state. Extradition is useful for the following two reasons.

1. Severe offences do not go unpunished (must be punished)
2. Demanding State may have good proof to penalize the offender or criminal.

Above two reasons show that crime is evil in the society and each state should punish the criminal because no one criminal do not go unpunished and which state is requesting to another state to extradite the criminal, it should have better proof to punish criminals. Because without evidence no one state will not extradite and no one authority will not punish the criminal. In *State of Madras v. C.G. Menon*[27], the Supreme Court of India held that, "*Extradition with foreign states is, except in exceptional cases, governed by treaties or arrangements made.*" It means in extradition matter States should perform their functions according to treaties and what the arrangements made between themselves. Extradition treaty confers a right on countries to ask for criminals who are alleged to have committed crimes with in their territories be surrendered over them for punishment but countries have discretionary powers to refuse extradition of criminals because there is no universal law in the world related to extradition. It is only a practice, treaty or arrangements between states.

[26] J.G.Starke, *Introduction to International law*, 352, (Adithya Book Pvt Ltd. New Delhi, 4th Edn.1994).
[27] *State of Madras v. C.G. Menon*, AIR 1954 SC 517.

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Definition of Asylum: Asylum in international law is the shelter granted by a state to an alien against his parental state. The concept of asylum in international involves two elements.

a. Shelter, which is more than merely temporary refuge;
b. A degree of active protection on the part of the authorities in control of the territory of asylum[28].

Article 14 of the UDHR (Universal Declaration of Human Rights) 1948 provides that 'everyone has the right to seek and enjoy in other countries asylum from prosecution[29]. Extradition and asylum are interlinked with each other, because in case of extradition when one person committed a crime and ran away to another country to bring back such fugitive where he committed the crime but in case of Asylum, it means a state grants shelter facility to alien in its territory who is a political offender or refugee. Example, (1) when State of China acquired the whole territory of Tibet in 1959, then14th Dali lama and his followers came to India and took shelter facility.

Extradition is based on the broad principle that it is in the interest of civilized communities that criminals should be punished and on that account it is recognised as a part of the comity of nations that one state should ordinarily afford to another state to assist towards bringing offenders to justice. The general desire of all states to ensure that serious crimes do not go unpunished. Frequently a state in whose territory criminals have taken refuge cannot prosecute or punish them purely because of some technical rule of criminal law or for lack of jurisdiction. Therefore to punish the fugitive offenders, international law applies the maxim, *'aut punier aut dedere'i.e.* offenders must be punished by the state of refuge or surrendered to the state which can and will punish them[30]. The state on whose territory the crime has been committed is best able to try the offender because the evidence is mere freely available there and that state has the greatest facilities for ascertaining the truth. Territorial State should handover such criminals who have taken shelter in abroad[31]. International Criminal Court is also one of the machinery to curb the anti-social elements but this court does not have the jurisdiction to decide all types of crimes, because its jurisdiction is limited. It means ICC (International Criminal Court) has the jurisdiction to punish war criminals, genocides, crimes against humanity, mass killing, crimes against peace etc. If ICC (International Criminal Court) has the jurisdiction to decide all types of criminal wrongs, then extradition will become a universal law.

The principle of extradition plays an important role in international level to punish the criminals. But even though existence of extradition treaty, if criminals involve in political, religious and military crime cannot be extradited, because the principle of extradition between two countries can be welcomed in case of criminals only.[32] Many countries such as the Netherlands, Belgium, Italy, Germany, Switzerland and France have adopted a rule for not extraditing their own nationals to foreign state. At the time of extraditing criminals, extraditing state can impose any type of

[28] J.G.Starke, Introduction to International law, 358 (Adithya Book Pvt Ltd. New Delhi, 4th ed.1994).
[29] D.W.Greig, International law, 442, (Butterworth's & co, London, 2nd edn, 1976).
[30] V.K.Bansal, Law of Extradition in India, 25, (LexisNexis Butterworth's Wadhwa, Nagpur, 1st ed, 2008)
[31] A. Shearer, Starks International Law, 317, (oxford university press, New Delhi, 11th ed,1994).
[32] K.C.Joshi, International [illegible]d Human rights, 211, (Eastern Book Company, Delhi, 3rd edn, 2016).

conditions on requesting state. These are the lacuna in the principle of extradition in international level. Therefore extradition is not a rule; it's only a will of the states based on good faith and reciprocity.

Object of Extradition

The object of extradition is to restore a fugitive or criminal to the jurisdiction of a state, in accordance with treaty obligations, which intend to prosecute or punish him for the violation of its laws. The rights of a citizen not to be sent out to foreign jurisdiction without strict compliance with law relating to extradition which are valuable rights. Object of Extradition are

- To punish the criminals;
- To give justice for injured state;
- To protect the valuable rights of states;
- Criminals are surrendered as it safeguards the interest of the territorial State;
- Extradition is based on mutual cooperation;
- Extradition is a step towards the achievement of international coordination in solving international disputes.
- To protect the objects of U.N.O. (to maintain peace and security throughout the world).
- Extradition laws as a warning to the criminals that they cannot escape from the punishment by fleeing to another state.
- Extradition is done because it is a step towards the achievement of international co-operation in solving international problems of a social character.

Rights of Extradited Person

Every fugitive criminal, irrespective of his citizenship, who has committed extradition offence or is convicted of an extradition offence, is liable to be extradited. Every extradited person has certain rights. If requested or requesting State failure to provide all these rights to accused or convicted person, its not only violation of legal rights and it is also violation of human rights. Therefore, human rights are the basic rights for everyone in the world. They are

(a) Right to meet an advocate of his choice
(b) Right to Sue
(c) Right to take back his property or article
(d) Right to bail
(e) Right to appeal
(f) Right to go back to sending State
(g) Fugitive criminal has the right to challenge his detention.

Essential Conditions for Extradition or Restriction on Surrender

Every State exercises its jurisdiction over all the persons living in their territory but when a person after committing a crime may flee away to another country for saving himself. In such situation from where that criminal has escaped, that State is helpless to exercise its jurisdiction to punish the wrongdoer. This event is very vital for maintaining peace and order. In such cases, peace and order can be maintained in the State through by international assistance between the States. As it is a social principle to punish the criminals. By extradition only a State can hand over the criminal from one State to another State and punish the criminal. This type of arrangements happened in international level through by cooperation otherwise it's very difficult. *In Abu Salem Abdul Qayoom Ansari v. State of Maharashtra*[13] justice A.K. Ganguli held that extradition has five essential ingredients. They are

(a) Reciprocity or Interchange
(b) Double criminality
(c) Extraditable offence
(d) Rule of Speciality and
(e) Non inquiry.

Through its diplomatic agent only a State can register its request to another State for extradition of criminal, before that first State should accomplish the following conditions.

I. Extraditable Persons;
II. Extradition crimes.

I. Extraditable Persons

It means capable of being extradited; subject to surrender an extraditable person. It is used to refer for which crime a person can be extradited. It means in extradition treaty both states agreed that what type of criminals can be extradited. There is uniformity of state practice that all the criminals should be extradited/surrendered. It means both states agreed in extradition treaty related to what type of crime committed by a person can be extradited or surrendered. Since extradition is the delivery of an accused or convicted individual to the State on the territory of which he is alleged to have committed a crime, or to have been convicted of a crime, the object of extradition can be any individual, whether he is a national of prosecuting State or the national of a third State or that of the extraditing State[14]. However, many States, such as USA, France and Germany etc., have adopted the principle of never extraditing their nationals to a foreign State. But some States like Great Britain did not make this distinction between their nationals and others[15].

II. Extradition Crimes

Extradition is an act where one jurisdiction delivers a person accused or convicted of committing a crime in another jurisdiction, over to their law enforcement. Usually the practice as to extradition crimes mentioned in the each bilateral extradition treaty. It means parties of bilateral treaty mentioned what type of crimes may be considered for extradition, because the practice of extradition doesn't apply for simple crimes. Generally States extradite only for serious crimes and there is a recognizable advantage in thus limiting the list of extradition crimes since the method is

[13] V.k.Ahuja, Public International Law, 94, (Lexis Nexis, Delhi, 1st edn, 2016).
[14] K.C.Joshi, International law and Human rights, 196 (Eastern Book Company, Delhi, 3rd edn, 2016).
[15] V.K.Bansal, Law of Extradition in India, (LexisNexis Butterworth's Wadhwa, Nagpur, 1st edn, 2008).

disgraceful conduct[49], Intoxication[50], Extortion and Corruption[51], offences relating to Court -Martial[52], False Evidence[53] and unlawful detention of pay[54] etc., There is no extradition for Military offences e.g. desertion.

Human Rights and Extradition

Human rights are standards that recognize and protect the dignity of all human beings. Human rights govern how individual human beings live in society and with each other, as well as their relationship with the State and the obligations that the State have towards them.

Human rights law obliges governments to do some things, and prevents them from doing others. Individuals also have responsibilities: in using their human rights, they must respect the rights of others. No government, group or individual person has the right to do anything that violates another's rights. Human rights are indivisible. Whether civil, political, economic, social or cultural in nature, they are all inherent to the dignity of every human person. Consequently, they all have equal status as rights. There is no such thing as a 'small' right. There is no hierarchy of human rights. Before us one question is whether convicted criminals also have human rights or not. For this question answer is yes criminals have the same human rights as all other people. Criminals, no matter the crime, are not "less than human". Not only is it ethically wrong to deny someone their rights as a human being, it is a dangerously slippery slope to society to walk along.

Extradition is perhaps the best-known of those mechanisms, and it plays a key role in the suppression of transnational crime. Extradition is the formal legal process by which persons accused or convicted of crime are surrendered from one state to another for prosecution or punishment. If extradition serves as a valuable tool of international cooperation for fighting crime and terrorism, will governments let human rights stand in the way? In this section, we develop an argument emphasizing the ways in which domestic norms, particularly those associated with human rights and physical integrity may shape a state's willingness to extradite individuals. Since extradition potentially puts the human rights of the extradited person at risk, states concerned for such rights will be more reluctant to extradite: extradition might legitimize conduct that runs contrary to their values and make them complicit in human rights violations. Furthermore, extradition might bring these states under criticism for failure to uphold fundamental norms. At present at the time of extradition states should not violate the rights of accused or convicted person. If state violates the rights of accused or criminal he can file a petition against the state in court and stop the extradition proceedings. Therefore every state should give at most respect for human rights, fundamental rights and legal rights of every one, either he is a common man, accused or criminal.

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[49] Indian Military Act, 1950, Article-46.
[50] Indian Military Act, 1950, Article-47.
[51] Indian Military Act, 1950, Article-53.
[52] Indian Military Act, 1950, Article-59.
[53] Indian Military Act, 1950, Article-60.
[54] Indian Military Act, 1950, Article-61.

Conclusion

Now day's individuals are extradited by one State to another State on the basis of certain conditions. States cannot claim extradition has a right, because extradition is not a law. Even today criminals enjoy the rights guaranteed by the statutes, such as All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person and There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent. Global criminal actions have converted as universal problem. To battle these problems there should be an international cooperation among nations to punish criminals and reduce the crime rates in the world. With reference to the overhead declaration in its Article 1, the United Nations Model Treaty on Extradition, 1990 gratifies States to extradite the fugitive offender on the basis of an agreement or treaty[55]. But at present even in absence of treaty also States can transfer or surrender or extradite the fugitive criminal on the basis of reciprocity or good faith. No State interferes in the affairs of another sovereign State because every State is sovereign in its territory. It means it follows from the simple proposal that one State may not do an act of control upon the territory of another sovereign State that a sentenced or suspected criminal who makes good his flee from the territory of the State where the offence was done to the land of another sovereign State is exempted from the confiscation by the authority of the former State. Even today also several States fail to bring back the fugitive criminal before the judiciary because what are the procedures and conditions are adopted by the States for extradition, it is very difficult to fulfil and follow. These practices and conditions some time help to fugitive criminal to flee from the punishment. Therefore, universal law is essential for extradition, then only we can see the conflict less extradition in the world. At the time of surrender of criminal, states should not violate the human rights of criminal, in case of violation he can appeal to Human rights commission.

[55] United Nations Model T[illegible]y on Extradition, 1990, Art.1.

so heavy and costly. Several States extradite the criminals only for crimes which are having a definite minimum punishment, both in the demanding and surrendering state[36]. It means the crimes for which extradition is requested must be a serious crime. Some countries prescribe in the extradition bilateral treaty that there can be extradition only for certain offences and minimum one year punishment for that crime he committed. Any foreign State wants to extradite the criminal from India, what the crime committed by that person, punishable with imprisonment for a term which shall not be less than one year under the laws of India or of a foreign state[37]. There is no lawful prevention in hand over a person for any crime but usually extradition is made in respect of severe crimes. Certain states enumerate extraditable offences. The common practice is to list such crimes in a bilateral extradition treaty. For example, the treaty of extradition between the Government of India and the State of Nepal in 1953 is subject to certain condition that both States accepted to extradite the criminal only for 17 crimes. They are

a) Murder or attempt or Conspiracy to Murder;
b) Culpable homicide;
c) Grievous hurt;
d) Rape;
e) Dacoit;
f) Highway Robbery;
g) Robbery with violence;
h) Burglary or House Breaking;
i) Arson (Torching);
j) Desertion from Armed forces;
k) Offences against the laws prohibiting the export and import goods;
l) Misappropriation by public officers;
m) Serious theft;
n) Abduction or Kidnapping;
o) Forgery or Altering money;
p) Receiving illegal gratification by a public servant;
q) Escaping from custody while undergoing punishment after conviction for any of the offences specified in clauses (1) to (16)[38].

[36] J.G.Starke, Introduction to International law, (Adithya Book Pvt Ltd, New Delhi,4th edn,1994).
[37] Indian Extradition Act,1962, Sec-2(c)
[38] V.K.Bansal, Law of Extradition in India, 313, (LexisNexis Butterworth's Wadhwa, Nagpur, 1st ed[illegible]).

It means in a bilateral extradition treaty what are the crimes are listed, parties of the treaty bound to surrender the criminal, if crime comes under the list otherwise requesting State cannot compel to such State where he physically presents. But generally the following crimes are not subject to extradition proceedings under customary rules of international law[39]:

a) Political Crime;
b) Religious Crime and
c) Military Crime.

(a) Political Crime

it is well-established principles of international law that persons accused of political crimes are not extradited. But sometimes a difficult situation arises as to what is Political Crime. Because until today there is no proper definition on political crime. Where a person physically presents that State will decide whether crime has a political character or not. Generally, a political offence is one committed with the object of changing the Government of a State or including it to change its policy.

(b) Religious crime

Religious crime means 'any act which insults religious feelings and stimulates serious negative emotions in people with strong belief and which is usually associated with a traditional response to, or correction of, sin'. In Saudi Arabia Religious offence is called Blasphemy. It means the act or offence of speaking sacrilegiously about god or sacred things profane talk.

(c) Military Crime

Military crime means if the crime has been committed against another military person or against the military authority or against the defence forces. State of India enacted the Military Act in 1950 and provisions of the Military Act, 1958 elucidate about Military offences. Military crime includes Mutiny, Coup (coup means a unexpected, forceful, and unlawful capture of power from a government), conspires with any other persons to cause any mutiny in the military[40], Desertion[41], Absence without leave[42], Threatening superior officers[43], Disobedience to superior officer[44], insubordination and obstruction[45], Fraudulent enrolment[46], False answers on enrolment[47], unbecoming conduct[48], Certain forms of

[39] D.W.Greig, International law, 412, (Butterworth's & co, London, 2nd edn, 1976).
[40] Indian Military Act, 1950, Art-2(c).
[41] Indian Military Act, 1950, Art-38.
[42] Indian Military Act, 1950, Art-39.
[43] Indian Military Act, 1950, Article-40.
[44] Indian Military Act, 1950, Article-40.
[45] Indian Military Act, 1950, Article-42.
[46] Indian Military Act, 1950, Article-43.
[47] Indian Military Act, 1950, Arti[illegible]44.
[48] Indian Military Act, 1950, Ar[illegible].

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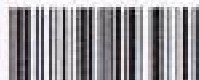

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Transition of Inclusive and Exclusive Practices of Child Protection and Promotion: A Multidisciplinary Approach

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TRANSITION OF INCLUSIVE AND EXCLUSIVE PRACTICES OF CHILD PROTECTION AND PROMOTION: A MULTIDISCIPLINARY APPROACH

Edited by

Dr. Rangaswamy D. | Prof. C.V. Kumaran

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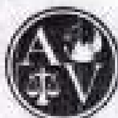

The transition of Inclusive and Exclusive Practices of Child Protection and Promotion: A Multidisciplinary Approach

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An Overview of Child Adoption Process in India

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Abstract

Parenthood is an important aspect of every human life. Right to parenthood has also gained significant recognition in the jurisprudence of various civilized nations. However, not every individual family possesses the fate to become parents naturally. In such a situation adoption of children becomes a blessing in disguise. Adoption sometimes also helps in giving identity to orphans and in some cases to left out illegitimate children. However, for protecting the rights of children law has framed several rules regarding procedures and how a child can be adopted. It is therefore necessary to know the law before adoption. In India also there is a well-drafted legal framework on child adoption. This paper shall try to provide an overview of child adoption laws in India.

Keywords:

Adoption; Child Rights; Indian Jurisprudence; and Parenthood

"Being a parent wasn't just about bearing a child. It was about bearing witness to its life."

Jodi Picoult

Introduction

Nature has bestowed mankind with the most cherished gift of parenthood. But this privilege is not conferred equitably due to various reasons. The infertility rate all over the world is alarming. Infertility is a major crisis for most couples as they are undergoing various suffering and losses within and outside the family. It affects the stability of the family because they have no opportunity to pass on the legacies of the family. Besides this infertility harm their role as parents or grandparents which spoils their self-esteem and worthiness. At this juncture, adoption comes as an alternative the couples who are unable to have their child then enjoy parenthood by way of adoption of the child.

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Meaning of Adoption

The concept of adoption is concerned it as very difficult to define in words. The concept of adoption has changed throughout times in its form, purposes and objects because it is natural that as human thought proceeds the concept and organization of social institutions is also advanced and get modified. In most of the ancient civilizations and Southern Indian cultures as well as, the purposes served by adoption differed substantially from those emphasized in modem times. The continuity of the male line had been the main goal of adoption among Hindus. The importance of male heir along with the religious and economic considerations made it more popular among the Hindus. During the olden days, only the son could be adopted and the welfare of the adoptee was the primary concern than the welfare of the adopted.

Definitions of Adoption:

Adoption has always been considered as a wonderful opportunity to provide the child with a home and the parents a child. It offers an excellent alternative to institutional care for an abandoned, destitute or neglected child in an atmosphere of happiness, love & understanding which only a family can provide.

Section 2(2) of Juvenile Justice (Care and Protection of Children) Act, 2015: Adoption means the process through which the adopted child is permanently separated from his biological parents & becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to be a biological child[1].

Section 2(3) of Central Adoption of Resource Authority: Adoption means the process through which the adopted child becomes the lawful child of his adoptive parents with all the rights, privileges & responsibilities that are attached to a biological child.[2]

[1] C.P.Veena,: *Law relating to Juvenile Justice (Care & Protection of Children) Act ,2015,* (C. Jamnandas & Co,Educational & Law Publishers, Mumbai 2017) at P 14

[2] 153rd Law Commission Report on Inter- country adoption.

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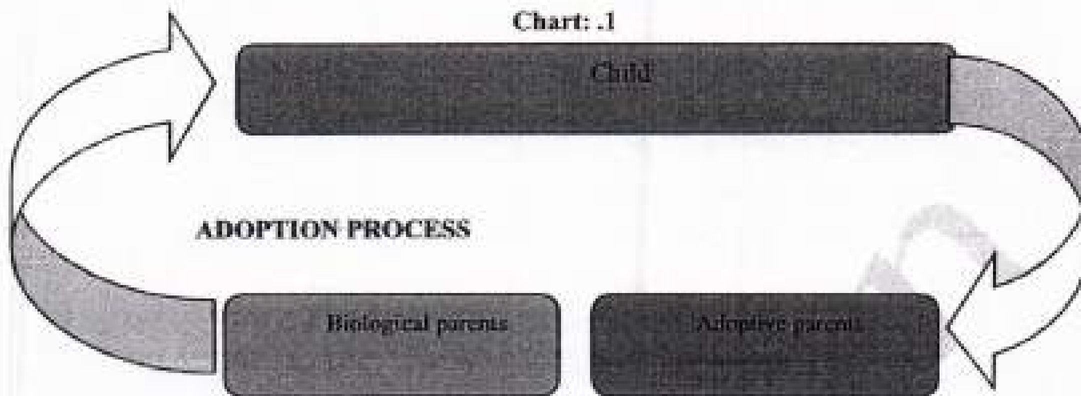
The concept of adoption is depicted in the chart below.

Chart: .1



Adoption under the Juvenile Justice (Care and Protection of Children) Act, 2015 and Adoption Regulations 2017.

The Juvenile Justice (Care and Protection of Children) Act, 2015 deals with various aspects of the adoption of orphaned[3], abandoned[4] and surrendered children[5]. Adoption of such children aligns with the emphasis on right to the family of every child in need of care and protection. Juvenile Justice Act is a secular Act i.e, it applies to all persons. The provisions of this Act do not apply to adoptions made under the Hindu Adoption and Maintenance Act, 1956.

Types of Adoption

In- Country Adoption

a) Adoption of Orphan , abandoned or surrender children:

The children deserted by his biological or adoptive parents or guardians and they declared as abandoned by the Child Welfare Committee after due inquiry[6],

[3] A child who is without biological or adoptive parent or legal guardian or whose legal guardian is either unable to unwilling to take care of the child.

[4] A child deserted by his biological or adoptive parents or guardians and who has been declared as abandoned by the Child welfare committee following due inquiry.

[5] A child who has been relinquished by the parents or guardian to the Child welfare committee due to physical, emotional or social factors that is beyond their control and declared as such by the CWC.

[6] Abandoned child defined under Section 2(1) of the Juvenile Justice (Care & Protection of Children) Act, 2015.

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who is without biological or adoptive parents or whose legal guardian is not willing to take or not able to taking care of the child[7], who is relinquished by the parent or guardian to the committee, on account of physical, emotional and social factors beyond their control and declared the committee[8] such children can be adopted by the prospective adoptive parents within India. Here both child and prospective adoptive parents are Indians. Relative adoption: Relative adoption is the legal adoption of a child by a biological relative irrespective of their religion. For example; the adoption of a child by his/ her relative such as a grandparent, uncle, aunty or cousin. This adoption takes place within the territory of India. Adoption by step-parents: step-parent adoption is a situation in which a step-parent adopts the child of his current spouse. For example, if a woman who has a child remarries, her new husband might choose to adopt the child in a step parent adoption. Step parent adoptions are generally straight forward process, provided there is parent consent for the adoption. Further, the adoptive step parents assumes all the responsibilities for providing the child with reasonable care as required under the law.

Inter – Country Adoption

a) Adoption of orphan, abandoned or surrenders children

b) Relative adoption

V. Procedure for In Country adoption of Orphan, Abandoned and surrender Children:

Step 1- Registration:

Every resident of Indian Prospective adoptive parents who are willing to adopt a child shall register online in the child adoption resource information and Guidance system by filling up the application form and uploading the relevant documents[9]. Once the registration process is completed and required documents are uploaded

[7] Orphan child defined under 2(42) of the Juvenile Justice (Care & Protection of Children) Act ,2015.
[8] Surrender child defined under 2(60) of the Juvenile Justice (Care & Protection of Children) Act, 2015.
[9] Regulation 9(1) of the Adoption Regulation 2017.

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within thirty days from the date of registration, the prospective adoptive parents received the registration number from the acknowledgment slip[10]. At any time by using this number the prospective adoptive parents check the status of the adoption process. The prospective adoptive parents shall opt for desired state or states by giving options for those particular states at the time of registration.[11] One of the adoptive parents registered in the child adoption resource information and guidance system would deem to be registered in all state adoption resource agencies. The seniority occurred to the prospective adoptive parents for selection of children from the date of registration. This registration is continuing till child adoption, with revalidation of the home study report in every three years.

***Step-2: Home study and counseling*;**

The home study report of the prospective adoptive parents shall be prepared by the specialized adoption agency in the state, where prospective adoptive parents have resided. Through its social worker or through a social worker from a panel maintained by the state adoption resource agency or District Child Protection Unit. For the home study the social worker visit the home of the prospective adoptive parents, do the home study and submit the report within thirty days from the date of submission of requisite documents and proceed to counseling session[12]. Soon after the completion of the home study, the report shall be shared in the Child Adoption Resource Information and Guidance System by the specialized adoption agency or District Child Protection Unit or State adoption Resource agency. This home study report remains valid for the period of three years and it's a basis for the adoption of child by prospective adoptive parents from anywhere in the country.[13]Based on the home study report the specialized adoption agency declared the eligible parents.[14]

[10] Section 9(3) of the Guidelines governing the adoption of children 2015.
[11] Regulation 9(2) of the Adoption Regulation 2017.
[12] The agency may also need the adoptive parents to attend counselling sessions in order to make them understand the preparation motivation, strengths and weaknesses of the adoptive parents.
[13] Regulation 9(12) of the Adoptive Regulation 2017.
[14] Regulation 9(12) of the Adoptive Regulation 2107; the prospective adoptive parents shall be declared eligible and suitable by the specialized adoption agency based upon the home study report and supporting documents and in case any prospective adoptive parent is not declared eligible or suitable ,the reason for the same shall be recorded in the child adoption resource information and guidance system.

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Step – 3: Selection of child by the Prospective adoptive parents:

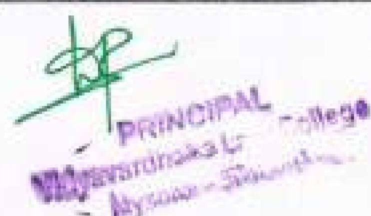
Based on the seniority the Prospective adoptive parents get an opportunity to view the photographs, child study report and medical examination report of up to three children, those who are legally free for adoption. Viewing of the children's details is completely based on the preference of the prospective adoptive parents. After viewing the child details, the prospective adoptive parents may reserve one child within forty-eight hours for possible adoption and the rest of the children would be released through the child adoption resource Information and Guidance system for other prospective adoptive parents on the waiting list.[15]

Step – 4: Matching of the Prospective adoptive parents with child:

The specialized adoption agency after getting the details of the prospective adoptive parents will fix the meeting with the prospective adoptive parents to assess the suitability of the prospective adoptive parents. This committee consists of its adoption in charge or social worker, pediatrician or visiting doctor and one official from the district child protection unit[16]. Further, the specialized adoptive agency also fixes the meeting of the prospective adoptive parents with the child. The entire process of matching the child shall be completed within twenty days from the date of reserving the child. While accepting the child the prospective adoptive parents shall have the right to get all the details of the child including a medical examination report reviewed by a medical practitioner of their choice and signed before the social worker or chief functionary of the specialized adoption agency. In case the prospective adoptive parents are not selected the reserved child then, the reason for non-selection should be recorded in the child adoption resource information and guidance system. If the prospective adoptive parents are not selected any child or they are not found in such a situation the prospective adoptive parents will be shifted to the bottom of the seniority list as on the date.

[15] Regulation 10(3) of the Adoption Regulation 2017.

[16] The quorum of the Adoption committee shall be two members and the quorum of the adoptive committed in case of adoption from a child care institution shall be three members , while the presence of one official from the district child protection unit would be mandatory.



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Step – 5 Pre – Adoption foster care:

After acceptance of the child by prospective adoptive parents shall be taken in pre-adoption foster care within ten days from the date of acceptance after signing the pre-adoption foster care undertaking. If the adoptive parents are working under the government of India or the State they are entitled to get the adoptive leave for the purpose to look after the child.[17]

***Step- 6: Legal Procedure*:**

The specialized adoption agency shall file the adoption petition with prospective adoptive parents as a co-petitioner in the jurisdictional court[18] within ten days from the date of acceptance of the child by the prospective adoptive parents. This adoption petition contains all relevant documents. In case the child is from a children's home which is located in another district, the specialized adoption agency shall file the adoption petition in the concerned court of that district.[19] In the case of siblings or twins, the specialized adoption agency shall file a single application in the court. Since adoption care is non-adversarial, the specialized adoption agency shall not make any opposite party or respondent in the adoption application. The courts hold in-camera proceedings and dispose the case within two months from the date of filing the adoption petition by the specialized adoption agency. It is the obligation of the specialized adoption agency to obtain a certified copy of the adoption order from the court and it is forwarded to the prospective adoptive parents within ten days. The same shall be shared in the child adoption resource information and guidance system with necessary entries. Further, the specialized adoption agency shall obtain the birth certificate of the child from the birth certificate issuing authority within ten days from the date of issuance of the adoption order.

[17] Section 14
[18] Where the specialized adoption agency is situated that court is having jurisdiction to [illegible] case.
[19] Section 12 (2) of Adoption Guidance 2015

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***Step 7: Follow up of the progress of adopted child*:**

The post-adoption follow-up will continue for two years from the date of placement of the child with an adoptive family. Further once in six months, the progress report of the child will be shared with the child adoption resource information and guidance system along with the photographs of the child by the specialized adoption agency. In case the child is facing an adjustment problem with the adoptive family or parents then the specialized adoption agency shall arrange necessary counseling for such adoptive parents as well as the child. If such counseling efforts do not succeed, the specialized adoption agency shall make effort for placing the child temporarily in alternative care.

***Procedure for in-country relative adoption*:**

STEP -1: Registration: The prospective adoptive parents shall register in the child adoption resource information and guidance system and upload all the requisite documents. *STEP 2: Verification*: In this connection, the prospective adoptive parents should obtain the consent of the biological parents. If they are alive otherwise they obtain permission from the child welfare committee. If the child is five years and above in such a situation the consent of the child must be taken by the prospective adoptive parents. *STEP;3 Filing of application*: The prospective adoptive parents shall apply to the competent court along with the consent letter of the biological parents and affidavit of adoptive parents in order to check their financial and social status of the prospective adoptive parents.

***Procedure for in country adoption by stepparent*:**

The couple i.e., step-parent and one of the biological parents shall register in Child Adoption Resource Information and Guidance System with the required documents. Consent of the biological parent(s) and the stepparent adopting the child or children shall need. In case the custody of the child is under litigation, the adoption process shall be initiated only after the finalization of the case by the court

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concerned[20]. The biological parent and the stepparent shall apply to family court or district court or city civil court to obtain the court order.

Conclusion

Adoption brings happiness to kids, who were abandoned, or orphaned and thus is a noble cause. Adoption gives a chance for the human side of civilization to shine through. Moreover, it is a beneficial program where the child is treated as a natural-born child and given all the love, care and attention. And also, it fills the void in the parents who yearned for kids, their laughter and mischief echoing off the walls of a home. Even now a few changes could be made to make all the laws regarding adoption a little, uniform. At the International level, National level, Constitution of India, various Acts, schemes and policies are addressing the adoption-related issues only on the best interest of the child. In India Hindu Adoptions and Maintenance Act 1956 has liberalized the law in several aspects, it has numerous loopholes. It has a clear religious bias, as only a Hindu can be adopted and only a Hindu can give and take in adoption. Besides the Act has little regard for the interest and welfare of the child, since there is no provision to investigate and look into the suitability and antecedents of neither the family seeking to adopt nor any follow-up to ascertain how the child is being treated. A foreigner who wishes to adopt cannot do so under this Act. He has to apply under the Guardian and Wards Act, 1890 for being appointed guardian of such child and has to seek court permission to take the child out of India. Moreover, under this Act, the rights which children get are very limited. They have no inheritance rights. Similarly, those who adopt are only guardians and not parents. Section 41(3) of The Juvenile Justice (Care and Protection of Children), Act 2015 and in suppression of the Guidelines governing the adoption of children 2011, the central government issued certain guidelines for adoption by central adoption resource authority to provide for the regulation of adoption of orphan, abandoned or surrendered children. Innumerable couples wish to adopt but some difficulties in adoption procedure the children remain homeless and people desiring to adopt, cannot do so.

[20] Regulation 56 of the Adoption Regulation 2017.

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ALTERNATIVE DISPUTE RESOLUTION SYSTEM

New Trends, Contemporary Challenges and Future

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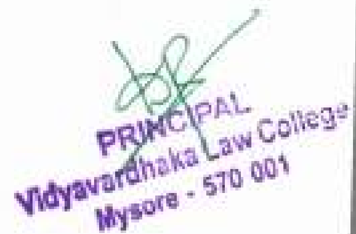

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A Critical Analysis on ADRS in Industrial Dispute and Labour Law

Dr. Deepu P*
Varun Raj R**

In India, during 19th Century a new branch of Jurisprudence known as Industrial Jurisprudence has been developed. Before Independence it existed in a rudimentary form of Laissez Faire, but after getting Independence there was a shift from 'Laissez Faire' to 'Welfare State 'and workmen where provided the Rights to form Associations, to Bargain Collectively for the betterment of working conditions and Implementation of Tripartite Consultation.

In the words of Dorothy Thompson, the First Lady of American Journalism, "Peace is not the absences of conflict, But the presence of creative Alternatives for a Responding to conflict - Alternatives to Passive or Aggressive responses, Alternatives to Violence", these words show the significance of Alternatives, in which a dispute can be resolved by Alternative System which can be termed as Alternative Dispute Resolution System.

Resolving individual labour rights disputes in recent years has taken new significance and prominence for both domestic and multinational corporations, especially in a country like India, wherein traditional justice delivery mechanism is Overburdened, Time Consuming and Costly. Alternative Dispute Resolution (ADR) has evolved as a perfect alternative in such a situation, for speedy and cheaper settlement of the disputes. Hence, as the result of implementation of ADRS into Industrial Jurisprudence in India, Industrial Dispute Act, 1947 was enacted, which came into operation on the first day of April 1947.

DEFINITIONS

- → "ADR" can be defined as a Technique of dispute resolution through the intervention of a third party whose decision is not legally binding on the parties[1].According to World Bank Group, "ADR is a wide range of means to resolve conflicts that are short of formal litigations".
- → "Settlement of Disputes" outside the court may referred to[2] ; (a)Arbitration; (b) Conciliation; (c)Judicial Settlement including settlement through Lok Adalat; Or (d) Mediation.
- → Section 2(k)[3], "Industrial Dispute" can be defined as "A dispute Or difference between Employers and Employers, Or Employers and Workmen, Or Workmen and Workmen; the dispute Or difference should be connected with, Employment Or Non-Employment, Or Terms of Employment, Or Conditions of labour of any person; the dispute may be in relation to any workman Or workmen Or any other person in whom they are interested as a body".
- → Section 2 (1)(a)[4]"Arbitration" means any arbitration whether administered by permanent arbitral institution.

[1] The Arbitration and Conciliation Act, 1996, No.26, Act of Parliament, 1996 (India).
[2] The Code of Civil Procedure (Amendment) Act, 1999, Sec 89, No. SO 603(E), dated 6-6-2002.
[3] The Industrial Disputes Act, 1947, Sec 2(k), No. 14 of 1947
[4] The Arbitration and Conciliation Act, 1996, Sec 2(1)(a), No.26, Act of Parliament, 1996 (India).

DEVELOPMENTOF LABOUR LAW WITH THE IMPLEMENTATION OF ADRS IN INDIA

In Ancient times, people very often referred their disputes voluntarily to a group of Wise Men of a Community called the Sabha's and Samitis, which is identical to present Panchayat System. There was an arrival of British in 1600, ADRS made a great influence from Pre-Independence period itself, as it was not only considered as convenient procedure but was seen as a politically safe and significant in the days of British Raj, in this present scenario the system of Alternative Dispute Resolution form picked up pace in the country, with the arrival of the East India Company. Indian Arbitration Act, 1899 was passed based on the English Arbitration Act of 1889, it was the first Substantive Law about Arbitration, but it applied only to limited presidency, towns of Calcutta, Bombay and Madras. As this act suffered from many defects, it was subjected to severe Judicial Criticisms and hence the Arbitration Act of 1940 was enacted by replacing the Indian arbitration Act of 1899.

During 1880's, The Indian Factories Act, 1881 which was the first Labour Legislation in the subcontinent which was passed based on a report of Major Moore, but this Act was repealed. In 1890, British Government formed a Commission to submit the report on Labour Law, based on this report the Factories Act, 1891 came into being. As the result of Development in Labour Law, The Employee's Compensation Act, 1923 and The Trade Union act, 1926 were enacted during the Pre-Independence Period. But the Factories Act 1934 as passed replacing all previous legislations regarding Factories. This act was drafted in the light of the recommendations of the Royal Commission on Labors; this act was also amended time to time. At this situation there was an enactment called the Industrial Dispute Act, 1947 which was First legislation to suggest the Alternative Dispute Resolution System by making the provisions to establish the Authorities under this act to resolve the disputes of Industries.

CONCEPT OF INDUSTRIAL DISPUTES

India, having huge Human Resources placed 6th in the world in Industrial Sectors. Industrialization has always contributed towards the Employment, National Income, Per Capita Income, Exports and Economic Development on One side and facing Industrial Disputes on the Other, which can be termed as the Two faces of the same Coin. A Dispute is a conflict arising out of the No Consensus Ad Idem between two or more parties in the Particular Matter. Similarly, when there is No Consensus between the Employer and Workmen in the Industry, this can be termed as an Industrial Dispute.

According to Section 2 (k) of Industrial Dispute Act, 1947 definition, Industrial Disputes arises between the following Parties and Connected with,

Parties to the Disputes	Disputes connected with
Employers and Employers	Employment and Non-Employment
Employers and Workmen	Terms of Employment
Workmen and Workmen	Conditions of Labour of any Person

Causes of Industrial Disputes: Industrial Disputes may arise out of social, political, economic, or socio-economic factors. The factors which lead to Industrial Disputes may be related to Industry, Management, Government or Union, which affects to the Employer and Workmen.

1) Psychological Causes.
2) Institutional Causes.

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3) Working Condition Causes.
4) Causes raised by Implementation of Policies.
5) Causes aroused from the Delay in Execution of Welfare Benefits.

ADVANTAGES OF IMPLEMENTATION OF INDUSTRIAL DISPUTE ACT AS ADRS

Before the enactment of Industrial Disputes Act, it is not considered that there was absence of industrial dispute, hence, to approach the traditional judicial system, it leads to very much legal procedural complexity and delay in disposal of the cases, and it was too costly which a labour in India could not afford it has they were economically weak. By implementing the Industrial Disputes Act, 1947 of ADRS had led to major Advantages, such as:

a) Scope for Cost Saving.
b) Less Economic Burden on Workmen.
c) Speedy Trials by the Authorities.
d) Scope for Settlement before it reaches Courts.
e) Absence of Traditional Formal Process.
f) No Win-Lose Doctrine.
g) Protection of Privacy and Goodwill of the Industry.
h) Party Autonomy.
i) Flexibility.

INDIAN JUDICIAL REVIEWS ON INDUSTRIAL DISPUTES AS ADRS

The Industrial Dispute Act itself act as the ADRS; the authorities established under this act has the power to give an Award. Even these Awards are made subject to the Judicial Review by the High Courts and Supreme Court of India. There are some of the Judicial interpretations and Judicial verdicts which are related to Industrial Disputes. *UshannaRajaiah & others. v. The Industries Tribunal/Labour Court, KAR., 3 others*[5] ;This case was about seeking the Writ of Certiorari declaring the order passed by the Respondent as Illegal and Arbitrary. The Petitioners were working as general mazdoors in the respondent's company. Has their increments earned as daily rated were omitted and as such their basic was wrongly fixed at lower scale. Section 33(c)(2) and Section 7-A of Industrial Disputes Act was invoked. It was Held that, it is found that the Petitioners are Eligible for the Pay, within period of 90 days. *Management of Deccan v. Hon'ble Additional Industrial Tribunal*[6];The Workmen filed a claim statement under Section 2A(2) of the Industrial Disputes Act. Additional Industrial Tribunal awarded the prayer from the Workmen. This was challenged by the Management, before the High Court, with reference to the Section 11 of the Industrial Act. Management filed the writ petition against the award passed by the Tribunals directing the reinstatement of the workmen. The High Court Upheld the award granted by the Tribunal. *The Manager Coimbatore District v. K.N.Murugesan*[7];This Petition is filed challenging the fair and decrial orders passed by the Additional Labour court. Petitioner contended that the amount claimed by the Workmen is wrong and even without considering the same the Presiding Officer, Additional Labour Court, had passed an order attaching the vehicles of Petitioner. The same was dismissed by the Hon'ble High Court. *GauriShanker v. State of Rajasthan*[8];In this case Section 25-F(a)(b), 25-G, and 25-H of the Industrial Disputes Act was referred and challenged that the Retrenchment of the Workmen was Improper. The Court Held that the Retrenchment of the Workman for the short 'the

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[5] W.P/39406/2013 (on 19 April 2022)
[6] W.P.NOS.8010, 8048 AND 8073 OF 2002 (on 7 September 2018)
[7] C.R.P.NO.1485 of 2020 and C.M.P.Nos.8778 & 8779 of 2020 (on 13 October 2022)
[8] CIVIL APPEAL NO. 3701 OF 2015 (Arising out of SLP (c) 30561 of 2014)(on 16 April 2015)

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workman' from his service is Improper and Invalid and directed the Employer for the reinstatement of the workmen in his post. And pay 25% back wages form the date of termination till the date within 6 weeks form the date of this judgment.

STATISTICS SHOWING THE NO OF CASES FILED, DISPOSED OFF AND PENDING IN SUPREME COURT OF INDIA, HIGH COURTS, AND OTHER COURTS FROM 2018 TO 2022[7].

YEARS	HON'BLE SUPREME COURT			HON'BLE HIGH COURTS AND OTHER COURTS		
	No. of Cases Received	No. of Cases Disposed Off	No. of Cases Pending	No. of Cases Received	No. of Cases Disposed Off	No. of Cases Pending
2018-2019	101	10	91	2,790	325	2,465
2019-2020	162	42	120	2,850	396	2,454
2020-2021	78	-	78	2,661	-	2,661
2021-2022	114	-	114	3,064	-	3,064

*Data Sourse :https://labour.gov.in/annual-reports.

STATISTICS SHOWING THE INDUSTRIAL DISPUTES HANDLED, DISPOSED OFF AND STRIKE AVERTED BY THE AUTHORITIES UNDER INDUSTRIAL DISPUTES ACT

YEARS	INDUSTRIAL DISPUTES HANDLED	INDUSTRIAL DISPUTES DISPOSED OFF	STRIKE AVERTED
2015-2016	12,033	6,692	720
2016-2017	12,235	7,333	845
2017-2018	12,450	7,774	475
2018-2019	12,427	7,976	461
2019-2020	14,002	9,016	698
2020-2021(Apr-Nov)	9,018	2,532	89
2021(Jan-Dec)	12,170	7,359	221

*Data Source: https://labour.gov.in/annual-reports.

PROBLEMS

ADRS in Industrial Jurisprudence had played a vital role in the development of the country and resulted in the industrialization of the nation, though ADRS is fully bounded with Advantages and Merits with the implementation, it is also not free from its drawbacks, this is like Both faces of the Single Coin. There are some of the difficulties faced by the Authorities while resolving the industrial disputes and as well as it is faced by the parties too:

- John Ray Grisham, An American Novelist and Lawyer – "There's always such a Rush to Judgment, it makes a fair trial, Hard to Get".
- Industrial Disputes Act provides the time limit for submitting their reports and awards.

  a) Conciliation Officers: 14 Days.

[7] Published by Government of India Ministry of Labour and Employment

b) Board of Conciliation: 2 Months.
c) Court of Inquiry: 6 Months.
d) Voluntary Arbitration: 30 Days.
Within these prescribed periods the authorities must perform their duties but sometimes this leads to the skip in the steps or procedures.

→ There are No Recognised Unions to bind Employer with the Common agreements and bring the workmen united when they have risen their voice.
→ During the process of appointment of the Voluntary Arbitrator, there is no prescribed Qualification, the consent of the parties to the dispute by referring to the authorities they can appoint Voluntary Arbitrator.
→ Award given by the Voluntary Arbitrator will be binding on both parties but there is the absence of recognition from the legal status.
→ The Conciliator need not to follow the legal procedures strictly.
→ The Authorities who make the investigation have the further power to resolve the disputes within the process. This power may lead to effect of Bias.
→ When the Voluntary Arbitrator is resolving the disputes, there is absence of simplified procedure, and which doesn't provide appeal provision.
→ In the process of Conciliation or Inquiry or Arbitration, there is no strict rule to follow the Principles of Natural Justice.

SUGGESTION AND RECOMMENDATIONS:

→ While appointing the Voluntary Arbitrator both the parties must give their consent but in practical sense, the consent of all the Workmen is difficult to attain and hence it is suggestive that, even though they have not given the consent, the workmen shall know who is appointed as their Arbitrator.
→ Prescribing the Qualification of the Voluntary Arbitrator.
→ Time limits for the submission of the reports and awards must be extended.
→ Has there is increasing in the Industrial Disputes, appointing Adjudicative bodies must be in time to time.
→ Making strict provisions on implementations of penalties for authorities if they practice any unfair procedures, corruption, or any other illegal settlements.
→ Check and Balance system must be implemented accurately.
→ Making sure that the Officer who is attaining the Disputes must not have any personal interest over those disputes, he shall be Neutral.
→ **CONCLUSION**

ADRS into the Industrial Disputes in India had made drastic changes by influencing its practical applicability towards to society and this system of ADRS is a kind of Money-Friendly system in which there is less cost of expenses compared to the traditional judicial machinery.

Eliot Spitzer, "Delay is the Enemy of Progress", if any of the country in the world must be developed, then there shall be no delay in which it may result in slow development or no development. In a country like India, 25.12% of the total population of working sector is depending upon the industries. When there is no protection towards their job security, which is interlinked with the disputes then, it may result in the downfall of the Economy as well as effects in the development of the Nation. Hence, the implementation of ADRS into Industrial Jurisprudence is a necessary step to take for the betterment of tomorrow's Nation.

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Status of Agrarian Sector in India:

Impediments, Causes, Consequences and Way Forward

Edited by

Dr. Siddaraju V.G

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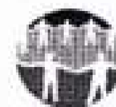

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Grabs Educational Charitable Trust

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FOREWORD

I am happy to know that Dr. Siddaraju V.G has edited a book on Status of Agrarian Sector in India: Impediments, Causes, Consequences and Way Forward, covering wider issues in agriculture sector. As you known, Agriculture continues to be the prime pulse of the Indian economy and is at the core of the socio-economic development of the country. About 58 per cent of the Indian population depends on agriculture for their livelihood. The growth of other sectors and the overall economy depend to a considerable extent on the performance of agriculture through its backward and forward linkages. It is a source of livelihood and food security for the majority of India's population but has special importance for the low-income, poor and vulnerable sections.

Agriculture in India is undergoing structural change leading to a crisis situation. The growth rate of agricultural production has been gradually declining in recent years. Agriculture's contribution to GDP has been steadily declining over time. The performance of agriculture by crop categories clearly indicates the slow pace of agriculture in India. Trends in area, input use, capital stock and technology reflect agricultural decline and farmers' response accordingly. It is alarming that India is moving from being a surplus food self-sufficient country to a net importer of food. All these trends indicate that the agriculture sector in India is facing a crisis today. Many research papers, in the current volume brought out a number of critical issues to fore as workable solutions and to improve the productivity in the agriculture sector. I am sure that this volume will be useful to researchers, policy makers and famers in agriculture sector in India. I congratulate the contributors and editor for their efforts.

(Prof. M.R Gangadhar)

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PREFACE

Agriculture plays a vital role in the process of socioeconomic development. India is one of the major players in the agriculture sector worldwide and it is the primary source of livelihood for about 58 per cent of India's population. India has the world's largest cattle herd (buffaloes), largest area planted to wheat, rice, and cotton, and is the largest producer of milk, pulses, and spices in the world. It is the second-largest producer of fruit, vegetables, tea, farmed fish, cotton, sugarcane, wheat, rice, cotton, and sugar. Agriculture sector in India holds the record for second-lorgest agricultural land in the world generating employment for about half of the country's population. Thus, farmers become an integral part of the sector to provide us with means of sustenance. Empowerment of the small and marginal farmers through education, reforms and development will ensure a better, efficient and strengthened Indian agriculture. Motivation new models in production and marketing along with creating awareness and imparting education to small farmers will help in development of the sector and more importantly improving the economic status of poor farmers.

I would like to express my heartfelt thanks to all the authors who have enriched the book by contributing their learned papers. I also thank Prof. Muzaffar H Assadi, Vice Chancellor (I/c) and Smt.V.R. Shylaja, Registrar, University of Mysore, Mysuru for their never ending encouragement and logistic support. I thanks to faculty members and Non-Teaching Staff of CSSEIP and Department of Anthropology, University of Mysore for their support. We acknowledge all others who have supported and assisted directly and indirectly for the completion of this work. I also grateful to the Grabs Educational Charitable Trust®, Chennai for publishing this edited book.

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Dr. Siddaraju V.G

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26 crore workers have been registered under the e-SHRAM portal out of which 13.78 crores are agricultural labourers as per self-declaration.

Probable Suggestions for the Improvement of Agricultural Labours:

The following suggestions can be made for the improvement of the socio-economic position of the agricultural labourers:

- Effective implementation of legislative measures.
- Improvement the bargaining position.
- Resettlement of agricultural workers
- Creating alternative sources of employment
- Protection of women labourers
- Public works programmes should be for longer period in year
- Improving the working conditions
- Regulation of working hour
- Improvements in Agricultural sector
- Credit at cheaper rates of interest on easy terms of payment for undertaking subsidiary occupation.
- Proper training for improving the skill of farm labourers

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- https://pib.gov.in/Pressreleaseshare, searched on 5-1-2023 at 4.30 pm.

6. **Changing of Family System**: changing of family system effect on the economic status of the agricultural labour. The economic support system has been reduced with the break-up of the joint family system. This has increased the need to work outside the family's land-holding.

Laws Governing for the **Agriculture Labour In India:**

1. *The employees state insurance Act 1948*: which provides comprehensive medical care and monetary compensation in case of sickness, maternity, death or disablement.
2. *The minimum wages Act 1948*; which fixes a minimum amount of wages to be paid to employees.
3. **Workmen compensation Act 1923**; which requires payment of compensation to the workman or his family in cases of employment related injuries , resulting in death or disability.
4. *Constitution of India:*

Article 14; State shall not deny to any person equality before the law or equal protection of the law within the territory of India.

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."

Article 41; Right to work, to education and to public assistance in certain cases 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.

Article 42; seeks to ensure humane work conditions and provide for maternity relief. It states that "The State shall make provision for securing just and humane conditions of work and for maternity relief". It is a principle of socialistic nature and dedicated to achieve social and economic welfare of the people with the objective to establish India as a Welfare State.

Article 47; which directs the State to raise the level of nutrition and the standard of living and to improve public health as among its primary duties and, in particular, the State shall endeavour to bring

about prohibition of intoxicating drinks and drugs which are injurious to health

Schemes Implemented For Agricultural Labourers

The Government Ministry of labour employment introduce the following schemes for the agricultural labours;

1. Life and disability cover is provided through Pradhan Mantri Jeevan Jyoti Bima Yojana (PMJJBY) and Pradhan Mantri Surksha Bima Yojana (PMSBY).
2. The health and maternity benefits are provided through Ayushman Bharat- Pradhan Mantri Jan Arogya Yojana (AB-PMJAY) which is a universal health scheme. Under this Scheme, a total of 17.81 Crore individuals including agricultural labourers have been verified and provided with Ayushman cards till 14th March, 2022.
3. In order to provide old age protection to the unorganised sector workers including agricultural labourers, the Government of India launched Pradhan Mantri Shram Yogi Maan-Dhan Yojana (PM-SYM) in 2019. It provides a monthly minimum assured pension of Rs. 3000/- after attaining the age of 60 years. As on 09.03.2022, more than 46 lakh workers have been registered under PM-SYM.
4. Apart from above, other schemes such as Public Distribution System through One Nation One Ration Card scheme under National Food Security Act, Mahatma Gandhi National Rural Employment Guarantee Act, Deen Dayal Upadhyay Gramin Kaushal Yojana, Pradhan Mantri Awas Yojana, Gareeb Kalyan Rojgar Yojana, Deen Dayal Antyodaya Yojana, PMSVANidhi, Pradhan Mantri Kaushal Vikas Yojana etc. are also available for the unorganised workers including rural and agricultural labourers depending upon their eligibility criteria.

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Further, the Ministry of Labour & Employment is maintaining e-SHRAM portal with an objective to create National Database of Unorganised Workers (NDUW) to facilitate delivery of Social Security Schemes/Welfare Schemes of the Central/State Governments to the workers of informal/unorganised sector. As on 13.03.2022, more than

terminated. When the agricultural labourers face financial problems then they borrow the hand loan form the landlords at the high rate of interest. This inevitably leads them into debt.

5. **Not United:** Agricultural labourers are considered as unorganised sector. They are illiterate and ignorant, lived in scattered villages. They are not able to form any union like trade unions. Thus, they are unable to negotiate their wages etc and fail to raise their voice against the violation of their rights with the land owners by uniting themselves.
6. **Exploitation of Women Labourers:** our society is male dominate society .Due to lower income women of agricultural labourers are also forced to work for their livelihood. She is getting low wages compared to men labour and exploitation of women labour in agricultural field is also another problem.
7. **Increase in migrant labour:** The wages of the labourers in the irrigation areas are less compared to the wages of the labourers in the rain-fed areas. This led to the migration of the labourers from the dry areas to the heavy rain areas.
8. **Agricultural Slavery:** Majority of agricultural labourer are landless and of backward classes. Due to their lower social status they are treated as animals. Big land owners make them work as slaves. They are used as labourer and in return given minimum wages.
9. **Unskilled and Lack Training:** Agricultural labourers, especially in smaller villages away from towns and cities, are generally unskilled workers carrying on agricultural operation in the centuries old traditional wages. Most of them, especially those in small isolated villages with around 500 populations, may not have even heard of modernization of agriculture. Majority of them are generally conservative, tradition bound, totalistic and resigned to the insufferable lot to which according to them fate has condemned them. There is hardly any motivation for change or improvement. Since, there is direct supervision by the landlord, there is hardly any escape form hard work and since there is no alternative employment. The agricultural labourer has to do all types of work-farm and domestic at the bidding of the landlord.
10. **Low Social Status:** Most agricultural workers belong to the depressed classes, which have been neglected for ages. The low

caste and depressed classes have been socially handicapped and they had never the courage to assert themselves. They have been like dump-driven cattle. In some parts of India, agricultural labourers are migratory, moving in search of jobs at the time of harvesting. Government measures to improve their lot by legislation have proved ineffective so far due to powerful hold of the rural elite classes in the rural economy.

Causes for the Growth of Agricultural Laborers:

There are a number of factors responsible for the continuous and enormous increase in the number of agricultural labourers in India. The more important among them are:

1. **Increase in Rural Population:** The increase in population is the major cause of sub-division and uneconomic land holding in the rural area as the same piece of land gets distributed among large number of persons in the family which becomes inadequate for their own basic requirements. Thus the rural families have to search for the employment to fulfil their economic needs.
2. **Decline of Cottage Industries and Handicrafts:** The rural industries are on the decline due to increased competition from modern industries. In the absence of the alternative employment opportunities for workers engaged in these village industries there is an increase of agriculture labour in India.
3. **Eviction of Small Farmers and Tenants from the Land:** During the British rules increase in the number of intermediaries, the land starded slipping out of the hands of small farmers and they were forced either to adopt the status of tenants or work as agricultural labourers. A majority of these people had no alternative but to seek employment as agricultural labourer.
4. **Uneconomic Land Holdings:** The vast inequality in the distribution of land-holding has resulted in the need to search for the rural employment.
5. **Increase in Indebtedness:** A very large proportion of rural population is in the grip of non-institutional source of credit especially money-lenders that charge huge interest. In order to pay these debts, poor farmers have to sell their land and look for the employment on other's farms.

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Problems of Agricultural Labour in India: A Critical Analysis

Deepu.P

"Labour is the real measure of the exchangeable value of all commodities .the real price of the everything , what everything real cost to the man who wants to acquire it , is the toil and trouble of acquiring it"

- ***Adam smith***

Introduction:

The distinguishing feature of rural economy of India has been the growth of agriculture labour in the crop production. The phenomena of under-employment, under-development and surplus population are visible amongst agricultural labourers. Agricultural labours constitute the most neglected class in Indian rural sector and are highly unorganized. The income level of these workers is quite low and employment is quite irregular. Further, these workers lack alternative employment due to lack of training and skills.

Definition of Agriculture Labour:

Agriculture labour may be defined as labour who works in agriculture or allied activities for the whole or part of the year in return for (in cash or kind or both) for full-time or part time work. The agriculture labourer has no risk in the cultivation, and no right of lease or contract on land but merely works on another person's land for wages.

Objectives of the Study:

- To study the problems of Agricultural Labourers in India.
- Causes for the growth of agricultural labourers
- To recommend the measures to improve the conditions of Agricultural Labourers

Classification of Agricultural Labourers: Agricultural labourers can be divided into four categories –

1. Landless Labourers, who are attached to the land lords;
2. Landless labourers, who are personally independent, but who work exclusively for others;
3. Petty farmers with tiny bits of land who devote most of their time working for others and
4. Farmers who have economic holdings but who have one or more of their sons and dependants working for other prosperous farmers. The first group of labourers has been more or less in the position of serfs or slaves; they are also known as bonded labourers.

Problems of Agricultural Labourers in India

1. **No fixed Working Hours:** The working hours of these labourers are not only irregular but also excessive. They have to work since morning to late night. Their working hours change with harvest, seasoned work.
2. **Seasonal Employment**: The agricultural labour does not get work for the whole year. They work only for the some days of the year and rest of the time they remain idle. According to Agricultural Labour Investigation Society, a Seasonal labourer gets an average of 197 days of work in a year. Women labourer gets 141 days of work in a year. It leads very low income.
3. 3.**Low Wages:** Since the agricultural labourer are considered as unorganised sector , there is no fixed wages for specified agriculture work and the wages level of agricultural labour very low as compared to that of industrial labour.
4. **Indebtedness:** Due to lower income, the indebtedness of agricultural farmers is increasing. They hesitate in negotiating their wages with the land owners in the fear that their services would be

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Child as a Witness: A Judicial Response to Its Credibility in India

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"Witnesses are the eyes and ears of Justice"[1]

- Jeremy Bentham

Abstract

Childhood is a golden part and the most cherished day in every person's life. The experiences in childhood days shape our future. They learn through seeing, hearing, exploring, experimenting and asking questions. The cognitive skills of every child develop when they learn to think more complexly, make decisions and solve problems. They understand things that they see hear or experience in their way and narrate the same as they have analyzed. But, when such narration is related to crimes that they experience or see, there arises a question as to the credibility of such testimony before the court of law whether the child himself may be a victim or a witness for the crime committed. Traditionally, the prospect of the child as a witness has posed thorny questions of competency like when a child can testify or at what age they possess the cognitive skill to perceive and understand the things happening around etc. Though we treat that child as innocent in describing an incident they saw at the same time, their testimony is very important in punishing the wrongdoer. This paper aims to examine the credibility of child witnesses and the judicial response to their testimony. The paper also discusses the laws about child witnesses and brings out a few suggestions as to the admissibility of such witnesses.

Key Words:

Child Witness, Testimony, Credibility, Admissibility

Introduction

In India, the category of a person below the age of 18 years is treated as a distinct legal entity. That is precisely why people can vote or get a driving license or enter into legal contracts when they attain the age of 18 or marriage of a girl below the age of 18 years and boy below 21 years is restricted under the Child Marriage Restraint Act of 1929. Moreover, after ratifying the UNCRC in 1992, India has changed its law on juvenile justice to ensure that every person below the age of

[1] www.brainyquotes.com

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18 years, who requires care and protection, is entitled to receive it from the State[2]. There are, however, other laws that define a child differently and are yet to be brought in conformity with the UNCRC. The legal understanding of the age of maturity is 18 for girls and 21 for boys. But what makes a person a 'child' is the person's 'age.' Even if a person under the age of 18 years is married and has children of her/his own, she/he is recognized as a child according to international standards.

Though age limit differs from the activity in which the child is involved and from country to country, in any legal proceedings before the court of law, where the child is called as a witness, regard is given to the competency of that child. A witness is said to be competent if that witness is qualified to testify in court. Such a witness must be physically and intellectually qualified to testify. Black's law dictionary defines competence as "a basic or minimal ability to do something; qualification especially to testify".

Competency and Credibility of Child Witness

The Indian judicial system has laid down some rules to determine the competence of a child witness, which has also been provided by the Indian Evidence Act and other relevant judgments. Section 118 of the Indian Evidence Act, 1872 makes all persons competent to testify the questions put to them or from giving rational answers to those questions (a) by tender years, (b) extreme old age, or (c) disease. Thus understanding is the sole test of competency. The test of competency is the capacity to understand the questions and to give rational answers. The court has to ascertain, in the best way it can, whether from the extent of intellectual capacity and understanding he can give a rational account of what he has seen or heard or done on the particular occasion. The *Voir dire Test* as derived from the Anglo-Norman phrase refers to 'Oath to tell the truth'. The word *voir or voire*, in this combination, comes from French which states, "*That which is true*". The test is conducted to decide the competency of a child witness. [3]Usually, the judge puts questions to the child witness to test his veracity and to verify that the facts build up with the progression of the accompanying facts. This test is a precursor to determining the maturity and capability of the child to act in the full capacity as a witness to testify in front of the judge, hence, the judge may examine the child by posing certain questions which may not be related to the ongoing case. This is done to determine the absolute competency of the child witness, which may be limited in nature otherwise.[4]

In the case, *Rameshwar S/o Kalyan Singh v. The State of Rajasthan*[5] the court held that every person is competent to be a witness in the court of law, unless incapable of understanding the question put before him/her, keeping in mind the provisions of Section 118 of the Indian

[2] Art 1, UNCRC
[3] Vivek Maurya, *Analyzing the Credibly of Child Witnesses in Indian Legal System*, <https://www.ijalr.in/2020/10/competency-and-credibility-of-child.html>(6th Oct 2021)
[4] Ibid at 2
[5] AIR 1952 SC 54

Evidence Act. Capability to understand at a young age is more likely to be dependent and to be formed at the opinion and perception of what others say and portray, due to which the testimony of a child is more likely to be modified or altered. Hence, dealing with a child witness is of key importance. This was also brought up in the landmark case, *Nivrutti Pandurang Kokate &Ors. v. The State of Maharashtra*, [6] where the Supreme Court held that the testimony of a child witness must be scrutinized to make sure that it was not given under any situation of coercion and undue influence, and must corroborate other given evidence as well. In-*State v Allen*[7] it was observed that the burden of proving incompetence is on the party opposing the witness. Courts consider 5 factors when determining the competency of a child witness. The absence of any of them renders the child incompetent to testify. They are- (1) An understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

As a matter of prudence courts often show cautiousness while putting absolute reliance on the evidence of a solitary child witness and look for corroboration of the same from the facts and circumstances in the case, the Privy Council decision in *R v. Norbury*[8], where the evidence of the child witness of 6 years, who herself was the victim of rape, was admitted. Here the court observed that a child may not understand the nature of an oath but if he is otherwise competent to testify and understand the nature of the questions put before him and can give rational answers thereto, then the statement of such a child witness would be held to be admitted and no corroborative proof is necessary.

The courts on several occasions have spoken in favor of this question. Because of the case of *Tehal Singh and Ors. v. The State of Punjab*,[9] the Supreme Court held that the common sense and progress of a witness at the age of 13 may be equivalent to that of a perfectly rational person. The Court argued that in an agrarian economy such as India, a 13-year-old child cannot be considered immature, at such an age that children begin working in various fields, farms and the informal sector. In the case of *Musst.JarinaKhatun* v *State of Assam*[10], it was held that by considering the credibility of the juvenile witness, the trial court may by taking into account the fact that the judge may have the first and direct conversation with the child. It enables him to be the best evaluator of the child's level of development and comprehension.

The Supreme Court, in the *State of Madhya Pradesh v. Ramesh &Anr*[11] , has examined the law relating to deposition by Child Witnesses. While examining the law on the aspect the Court has

[6] AIR 2008 SC 1460
[7] 70 Wn.2d 690, 424 P.2d 1021 (1967)
[8] (1978) Crim. LR 435
[9] (2002) 2 SCC 7
[10] (1992) Cr LJ 733
[11] 2011 (3) SCALE 619

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observed that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case, there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether the child has been tutored or not can be drawn from the contents of his deposition. In the '90s a trend emerged where the Courts started recording their opinions that child witnesses had understood their duty of telling the truth to lend credibility to any evidence collected thereof. The Supreme Court has also commended this practice. If the court is satisfied, it may convict a person without looking for collaboration of the child's witness. It has been stated many times that support of a child's evidence should be a rule of prudence and is very desirable.

Testimony and need for corroboration of Child Witness

Based on the facts and circumstances of each occurrence, the court has examined and ignored the testimony of child witnesses on many instances. One might inquire: Is it possible to disregard a child's evidence due to his/her age? A kid of such a tender age cannot be regarded as a credible witness since he or she is unable to form a distinct viewpoint and is too young to comprehend the question. In *Nirmal Kumar v. the State of U.P*[12] the Supreme Court stated that a child's evidence should be scrutinized carefully and that the court should seek some form of corroboration because corroboration is more of a norm of practical judgment than of law. The testimony of the child witness is very likely to be taught and should be accepted only after careful consideration. Because of fear and temptations, the child may testify about things he has not seen. The court must carefully consider whether the child witness is under any teaching influence. However, the evidence should not be dismissed as he is likely to be taught because of his soft age. Though Section 114 of the Indian Evidence Act, 1872, requires that every statement of compliance must be corroborated, a vast majority of cases show that it is not a very hard and fast rule, especially in cases that involve children of tender age. There is a difference between "what the rule is" and "what has been hardened into a rule of law". In such cases, the judge must give some indication that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case. In *Panchhi &Ors. v. State of Uttar Pradesh*[13] , the Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that "the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater

[12] Criminal Appeal No. 291 of 1989
[13] AIR 1998 SC 2726

circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring." In the *State of Uttar Pradesh v. Krishna Master & Ors*[14], held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature. In *Mangoo & Anr. v. State of Madhya Pradesh*[15], the Apex Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child; however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for corroboration as in the case of a hostile witness.Furthermore, there is no principle of law that it is inconceivable that a child of tender age will not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case a child explains relevant events at the crime (scene) without improvement or embellishment, and the same inspire the confidence of the court, his deposition does not require corroboration whatsoever. The child at a tender age is incapable of having any malice or ill-will against any person. Lastly, following the principles of the *voir dire test*, a judge must ascertain and verify the competency of the child to testify in a court of law. What must be understood is that children of such young and tender age must be dealt with extreme care and sensitivity, which might not be the expertise of the judge handling the case.

Laws Pertaining to Child Witness

India has been a signatory to the Convention on the Rights of the Child since 1992, which was adopted by the General Assembly of the United Nations in 1989.[16] The Convention states -"*In all actions concerning children, whether undertaken by public or private social welfare institutions,*

[14] AIR 2010 SC 3071
[15] AIR 1995 SC 959
[16] *Supra* at 2

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courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration,". In 2009, the 'United Nations: Justice in Matters involving Child Victims and Witnesses in Crime: Model Law' provided a more specific set of guidelines in the context of child witnesses. These guidelines recommend that authorities treat children in a caring and sensitive manner, with interview techniques that "minimize distress or trauma to children".[17]

They recommend specifically that an investigator specially trained in dealing with children be appointed to guide the interview of the child, using a child-sensitive approach. "The investigator shall, to the extent possible, avoid repetition of the interview during the justice process to prevent secondary victimization of the child." Secondary victimization is defined as victimization that occurs not as a direct result of a criminal act, but through the response of institutions and individuals to the victim. Child rights activists say that children repeatedly questioned by authorities while in police uniform, without the presence of their parents, can lead to such trauma. The Economic and Social Council of the United Nations has developed Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (Guidelines). The main objective of these Guidelines is to set forth good practice on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles. These Guidelines provide a useful guide to the understanding of the rights of the child to have his or her best interests given primary consideration in all matters concerning the child. They provide that child complainants and witnesses should receive special protection and assistance that they need to prevent hardship and trauma that may arise from their participation in the criminal justice system.[18] In particular, in the context of the best interests of the child, the Guidelines set forth the following principle: While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and a chance for harmonious development:

i. **Protection**- Every child has the right to life and survival and to be shielded from any form of hardship, abuse, or neglect, including physical, psychological, mental, and emotional abuse and neglect;

ii. **Harmonious development**- Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development.12 In this context keeping the guidelines above in mind, it can be said that the protection of Child witnesses is far from being satisfactory.[19]

Apart from International Laws, there are also national laws that tend to protect the interest of child witnesses. They are-

[17] Sadaf Modak, *Explained: How to Treat A Child Witness*, Indian Express (18th Feb 2020) at 4
[18] Ibid at 5
[19] State vs Rahul , Delhi High Court, CRL.L.P, 250/2012 (15th April, 2013)

I. **JJ Act**: The primary legislation in the country about children is The Juvenile Justice (Care and Protection of Children) Act, 2015. The Act does not provide guidelines specifically relating to questioning or interviewing children as witnesses. The Act's very preamble, however, says that a "child-friendly approach in the adjudication and disposal of matters in the best interest of children" must be adhered to. This means adhering to general guidelines of the juvenile justice system — for instance, for the police to not be in their uniform while dealing with children. It also requires that interviews of children be done by specialized units of police who are trained to sensitively deal with them. The Act prescribes that a Special Juvenile Police Unit is to be constituted by the state government in each district and city, headed by a police officer, not below the rank of Deputy Superintendent of Police, and including two social workers, at least one of whom must be a woman, and both of whom should be experienced in the field of child welfare. Their work includes coordinating with the police towards the sensitive treatment of children. The Act also provides for a Child Welfare Committee in every district to take cognizance of any violations by the authorities in their handling of children.

II. **POCSO Act**: Apart from the Juvenile Justice Act, The Protection of Children from Sexual Offences (POCSO) Act, 2012 has specific guidelines regarding interviewing children as witnesses. While it pertains to child sexual abuse victims, child rights activists say the guidelines are a framework for all children who are being interviewed by the police as witnesses. The Act states that interviews should be conducted in a safe, neutral, child-friendly environment, including allowing for them to be done at homes. It says a child should not be made to recount the incident in question multiple times. The Act also allows for a support person, who could be trained in counseling, to be present with the child to reduce stress and trauma.

Conclusion

Children present a special challenge when they become participants in the legal system. Young children provide a higher percentage of accurate and relevant information in a free recall situation in which they are merely asked to express in their words everything they remember, without prompts, cues, or suggestions. But young children are gullible and vulnerable to making serious errors in their court testimony. When children are questioned skillfully and appropriately and supported and encouraged to tell their story in their own words, they can provide accurate and forensically useful information. But when questioners use suggestive, leading, specific, and coercive questioning to get the child to confirm pre-existing biases about abuse, there is a risk of eliciting false statements from the child. A Judge may not be competent or have any expertise in dealing with children of tender years, herein would come to the role of child welfare expert, social workers, psychologists and counselors. Therefore, it is suggested that trained personnel and counselors must work with the court, who can deal with the child in a prescribed manner to ensure that the child's testimony is not doctored in any way. The courts should take into account

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the expert opinion of various professionals and analyze them accordingly. The court must also take into account the testimony given by a person on behalf of the child and to what extent it can be held valid, in case a child is not competent enough to testify and understand what he/she went through. Several factors influence children's memory capacity, including the child's age, psychological development and intellectual ability, the complexity of the event, their familiarity with the event and the delay between the event and the time at which the event is recalled. Children could be easily tutored and therefore can be made a puppet in the hands of the elders. Though a child may be a competent witness, closer scrutiny of the evidence should be done before it is accepted. The competency of a child witness at times may not be consistent and his statement probably may be drawn upon his imagination sometimes. So the deposition of a child witness may require corroboration, but in case the deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case, there is evidence on record to show that a child has been tutored, the Court should reject his statement partly or fully. However, an inference as to whether a child has been tutored or not can be drawn from the contents of his deposition. Thus, it can be said that a child witness is a privileged witness and their competency and credibility are to be decided by the court which may differ from case to case. On the other hand, the protection of Child witnesses is of great importance. In cases where a child appears as a witness when he is the victim or otherwise, the role of Courts can never be overemphasized because the welfare of the child should always be of paramount consideration. The first special child witness court of India came up in New Delhi. Such courtrooms are a common thing in developed countries like the USA, Canada and other European countries.[20] It is suggested that more such Child Witness Courts be established in India.

The following suggestions are made in the best interest of Child witnesses in India:

a) Prosecutors or legal representatives of parties presenting the child witness should always meet the child before the court appearance and should attempt to establish a comfort level. Wherever possible the same prosecution team should conduct the case at committal and trial in a way that minimizes the number of people involved in the process of preparing and presenting the child witness.
b) Child witnesses should be provided with the right to assistance, support and preparation for the experience of giving evidence.
c) Age-appropriate literature and other forms of information should be developed for all child witnesses to explain various proceedings, possible parties to the proceedings, the roles of each person involved in the process, the types of questions that may be encountered and the reasons for them and the meaning of common terms, legal and otherwise, that may be encountered by the child while giving evidence

[20] *Supra* note 16

d) Children should be allowed to choose at least one person who may accompany them in the courtroom while giving evidence. This person should be permitted to sit next to the child while the child gives evidence.
e) Guidelines and training programs should be developed to assist judges and magistrates in dealing with child witnesses.
f) Prosecution who has contact with child witnesses should receive training in the use of age-appropriate language for child witnesses, children's developmental stages and the possible adverse effects of giving evidence on children of various ages. The advocacy and professional conduct rules incorporated in the Advocates Act 1961, Bar Council of India rules, State Bar Council Rules should specifically proscribe intimidating and harassing questioning of child witnesses. Lawyers should be encouraged to use age-appropriate language when questioning child witnesses.
g) Child witnesses should be provided with appropriate waiting facilities in all court buildings where they are likely to appear as witnesses. These should ensure privacy and separation from the public and in particular from a defendant or hostile opposing party, that party's counsel and the media.
h) Upon the application of a party or on its own motion, a court should have the discretion to modify the court environment and prevent unnecessary distress caused to the child witness.

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6. Vivek Maurya, *Analyzing the Credibly of Child Witnesses in Indian Legal System*, <https://www.ijalr.in/2020/10/competency-and-credibility-of-child.html> (6th Oct 2021) accessed on 9th November 2021

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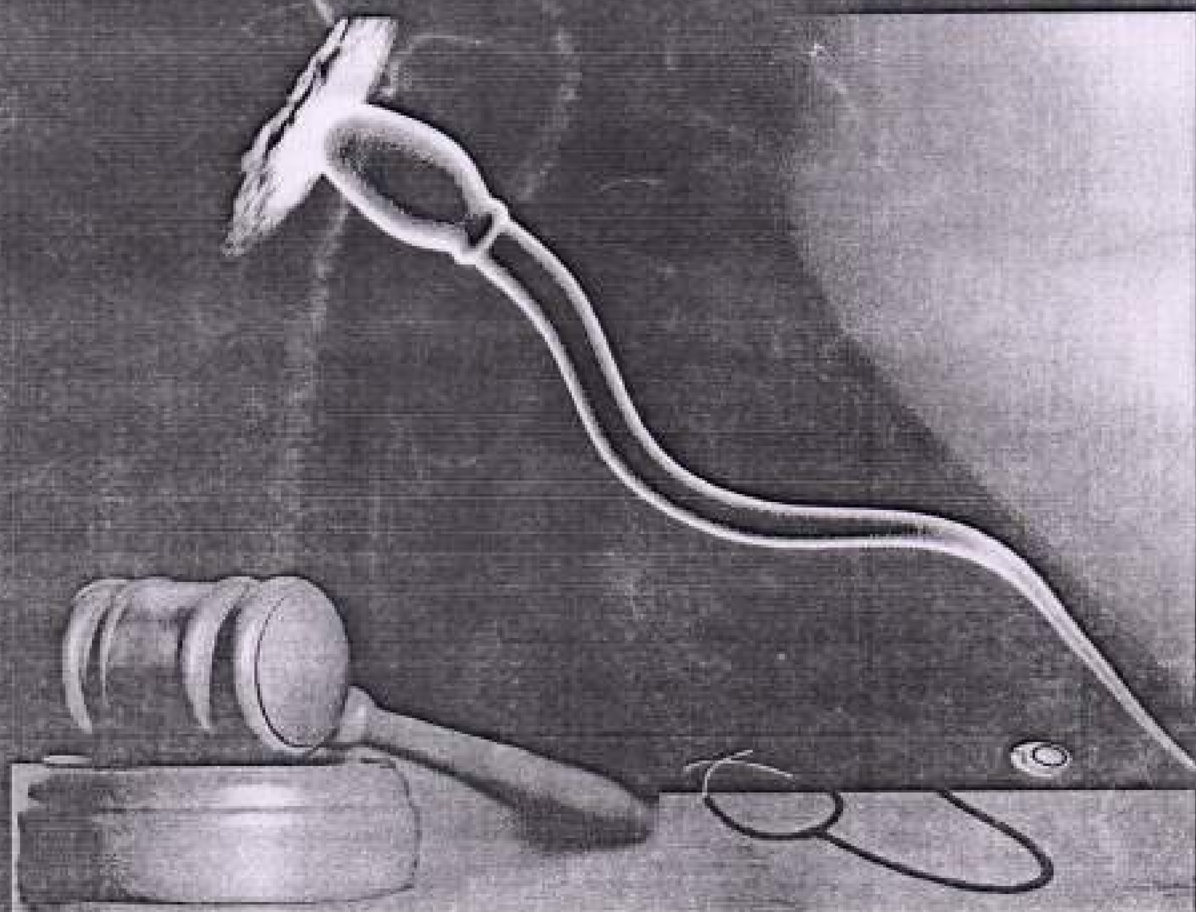

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Chapter 1

Validity of Surrogacy Contract in India
Issues and Challenges

Dr. Sridevi Krishna[*]

ABSTRACT

"It is believed that motherhood is the greatest status which a woman attains in her life time. The strength of motherhood is greater than natural laws. She can go to any extent and even break the laws for her children.[1] *But not all women are blessed with this status of bearing the child. Some face the social stigma of barrenness or experience reproach and while some treat it as a medical problem, often identifiable with causes and treatments. Surrogacy is the way light for such mothers or childless couples who through certain arrangement mostly supported by the legal agreement, can have a child through a gestational/surrogate mother. It is a time-consuming process which calls for sincere cooperation between the parties to contract and requires to recognize their respective rights and obligations as it has to undergo the test of validity in terms of protection and enforcement. Moreover, it also embraces the right of the child born out of surrogacy and the intending couples' obligation as parents towards the child. In this chapter the legal validity of surrogacy contract is analyzed referring to laws meant to protect it and also various issues and challenges posed by such contracts in its enforcement".*

Key Words: *Surrogacy, Contract, Legal Validity, Obligation*

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1 Barbara Kingsolver, *The Bean Trees*, (Harper Collins,1998) 85

1. Introduction

India is a land of vivid culture. The variousincidents in Indian mythology show that surrogacy is not new to India. The *BhagavataPurana* of 9th century narrates the story of Lord Balarama, who was saved in his mother's womb by the act of transferring the embryo from his biological mother *Devaki* to a surrogate mother *Rohini*, her sister. This was done with the intention to protect the child from the evil intention of his maternal uncle *Kansa*, who had sworn to kill the child at birth, believing the words of some divine prophecy which predicted his death in the hands of his sister's son *Devaki*.[2] Even the great Indian epic Mahabharata, the incidents of surrogacy is evident. King *Vichitravirya*, remained without heir to continue the Kuru dynasty. At the request of his mother *Satyavathi*, his half-brother Vyasa agreed to be a surrogate father of *Vichitravirya's* children *Dhrutharashta, Pandu* and *VidhurathroughNiyoga*, which is done taking the consent of women whose husband suffers from infertility or is dead. These mythological stories show that surrogacy was a way to protect or create family in exceptional circumstances or a method adopted for keeping up family edifice.

Today, surrogacy is a way light for childless couples, who may not always opt for surrogacy because of infertility but for various other reasons which are attached to family sentiments, societal status, inheritance etc. The process is initiated with the help of surrogate woman who agrees to carry the child and thereafter relinquishes her rights over the child. Though it is a time consuming process, it is generally guided by the terms of contract/agreement between the intending couples and the surrogate mother. The roles and responsibilities of the parties are also guided under this contract. It is generally regarded that, those contract which involves consideration to be paid to the surrogate mother is a commercial surrogacy contract and that which does not contain such clauses but recognizes only the service of the surrogate are called as altruistic surrogacy contract. Unlike any other contract, the rights and duties of the parties are recognized under the terms of the contract. But, with regard to validity and enforceability of such contracts, it often raises various legal and human rights issues. The questions like whether it give rise to a form of slavery, commodification of motherhood or regarded as baby selling; whether such contracts are against public policy and further whether it provides proper remedy for breach of contract. All these issues are controversial and require to be regulated by proper law.

2. Essentials of Surrogacy Contract

Every contract enforces the promise and protects the expectation of parties to the contract.[3] Even the surrogacy contract which is made in writing intends to enforce the object of the contract i.e. to give birth to the child by the surrogate and handover it to the intending parents. But often the surrogacy contract poses a challenge of enforceability. Hence it is necessary to understand the legal status of such contract.

In India, the general principles of contract are codified under Indian Contract Act, 1872. This law was passed in consonance with the common law of England and holds good even today as comprises the universally accepted principles as to status of parties to contract, their intention and consent. Accordingly, a contract can be defined as an agreement enforceable by law.[4] An agreement is the reciprocal promises made by the parties.[5] Thus, in order to create contractual obligation both offer and acceptance must be present and it gives rise to *right in personam* in case of any failure to fulfil the obligation. Even in surrogacy contract there is an offer and acceptance made between the intending couples and the surrogate mother. When the surrogate mother accepts the offer made, she is bound by the contract and her consent to undergo necessary medical tests for fulfilling the very purpose of the contract is presumed to be present.

Further, in any surrogacy contract, the intending couples and the surrogate woman along with her husband if she is married will be the parties to the contract.[6] Here it is pertinent to note that every individual has the right to procreation and if the surrogate woman and intending parents are major; are of sound mind; and are not disqualified by the law in force, they are competent to enter into a valid contract. This contract also comprises the consideration which can be considered as *quid pro quo* or something in return for the promise fulfilled. A contract is said to be void if it is made without consideration[7] and the commercial surrogacy contract involves monetary consideration to be paid to the surrogate woman by the intending couples but under altruistic surrogacy there is no monetary consideration and this is an exception to the rule '*absence of consideration makes the contract void*' as such kind of contracts are made out of love and affection.[8] Even the objective of such contract i.e. to beget a child, is a basic human right recognized under various national and international law. Thus, such right cannot be declared as unlawful or considered as defeating the provisions of any law in force nor as fraudulent in nature.

3. Validity of Surrogacy Contract

In surrogacy contract one of the major problems is the enforcement and today it is one of the controversial and debatable issues.[9] Those who argue against the issue contend

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2 N. Witzleb., & A. Chawla, '*Surrogacy in India: strong demands, weak laws*', in Paula Gerber, Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate Publications Ltd, 2015) http://doi.org/10.4324/9781315611372-12 accessed 15th April 2021

3 John Edward Murray, '*Murray on Contracts*', (Lexis, USA,1990)

4 Indian Contract Act 1872, S 2(h),

5 Ibid, S 2(e)

6 Barbara L. Keller, 'Surrogate Motherhood Contracts In Louisiana: To Ban or to Regulate?' 49*Louisiana Law Review*, September, 143 (1988), p 160

7 Indian Contract Act 1872, S 25

8 Ibid, S 25(1)

9 Molly J. Walker Wilson, 'Pre-commitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity', 31 *Journal of Legislation*, 329 (2004-2005), p 329-330

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that it is against public policy which often leads to exploitation of surrogate mother.[10] Those in favour of such contract contend that, if the contract is made out of free will of the parties it is enforceable and if in case it is invalidated it undermines the women's ability to give consent freely for the use of her body.[11] Such contract does not lead to any kind of exploitation or slavery but rather it helps in protecting the interest of the parties to the contract. Thus, surrogacy contract is an enforceable valid contract. These views regarding the validity of a surrogacy contract shows that it requires to be backed by proper law for its regulation.

The legal validity of the surrogacy contract was discussed in landmark case of "*Baby Manji Yamada V Union of India*[12] where the Supreme Court considered pro-surrogacy and pro-contract but as such did not take any stand on the issue of surrogacy, though it was a right time to lay down a precedent for future law."[13] The case was taken up by the National Commission for Protection of Child Rights set up under the Commissions for Protection of Child Rights Act, 2005. Thereafter, in *Jan Balaz V Anand Muncipality*[14] The Supreme Court found a way out for twins who were born under contract of surrogacy entered by German couples and who were not given passport, as surrogacy is not allowed in Germany. The Court ordered the Central Adoption Resource Agency to relax the rules and allow the German couples to adopt the twins from the surrogate mother. In this case the Supreme Court emphasized on the need to make proper laws for regulation of surrogacy in India.

Through these decisions it can be inferred that there is no consensus with regard to legal validity of such contracts in India. Even the laws of various countries are different. In United Kingdom, surrogacy is legal but surrogacy contract is not enforceable even if the contract has been signed by the parties with consent and agreed to pay consideration for service. Only the reasonable expenses towards her medical treatment and tests are allowed. Any kind of advertising and professional services for surrogacy are restricted. The three main non-profit agencies like Brilliant Beginnings, COTS and Surrogacy UK, which operate within the permitted framework of the Government, are permitted to make such arrangements.[15] In United States of America, the law varies from state to state.[16] The Canadian Assisted Human reproduction Act permits only altruistic surrogacy and the surrogate mother is paid only the expenses incurred as a

10 Katherine B. Lieber, 'Selling the Womb: Can the Feminist Critique of Surrogacy BeAnswered?' 68 *Indiana Law Journal*, 205 (1992), p 232

11 Lori B. Andrews, '*Surrogate Motherhood: The Challenge for Feminists*', 16 *Law Medicine & Health Care* 72 (1988), at p.76; and Ruth Macklin, "*Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis*", 16 Law Medicine and Health Care 57 (1988) p 60

12 (2008) 13 SCC 518

13 Ibid at 523

14 AIR 2009 Guj 21

15 https://www.ngalaw.co.uk/knowledge-centre/surrogacy-in-the-uk-the-law, accessed on 21st April 2021

16 Carla Spivack, '*The Law of Surrogate Motherhood in the United States*' (2010) 58 American Journal of Comparative Law 97

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result of pregnancy. Any third party receiving consideration for such an arrangement will be punished. In South Africa, the surrogacy is regulated under Children's Act of 2005. Under this law, the parties should enter into an agreement in writing before they commence the process of surrogacy. Such agreements are to be confirmed by the competent court and this should be obtained prior to the insemination to the surrogate woman. Even here she is not paid any consideration for being surrogate but reimbursed for the expenses towards her medical treatment or loss of income due to her absence from working.[17] The diverge approach of laws of these countries shows that commercial surrogacy is banned unlike in India and to certain extent only altruistic surrogacy is allowed. The surrogacy contract is not enforceable though it satisfies all the essential conditions of a valid contract. This of course calls for ethical and moral considerations and completely not based on legal validation. Therefore, it is necessary to ponder over the issues and challenges adduced to surrogacy contract.

4. Issues and Challenges in Surrogacy Contract

In surrogacy contract, the surrogate mother agrees to hand over the child to intending parents after birth. This is of course the very intention and obligation of the surrogate. But the issue always lies with the use of terminology '*contract*', as the word indicates the commoditization of the reproductive ability of a woman compromising with her right to procreate for her own need or for fulfilling the desire of childless couples. The argument against surrogacy contract is that it creates a market for genetic services provided by the surrogate and availed by the infertile couples for begetting a child. Thus, surrogate motherhood becomes a tradable commodity. The reproductive ability of a woman is considered to be the intrinsic capacity or property of woman which cannot be brought or sold in open market like a commodity. Human beings are born with inherent rights, have moral worth and dignity.[18] When surrogacy contract is made, it is considered to be surrendering of these rights, moral worth and dignity.

But, it is always not right to view the coin from one side. The argument in favour of surrogacy contract is that offering help by one person to another person does not always mean that one of them is treated as a commodity and dignity of such person is reduced. The Medical Termination of Pregnancy Act, 1971 also provides for termination of pregnancy if continuation of such pregnancy is a risk to the life of the women carrying the foetus.[19] Here it cannot be inferred that dignity anmoral worth of the foetus is reduced. Even the contracts pertaining to employment, sports, adds etc contain certain conditions wherein the person has to compromise with his autonomy. Further, in case of any medical emergency blood, organ, bone marrow, gametes donation are done between persons and these are all permitted by law subject to reasonable restriction.

17 Shani Van, Niekerk, '*Modern Families: Surrogacy is an option*' (27th Sept 2018) https://www.golegal.co.za/surrogacy-south-africa-children, accessed 21st April 2021.

18 Elizabeth Anderson, '*Is Women's Labour a Commodity?*' (19 *Phil. & Pub. Aff.* 71,1990)

19 Sec 3(2) of MTP Act, 1971

Thus, it is not true to hold that surrogacy contract is immoral or illegal. What it requires today is the need to be regulated by proper law to avoid misuse.

The second issue pertaining to surrogacy contract is the '*child*'. The judicial decisions on this point clearly highlight the issue of citizenship of the child born out of surrogacy and this occurs if surrogacy is not recognized in the country where the intending parents plan to bring up the child. As noted in *Jan Balaz* case,[20] Germany refused to give passport to the twins born out of surrogacy as it is banned in Germany. Thus, this calls for proper regulation through citizenship laws so that no children born out of surrogacy should suffer statelessness.

The third issue is with regard to the promotion of positive eugenics or selective breeding which involves the reproduction among the genetically advantaged.[21] It is concerned with the optimal mating and reproduction by individuals considering the superior traits.[22] This may also be possible in surrogacy contract, where the intending couples may select the surrogate mother based on certain attributes like her colour, height, health etc. When the intending parents opt for surrogacy, they may want a perfect child with the characteristics which they like and prefer. There may also be the process of screening of embryo and also modification of genetics of the child as per their choice.[23] This is also possible in altruistic surrogacy contract but, it is not a valid to prohibit surrogacy contract just because it promotes positive eugenics. Here it is to be noted that, the positive eugenics is allowed only for the selection of surrogate mother or donor is concerned which involves the process of In Vitro Fertilization (IVF). This should be restricted in case of selection of sex and manipulating the embryo for begetting the child of desirable character. The law should intervene in restricting such attempts. The fourth issue which one has to ponder over in contract of surrogacy is its breach. Generally contract is made to keep up the promise by the parties, but when the parties fail to fulfil their respective obligation/promise there is said to be breach of contract. In surrogacy contract this can be committed either by intending parents or the surrogate mother and it can happen before or after artificial insemination. In either of the case, the main question which arises are- can the surrogate women go for abortion, if she is unwilling to carry the child? Or can the intending parents refuse to accept the child after birth? Or can both back up before artificial insemination from fulfilling their respective obligation?

20 Ibid at 16

21 Houghton Mifflin Company, '*The American Heritage Dictionary of the English Language*', Houghton Mifflin Company Publication, U.S.A. (4ᵗ edn, 2000) <http://www.thefree dictionary.com/positive eugenics> accessed on 21st April 2021

22 Saunders, '*Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health*', (Elsevier Press Inc., U.S.A., 7th edn, 2003) <http://medical-dictionary.thefree dictionary. com/ positive eugenics> accessed on 21st April 2021

23 R. Arditti, R. Duelli Klein, and S. Minden (ed.), '*Test-Tube Women: What Future for Motherhood*' (Pandora Press, London, 1984)

The answer to the first question is that when a surrogate woman has consented to carry the child belonging to somebody else she waives her right to abort and if such pregnancy poses a risk to her life and hampers her health then, termination of such pregnancy is allowed. The answer to the second question has been raised in several cases before the court and it is pertinent to note that the court has handed over the custody of the child to near relative of intending parents or to the surrogate mother if she is willing to keep the child. If this is not possible the court may also order to hand over the child to orphanage and be allowed for adoption. It is the obligation of intending parents to maintain the child until it is adopted or if placed in orphanage, maintain the child until it attains the age of majority. The answer to the third question is commission of anticipatory breach of contract. According to Section 39 of Indian Contract Act where a party has refused or disabled himself from performing the contractual obligation he said to commit anticipatory breach. In such circumstances either of the party can treat the contract as repudiated or wait for the date of fulfilment and then sue for damages. Even in surrogacy contract the surrogate woman can refuse to go for AI or IE or the intending couples may refuse to accept the service of the surrogate mother. Both have a remedy against each other as prescribed by the provisions of Indian Contract Act.

Through the above analysis of the issues pertaining to surrogacy contract, it can be inferred that specifically commercial surrogacy gives rise to various other issues which tend to exploit the surrogate woman in various forms like slavery, trafficking in women and children, commercializing the womb etc. These also pose a challenge to law makers as numerous areas have to be considered while amending or bringing a law. The challenge also lies with the judiciary while interpreting the terms in contract as it always has to enforce the intention of the parties.

5. Legal Framework on Surrogacy in India

India has been considered as one of the cheapest destination for surrogacy. The market for commercial surrogacy has been increasing, where both doctors and surrogate mothers are engaging in the profiteering activity. But this may lead to misuse and result in prostitution and human trafficking. Also, there may be coercion to become surrogate due to poverty and lack of education. The surrogacy contracts too may not be helpful for surrogate women to claim any compensation because of its legal invalidity. In this regard there is a need to analyze the legal framework on surrogacy in India.

i. **Surrogacy (Regulation) Bill, 2020:** Recently Parliament passed the Surrogacy (Regulation) Bill, 2020. It allows any "willing" woman to be a surrogate and prescribes that a widow and divorced women can also benefit from its provisions, besides infertile couples.[24] The bill also incorporates the provisions

24 The Surrogacy (Regulation) Bill, 2020, < https://www.civilsdaily.com/burning-issue-the-surrogacy-Regulation-bill-2020/>

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for regulating surrogacy through National Surrogacy Board, State Surrogacy Board and appropriate authorities stablished both at centre, states and in Union Territories. Commercial surrogacy is completely prohibited under the bill but allows single Indian women cannot opt for surrogacy arrangement and also people who are in live-in relationship, gay or transgender stand excluded. Divorced and widowed women aged between 35 to 45 years are allowed to be a single commissioning parent. The bill provides for mandatory insurance coverage for surrogate mother up to 36 months. The bill, as it was introduced in 2019 carried certain criticism with respect to obtaining of certificate of infertility which is a violation of right to privacy; surrogate to be a 'close relative', which may lead to exploitation of women due to patriarchal nature of Indian family; the time limit of 5years prescribed for couples to be allowed to opt for surrogacy etc. Though the critics descend yet the bill is a master piece which protects the ethical, moral and social rights of surrogate mother the child.

ii. **Assisted Reproductive Technology (Regulation) Bill, 2020:** the bill was introduced in Lok Sabha on 14th September 2020. This bill was passed to supplement the Surrogacy (Regulation) Bill, 2019. Primarily, it aims to regulate the Assisted Reproductive Technology (ART) centres and clinics thereby allowing a safe and ethical practice of surrogacy. The bill allows married couples and woman above the age of marriage to opt for ARTs. Even this bill excludes single women/man, cohabiting heterosexual couples, LGBTQ from its ambit. Unlike the Surrogacy Bill it does not prohibit foreign citizens from accessing ARTs. A written consent of the donor is mandatory but no provision as to counselling, withdraw the consent of the donor, compensation for loss of earnings etc. is provided. It only provides the provision of insurance policy which covers the medical complications, death and other expenses of the donor. The donor should be a woman who is married and that she has fulfilled her obligations as per norms of institution of marriage. The bill provides for requirement of '*pre-implantation of genetic testing*' where an embryo suffers from genetic disorders or ailments, it is allowed to be used for research purpose taking The consent of commissioning parents. Even this bill is also criticised as it raises several constitutional, medical, legal and regulatory concerns.[25] The Supreme Court has observed that "*the discrimination present as to people who can opt for ART violates Article 14 of the Constitution and Right to Privacy as the very sanctity of marriage imbibes the liberty of procreation, choice of a family life and the dignity of being which concerns all individuals irrespective of their social status*".[26] There is also overlap of the provisions relating to SRB and ART bill especially with regard to the regulation of surrogacy through centres and banks. Even with respect to punishments both the bills are different. Higher penalty provision is given under SRB in comparison to ART bill.

25 Prabha Kotiswaran, '*Assisted Reproductive Technology Bill needs a thorough review*'<https://indianexpress.com/article/opinion/columns/assisted-reproductive-technology-regulation-bill-surrogacy-6716444/> accessed on 27th April 2021

26 *K.S Puttaswamy V Union of India*, W.P 1040 2017

Thus, the above piece of legislation though proves to be a step forward in protecting the women and child rights in surrogacy yet they are to be reviewed before passage.

6. Conclusion

The process of surrogacy in entreaty brings happiness in the life of childless couples. A surrogate woman fulfils their desire by consenting to carry their child in her womb. However, considering the nature of such contract, it requires a careful consideration on various aspects like rights and duties of the parties, consequences of breach and their liability in case of any unforeseen situations. This problem can be addressed by incorporating compensatory surrogacy clauses in the contract or the liquidated damages in case of any unforeseen circumstances. The SRB and ART bill needs to be analyzed from the point of implementation and impact which yet again every Indian law suffers. The bill should also address the legal validity of surrogacy contract by incorporating necessary provisions for its regulation and not just limiting or restricting the options. The duty also lies with the state to protect the rights and interests of every individual. Thus, this has to be addressed by removing the discrepancies in the law and ultimately the concern should be only to provide a happy family rather than a long legal battle.

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(13) Saunders, 'Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health', (Elsevier Press Inc., U.S.A., 7th edn, 2003) <http://medical-dictionary. thefree dictionary.com/positive eugenics> accessed on 21st April 2021

(14) Shani Van, Niekerk, 'Modern Families: Surrogacy is an option' (27th Sept 2018) https://www.golegal.co.za/surrogacy-south-africa-children, accessed 21st April 2021.

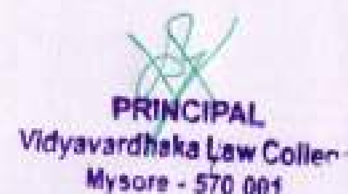
Chapter 2

Practice of Surrogacy
Issues and Legal Measures

*Dr. Bindu S**

ABSTRACT

"Surrogacy is an important method of assisted reproductive technology and an alternative to infertility. It is an option to issueless couples who want to have their own baby. In traditional surrogacy pregnancy happens when the sperm of the intended father is artificially inseminated into the womb of the mother. But in gestational surrogacy, fertilized embryo is implanted into the uterus of the surrogate. Surrogacy may be commercial or altruistic depending on the financial assistant received by the mother. Though the concept of surrogacy seems beneficial to both the surrogate mother and the intending parents, it often poses social, medical, ethical and legal problems. Few of the major ethical issues involved are the exploitation, compulsion, commodification etc involved in the surrogate's remuneration. The relationship between the gestational mother and the genetic mother, the right of the child to know the identity of its parent, the physical risk and the emotional trauma that many surrogate mothers face after relinquishing the child are all key issues. As commercial surrogacy is not explicitly banned, India is an end point of reproductive tourism due to low rate of expenditure, better and enhanced medical facilities. Surrogacy has created yet another issue related to the citizenship of the baby also. However, in the absence of proper legislation regulating commercial surrogacy, we couldn't resolve these problems effectively. The regulations imposed by ICMR and contractual obligations are the only legal principles for addressing this issue. Several attempts were made for enacting law for controlling surrogacy. Finally, The Surrogacy (Regulation) Bill, 2020 which inserted relevant provisions for controlling the menace of surrogacy is under discussion now".



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Threats and Challenges to Cyber Security: A Trend in 21st Century

*Dr. Sridevi Krishna**

Abstract

The concept of common heritage of mankind as proposed before UN General Assembly[1] in 1967 is an ideal jacket that fits the present human generation in cyberspace. It has called for international governance in the interest of mankind. The internet as cyberspace has a wider influence on the present generation as it is used to facilitate online communication and for diverse purposes, from commerce to entertainment. Whenever a virtual meeting space is set up, we find a cyberspace is created. It is growing abundantly with the use of computers and smart phones. It has gained popularity as a medium of interaction and sharing of information. Today, the use of cyberspace is exposed to threats and vulnerable to cyber-attacks which maliciously aim at computer infrastructure. Whatever may be the means of attack, it violates human rights and there is a need to prevent the present generation from being prey to this kind of violence. This paper analyses the concept of cyber threats and laws meant to provide cybersecurity. In the light of above analysis the paper also brings out few suggestions as to prevent such cyber threats.

***Key words**: Cyber Security, Cyberspace, Cyber Law, Cyber-attack, Disinformation*

INTRODUCTION

Today's world is dominated by computers. They are the masters of protecting the information of every individual. Cyberspace, faces the threat of disseminating the personal

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[1]UN General Assembly 22nd Session (1515 Meeting, 1st November 1967, 3:00pm), www.un.org/Depts/los/convention_agreements/texts/pardo_ga1967.pdf

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information of an individual for committing crimes which are prejudiced to his interest. The cyber criminals' resort to cyber-attacks to compromise privacy, confidentiality and availability of data for their benefit.

In cyber space both cyber-attack and cyber-crime has created havoc. Both pose a challenge to the cyber security ecosystem, which today calls for proper legal regulation. The situation of pandemic sets a good example as to how disinformation, a new trend in cyber-attack, spread information about COVID-19 cures which was sold using the World Health Organization logo through fake shops and malware.[2] Even the pandemic situation did not slow down the cyber-attacks, rather it increased the cyber criminal's activity online, who resorted for cheap tricks to spread various types of fake news and attack major business and commercial establishments.

CYBER SECURITY THREATS AND CHALLENGES

A major threat which poses a challenge in cyber space today is cyber-attack. It involves the use of ICT to exploit others. It is an offensive action that targets computer information systems, infrastructure, network or devices using various methods to steal, alter or capture data or information systems. They tend to access, change or even destroy sensitive information to the extent of committing extortion. Today, not only techies and big business establishments are prone to cyber-attacks. Anybody connected to electronic gadgets, smart phones and anything connected to computer or internet is susceptible to cyber-attacks. Evenwomen and children are the targeted sections of this cyber society. The use of social media such as *Facebook, Instagram, WhatsApp* and *TikTok* has created a new trend of harassment among this vulnerable section of population. The crimes committed in cyberspace are carried out with much ease than the crimes committed in the physical world. Some of the common cyber-attacks are-

[2] 2020: The year of fake news, COVID related scams and ransomware, (Prague, Czech Republic, 24th Nov 2020, 2pm) , https://press.avast.com/2020-the-year-of-fake-news-covid-related-scams-and-ransomware

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- **Phishing-** It is a method used to steal data from the internet or computer. The hackers send emails that appear to be from trusted sites with an intention to grab personal information. It could be in various forms like attachment to an email loading malware to computers, providing a link to fake websites which may ask for personal information or by conducting intense research the attackers target big organizations or individuals through creating messages that are relevant and personal. Recently, IBM security researchers highlighted that they have detected a cyber espionage effort using targeted phishing emails trying to collect vital information on the WHO's initiative for distributing COVID-19 vaccine to developing countries.[3] Such kind of attacks impact on global economy and even life.
- **Denial of Service Attack**- it engulfs a network or system resource with unwanted network traffic so that it cannot respond to service requests. On system resources it can be launched from a large number of host machines that are infected with virus and controlled by the attacker. In 2020, Amazon Web Services (AWS), the 800 pound gorilla of everything cloud computing, was hit by a gigantic DDoS attack. It targeted an unidentified AWS customer using a technique called Connectionless Lightweight Directory Access Protocol Reflection (CLDAP). It relied on vulnerable third part CLDAP servers and amplifies the amount of data sent to the victim's IP address by 56 to 70 times. The attack lasted for 3 days and peaked at an astounding 2.3 terabytes per second.[4]
- **Man in the Middle Attack**- it occurs when a hacker place themselves between communication of a client and server.

[3] "Phishing ploy targets COVID-19 Vaccine distribution effort", (The Economic Times, 3rd Dec 2020, 3:30 pm), https://economictimes.indiatimes.com/news/international/world-news/phishing-ploy-targets-covid-19-vaccine-distribution-effort/articleshow/79550803.cms

[4] Paul Nicholson, "Five Most Famous DDoS Attacks and Then Some", (27th July 2020), https://www.a10networks.com/blog/5-most-famous-ddos-attacks/

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The common types of such attack are session hijacking where the hacker takes over the control of session between server and client; IP spoofing where the hacker may trick the user by communicating with known entity; replay attacks where the hacker may save an old post/message and then use it later to impersonate the victim. In 2015, users expressed concerns about scans of SSL-encrypted web traffic by Super fish Visual Search software installed on Lenovo machines. The installation included a universal self-signed certificate authority which allowed man-in the middle to introduce ads even on encrypted pages. It had same private key across laptops, which allowed third party eavesdroppers to intercept or modify HTTPS secure communications without triggering browser warnings by either extracting the private key or using a self-signed certificate.[5]

- **Structure Query Attack**- it is one of the traditional methods used to grab information through queries. Such queries may be sent to a computer or phone or server to get sensitive or confidential information. In August 2020, an SQL attack was used to access information on the romantic interest of many students of Stanford. It was the result of insecure data sanitization standards on the part of link, a start-up founded on campus by an undergraduate student named Ishan Gandhi.[6]The individual also provided screenshots and a screen-recorded video depicting the alleged hack. An action was taken until the site was declared secured.
- **Cross-site Scripting**- in this type of attack the hacker target third party sites by sending malicious code. It can happen only when the particular website allows a code to

[5] Fox Brewster, "How Lenovo SuperfishMalwae Works and What you can do to Kill it", (20th Feb 2015), www. forbes.com

[6] Sam Catania, "Vulnerability in 'Link' website may have exposed data on Stanford students' crushes", (13th Aug, 2020, 5pm) , https://www.stanforddaily.com/2020/08/13/vulnerability-in-link-website-may-have-exposed-data-on-stanford-students-crushes/

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attach to its own code. When the user requests a page from such a website, it transmits the page to the attacker's play load as a part of the HTML body, to the user's browser which again executes a malicious script. The most common example can be found in bulletin-board websites which provide web based mailing list style functionality.[7]

- **Drive by attack**- it is a common method of spreading malware. The hackers target insecure websites and plant malicious information into HTTP or PHP code on the page. Such attacks can also happen while viewing a website or email or a pop-up window. Through drive by download, the malicious code that is downloaded is then used by the attackers to steal passwords or financial information. During pandemic there were about 60000 malicious attachments or URL related to COVID-19. Attackers impersonated entities like World Health Organization, Centre for Disease Control and Prevention (CDC) and Department of Health to get into their inbox. People's fear was capitalized during this time.[8]The main causes of such attack is, not updating the internet browser or leaving apps open without logout.
- **Password Attack**- it is one of the most common methods used by the attackers. Since a password is required to authenticate a user to an information system, obtaining it is a common approach adopted by the hackers. It can be done through methods like guessing when the hacker knows the user and try some random words or numbers. It can also be through sniffing where the passing data are captured through a computer network using packet sniffers. Eavesdropping method is also used to get password information or credit card number and other

[7]Kirsten.S et.al, "Cross Site Scripting",(24th July 2020, 6pm), https://owasp.org/www-community/attacks/xss/

[8]"India sees 2nd highest drive by download attack volume in APAC in 2019: Microsoft", (Economic Times, 29th July 2020), https://economictimes.indiatimes.com/tech/internet/india-sees-2nd-highest-drive-by-download-attack-volume-in-apac-in-2019-microsoft/articleshow/77239906.cms

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information through the interception of network traffic.In July 2015, a group called 'The Impact Team' stole the user data of Ashley Madison. Many passwords were hashed using both the relatively strong password hashing function and the weaker MD5 hash. Attacking the latter algorithm allowed some 11 million plaintext passwords to be recovered.[9]

- **Ransomware Attack-**It is one of the biggest threats in present days. It is a type of malicious software or malware that gains access to files or systems and blocks user access to those files or systems. They hold these files and systems as hostages until the ransom is paid. The more advanced version of these called as crypto viral extortion encrypts the victim's files and makes them inaccessible. A ransom payment is then demanded to decrypt them. In 2017, the WannaCry ransomware attack, which was considered as a worldwide cyber-attack, targeted computers running the Microsoft Windows operating system by encrypting data and demanding ransom payments in the Bitcoin cryptocurrency.[10] The National Security Agency of USA had developed an exploit named Eternal Blue, which was stolen and leaked by a group of hackers called The Shadow Brokers. The attack was estimated to have affected more than 200,000 computers across 250 countries, with total damages ranging from hundreds of million dollars. In the same year National Health Service hospitals in England and Scotland, the biggest health care agencies were struck due to the Wannacry outbreak. About 70,000 devices including computers, MRI scanners, blood storage refrigerators and theatre equipment were affected.[11]Staffs were forced to

[9]Mark Ward, "Ashley Madison: Who are the hackers behind the attack"(20th Aug 2015, 5:15 pm), https://www.bbc.com/news/technology-34002053

[10]Zack Whittaker, "Two years after Wannacry, a million computers remains at Risk",(13th May 2019, 7pm), https://techcrunch.com/2019/05/12/wannacry-two-years-on/

11Ungoed-Thomas, et.all, "Cyber-attack guides prompted on You Tube", (The Sunday Times, 14th May 2017), https://www.thetimes.co.uk/article/cyber-attack-

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revert to pen and paper and use their own mobiles after the attack affected the key systems.

- **Artificial Intelligence Attack-** this is one of the most successful forms of attack in recent times. The attackers manipulate the data to train the AI by slowly steering it to the desired direction. They modify the input data to make proper identification hard. Every electronic gadgethas an AI application in it and such security threats will have devastating effects on drones, computer systems etc. The attackers employ AI assistance to detect behavior patterns and to convince the people with sufficient information sent through calls or emails. It may even persuade the victims to compromise networks and hand over confidential data. Recently, Japan has taken initiative to invest 237.12 million in the cyber domain to develop AI to counter cyber-attacks. This system is introduced to detect malicious emails, judge the level of threat using AI and also respond against the attack.[12]

- **Disinformation-** It is used for creating social engineering threats on a mass scale just like phishing attacks, to compromise IT systems for data extraction and dissemination.[13] They play on our emotions and control our ideas. Though disinformation cannot be directly treated as cyber-attack, yet it is posing a challenge to cyber security and can be considered as cyber-attack as it hampers the well-being of people who are targeted. It is also considered as a species of misinformation which aims at misleading the public through spreading false information. It is also not easy to tackle the source of such

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[12] Japan to develop AI based System to counter cyber-attack, (30th March 2020, 10:59am), https://www.defenseworld.net/news/26616/Japan_to_Develop_AI_based_System_to_Counter_Cyber_Attacks

[13] Ashish Jaiman, "Disinformation is a Cybersecurity Threat", The Hindu, (11th Feb 2021,3:00 pm) https://www.thehindu.com/opinion/lead/disinformation-is-a-cybersecurity-threat/article33804285.ece

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information as the data created in bulk makes it difficult to find out what's real and what is not, as it is a compromise of our cognitive being. In the case of *Alok Srivastava v. Union of India*[14], the problems created by the spread of fake news were highlighted, with reference to the plight of the migrant workers. The Supreme Court emphasized on the dire need for spreading verified and accurate information via the issue of Government authorized daily bulletin through all the media avenues. With the havoc caused by rumors and misinformation, it was observed that India is in urgent need of a comprehensive and efficient regulatory legal framework to deal with the fake news issue.

- The above kinds of threat are not exclusive and there may be other kinds of threat which an individual faces every time when he disseminates his personal information. The offenders use the above attacks to commit crimes which in particular may hamper the safety and security of women and children. They often fall prey to such cyber-crimes because they are mostly done by the harassers who they knew rather from strangers. Some of the common cyber-crimes committed against them are- harassment, voyeurism, cyber stalking, sexting and revenge porn attacks. They pose a challenge to the safety and security of the community and this may be because of lack of awareness both at institutional and individual level. Apart from this, lack of uniformity in devices used for internet access, lack of national level architecture for providing cyber security and absence of proper regulatory policy to tackle the issues of such cyber-attack is also contributing for increased cyber threats.

LEGAL INITIATIVES

Privacy is an integral part of human's life. No one has a right to reveal the information of another without his consent. The Indian Constitution too recognizes such rights under Art 21

[14](2020) SC 345

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which emphasizes on right to life and personal liberty, which also includes right to live with dignity. With the influence of technology in life, the private information is being circulated or made public without the individual's consent. In cyber space such activities are common because of the anonymity as well as easy access to the information online. Often the victims are even unware about the threat and cyber-crime committed against them. Also, they are not aware of the legal remedies available. In India, the general criminal offences are codified under Indian Penal Code, 1860 and certain white-collar crimes are punishable under Information Technology Act, 2000.

Section 505(1) provides that whoever makes, publishes or circulates any statement, rumor or report with the intention to cause, or which may likely cause fear or alarm, or incite the public whereby any person may be induced to commit an offense against the state or the public tranquility, shall be punished with imprisonment up to three years, or with fine, or both.[15]

Section 354 of IPC provides punishment for assault or criminal force to women with intent to outrage her modesty. The punishment shall not be less than one year but which may extend to five years and shall also be liable to fine.[16]

Section 354 A[17] defines sexual harassment and punishment for sexual harassment. It provides that 1) a man committing acts like

i) Physical contact and advances involving unwelcome and explicit sexual overtures or

ii) A demand or request for sexual favors or

iii) Showing pornography against the will of a women or

iv) Making sexually colored remarks, shall be guilty of the offence of sexual harassment

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[15] Ratanlal&Dhirajlal, "The Indian Penal Code", (34th Edt, Lexis Nexis, 2019) at 952
[16] Id at 809
[17] Cri. Law. Amend. Act (2013)

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(2) Any man who commits the offence specified above in sub-section 1 clause (i), (ii) and (iii), shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 354B provides punishment for Assault or criminal force to women with intent to disrobe her. The punishment shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

Section 354C defines and provides punishment for Cyber Voyeurism. Any man who watches or captures the image of a woman engaging in private act without the knowledge of the women being observed who disseminates such images shall be punished with imprisonment for not less than one year, but which may extend to three years along with fine. The subsequent commission of such offence is also punishable with a higher term.

Section 354D defines and prescribes punishment for stalking. Whoever follows a woman or attempts to foster personal information against her will or through the internet, email or any other form of electronic information monitors the use by the woman of committing the offence of stalking. The punishment for such offence is imprisonment of three years along with fine. For subsequent offence, imprisonment may extend to five years along with fine.

Apart from the above provisions of IPC, the IT Act also provides certain provisions which prescribe punishment for computer related offences[18]. Section 43 of the IT Act provides for penalty and compensation for damage to computer and computer system. It prescribes damages by way of compensation to be paid for the person affected. Section 66A provides for punishment for sending offensive messages through

[18]IT Act §6(2000)

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communication service, where the punishment is three years imprisonment along with fine. Section 66C adds on a unique feature of offence which prescribes punishment for a period of three years along with fine to any person who fraudulently or dishonestly makes use of personal information like digital signature, password or other information. Section 66D of the Act provides punishment for a period of three years along with fine for cheating by personation by using a computer resource. The act also deals with offences which violate the right to privacy. Section 66E prescribes punishment for a period of three years along with a fine of two lakhs rupees for violation of right to privacy. Any material which is lascivious or appeals to the prurient interest of a person is transmitted or published through electronic form is punishable with imprisonment for three years and fine of rupees three lakhs is imposed. For subsequent conviction the quantum of punishment is five years imprisonment along with a fine of rupees five lakhs.[19] Further, the act also provides imprisonment for five years along with ten lakh rupees fine, for revenge porn acts, where the offender publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct.[20]

NEED FOR ACTION THROUGH LAW

India has quickly responded to the adoption of digitalization. Use of internet, payment apps and social networking sites for business and personal use are common. It is to be noted that, with over 1.2 billion mobile accounts and half billion internet users, the country is facing threat from cyber criminals. There is also a hub of outsourcing and because of this India is placed one among top five cyber –targeted nations along with US, UK, Singapore and Ukraine.[21] It is also estimated that several

[19] Id at §67

[20] Id at §67A

[21] Nidhi Single, "Increasing Cyber-attacks show why stringent cyber-security laws are need of the hour", (10th Jan, 2021, 9:03pm), https://www.businesstoday.in/technology/news/increasing-cyber-attacks-show-why-stringent-cyber-security-laws-are-need-of-the-hour/story/427509.html

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organizations and individuals estimated losses of about 6$ trillion dues to cyber theft in recent lockdown due to outbreak of pandemic.[22] There are laws and regulations which punishes cyber criminals but still it calls for the need of comprehensive policy.In this regard as pointed out by an American Jurist, Robert Summers on "*Techniques of Social Control*", adopting Preventive Technique would serve the purpose.[23] In this regard following actions are to be addressed to ensure cyber security-

- "*Self-defense is the best defense*",a common man using the technology should understand the level of risk and also mitigating the risk. For Example: A man who downloads and installs the app from the play store shares access for location, phone calls and device storage. While installing, he installs by default but, no-one will think or review why the phone call and device storage access is needed? What is the risk involved in allowing these settings for the app installation? From which source the threat would arise? What is to be done to mitigate the risk? These questions cannot be addressed by a common man. In this regard consumer awareness should be created through advertisement and the initiative should be taken by the Department of Consumer Affairs, Food and Public Distribution.
- A regulatory policy should be passed- the policy should define and rely on the methods of controlling disinformation actors, who push the boundaries and use the platforms to achieve their wicked goals. A mechanism like the Information Sharing and Analysis Centre should be used to tackle the source of disinformation.
- The policy should provide for a certification of authenticated apps and websites especially when it is B2C model. These certificates should be issued based on prescribed criteria to be fulfilled by the apps like security regarding information of consumer, assurance of protection of information like email-id, phone number,

[22] Idat 1

[23] Farrar, "Introduction to Legal Method", (3rd Edt, Sweet & Maxwell, 1990) at 13

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debit/credit card details etc. Misuse of this information should carry a penalty and should be made a punishable offence.

- To take initiatives on AI attacks, the policy must lay emphasis on the importance of transparency, testing, accountability for algorithms and their developers. The government should also invest in this so as to ensure security of the mass.
- A separate authority/directorate for issuing certification/authenticating the apps, websites should be established. This authority should be given the autonomy to certify with minimal governmental intervention. The authority should consist of experts from the cyber world, legal and technical.
- The certification/ authentication issued should be for a limited period and subject to renewal based on their performance in terms of security and protection of consumer information. This should also be frequently subject to assessment by the authority so constituted. The idea can be borrowed from the patent, copyright authority.
- Anti- virus database should be kept up to date. Passwords should be strong and IT systems should be subject to frequent audit for suspicious activity.
- Apart from consumer forums, a separate court for trying cases relating to breach of obligation and security policy should be established. The jurisdiction of these courts should not overlap. A better idea can be borrowed from the Competition Commission of India in this regard.[24]

CONCLUSION

As stated by Cicero, '*saluspopuli suprema lex*',[25] the health and welfare of the people should be the supreme law. Today, there is a need to think about the health of netizens in terms of protection of their personal information from being

[24] Competition Act§ 7 (2002)

[25] Cicero, "de Legibus", (Loeb Classics)at 467

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misused. The new trends in cyber-attacks and crimes should be cautiously handled. Raising awareness among young people about the hidden perils of internet use is the need of the hour. Taking of legal initiative primarily will act as a deterrent for future criminals and will also be a motivating factor for other victims to report any kind of cyber-crimes committed against them. The government, non-governmental organizations, and business organizations also has a responsibility to support the voice raised against such heinous act. They play a vital role in creating a proper standards and policies in this regard.

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PART-I

INTELLECTUAL PROPERTY RIGHTS

Chapter-43

Traditional Knowledge in India- Protection through 'Sui Generis' System

Dr. Sridevi Krishna[1]

Introduction

India is land of diverse culture and tradition. It possesses natural resources which make it a richer country of traditional knowledge. This traditional knowledge is fundamental identification of autochthonous communities/groups in which it operates and is preserved. It has been the mainstay in their life especially in key sectors like food and health. It represents the historical records of human experience, observation and experiments. It is embedded in the culture, tradition, spirituality, global views and expressed in stories, songs, proverb, customary laws and language. It is passed on from generation to generation through cultural practices and rituals. These sets of understandings, interpretations and meanings are connected to language, naming and systemclassification and use of natural assets.[2]

Traditional knowledge informs decision-making on the basics of everyday life starting from hunting and fishing to agriculture and animal husbandry to the interpretation of meteorological and environmental condition phenomena and the attempt of tackling illnesses and disease. It is the premise for food preparation, education, environmental conservation and the wide selection of activities that outline the society in different parts of the world. It is dynamic as new knowledge is continuously added, adapted and altered. The systems innovate from within and internalize use and adapt external knowledge to match up local situations and thereby guarantee communities' resilience to change.[3]

Protection of Traditional Knowledge

Traditional Knowledge is regularly subject to unauthorized commercial misuse. A need has been arisen to protect and preserve such historic practices from being misused. However, there has been lot of debate on protection of traditional knowledge under IP regime and consists ofthe oppositedemanding situations like whether or not it must becoveredbeneath the patent system, copyright or trademark; whether or not time constraints on safety granted under the IP might be relevantto traditional knowledge and if so, how a non-stopsafety systemmight be ensured. The issue of bio piracy is alsolikewise a challenge which might also additionallyarisewhilethere is a commercial

1. Assistant Professor, Vidyavardhaka Law College, Mysore.
2. Henrietta Marrie, "Emerging trends in the Generation, Transmission and Protection of TraditionalKnowledge", Retrieved from <www.un.org> (visited on 22nd Oct, 2020).
3. *Ibid.*

usage of traditional knowledge without authorization. Positive protection of traditional knowledge is ensured through legal standards, rules and regulations, access and benefit sharing provisions; royalties' etc. Defensive protection is ensured via steps taken to prevent acquisition of IP rights over traditional knowledge. In India the Turmeric Case[4] is the best example for such kind of protection. In this case,a patent was granted for "use of turmeric in healing wound" and claimed a method to heal wounds in an affected person by administration of required amount of turmeric. The inventors of this patent had later assigned the patent to the University of Mississippi. A re-examination application was filed against the grant of patent along with nearly two dozen references, which resulted into early success. The inventors' defense was proven to be weak in front of the latest commentaries on traditional Ayurveda texts, extracts from Compendium of Indian Medicinal Plants and nineteenth century historical texts from the library of Hamdard University, resultantly in August 1997, the USPTO ordered revocation of the patent, which lacked novelty. Later, India adopted a mechanism to protect its traditional knowledge by way of setting up a traditional knowledge digital library in 2001 together with Ayush and CSIR.

Cases of Biopiracy

The Neem case,[5]the first ever problem for India which raised several doubts on the so called strict patent system was concerning the grant of patent to the employer W.R. Grace. The company was granted a patent to function within America and Europe, for a formulation that held in the strong storage of chemical compound called '*azadirachtin*', the active ingredient in the neem plant; it planned to use this chemical compound for its pesticidal properties. Ancient systems of medication like Ayurveda and Unani, determine antiviral and antibacterial properties of the neem tree also known as the "*curer of all ailments*" in Sanskrit, and prescribe the same for treating skin ailments and also as herbal pesticide. The applicant admitted in the patent application as to how the curative uses of neem were acknowledged and pointed out to the fact that storing *azadirachtin* for an extended period of time is difficult. The patent granted in USwas limited, whereby the applicant was only given the exclusive right to use *azadirachtin* in the particular storage solution described in the patent. The sanctioning of patent created chaos and it was questioned through re-examination and post-grant opposition proceedings before the United States Patent and Trade Mark Office (USPTO) and the European Patent Office (EPO), respectively. Though there has been no success on the USPTO, the European Patent Office favoured the opposition stating that the patent granted, lacked in novelty and inventive step.

Yet another case that created lot of havoc was a patent granted by the USPTO to an American employer called Rice Tec for Basmati rice.[6]Basmati rice is a unique aromatic

4. Retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3038276> (visited on 21st October, 2020).
5. Retrieved from <https://www.countercurrents.org/bhargava140709.html> (visited on 10th November, 2020).
6. Nair [illegible], "Geographical Indications: A Search for Identity", LexisNexis Butterworths, New Delhi, (2005) RiceTec acquired the trademarks "Texmati" and "Kasmati" in the UK. India challenged the trademark by gathering affidavits from culinary experts and the London Rice Brokers, after which RiceTec decided to surrender its registration of both trademarks.

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variety of rice grown in India and Pakistan. The patent granted created multiple issues besides that under the patent law i.e. under trademarks and geographical indications. Rice Tec had been granted patent for the invention of hybrid variety of rice lines that combined desirable grain traits of Basmati rice with desirable plant traits. This was due to the lower quality of Basmati rice that grew in US in comparison to the good quality of Basmati rice being cultivated in northern part of India and Pakistan and would help in growing a better crop of Basmati rice in the western hemisphere, especially US. A request for review was filed, with declarations from scientists, alongside numerous publications on Basmati rice and studies carried out on the rice in India. This also made the USPTO to realize that core claims of Rice Tec were non-obvious. RiceTec did not question the USPTO's decision and reduced its claims.[7]

Protection under Traditional Knowledge Digital Library (TKDL)

TKDL is an initiative of India to prevent misappropriation of country's traditional medicinal knowledge at international patent offices on which healthcare needs of more than 75% population and livelihood of millions of people in India is dependent.[8]The Central Government through its then Planning Commission constituted a "Task Force on Conservation and Sustainable Use of Medicinal Plants" in June 1999.[9] The veryobjective wasto identify the measures to facilitate the protection of patent rights and Intellectual Property Rights of medicinal plants. It made several recommendations and one was for creation of a library to ensure collation of traditional knowledge to be made available digitally and which is also helpful to show the world that traditional knowledge in medicine is prior art in India and any patent application based on such knowledge will not qualify for novelty.[10]Thus, this gave birth to a database of India's traditional knowledge. Traditional Knowledge Digital Library (TKDL) is a database of over 2, 50,000 formulations used in traditional medicine systems in India, like Ayurveda, Siddha, Yoga and Unani. With this India has moved towards a defensive protection in preparing shield for protection of digital library and curb the menace of bio piracy and misuse of traditional knowledge.

The expert group of TKDL surveyed and estimated that about 2000 patents concerning Indian systems of medicine were being granted wrongly every year at international level, mainly due to the fact that traditional knowledge on medicine also exists in Indian local languages and is not inclusive or accessible for patent examiners at the international patent offices.[11] The US agro chemical and biotechnology corporation Monsanto Company applied for the breeding of melon seeds resistant to closterovirus using molecular biology. This virus caused cucurbit yellow stunting disorder in melons and the leaves turned yellow reducing the plant growth. The National Biodiversity Authority challenged the grant of patent on the ground that patent was based on an Indian

7. Retrieved from <https://delhiscienceforum.net/intellectual-property-rights/87-victory-on-basmati-by-amit-sen-gupta-.html> (visited on 5th November, 2020)
8. Retrieved from <http://www.tkdl.res.in/tkdl/langdefault/common/Abouttkdl.asp?GL=Eng> (visited on 26th November, 2020).
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10. Prashant Reddy T.et.al, "*Create, Copy, Disrupt: India's Intellectual Property Dilemmas*", 271 (Oxford University Press, 2017).
11. *Ibid.*

indigenous, melon varieties and non-compliance with the Biological Diversity Act, 2002. Thus not all bio piracy bids are based on the Indian traditional knowledge has been foiled due to TKDL and any such attempt to credit it is preposterous.[12]The digital library though contains the voluminous documents and Indian traditional knowledge work has certain shortcomings like translation, disclosure and TKDL maintains no record of oral traditional knowledge which is passed on from generation to generation. It is also true that there is lack of accepted definition of novelty at international level and that TKDL on country's patent system for its efficacy. This has also resulted in fishing expeditions and its misuse.

Protection through International Conventions and Municipal Laws

In the past few decades it has been ascertained that India has actively participated in TK conventions and has taken a ton of efforts to protect its TK at international level. The access to Indian traditional knowledge is also available at United States Patent and Trademark Office and European Patent Office. Also the TKDL which is a pioneering initiative of India, under the joint collaboration of the Ministry of Ayurveda, Yoga & Naturopathy, Unani, Siddha, Homoeopathy (AYUSH) and Council of Scientific and Industrial Research (CSIR), prevents the exploitation of traditional knowledge at Patent Offices worldwide.[13] This is a welcome initiative for protection of traditional knowledge in India.

The Convention on Biodiversity and the Nagoya Protocol, 2010 introduces the recognition and protection of TK at international level. The CBD provides that, parties are required to respect and maintain knowledge held by indigenous communities, and promote broader application of Traditional Knowledge based on fair and equitable benefit-sharing. It is recognized as key machinery for effective practices of conservation and sustainable use of biodiversity[14]and the procedural requirements stated under the provisions of Article 15 provides for access to genetic resources, together with those based on prior informed consent and mutually agreed terms. The Nagoya Protocol supplementary to CBD convention broadens the CBD provisions relating to access and benefit-sharing.[15] It covers the traditional knowledge associated with genetic resources enclosed under the ambit of CBD and also the uses arising from its utilization. Certain core obligations are set out for contracting parties in addition to access to genetic resources, benefits and compliances. It conjointly addresses the problems of genetic resources where indigenous and local communities have the established right to grant access to them and measures for contracting parties to ensure these communities prior informed consent, and fair and equitable benefit sharing, keeping in mind the community laws, procedure and customary use and exchange.[16]

In India there is no substantive Act or law to protect traditional knowledge unlike other categories of Intellectual Property Rights. The current Intellectual Property enactments like the Patents Act, 1970contain provisions with respect to traditional

12. Navadanya, "No Patents on Seed", Retrieved from <http://no-patents-onseeds.org> (visited on 21st November, 2021).
13. Retrieved from <https://www.csir.res.in/documents/tkdl> (visited on 24th November, 2021).
14. Article 16.
15. *Ibid.*
16. Retrieved from <https://www.cbd.int/abs/about/default.shtml> (visited on 24th November, 2021).

knowledge, where under Section 25 opposition to grant of patent are often claimed if the invention claimed is anticipated for having accessible at intervals within any native or autochthonous community in India or other places. Under the Copyright Act, 1957, though specific mention about protection of traditional knowledge is not mentioned yet, Section 31A provides for protection of work which is unpublished. The copyright protection is for a limited time period and also demands certain criteria to be fulfilled. Thus, traditional knowledge is protected though not directly but indirectly under these IP regime.

Need for '*Sui Generis*' System

A *sui generis* system is the need of the hour as there is a necessity for protection of traditional knowledge since IP protection has its own drawbacks. *Sui generis* means 'of its own kind'. It is a special and a distinct initiative taken to provide protection for traditional knowledge, enforcing the rights of autochthonous communities and prevent its misuse. This unique system can help legal rights associated with traditional knowledge and cultural expression and create space for access and benefit sharing to protect the unique set of knowledge and information that indigenous communities hold. The *Sui generis* system can bring about both defensive and positive protection. In the former kind, the people from outside the community holding such knowledge will be prevented from gaining the IP rights over the subject matter and the latter, tend to protect the legal rights of communities to promote their traditional cultural knowledge and expression. It seeks to protect their power and manage its utilization and benefits arising from its commercial use. In addition to TKDL system, a proactive approach to create awareness and understanding among people who are till today completely unaware about it or have limited knowledge on traditional knowledge protection can be taken.[17]

Conclusion

As the byword goes 'knowledge is wealth', the exploitation of knowledge must be coupled with protection, its promotion and benefit sharing. Likewise, Traditional Knowledge requires a special protection because it contains the aesthetic culture skipped over from generation to generation. It is typically oral and lacks improper documentation.[18] Today, the linking of traditional knowledge with contemporary IPR system is the question of relevance. A *sui generis* law is often pitched in as a probable solution for proper protection of traditional knowledge, however till time no legal initiative is taken. However, policies and ideas like National IP Policy, Digital India and Startup India can come to rescue disappearing system of traditional knowledge. Thus, the current generation ought to notice the value of age old knowledge and its protection should be the paramount consideration.

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18. Retrieved from <http://www.nopr.niscair.res.in> (visited on 6th November, 2020).

Chapter-44

Rights of Indigenous People

Dr. Manisha Narula[1]
Dr. Daljit Riyat[2]

Introduction

Indigenous people are also called first people and aboriginal people. Indigenous people are those who were living on their lands before settlers came from elsewhere. They are the descendants of those who are inhabitant of a country or a geographical region at the time, where people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means.[3] The term indigenous people can be used to describe any ethnic group of people who inhabit a geographic region with which they have the earliest known historical connection, alongside immigrants who have populated the region and are greater in number.[4]

Indigenous people in many parts of the world do not enjoy their fundamental rights in the state in which they live to the same degree as the rest of the population.[5] Presently, they are non dominant sections of the society because of their poverty and illiteracy.

Rights of Indigenous People

During the past twenty five years, "International law has displayed steady progress in identifying and protecting indignous peoples' rights. The 'United Nations Committee for the Elimination of All Forms of Racial Discrimination 'has mentioned about rights of indigenous people. It established that "Governments should be sensitive towards the rights of persons of ethnic groups, particularly, their right to lead lives of dignity, to preserve their culture and to share equitably in the fruits of national growth with the right to engage in such activities, which are particularly, relevant to the preservation of the identity of such persons or groups".[6]

The 'United Nations Working-Group on Indigenous Population' was established on the basis of the 'Economic and Social Council Resolution 1982/34'. The group began

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2. Officiating Principal, K.C.L. Institute of Law, Jalandhar.
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REGULATION OF CRYPTO CURRENCY IN INDIA: LEGAL ISSUES AND CHALLENGES

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***Abstract**: The current technological revolution has revolutionized money too. This has given rise to a new medium of exchange which is popularly known as 'crypto currency'. It is a mode of exchange which is available only in digital or in electronic form. They are also called as virtual currency which has been widely used these days due to increased privacy and lo transaction costs. In the light of its usage and considering the interest of its users around the globe and in India specifically, there is a need to deal with virtual currencies within the country and also globally. Their decentralized system of operation and its anonymous nature has given rise to the problem of legal regulation. It has also accelerated other menaces like money laundering, terrorist funding and tax evasion, which is required to be addressed at the earliest in order to prevent the risk. This paper analyses the legal issues and challenges faced in regulating crypto currency and also brings out few suggestions for its regulation in India.*

***Keywords**: Crypto Currency, Virtual, Regulation, decentralized, block chain*

1. INTRODUCTION

The financial industry and business have been remarkably disrupted by today's 'Digital World'. The wide use of internet has created a platform for doing business in a new way. The introduction of information technology has created entirely new and effective ways for doing business. The firms are using new methods of financial technology (Fintech) to provide their financial services. Artificial Intelligence, block chain, cloud computing and big data are the four key areas of fin-tech. Crypto currencies are designed to make financial services more accessible to general public. They are the medium of exchange that relies on a decentralized network that facilitates a peer- to- peer exchange of transaction which is secured by public key cryptography. Bit coins were introduced in 2009 by Santoshi Nakamoto. He described it as peer- to- peer electronic cash system. It is completely decentralized, meaning there are no servers involved and no central controlling authority. Crypto currencies like bit coins can be and is being used in number of ways like to buy goods, as an investment, mining, business transactions etc. With the level of growth that has occurred in the industry, greater attention is now being paid by Governments and other

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stakeholders around the world. Are becoming more and more mainstream. Law enforcement authorities, tax bodies and legal regulators worldwide are trying to understand the very concept of crypto currencies and where exactly do they fit in existing regulations and legal frameworks. Decentralised and anonymous nature of crypto currencies has also attracted various illegal activities. The authorities all over the world are worried about the use of crypto currencies in money laundering, terrorist funding and tax evasion schemes. Crypto currency is also used in controversial settings in the form of online black markets, such as Silk Road. Crypto currencies such as Bitcoin completely banned in countries such as Bangladesh, Bolivia, Ecuador, Kyrgyzstan and Vietnam. Countries like Japan and Sweden have taken steps to regulate crypto currency by declaring Bitcoin as a legal tender. As USA has the highest number of Bitcoin ATMs and also the highest Bitcoin trading volumes globally, the usage of crypto currencies is not illegal as of yet, but the laws and regulations can vary drastically depending on the state or the country. A lot of challenges are going to come up with the emerging trends in the field of digital currencies at an extensive rate. The legal fraternity should be well prepared with the possible issues and try to foresee most of them coming and also build capabilities to resolve most of them. It is vital that the legal issues are addressed by the legislators before the judiciary is bombarded with numerous lawsuits involving crypto currencies.

2. DISCUSSION

2.1 Legal Issues on Crypto Currency

2.1.1 Crypto Currency: Currency or Commodity-

Money is considered as a medium of exchange and it is not considered as goods. It serves three main distinct functions like it is a medium of exchange that facilitate the exchange of goods. It is a unit of account where we compare the costs and services over time and between merchants. In this regard money is the yardstick against which prices are measured; it is a store of value that stays stable over time. Money has to be able to be stored and spent on a later period in time, while retaining its value. For it to retain its value it is important that the value does not fluctuate heavily. Likewise crypto currency score high on the function medium of exchange. They exist in a purely digital form; therefore they are by definition non-perishable. Crypto currencies are highly divisible and fungible. There are no transport costs as opposed to gold and cash, since transactions happen on the internet. Finally are they unable to be counterfeited due to the technical

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architecture and use of cryptography. Unlike money the value of crypto currencies is highly volatile at the moment making it unsuitable as a unit of account at the moment. Crypto currencies can be stored very well and do not perish due to their digital nature.

Thus, from the point of view of economics, a thing capable of fulfilling all these three functions would be regarded as money, no matter what its legal nature. However, a crypto currency like Bit coins faces a structural economic problem. If such crypto currencies becomes successful and displaces sovereign fiat currencies, it would exert a deflationary force on the economy since the money supply would not increase in concert with economic growth. Bit coin shares many similarities with gold. First of all, neither is overseen by a single government. Second, Bit coins and gold both have limited supply, whereas currencies can always be printed by their respective governments. Finally, with respect to the concerns over fluctuation, the price of gold fluctuates much more than the price of currencies, as demand against the finite supply fluctuates, just like crypto currencies. From a legal perspective, a crypto currency fulfils the requisites of definition of a commodity according to U.S. law. Also, crypto currencies are tangible, even if they are not physical coins nor in the actual possession of the investors. In sum, the classification of Bit coin remains a contentious subject. In light of the foregoing, there could be as many classifications as there are uses of Bitcoin. Government regulators should provide guidelines on exactly how each regulatory framework will apply and co-exist without hindering the promising growth potential of this innovative financial platform.

2.1.2 Impact on Tax Regime-

Legal characterization of crypto currencies is the key in determining its tax consequences. The main distinction is whether crypto currency is a commodity, in which case capital gains rules apply or a currency. Crypto currency transactions are subject to tax like any other asset or currency. Crypto currency transaction may attract capital gain tax, income tax, transaction tax etc. Even if crypto currency transaction is void and illegal, the tax law is empowered to charge taxes on such transactions. In March 2014, the Internal Revenue Service in the United States ruled that Bitcoin will be treated as property for tax purposes as opposed to currency despite knowing that Bitcoin functions as a medium of exchange, a unit of account, and store of value and operates like real currency in some environments. This means Bit coin will be subject to capital gains tax. Globally, some countries have focused on which category Bitcoin should fall under. Canada came to the

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conclusion that, in the absence of a legal tender, Bitcoins cannot be considered as currency and should be treated as commodity for tax purpose. Countries like Germany and U.K have decided to adapt their tax system based on economic viability. Germany recognizes Bitcoin as an equivalent to private money and thus gives tax regulation of a currency. Thus, cryptocurrencies may be considered as a medium of exchange, a negotiable instrument, a property or a subject of the contract. Thus may depend upon the nature of transaction and the power of legislation to tax such transaction.

2.1.3 Crypto Currency and Consumer Protection-

The crypto currency transactions are based on trust on peers, promoters and the system. Bit coin transactions are risky due to the absence of basic consumer protection, such as the provision of refunds arising from disputes between merchants and customers. In case of any breach, the victim may not be able to produce acceptable legal evidences for recovery of the damages. Most of the information related to crypto currencies focus on the shortcomings of the system. The crypto currency uses principles of information technology and hence most of the possible disputes involve IT related offences such as hacking, digital licenses etc.

Apart from this, other legislations that may be relevant are consumer protection law, contract law, laws related to money laundering, intellectual property law and banking laws. Various estimates show crypto currency crime is on the rise, keeping pace with the market's rapid growth. It forces investigators to focus on high-profile cases, security professionals and officials say, effectively leaving small investors to their own devices. People are encouraged to report crypto currency theft to local police like any other crime, saying failing to do so only emboldens criminals. Yet because many victims simply do not see the point, crypto currency theft is far more common than any published estimates suggest, according to the security professionals.

Currently, crypto currencies are operating in a sort of regulatory vacuum. Many newspapers articles have attempted to highlight the various consumer risks pertaining to crypto currencies. Japan witnessed such risks with loss of $6 billion worth of Bit coin due to the hack of Mt. Gox. Also, in case of any crypto currency fraud, the victim is clueless as there are no remedies available. Due to anonymity, it is difficult to figure out the perpetrator. Thus, suspect as well as the jurisdiction is unknown because of the absence of any dedicated legislation or regulation. If consumers need for protection, it stems from the informational inequity; it seems more than relevant to provide them with guidance on the strengths and

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weaknesses that accompany crypto currencies, and to warn them of the risks associated with it.

2.1.4 Crypto currency driven illegal activities-

Crypto currencies are used for money laundering, tax evasion, terrorist funding and political funding. It appears that crypto currencies are better suited for this objective than cash. Crypto currencies such as bit coins generally lack legal tender status and their broad acceptance does not require any obligation on any government or country. Due to lack of regulations and oversight, crypto currencies lack consumer protection. Crypto currencies are being used for money laundering because they provide considerable anonymity, especially when used together with the TOR system. Further to that, they are global, easy to store and at the same time very difficult to be accessed to by unauthorized persons, since it is possible to use sophisticated encryption methods, the so called "wallets". Bit coins are a favorable means of payment for hackers. On the black market, they are used to pay for drugs, pornography, counterfeited documents as well as weapons and ammunition.

From this perspective crypto currencies are like a super tax haven; no taxation and complete anonymity, but also the added benefit of not being dependent on a bank. Crypto currencies possess the two most important characteristics of a traditional tax haven. First, because there is no jurisdiction in which they operate, they are not subject to taxation at source. Second, crypto currency accounts are anonymous. Users can start as many online wallets as they want to buy or mine Bit coins and trade them without ever providing any identifying information. Significantly, Bit coin offer one additional major advantage to tax-evaders that traditional tax havens do not: the operation of Bit coin is not dependent on the existence of financial intermediaries such as banks. Bit coin is exchangeable peer-to-peer by definition. Bit coin thus seems immune to the developing international anti-evasion regimes. In cyberspace, financial institutions the emerging agents of tax collection are taken out of the picture. Thus, crypto currencies have the potential to become super tax havens.

Given their transaction anonymity and user-friendliness, crypto currencies appeal to extremist groups as they offer a viable alternative to the mainstream financial system and fiat money. Bit coins and similar crypto currencies have become attractive to terrorists who see them as a means to solicit donations, purchase or sell weapons in the dark web and move funds globally to boost their financial capacities. Anti-terrorism activist Ghost Security Group had previously disclosed that the 2015 Charlie Hebdo attack in Paris was funded by Al Qaeda in the Arabian Peninsula (AQAP) through Bit coin financing. The group has uncovered several

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Bit coin funding sites exploited by IS supporters on the dark web with a digital wallet containing $3 million in Bit coin value believed to have been used to finance the terror operation.

As crypto currencies such as Bit coins are finding greater acceptance in the commercial world, an increasing regulatory oversight and enhanced law enforcement scrutiny of its usage is incumbent. Authorities need to harness the potential of crypto currencies and understand its mechanism to facilitate earlier detection of terror financing, tax evasion and money laundering. Failure to do so would allow the unconstrained development of a potentially major financial apparatus waiting to be fully exploited by cyber-driven terrorism and corruption.

2.2 Legal Regime on Crypto Currency

In India the usage of crypto currencies is not barred but there is no right to seek readressal or remedies for matters involving crypto currency. Crypto currencies have not been recognized as currencies by the RBI, and no specific laws or laws related to crypto currencies have been introduced in India till date. Due to the lack of a clear legal definition of crypto currencies, crypto currencies are currently regulated by various requirements of applicable law. Crypto currencies may fall under the definition of "computer program" under the Indian Copyright Act of 1957. This is a set of instructions expressed in other formats, including computer-readable media, including words, codes, schemas, or a computer that completes a specific task or achieve particular results. In addition, crypto currencies can almost certainly be classified as intangible "goods" under the Sale of Goods Act of 1930.

However, crypto currency taxation is still in the grey area, and there is even more uncertainty about the crypto currency regulatory environment. From the point of view of currency control law, the purchase of crypto currencies by Indian residents can be regarded as importing software or computer programmes into India. This requires compliance with applicable exchange control laws, including RBI's policies regarding importing goods and services. Regarding substances manufactured in the intangible form in India. RBI also manages "payment systems" and "prepaid equipment" that require RBI pre-approval and compliance with relevant RBI regulations/instructions. However, crypto currencies may not be classified as payment systems as long as they are not recognized as a payment system that can settle payments between payers and beneficiaries and have insight into the constant fluctuations in the value of crypto currencies. However, the use and trading of crypto currencies protect the information sensitive personal data. Each of the crypto currencies requires the use of crypto

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currencies to comply with the principles required under the protection of information. It can raise privacy concerns, such as knowing how to handle it.

Crypto currency under Indian law can be analysed in accordance with different subject matters as follows-

2.2.1 Payment & Settlement Systems Act, 2007:

This act gives RBI the power to certify any kind of pre-paid payment instrument. The RBI defined 'Pre-paid Payment Instrument' as: "Payment instruments that facilitate purchase of goods and services against the value stored on such instruments. The value stored on such instruments represents the value paid for by the holders by cash, by debit to a bank account, or by credit card." With respect to crypto currency, it is observed that crypto currencies are not stable and fluctuates on a regular basis. Also, they may or may not be accepted as a means to facilitate purchase of goods and services, since it does not fulfil the requisites of a 'Prepaid Payment Instrument'. Hence, it cannot be categorized under the purview of the Payment and Settlement Systems Act, 2007.

2.2.2 Negotiable Instruments Act, 1881:

As per section 13 of this act a negotiable instrument is "a promissory note, bill of exchange or a cheque payable either to order or to bearer." Hence, it is clear that a crypto currency does not have the characteristics to be included within a promissory note, bill of exchange or a cheque. And, thus, its specifications are not sufficient to be included under the scope of this Act.

2.2.3 The Coinage Act, 2011:

According to section 2 (a) of The Coinage Act, 2011 "coin" means any coin made of metal or any other material which is recognized as legal tender and stamped and issued by the Government or any authority empowered by the Government for this purpose which includes one-rupee note issued by Government and a commemorative coin." However, the term "coin" expressly does not include postal orders, credit and debit card and e-money issued by any financial institution, post office or bank. Therefore, Bitcoins are not coins as per Coinage Act, 2011 and hence are not covered by it.

2.2.4 Securities Contracts (Regulation) Act, 1955:

Section 2 (h) of Securities Contracts (Regulation) Act, 1956 defines the term "securities". On critical analysis of this provision, it is observed that cryptocurrencies such as Bitcoins are

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beyond the ambit of sub-clauses mentioned under this section. The only means by which a cryptocurrency can be included within the term "securities" is by using the sub-clause (ii) (a), which grants the Central Government the authority to declare certain instruments as securities. But, currently, the Central Government does not consider cryptocurrencies as legal tender and neither has it been given any due recognition. Thus, it does not fall under the above Act as well."

2.2.5 Reserve Bank of India Act, 1934 (RBI Act):

The only manner for inclusion of crypto currency within the sphere of the RBI Act, 1934 is upon its scrutiny with respect to the definition of derivative. A crypto currency fulfils the first part of the definition, coming under the term instrument and having its value derived from a change in combination of several factors. But, the factors mentioned in the definition have no bearing upon the value of a crypto currency. Its value, i.e., its price goes higher upon its increasing demand, along with other factors like its recognition or it being declared illegal also affects its value. Thus, if crypto currencies are interpreted under the category of a variable of like nature, then only the RBI Act, 1934 deem to include them within its scope under the definition of a derivative.

2.2.6 Foreign Exchange Management Act, 1999 (FEMA):

None of the Indian statutes interpret or define crypto currencies. Therefore, to evaluate the status of crypto currency, the definition of currency is to be looked under section 2(h) of Foreign Exchange Management Act, 1999. After a close and critical analysis of the given definition, it is observed that cryptocurrencies do not fit within any of the instruments in the given definition, but it does not exclude the possibility of the same being notified as currency by the Reserve Bank. However, until that happens, the situation has to be viewed from the fact that Japan has declared Bitcoin as a legal tender in its country and thus, any currency other than the Indian one will have to be considered as Foreign Currency under the FEMA and will have to comply with the rules and guidelines set under it.

2.2.7 The Indian Copyright Act, 1957:

Cryptocurrencies can be co-related with The Copyright Act, 1957under the definition of "Computer Programme". According to section 2(ffc) of the Copyright Act, 1957, a computer programme is "a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular

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task or achieve a particular result". Hence, if cryptocurrencies are analyzed in a broad manner, then according to the above definition, which includes a set of instructions expressed in codes or any form will be sufficient enough to bring cryptocurrencies within its purview.

2.2.8 Information Technology Act, 2000:

The Information Technology Act, 2000 has a term called asymmetric crypto system within its sphere. Cryptocurrencies functions by the issuance of a private key to each owner and holder of a cryptocurrency. Thus, it is intelligible that cryptocurrencies can be assessed and used as a part of the IT Act, 2000 under the definition of the expression "Asymmetric Crypto System".

2.2.9 General Clauses Act, 1897:

Section 3 (36) of the General Clauses Act, 1897 defines a movable property as "a property of every description, except immovable property." Also, immovable property has been defined under section 3(26), i.e. "immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." Thus, a cryptocurrency fulfils the requirements to fit within the definition of a computer programme, but, the same cannot be categorized under the definition of an immovable property. However, it can easily be included under the definition and be treated as a movable property within the General Clauses Act, 1897.

In the case of The Central Warehousing Corporation v. Central Bank of India Ltd.[1], it was held that "money can be considered as a movable property under section 3(36) of General Clauses Act." Hence, money can be considered as a movable property and also cryptocurrency fulfils the requisites of movable property as per section 3 (36) of the General Clauses Act, 1897. Thus, upon the usage of mathematical equation, it can be concluded that cryptocurrency is a form of money. However, no Indian laws explicitly address this issue, which leads to ambiguity regarding the legal status of cryptocurrencies.

3 RECENT PROSPECTS ON CRYPTOCURRENCY

The Union Government has recently discussed a ban on private cryptocurrencies in a new bill, "Cryptocurrency and Official Digital Currency Bill Regulations, 2021. The New Bill addresses the challenges of cryptocurrency regulations and proposes a total prohibition on all private cryptocurrencies. With the amendment to companies Act 2013, the Government of India instructed that companies have to disclose profit and loss on transactions involving cryptocurrency, the amount of holding and details about deposits or advances from any

[1] AIR 1974 AP 8

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person trading or investing in crypto currency. The holder of any virtual currencies should declare the number of holdings, details of deposits and advances from any person for the purpose of trading or investing in cryptocurrency. Today income transfer of any virtual asset is taxed at the rate of 30%. In addition to it is suggested that transactions involving cryptocurrencies be subject to 1% tax deduction at source.

4 CONCLUSION

Cryptocurrency is catching the new technology wave. Its increasing importance is within the thanks to deal with the upcoming era of the digital revolution. Although there are a variety of risks involved with this digital currency, still billions of dollars invested in it thanks to its permanent transparency, traceability, low transaction cost, no processing fees and status profits. The current draft of the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 ("draft Bill"), among other things, seeks to ban all private cryptocurrencies in India. However, it is pertinent to know that the whole crux of the cryptocurrency ecosystem is that it has decentralized. Many exchanges are managed to remain alive through peer to peer and crypto to crypto trade without the intervention of a middleman. This may include explicit legal provisions regarding the abuse of cryptocurrency mechanisms. Since cryptocurrencies are implemented via the blockchain, their verification methods are also transparent. However, India also faces some challenges related to cryptocurrencies, such as identifying illegal transactions. This information remains sensitive in other cryptocurrencies such as Bitcoin. Currently, the number of trades executed over cryptocurrencies is increasing. With its growing popularity in India, cryptocurrencies can bring many benefits to India with a better legal environment and regulations. . Indian government should take necessary steps to manage such digital currency, which is the way forward for profitable business and productiveness of the economy

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of IP Rights in the areas of food, hospital sector, entertainment, space sector, and domain names is also presented for the readers.

Much has been discussed at the national and international level regarding IP Rights, its challenges, possibilities, monetary benefits, innovations, licenses, etc. These deliberations are crucial as they pave the way for policies and legal frameworks that will shape the future of IP Rights. Through these discourses, it is pertinent to evolve some principles that can show the way forward to IP Rights at the national and international levels. When the recognition of these rights is embraced with quality, culture and uniqueness, it will bring development to the nations based on the values of fairness and justice.

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THE CHANGING SCENARIO OF INTELLECTUAL PROPERTY RIGHTS AND THE WAY FORWARD

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CHANGING RELATION OF IPR AND COMPETITION LAW: INDIAN PERSPECTIVE

Dr. Sridevi Krishna*

ABSTRACT

The laws related to Intellectual Property Rights (IPR) and Competition law have evolved as two separate systems of law. The role of competition law confines itself to promote market efficiency and aims to prevent market distortions. The role of IPR is to promote innovations by granting protection to the rights over inventions. The application of IPR to competition matters is one of the challenging tasks. The advancement of technology has brought significant rise in the number of cases of abuse of monopoly by stakeholder's rights which has today called for in depth research to understand the interplay between the these two system of law. The Competition Act, 2002 provided that anti-competitive agreements are not applicable to agreements executed by a person to restrain any infringement or impose reasonable conditions for protecting the rights of person in IPR.[1] But this does not take into consideration the defence in abuse of dominance cases. The Competition Law (Amendment) Act 2023 has not provided any such provision for encouraging exclusivity in creations in spite of recommendations made by the Competition Law review Committee. This paper analyses the interplay between competition law and IPR. In

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[1] Section 3(5)(i)

the light of present amendment, the paper also discusses the recommendations of competition law review committee which is necessary to extend the IPR boundaries in Competition Law.

***Keywords**: IPR, Competition Law, Dominant Position, Anti-competitive agreement*

INTRODUCTION

The laws of Intellectual Property Rights and Competition law are perceived as two distinct subjects, which are in opposition to each other. While the objective of IPR is to protect the inventor's rights over their creations, the objective of competition law is to maintain market condition by prohibiting anti- competitive practices and abuse of dominant position. The competition law offers better market access to society, which goes against the exclusivity granted to inventors by the IPR law, while the IPR legislation attempts to protect and compensate the innovator.[2]

The IPR law and the competition law are now being confirmed with one another through legislation and judicial rulings, despite the fact that this contradiction is raptorial in nature. IPR laws have been changed from defending individual inventors to promoting new ideas. As a result, the IPR legislation is now considered a supporting element of competition law policy

OBJECTIVES OF IPR AND COMPETITION LAW

The main aim of granting licences in IPR is to encourage competition among prospective innovators while simultaneously restricting competition in various ways. After a specified period, the rights revert to the public domain, effectively ending the competition. The primary aim of competition law is to prevent abusive market practices, stimulate and encourage market competition, and ensure that customers receive high-quality goods and services at a reasonable price. The main aim of

[2] *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981).

IPR is to encourage innovation by providing appropriate incentives. This goal is met by granting inventors exclusive rights to their inventions for a set period of time, allowing them to recoup their R&D investments.[3]

The pretentions of Competition Law are to promote efficiency, economic growth, and consumer welfare. To achieve them, competition law limits, to some extent, private property rights for the benefit of the community. Competition is thought to be advantageous to the economy because it fosters innovation and increases competitiveness.

Therefore, we can say that IPR is about individual rights that give monopoly only to the owner of the invented product in order to protect his invention from commercial exploitation, whereas Commercial Law protects the interests of the market and the broader community, rather than an individual, by limiting private rights that may hamper the community's good and therefore encourages market competitiveness. Despite the fact that they are utterly opposed, their ultimate aim is consumer welfare.

THE CHANGING SCENARIO OF IPR AND COMPETITION LAW

The aim of IPR and competition law appears to be at odds. They appear to be incompatible, with several disagreements and abrasion unavoidable. Whereas disagreements may be a part of the difference between IPR and competition law, where they may contradict in any case, the fact is that they also work in tandem. The goals of IPR and Competition law is aligned with their ultimate goal i.e., to protect the consumer's rights and interest by facilitating market innovation.

IPRs give innovators and producers monopoly rights to be satisfactorily reimbursed for their innovation, research and development costs,

[3] http://unctad.org/meetingsen/sessionalDocuments/ciclpd36_en.pdf.accessed on 12 August 2022.

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competition law protects the rights of whole community by limiting private rights, including those granted by IPRs, to ensure that the market is free of anti-competitive behaviour, resulting in more innovation and better products for the consumer. This is how the IPRs and competition law serve to improve consumer welfare by facilitating innovation. This objective of enabling innovation necessitates a balancing act of competition law to see that IPRs are not exploited and abused while still allowing enough room and incentives for a vibrant market for innovation and creativity.

Section3 of the Competition Act 2002 provides that no enterprise or association has the right to enter into any anti-competitive agreements, under Section 3(5) of the Competition Act, 2002; an IPR holder is protected even if he may enter into an anti-competitive agreement provided that he acts within the boundaries of his IPR rights.[4] The Competition Commission of India has stated the practices that would be in contravention to Section 3 of the Act. These include patent pooling, tie-in arraignment, price fixing and royalty payment.

In the case of *Shamsher Kataria V Honda Siel Cars Ltd.*[5] The CCI dealt with the IPR exemption under Section 3(5) where in the original equipment manufacturer entered into agreement with original equipment suppliers for the procurement of some components. The designs, technical specifications, tools etc. were given by the manufacturers and the agreement prohibited the suppliers to trade in the outside market with third parties or aftermarkets without the consent of the manufacturers. The manufacturer's contention was that this agreement fell within the ambit of reasonable condition under Section 3 (5). The CCI held that if any exemption is claimed under this section, the pre-requisite is that the rights in question have to be conferred by

[4] Intergovernmental Group of Experts on Competition Law and Policy, fifteenth session, UNCTAD https://unctad.org/meeting/intergovernmental-group-experts-competition-law-and-policy-fifteenth-session

[5] Case No. 03/2011 Date: 25/08/2014

the mentioned IPR status. The manufacturers have failed to submit relevant documents to prove that they had IPR rights in India conferred by statues mentioned under S 3(5) (i) and thus could not claim protection.

Section 4 of the Indian Competition Act, 2002, deals with abuse of dominant position, and it only prohibits abuse, not the mere existence of a dominant position. What is important to note here is that no exception has been made for IPRs under this Section, it is because IPRs do not confer dominant position in the market, and even if they do, this Section does not prohibit the mere existence of dominant position, but only the abuse of dominant position.

Section 4(2) of the Indian Competition Act, 2002, that treats enterprise action of abuse and applies similarly to IPR holders, Section (3) of the Indian Competition Act, 2002 prohibits anti-competitive practices, but this prohibition does not limit any person's right to restrain any infringement of, or to impose reasonable conditions necessary for protecting any of his rights conferred by IPR laws such as the Copyright Act, 1956, the Patents Act, 1970, the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999), and the Designs Act, 2000.

Even under Copyright Laws the CCI in *HT Media Ltd v Super Cassettes Industries*[6] Ltd has held that exclusive rights that a copyright owner has, i.e. right to perform and communicate his/her work to the public, to make adaptations etc. may constitute different market individually.

In the case of Entertainment Network Ltd b Super Cassettes Industries Ltd.[7] the relationship between IPR and Competition law was discussed. The CCI held that the owner of copyright exercises freedom of monopoly, but with unreasonable terms, it would amount to refusal.

[6] Case No, 40/2011

[7] CM no.9370-72/ 2011

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The refusal of license in this case was said to be anti-competitive.

The conflict between competition policy and the regime of intellectual property rights has been most contentious even in the context of patent laws. The techniques used to achieve their respective goals give rise to the inter relationship between competition policy and patent law. On one side, competition policy requires that no unreasonable restrictions on competition exist; on the other hand, patent laws reward the inventor with a temporary monopoly that protects him from competitive exploitation of his patented article.

IPR protection is a boon for encouraging innovation, which benefits consumers by allowing for the development of new and improved goods and services, as well as promoting economic growth. It grants the inventors the right to legitimately prevent others from commercialising innovative products and access the processes based on that new knowledge for a limited time. This means that the law provides inventors or IPR holders with a temporary monopoly to recover costs incurred during the research and innovation process. Through this, they earn just and reasonable profits, giving them an incentive to innovate. The Competition law, on the other hand, is important in closing market gaps, disciplining anti-competitive practices; prevent monopoly abuse, inducing optimal resource allocation, and benefiting consumers with fair prices, a wider selection, and higher quality. Through this, it ensures that the dominant power associated with IPRs is not overcomplicated, leveraged, or extended to the detriment of competition. The competition law seeks to protect competition and the competitive process in turn encourages innovators to be the first in the market with a new product or service at a price and quality that consumers want, it also focuses on the importance of stimulating innovation as competitive inputs, and thus works to improve consumer welfare.

Though the differences exist in the two regimes, they tend to coexist on various grounds where both disciplines prevail by limiting each other's

rights. The relationship between these two areas of law is widely anticipated in many sectors of the economy like the pharmaceutical sector, where there is a lack of consumer knowledge and which gives rise to the problem of Pay for delay/Reverse delay settlements, discrimination in patient assistance programmes, ever-greening of patents and for which the concept of 'Compulsory Licensing' was addressed to draw the balance between intellectual property rights and competition law to enable the owners of intellectual property rights not to abuse their privileges and stifle market competition by abusing their dominant position.

THE AMENDMENT TO COMPETITION ACT

The Competition Law Review Committee which submitted its report on July 2019 stressed upon the reforms in the regime of competition law. The Draft Competition (Amendment) Bill, 2020[8] proposed numerous notable amendments to the Competition Act, 2002, two of which are very important. One is the expansion of Section 3(4) application and the extension of the IPR Safe Harbour to cases involving dominant positions.

The Competition Commission of India or the Courts can apply the provision addressing anti-competitive practise under numerous circumstances, as set forth in Section 3(4) of the Competition Act, 2002. In order to widen the application of anti-competitive agreements that do not fit into any of the other categories stated in Section 3(4) of the Competition Act, 2002, the Competition (Amendment) Bill, 2020 wanted to incorporate the term "*any other agreement.*"

As noted above, the IPR Safe Harbour provision is currently used in India for situations involving anti-competitive activities. In order to widen the IPR Safe Harbour to IPR holders in respect to the competition law even in situations of dominant position, the Bill

[8] Report of the Competition Law Review Committee, Ministry of Corporate Affairs, Government of India (July 2019).

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wanted to add Section 4A to the Competition Act, 2002. By guarding them from legal problems when they exercise their lawful intellectual property rights, the holders in a good faith and just manner, this new provision is made to strengthen the protection of the rights of the IPR holders. Though its application was only limited to anticompetitive trade agreements, Section 3(5) of the Competition Act, 2005 does not grant the IPR Safe Harbour to IPR holders in circumstances of dominant power. According to the Competition Committee, IPR owners should also receive protection in situations involving misuse of a dominant position, subject to acceptable limits and restrictions. It was thought that even if IPR holders were protected against anti-competitive acts, there was no justification for not also offering the IPR Safe Harbour in situations involving the misuse of dominant position. In place of the Committee's recommendations, Section 4A of the Competition (Amendment) Bill, 2020 stated that IPR holders also be covered by the IPR Safe Harbour in situations of abuse of dominant position.[9] Referring to the international legal regime on dominant position and IPR protection, the European Court of Justice in the case of *Parke Davis & Co v Probel*[10]stated that while granting of a patent to an inventor it is not an unfair business activity. The improper use of patent can result in the exploitation of the efficient operation of the markets as a whole. The court said IPR are legitimate factor to take into account in situations involving dominant position. Even in *Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission of the European Communities*,[11] that in some exceptional situations, the owners of intellectual property rights may use their rights in a way that results in an abuse of dominant position. Even the US court in in the case of *Data General Corporation v. Grumman Systems

[9] Draft Competition (Amendment) Bill, 2020

[10] 29 February 1968.

[11] ECLI:EU:C:1995:98

Support Corporation* [12]on the grounds that the opposite party had a valid copyright on the subject matter, and as a result, the court granted an IPR holder, Safe Harbour in connection with a case involving dominance of position. According to the concept stated in the Magill case,[13] the owner of an intellectual property right shall be considered to have abused his dominant position if any one of the following four circumstances exists:

a) The absence of a suitable replacement item,

b) The creation of new products was hampered by the refusal to provide information.,

c) a rejection without a valid justification and/or

d) Avoiding competition in a different market and taking advantage of a secondary market like this.

But in *Microsoft Corp. v. Commission*[14] it was determined that additional criteria may also be pertinent for the application of the extraordinary circumstances doctrine and that the list of reasons presented in the Magill case is not comprehensive. Thus, the scope of the doctrine of exceptional circumstances has thus been broadened by the Microsoft case ruling and is now applied by the courts depending on the specific facts and circumstances of each and every case. In fact, the Committee had proposed to resort to the rule of reason that is based on appraisal of the evidence of each case, in recognition of the fact that cases relating to the intersection of IPR and competition law may highly be based on the circumstances of the situation. Thus, Section 19(4)(m) of the Competition Act, 2002, that grants the Commission the authority to consider any relevant factors for the purpose of identifying the abuse of dominant position, may be referred to and relied upon if

[12] 761 F. Supp. 185 (D. Mass. 1991)

[13] European Court Reports 1995 I-0074

[14] *Microsoft Corp. v Commission of the European Communities*. ECLI: EU: T: 2007:289.

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this doctrine is applied by the Commission or the Courts in India while dealing with cases related to Section 4A.

CONCLUSION

The Ministry has amicably resolved the dilemma that the IPR rights are a relevant consideration at the time of making decisions in connection to misuse of dominant power with the introduction of Section 4A in the Competition Bill. Currently, under the amended Act, a party can take the defence to protect its IPR in a reasonable manner; certain agreements were entered into, although they might have anti-competitive effect, like vertical restraint provisions under section 3(5). The CLRC had recommended that a similar defence may be allowed with respect to abuse of dominance. The SCF endorsed this view to avoid any uncertainty and promote innovation. However, the 2023 Bill misses out on this safe harbour provision.

A CONCEPTUAL OVERVIEW OF INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE IN INDIA

Dr. Shrinivasa Prasad R.*

ABSTRACT

Intellectual Property Rights is a term that rarely requires explanation in modern times. The phrase Intellectual Property expresses the notion that its subject matter is the result of the intellect or mind. It serves as both a deterrent and an incentive for creators, whose work might otherwise be freely exploited by others. In relation to the Traditional Knowledge it incorporates development from one generation to the next, physical and intangible knowledge, and both potential and real innovations of value. Traditional knowledge forms the basis of cultural heritage. Due to its great biodiversity and natural riches, India has a wealth of traditional knowledge regarding the qualities and uses of various biological resources. Traditional knowledge and Intellectual Property Rights (IPR), both are supplementary and complementary to each other. The aim of traditional knowledge is to promote community interest and protect indigenous rights against bio-piracy and bio-prospecting. On the other hand, IPR guarantees monopoly of a product or service to an organization and empowers it to profit from it. With this background this article studies the present Indian IPR system to

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REVIEWING GENDER EQUALITY
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Preface

We are thankful for the managementSmt. Manjula Krishnappa, Chairperson, Smt. Poornima Srinivas, CEO, Mr. Srinivas DT, Secretary, Smt. Anupama, Joint Secretary, SEA Group of Institutionsfor their support and constant encouragement in organizing all 3 National Level Seminarsnamely, ***Innovative Research in Science and Technology, Reviewing Gender EqualityandEntrepreneurship Development, Employability and Sustainable Development.***

National Conference on "Innovative Research in Science and Technology" (NCIRST-2022) conducted by the Dept of Science was themed around the numerous outstanding results and new difficulties in the applied sciences, engineering, technology as well as corporate sectors. The objective of the seminar was to discuss various issues & problems facing science & technology projects which required to be identified in adapting and application of new innovations made in science & technology field.

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We are thankful for ShanlaxPublications for their timely support in the publication of this book. We hope that this book will be helpful to academicians, researchers and corporate.

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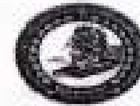

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I wish the management, Principal, Staff, and students the best for their future and a grand success for the seminar.

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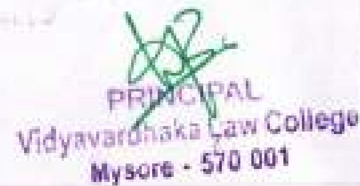

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Conclusion

Women's representation in government has been deteriorating for millennia, and it is currently an all-time low, necessitating prompt action "from recognized political parties to ensure that wom receive a minimum agreed-upon representation in state assemblies." This is especially true in lig of the precarious situation we've created. As a result, women are underrepresented in Indian politi particularly at the highest levels of government. However, if there are more female politicians a women exercising their democratic rights in India, the country's political performance may impro

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ACCESS OF EDUCATION AND GENDER EQUALITY – A STUDY

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Abstract

Feminism is not about making women strong because women are already strong. It is about changing the way the world perceives that strength with access of education. In 2011, the disparity in access to education between genders was most visible in India's childhood literacy rates – 82% of boys were literate while only 65% of girls could read and write. Statistics show that around 10% more girls were enrolled in secondary school in India by 2019 when compared to 2011. While this is a significant increase, there's still a long way to go in ensuring that girls have the same access to quality education as boys.Equality and equity in education are directly related to the democratic development of society, where the purpose of education is to produce knowledge makers with the capacity to make the most profitable use of the acquired knowledge.According to United Nations Children Fund (UNICEF), poverty and local cultural practices play a role in gender inequality in education through India. Another obstacle to educating girls is the lack of hygiene in schools across the country.According to United Nations Children Fund (UNICEF), poverty and local cultural practices play a role in gender inequality in education throughout India. Another obstacle to educating girls is the lack of hygiene in schools across the country. The NPE emphasizes vital values such as equality between men and women, eradicating social ills and degrading practices, small family practices, etc. The NPE and program of action highlight the need to improve the social, nutritional and health status of the girls and also to strengthen support services

Introduction

Equality to the education is directly related to the democratic development of this society, where the purpose to education is to produce knowledge makers with the capacity to make the most profitable use of the acquired knowledge. According to United Nations Children Fund (UNICEF), poverty and local cultural practices play a role in gender inequality in education througho ut India. Another obstacle to educating girls is the lack of hygiene in schools across the country. According to United Nations Children Fund (UNICEF), poverty and local cultural practices play a role in gender inequality in education throughout India. Another obstacle to educating girls is the lack of hygiene in schools across the country.

Concept

Gender Equality

The concept of Gender equality is when people of all genders have equal rights, responsibilities and opportunities. Through Gender equality prevents violence against women and girls. It's essential for economic prosperity. Societies that value women and men as equal are safer and healthier.

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Gender equality is a right. Everyone benefits from gender equality. A "gender-equal society" is a society in which both men and women shall be given equal opportunities to participate voluntarily in activities at all levels as equal partners and shall be able to enjoy educational, political, economic, social and cultural benefits and to take responsibilities equally.

Access of Education

Education in India is the joint responsibility of the central and state governments, and educational rights of education are provided for within the Constitution. Further commitments to the universalization of education as well as the legal, administrative and financial frameworks for the government-funded education structures are found in two primary sources. Right to Education Act of 2009 was designed to provide right to free, quality school education to all up to six to fourteen years of children in India. This article examines the influence of RTE on the expansion of private tutoring. It finds that the Act led to a significant increase the number private tuition centres that necessarily help the relatively well-off students who can afford them, thereby counteracting the goal of equitable access to schooling.

Issues and Challenges

Girls' education faces a sense of urgency globally and in India. The world realizes that many developmental promises cannot be fulfilled unless gender inequality is addressed. Schooling for girls, especially completing a high quality secondary education, is now celebrated by experts as the magic solution to combat many of the most profound challenges to human development, with innumerable social and economic benefits to societies and nations. The argument, however, remains based on efficiency rather than on rights, taking a decidedly instrumental approach and describing the effects of girls' education on the country's progress, on economic and social development, on maternal mortality, and on the education of their children.

"Education, especially for girls living in poverty in countries like India, is an extremely complex undertaking: it requires a multi-perspective approach to be understood and addressed effectively. If we want education to mitigate the harm caused to the girl by nexus of poverty, violence, child labour, early marriage, abuse within and outside families, and lack of care and nutrition, then we need to look closely at the important perspectives of those who are most affected by the issues and problems of girls themselves, their parents and their teachers. As we get closer to daily lives, we better understand complex concepts of power, hegemony, difference, and equality. Large, complex social problems are played out in this mundaneness of daily life. While the macro perspective provides useful information, locating problems and solutions in significant social and economic structures also showing the magnitude of the problem, such discussions are inadequate. Girls' lives and voices get lost when research and arguments centre on enrolment, dropout, completion, and achievement rates, even though the discussions are supposedly about them."

Law and Gender Equality to Ensure Access to Education

"The gender equality goals are to eliminate gender discrimination, to create equal opportunities for men and women in socio-economic development and human resources development to reach substantial equality between men and women, and to establish and enhance cooperation and mutual assistance between men and women.

Suggestion

1. First, there is a need to understand the forces (both push and pull) that shape female access to education, especially in the context of the recent rapid structural transfor mation of Indian society.
2. Second, the education landscape is also changing within this broader, social transformationis better understanding of these changes would help identify new spaces and language to promote greater gender equality.
3. Third, the impact of current strategies needs to be monitored and assessed to ensure that current expenditures (which are large) are actually translating into change or that, where necessary, they can be more effectively structured.

Therefore, in addition to checking whether existing resources reach their intended recipients, there is a broader question about the value of incentive schemes in terms of their actual impacts on demand and participation. A number of challenging questions are need to ask andthe research studies are required to focus on these questions to support improvements to gender equity across India.

Conclusion

The initial analysis reveals that there has been considerable improvement in participation of girls during the post-Independence period yet, it continues to be below 50% both at primary and upper primary levels of school education. In addition to improvements in the enrolment of girls, a simultaneous decline in dropout rates has also contributed to the overall increase in school participation Several gaps continue to exist in research on gender and education in India.

ALTERNATIVE DISPUTE RESOLUTION SYSTEM

New Trends, Contemporary Challenges and Future

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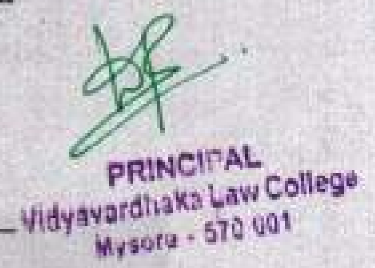

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MESSAGE

ADR is a widely accepted alternative to civil actions as it can be employed to negotiate any settlement or conflict between two or more opposing parties. Mediators and arbitrators are experienced legal experts and can effectively resolve conflicts between disagreeing business partners or disputes between workers' unions and business owners.

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Alternative Dispute Resolution System

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FROM THE EDITOR'S DESK

Alternative Dispute Resolution System- Issues And Challenges organised on 28.1.2023.

Let me share a thought which I read in a newspaper article some time ago. The entrance

the Great, in the 3rd century BCE. This Sanchi stupa narrates the tale of the "Battle over the Buddha's Relics", which goes like this, "the Kingdom of Mallas held all of Buddha's

seven other countries and war was imminent. Then, to ease the matters, a respected sage, intervened and questioned the motive behind the war. He reasoned that war will only lead to destruction and resentment among former allies which was in contravention of

Let me connect this instance with the present system of Indian judicial system. In the present scenario, battlefields have been replaced by courts, relics by properties, and warring

an adversarial system of court procedure, where litigants may be dissatisfied as it's a win-lose situation for them. Therefore, for more amicable resolutions, in addition to adversarial

cases with fairness, reason and trust, leaving all parties satisfied and without acrimony. Litigants will be satisfied as mediation will create a win-win situation for them. People will resolve their disputes without acrimony and a system which leaves the parties with a feeling

I would like to share a thought to end that, "the efforts made towards encouraging the Alternative Dispute Resolution System in India must never rest, we as legal professionals,

rather than a fragmented society. And trust me, when I say, "that a contended and satisfied society is the foundation of a prosperous nation".

Dr. Samina Nahid Baig
Co-Editor

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Role Of ADR's to Resolved the Industrial Disputes

Dr. Prakruthi A R*
Pruthvi Bhat**

In changing Nations where almost, everyone chooses for lawsuit to resolve their disputes, there is extreme burdening of cases on courts, which has ultimately led to disappointment among people regarding the existing situation of judicial system and its ability to distribute fairness. This opinion is strongly based on the popular saying of, "Justice delayed is justice denied". However, the blame for the backlogged cases in these developing countries cannot be qualified to the Courts & rigid judicial system alone. The main reason behind the delayed justice is the non-implementation of conciliation processes before lawsuit. It is against this flaw that the mechanisms of alternative dispute resolution are being introduced in these countries which is very essential for the smooth functioning of the judicial system. These ADR mechanisms, which have been working effectively in providing a cordial and speedy solution for issues in developed economies, are being suitably amended accordingly and applied in order to strengthen the judicial system of the developing countries.

CONCEPT OF ADRs AND INDUSTRIAL DISPUTE

The 222nd Report of the Law Commission of India stated that the Constitution has guaranteed access to justice for all, primarily through Article 39A, which states that everyone must have an equal opportunity of getting justice and this must not be deprived of to any citizen by reason of economic or other sort of incapacities. In a developing country like India, so many people still live in poverty. When their rights get violated, they do not have the money to face a long procedure in the Court. They do not have the money to afford a lawyer. They do not know the legal system and procedures. Therefore, they think that the court system is an inconvenience for them. These kinds of inefficiencies are shared reasons among many countries, because of this reason ADR is being discovered. The courts also have too many pending cases and these cases keep going on for many years which is a incredible burden to the courts, so that the legal system adopted the concept of ADR.

Concept of industrial dispute

Generally industrial dispute means conflict between parties in industrial establishments. Dictionary meaning of 'dispute' is 'disagreement', 'mutual antagonism as of ideas, interests etc.' So, industrial dispute is disagreement/mutual resentment as of ideas, interests etc. between parties in industry. In industrial setting parties are always workers and management. In the process of working, workers express their need, expectation, desire for fulfilment and satisfaction. They want more money i.e., attractive wages, allowances, monetary incentive which the management may not be ready to pay. Workers demand of better fringe benefits, health benefits but management may provide less than that of their requirement. They want recognition, status, power,

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advancement, higher quality of work life but management may be unwilling to give. Under such situation, if management failure to fulfilment of demand of the workers a state of disagreement/mutual antagonism between workers and management develops which gives birth to industrial conflict. So, industrial dispute is a general concept, and this conflict gets the shape of industrial dispute in a specific dimensional situation.

NEED FOR ALTERNATIVE DISPUTE RESOLUTION SYSTEM

1. In the case of arbitration, the parties can choice what procedural and domestic rules will be applied to their dispute.
2. Attorneys and skilled witnesses are very expensive. Suing a case can easily cost hundreds and thousands of rupees. ADR offers to resolve the case rapidly without much delay and incurs less expenses.
3. ADR allows the parties to work together with a impartial arbitrator or mediator so that the dispute can resolved speedily and the transacting parties are satisfied by the conclusion.
4. ADR process can be initiated at any time, whenever disputing party takes option to ADR.
5. ADR programs are not rigid, they are flexible in nature.
6. ADR can be used to reduce the gravity of contentious issues between the parties.
7. For amicable settlement of disputes
8. Speedy disposal of trial
9. Economical settlement of disputes
10. Time saving management
11. Legal recognition
12. Advent of multinational corporation

INDUSTRIAL DISPUTE THOUGH ADRs

The Industrial Dispute Act, 1947 came into existence in April 1947 . It was passed to make provisions for investigations and settlement of industrial dispute and to ensure reasonable wages and other safeguards to the workers. According to the section 2(k) of this act , the industrial disputes means any dispute or difference between employers and employee or between workman or employer or between workman or workman , which is connected with the employment or non-employment or with the condition of labour , or of any person. There are mainly two type of industrial disputes Interest disputes Right disputes. Interest disputes relate to determination of new wage level and other matter of employment. Whereas right disputes relate to the rules made for the workers and they have not been treated in accordance with that the provision of the act

There are various major industrial dispute settlement machinery which are as follow: -

1. Conciliation
2. Court of inquiry
3. Voluntary arbitration
4. Compulsory arbitration (adjudication)

CONCILIATION

Conciliation is one of the non-binding procedure where a impartial third party known as conciliator , assist the parties to a dispute in reaching a mutually agreed settlement of dispute.

CONCILIATION OFFICER

As per the Section 4 of the Industrial Disputes Act, 1947 the appropriate Government may appoint one or more conciliation officers. A conciliation officer may be appointed for a specified area or for specified industries in a specified area or for one or more specified industries and either permanently or for a limited period. Under Section 21 of the Indian Penal Code (IPC) a Conciliation

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officer shall be deemed to be a public servant. The Conciliation officer is empowered to exercise all quasi-judicial powers of a Civil Court under the Civil Procedure Code, 1908. (CPC). He is or has been a Deputy Chief Labour Commissioner (Central) or Joint Commissioner of the State Labour Department, having a degree in law and at least seven years' experience in the labour department including three years of experience as Conciliation Officer.

Powers of Conciliation Officer

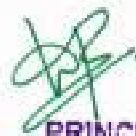
The Powers and Procedure is explained under in Section 11 of the Industrial Dispute Act, 1947.

i. Conciliation Officer for the purpose of inquiring into an existing apprehended Industrial Dispute is empowered, after giving the notice to enter the premises occupied by the Industrial establishment.
ii. Conciliation Officer is also empowered to call for and inspect any document which he may consider relevant to the dispute.
iii. Conciliation Officer enjoys the same powers as are available to the civil Courts in respect of compelling the parties, to appear and produce the entire relevant document.
iv. All Conciliation Officers are Public Servants within the meaning of Section 21 of the Indian Penal Code.

Duties of Conciliation officer

The duties of the Conciliation Officers are prescribed under Section 12 of the Industrial Dispute Act 1947 which are as follows –

i. Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice under section 22 has been given, shall, hold conciliation proceedings in the prescribed manner.
ii. The conciliation officer shall, for the purpose of bringing about a settlement of the dispute without delay investigate the dispute and all matters affecting the merits and right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.
iii. If a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings the conciliation officer shall send a report thereof to the appropriate Government or an officer authorised in this behalf by the appropriate Government together with a memorandum of the settlement signed by the parties to the dispute.
iv. If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.
v. If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor.
vi. A report under this section shall be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government. Provided that, subject to the approval of the conciliation officer, the time for the



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submission of the report may be extended by such period as may be agreed upon in writing by all the parties to the dispute.

BOARD OF CONCILIATION

The appropriate Government may as occasion arises by notification in the Official Gazette constitute a Board of Conciliation for promoting the settlement of an industrial dispute.[1]

Duties of Board of Conciliation[2]

- The Board is required to investigate the report without delay and to induce the parties to the dispute, come to a fair and amicable settlement.
- If the dispute is settled, the Board has to send a report to the Government along with a memorandum of the settlement signed by the parties. If not settled, it has to send a report to the Government stating the reasons and recommendations for determination of the dispute.[3] Proceedings are initiated only before a Board only on a reference by the appropriate government.
    i. When a Board sends a failure report, it has also inter alia, to send its memorandum for determination of the dispute.

    ii. The board has to submit its report within 2 months instead of 14 days in the case of proceedings before the Conciliation Officer.

VOLUNTARY ARBITRATION – NEED FOR ARBITRAL METHOD

Arbitration in some form has an important place in most of the government systems of labour dispute settlement and is also at times used voluntarily by disputing parties for settling their disputes. The terms of collective agreements may be provided to deal explicitly with rights disputes originating out of the agreement, as is common in the United States and Canada, or to deal with interest disputes that are occurring elsewhere, the parties to make a reference to the voluntary arbitrator. Nevertheless, before a reference may be made to the arbitrator, four conditions must be met[4]

1. Industrial disputes must exist or be apprehended;
2. The agreement made by the parties must be in writing;
3. Under Section 10A, the reference must be made before a dispute has been referred to a labour court, tribunal or national tribunal;
4. The name of the arbitrator or arbitrators must be specified.

Some essentials of voluntary arbitration are as follows:

- Submission of the dispute to the arbitrator must be voluntary.
- Investigation and examination of witnesses.
- The decision is not necessarily binding on the parties.
- Disputes arising out of agreements between the parties.

Voluntary arbitration takes mainly two forms:

1. **Pre-dispute arbitration:** There must be a contract between the parties before the dispute arises through an arbitration clause.
2. **Post-dispute arbitration:** There may not be an arbitration clause beforehand, but the parties may enter into an agreement after the dispute arises to resolve the dispute through arbitration.

When is voluntary arbitration needed

- granting it a statutory basis;
- making arbitration decisions or awards legally binding on the disrupting parties;

[1] According to Section 5 of the Industrial Disputes Act, 1947

[2] The duties of the Board of Conciliation are prescribed under Section 13 of the said Act.

[3] There are only three points of difference between the duties of the Board and the Conciliation Officer.

[4] Section 10A(1) of the Industrial Disputes Act, 1947

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- offering machinery and facilities for arbitration;
- providing that a conciliator should attempt to convince the parties to submit the dispute to arbitration if conciliation is unsuccessful; or
- empowering the conciliator to arbitrate a dispute with the consent of both parties.

CONCLUSION

ADR is one of the fantastic method of obtaining justice as soon as possible. Reasons for the success of ADR include its low cost, speed, expertise, availability, ability to mediate conflicts amicably, lack of formality, lack of adversarial, and low cost. Because ADR focuses on resolving disputes through communication and compromise rather than lawsuit, it often results in positive interactions with customers. Using ADR, parties can evade going to court to settle their differences. Every ruling the judge makes will only inflame tensions between the two sides. This is due to the fact that ADR methods, and particularly conciliation, tend to be somewhat influential. This is because ADR is more active and offers suggestions for how to resolve the conflict. Therefore, there is no doubt that ADR is a simple way to get justice for settling any disagreement that may arise.

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English Language Teaching

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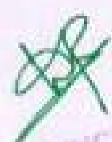

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3. ROLE OF ENGLISH IN INDIA

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Abstract

India is a nation where the use of English by the masses has been increasing by the minute. The usage of English is highly widespread in almost all parts of India not to mention the whole globe itself. English is known as the 'universal language or lingua franca'. We know that the establishment and usage English language started in India after the arrival of British in the 17th century. The British Colonial rule established a system of Life, Education and administration- all of which required the communication in English.

Introduction

English has been the convenient language in the Indian society as we all live and thrive in the Gen Z era where the role of English has been flexed even further. It has farfetched reaches and it has a vital role in all walks of life. It has been the tide of change in the society specifically speaking of Indians who are linguistically based on the Indian languages like Hindi, Urdu, Kannada, Marathi, Malayalam, Tamil Telugu and the like. They have extensively used English for the purposes in the occupational, educational, economical as well as the social fields which facilitated them to reach out to the masses in a better way. The fact that regional languages are efficient cannot be inevitable yet the role of English in all these has been irrevocable

In India because of the diversity, the English language has taken the role of being the indispensable link between the various pieces of cultures. Now with the information technology revolution in India they have been an emerging trend for the written and spoken English language, this language has penetrated into every nook and corner of our

nation which helps people to communicate and interact with each other and also look after their business. The flexibility of the language has helped it to lace itself along with other languages.

Irrespective of the fact that it was introduced by the British who made India a colony for 200 years Mahatma Gandhi in one of his famous quotes mentioned thus: ''I am not anti-British, I am not anti- English, I am not anti- any government but I am anti-truth anti-humbug and anti-injustice. ''Mahatma Gandhiji was of the view that though the introduction and emphasis of English in India was unfair it was still a great gift for the people as he knew to what extent English is being used in the outer world. He had been to London and became an attorney, later he went to south Africa and practiced law. He then returned to India and started the Indian independence movement. He emphasizes on the fact that learning the languages was far more important than anything.

The famous, vibrant and young Swami Vivekananda in his speech in Chicago started his speech thus "sisters and brothers of America, it fills my heart..." This led to his acknowledgement in the assembly and it would have been impossible without the English language. These examples have shown us the importance of the language in the Indian history.

Dr. S R Radhakrishnan commission on English language teaching stated thus, "English is the only means of preventing our isolation from the world and we will act unwisely if we allow ourselves to be enveloped in the folds of the dark curtain of ignorance." This correctly and accurately explains why we as Indians have the need to learn a foreign language.

Among the 8 billion people, almost 457 million people natively speak English, while a total of 1000 million speak English globally. In the vast ocean of such a universal language, it is truly an advantage for us Indians to know and learn the English language.

We all have grown up in a society seven decades post the independence and we can never call English as a foreign language anymore. In the modern era English language teaching (ELT), second language acquisition (SAC), English language communicative skills (ELCS) have been the major formats through which English language is being taught inculcated and utilized.

Human beings, while learning any language developed or have to develop basic skills like **listening, speaking, reading and writing the language**. These four basic skills in the English language have created a revolution among human beings. It goes without doubt that English has developed us all into one single global community. As the younger generations have sprung up we get to see the emerging trends in teaching

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language and literature too. Nowadays the textbooks, resource materials, vocabulary and terminologies, competitive exams, and why, even the Internet itself uses English as the prima facie language.

Communication plays an important role in the society and languages were created or evolved for the necessity of communication. In the present Indian society, the English language has such a high significance that it cannot be avoided from any field of the society. The public, private, combined and other miscellaneous sectors of the society, all of them, indiscriminately use English language. English language plays a very vital role in the lives of all Indians.

The English language has the following roles in the Indian society–

- Effective interaction
- Clerical and formal functions of Government
- Procuring better occupations
- Development of knowledge in science and technology.
- Improving or enhancing individual network.
- To identify and recognize new cultures.
- Educational/Academic enhancement.

Effective interaction

Interaction or communication between two or more people is very crucial for the survival in the present-day society. In our daily lives, we interact with a minimum of 2 or 3 persons. This requires proper knowledge of the usage of language, i.e., if we do not know the language, then it will be difficult for use to communicate our ideas, opinions & wants.

Not only in the lives of common people but also in the political, economic and social scenarios of various people such an interaction is necessary. We citizens of India having a rich as well as diversity in languages often find difficult to interact with peoples of different regions as we move from one region to another. English language has made it easier as it can be transformed as the bridge linking between the two regions.

Clerical and formal functions of Government.

Various duties and responsibilities of the authorities are required for the proper and smooth functioning of the government offices and schemes. The instructions, laws, documentation, orders etc. are given in both regional language as well as the English language. There can be instances where the authorities may not be from the region or the authorities may not know to use the regional language, and there, English

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language facilitates the exchange of the instructions thus helping in the sovereign as well as organizational functions of the state are carried out.

Procuring better occupations.

Humans need to earn money for their survival and livelihood. For the purpose of earning, individuals must interact and communicate their abilities in a better way so that they can conduct the occupation of their choice and in turn produce qualitative and quantitative goods and services to the society thus building the national economy. The knowledge of the English language helps them to procure the best job and get a feasible income out of it. This indirectly also can help to eradicate poverty among the society.

Development of knowledge in science and technology.

Science and technology have been the two major trident bearers for the developmental enhancement of the society in the present day. Without the help of science and technology, the modern India would still have been a long-lasting dream. Recent developments have helped us establish ourselves as a well-furnished global economy with over 3.75 trillion-dollar GDP. The knowledge to use the science and technology is such a way has been provided and is still being provided through the English as well as other lingual medium. We can carefully observe that the English language plays a significant role in the business and trade.

Improving or enhancing individual network.

Individual networking plays a vital role among the modern generations. Individual network is nothing but the social interaction of individuals in the society either in the online or the offline domain. The realm of social life has been affected by both these domains which tend to interact with the human society in such a way that the social existence is null and void without them.

Here too languages, especially English plays a very important role. Two or more people interact with the help of the global language and information is passed on from one corner to the other corner instantly. Having an individual network is very essential for the effective survival in the society as we gain knowledge regarding the various occurrences around us and we too can create an awareness among the citizens.

To identify and recognize new cultures.

A culture is a unique trademark of a particular region or a particular linguistic group and is entirely sophisticated to itself. India is a land of various cultures and traditions which are complex and diverse in nature. When the question of understanding and realizing the different cultures come up, we take the help of the English language so as to analyze and derive the information on the cultural aspects which are in comparison

to the other cultures. For the purpose of conveying the ideologies the English language forms an irreplaceable link between the two.

Educational and Academic enhancement.

English language as said earlier was introduced in India by Lord Thomas Bentick Macaulay who emphasized on the necessity to learn the language for purpose of imparting the education in the society. Although he had several other goals, this was one of his major aims.

This created a wave of protests and led to huge disliking among the people. However, that educational system has proven to be very effective and thus has continued to influence our nation's literacy and educational sector. It has helped to develop the Indian society from the grass root level where there was no organized system to conduct the educational and academic activities.

Other significant and visible roles include:

- Giving a feeling of independence to an individual.
- Helping them to improve their affinity towards literary works.
- Helping to create an awareness among the people.
- Improved legal service and legal knowledge.
- Enhanced the standards of education in India to the International level.
- Ensuring that information reaches to every person residing in India.
- Enhancing technological knowledge.
- Encouraging online business and services.

Conclusion

Further speaking, we all have seen how the English language has developed and influenced the Indian society from the time it was introduced. The role it has played in the formation of the modern society is so pivotal that what we see today, the efficient government system, the judicial or the legal system and the administrative field, the business and trade sectors, the education sector, the medical sector and various other sectors is very crucial and has placed a permanent mark which is unique and also powerful in its own way.

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