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EDITORIAL

The objective of the teaching profession is not only to educate society but also to motivate society for the dissemination of information learned and observed by them. The human mind is the most fertile and the intellect of the human mind has always huge potential to conceive novel and original ideas. If these intellectual ideas would not be paid due attention and not be duly recognised, the purpose of teaching-learning would be futile. Therefore, the intellectual creation of the human mind should always be given a due forum to express their novel and unique ideas in public so that the coming academic generation may easily get aquatinted with the past contemporary issues and challenges discussed and addressed by a particular society. Nothing could be a better forum for this purpose than a periodical journal.

With a view contributing to the area of legal study, the school of Law, Sharda University is coming with its periodical law journal namely Sharda Law Review. This journal aims at publishing doctrinal as well as non-doctrinal research works along with the original and novel articles, case comments etc.

We are deeply indebted to the contributors for their enthusiasm in sharing their intellectual creations and their warm extended support in our journal. We are deeply thankful to the members of the Advisory Board who has given us unconditional support in publishing this journal as well as we are grateful to the Management and Administration of Sharda University for their constant support and encouragement in bringing out this journal. Lastly, we are thankful to all, who have supported us in bringing out this edition of the journal.

Prof. (Dr.) Pradeep Kulshrestha,
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SHARDA LAW REVIEW

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Sharda Law Review is an online quarterly peer-reviewed academic publication published by the Sharda Law School, Sharda University, Greater Noida. This publication is an honest effort to serve as a medium for the promotion and circulation of original or/and novel views, ideas or research on contemporary legal issues among members of the legal profession such as academicians, scholars, researchers or students. The Sharda Law Review aims at legal research centres, policymakers and government organisations. The views expressed in this publication are those of the authors and not necessarily those of the Editorial Board of the Law Review.

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Trafficking of Children for Prostitution in India: A Critical Analysis of the Preventive and Rehabilitative Measures under the Indian Legal System

Tridipa Sehanobi*

Abstract

The state is under the constitutional obligation to protect the interests of children. Education, health and necessities are required for complete development. These should be made available to the children abiding by non-discriminatory principles. However, poverty, illiteracy, unhygienic environment and caste discrimination in different spheres of society are the major factors behind the rise in the trafficking of children for end number of reasons of which prostitution goes off to be the most significant one in India. There are many states in India where commercial sexual abuse of trafficked children takes place, of which West Bengal, Assam, Karnataka turn out to be the most problematic ones. Around the India-Nepal Border, Nepali girls fall prey to this traffic channel and are subjected to prostitution in Assam, West Bengal and other cities such as Nagpur and Pune. Being obliged under the Convention on Child Rights and various other important international instruments and most importantly under the constitutional provisions, it is the duty of the state to safeguard the interest of these distressed children through enacting effective legislation in this regard as the existing legal framework is insufficient to meet the situation. This paper argues that the trafficking of children for prostitution can be prevented and punished only when the state, as well as non-state actors, work collectively in fulfilling the standards which are prescribed under international law and the constitutional law of India in this regard. The paper proposes the legal model that would bind the child welfare committees, legal services authorities and registered societies to protect and rehabilitate the child victims based on field observation.

Keywords: *Child Trafficking, Adolescent girls, Prostitution, Restorative justice, Rehabilitation, Game therapy*

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1. INTRODUCTION

Child trafficking ensues when children are removed from the safe custody of their parents, or being lured for taking to someplace for exploitation; forced labour or prostitution. According to ILO, trafficking is one of the "forms of slavery or practices similar to slavery" and it should be eliminated by any means and at the earliest. Child trafficking for different sexual purposes such as pornography, prostitution and sex tourism is in vogue. It is regarded as a grave violation of human rights and is a serious crime against human civilisation. The traffickers mostly target vulnerable groups, and children are the most suitable option in that regard. Adolescent girls of the 12-18 years of age group are convenient pray for them who can be easily duped and trapped in the life of prostitution and pornography. With the advancement of technology, it has become more expedient for the traffickers and the pimps to proliferate their business of prostitution by creating worldwide channels and thereby facilitating sex trafficking of children. Nowadays as small as 6-7 years, girls are also heard of being trapped and abused for pornography. No child is immune to such sexual exploitation irrespective of their caste, race, religion, location, status; however, the children belonging from the backward region are prone to become a victim of such dangerous phenomenon.

Nearly, every country in the world is affected by these scourges of trafficking and sexual abuse, whether as a source country or of transit or destination for victims.[1] On 30th July in 2018, regarded as the "World Day against Trafficking in Persons", the United Nations called on the international community to straightaway address the huge trafficking of children. They account for almost one-third of all trafficked victims worldwide. Across the globe, about 20% of all victims of trafficking are children. However, in few regions of the Mekong and the African region, child victims are the more and sometimes even goes up to 100%.[2]

India is known as a source, transit and destination country with regard to sex trafficking i.e. for prostitution and pornography. Children trafficking are rampant in the country. The trends

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[1] UNODC marks world day against human trafficking, urges to better protect children and young people, *available at:* https://www.unodc.org/unodc/en/enewsunodc/2018/July/unodc-enews---30-july-2018.html (Visited on March 02, 2021)

[2] UNODC report on human trafficking exposes modern form of slavery, *available at:* https://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html (Visited on March 02, 2021).

of trafficking nowadays are not traditional. Even women are now caught as traffickers deceiving innocent girls and boys, creating examples of dangerous organized crime. This results at the end of the lives of the victims either physically or mentally or both. India has become a hub of trafficked children from different south Asian countries mainly feeding the commercial sex industry. Inter-state trafficking in India also shows a huge rise according to many reports. It is utterly against the human dignity of individuals.

Though the legal framework to combat the peril of child trafficking in India is in place, but the existing one is insufficient in terms of combating the crime and rehabilitating the victims. Therefore, the paper suggests for preventive and restorative justice model to curb the incidence of child trafficking committed for the reason of prostitution and other forms of sexual exploitation.

2. CHILD TRAFFICKING SCENARIO IN INDIA

The menace of child trafficking has been prevalent in India for a long and gradually it is rising at an alarming rate, threatening the lives of innocent children to great extent. The Hon'ble Supreme Court of India in the case of *Budhadev Karmakar* v. *State of West Bengal and Others*[3] on 19th July 2011 ordered for the constitution of a Panel to support and advise the court on the following aspects:

i. Abatement and prevention of trafficking
ii. Reintegration and rehabilitation of sex workers who wish to leave sex work and
iii. Conditions conducive for sex workers to live with dignity.

The panel submitted its report to the Court in 2019 where it focused on the status of missing persons in the country to trace trafficking. According to the report, the maximum number of children have gone missing from the State of Madhya Pradesh (mainly from the district of Indore), West Bengal (from the district of Kolkata), Delhi and Bihar (mainly from Patna). West Bengal goes top in the list of missing children accounting for 8205 children in 2018 which was 8178 in 2017. West Bengal is regarded as the core hub for child trafficking for

[3] *Budhadev Karmakar* v. *State of West Bengal and Others,* Criminal appeal no. 135 of 2010, order dated 19th July 2011.

commercial sexual exploitation. Approximately, 5,000 to 7,000 girls are trafficked every year from Bangladesh to West Bengal.[4]

The latest available data from the National Crime Records Bureau (NCRB) Report indicates that a total of 6,616 human trafficking cases were registered in India in 2019, which was far more than the 5,788 cases recorded in 2018 and 5,900 cases in 2017.[5] The conviction rates in trafficking cases also reduced from 29.4% in 2018 to 22% in 2019.[6]

The state of Rajasthan accounted for the highest child trafficking cases. A total of 653 children were reportedly trafficked from Rajasthan of which 636 were boys and the remaining 17 were girls. According to the NCRB report, the NCT of Delhi accounted for the second-highest child trafficking cases. The major reason for the trafficking was found to be sexual exploitation in the form of prostitution, in which Maharashtra accounted for the most cases; followed by forced marriage, for which Assam reported the maximum cases; forced labour, the category in which Bihar recorded the maximum number of cases; and domestic servitude for which Manipur accounted for highest cases.[7]

The *National Commission for Protection of Child Rights (NCPCR)* reported that the states of Manipur, Assam, Meghalaya, Nagaland and Arunachal Pradesh were the foundation states in the North-East from where children as small as of 5-years olds were trafficked in the name of free schooling[8] and were destined to the states of Tamil Nadu, Karnataka, Andhra Pradesh and Kerala. The traffickers effortlessly tempt the poor parents owing to absence of rudimentary structure such as road connectivity, power, hospitals, etc. and growing importance in their local areas for the high prospect of education for their children. Hence they get easily trapped in the channel of trafficking.

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[4] National Crime Record Bureau, "Report on Missing Women and Children in India" (Ministry of Home Affairs, 2019).

[5] Human Trafficking Hit Three-year High in 2019 as Maha Tops List of Cases Followed by Delhi, Shows NCRB Data, *available at,* https://www.news18.com/news/india/human-trafficking-hit-three-year-high-in-2019-as-maha-tops-list-of-cases-followed-by-delhi-shows-ncrb-data-2944085.html, (Visited on February 01, 2021).

[6] *Ibid.*

[7] *Ibid.*

[8] Manipur Commission For Protection of Child Rights, "Research Report, Child Trafficking In The Indo-Myanmar Region: A Case Study In Manipur" (February, 2016).

It is, therefore, clear that the protection of children in our country is still at stake. Despite having various International Conventions and documents to address the menace to and stringent legal provisions in the country that punishes the trafficking and exploitation of children, the evil activities are not yet stopped.

3. INTERNATIONAL INSTRUMENTS RELATING TO HUMAN TRAFFICKING AND PARTICULAR TO CHILD TRAFFICKING

Since the concern for the protection of children is global, many international instruments are in existence to safeguard their rights and oblige the state parties to ensure it. In this view, it is significant to point out that India is a signatory to many of the international instruments which are dedicated to the protection of the rights of children and also ratified most of them.

3.1. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949

The first efforts made at the international level for the suppression of child prostitution by means of trafficking was the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, which India ratified on 9thJan 1953. The Convention prohibits various activities aiming at averting marketable sexual exploitation and to end pornography, by way of criminalizing and punishing all forms of gain by this means. Affirming states by signing this convention committed themselves to eliminate every kind of discrimination that exclude victims of sexual exploitation to participate in the mainstream society.

3.1.1.The Convention on Child Rights, 1989

The most momentous document, safeguarding the interest of the children, is the Convention on Child Rights, 1989 and it is being ratified by India. The convention requires the state parties to take suitable national, bilateral and multilateral measures to thwart the abduction, selling of or traffic in children for whatsoever purpose. Further, it prevents abuse of children in prostitution or pornographic performances or other unlawful sexual practices.[9]

[9] The Convention on Rights of Child, 1989, arts. 34, 35.

3.1.2. United Nations Convention against Transnational Organized Crime (UNTOC, 2000

Another noteworthy instrument is the United Nations Convention against Transnational Organized Crime (UNTOC), being the very first international document against transnational organized crime, which was adopted by a resolution of Assembly of 15 November 2000 in Palermo, Italy. It was effective from 29 September 2003. Three protocols were further adopted targeting specific areas of organized crime. One among them deals with trafficking in person namely, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children. India approved the convention and its protocol on 5th May 2011.

3.1.3. The International Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000

The International Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, is the first legally binding global instrument with a settled definition of 'trafficking in persons. Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines trafficking as:

> "*Trafficking in Persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".*

The new feature introduced by this protocol provides that the consent of the trafficked person, i.e. child who is below the age of 18 years, is immaterial.

Other documents that India has ratified are namely, the '*Optional Protocol to the Convention on the Rights of the Child on the Sale of Children'*, '*Child Prostitution and Child Pornography, 2000',* the '*SAARC Convention on Prevention and Combating Trafficking in*

Women and Children for Prostitution (2002)', '*SAARC Convention on Regional arrangements on the Promotion of Child Welfare in South Asia (2002)'*, '*UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985'* and so on.

Therefore, it is very well established that India is bound to enact proper law and put effective machinery in place to tackle the crime of child trafficking for any purpose, and particularly for sexual exploitation in the field of prostitution and pornography. Now, it is important to have a glance at the laws enacted by India to combat the evil of child trafficking. To start with, the Constitution of India, being the mother law of the country, deserves the mention first.

4. LEGAL FRAMEWORK IN COMBATING CHILD TRAFFICKING IN INDIA

For achieving the end of an inclusive and equitable society, recognizing the rights of the children is of paramount importance.

4.1. The Constitution of India, 1950

The Constitution of India, considering the vulnerable position of the children, through its various provisions, extends its umbrella protection and guarantees various rights to the children starting from their basic necessity to their education, and also protects them against exploitation. Relevant provisions are article 14[10], 21[11], 15(3)[12], 21A[13], 45[14], 46[15] and article 23 and 24 particularly prohibits trafficking in persons. The right to be free from exploitation is assured as one of the fundamental rights of any person living in India. Exploitation is opposed to the dignity of the individual proclaimed in the preamble. It also runs counter to the obligation of the state as enshrined under in the provisions of article 39(e) and Article 39(f) of the Constitution, which obliges the state to ensure that the health of the workers and the tender

[10] The Constitution of India, art.14, provides for right to equality.

[11] *Id.*, at art.21, provides for right to life and personal liberty.

[12] *Id.*, at art.15(3), provides that state can make special provision for women and children.

[13] *Id.*, at art.21A, provides for right to education for children between the age of 6 to 14 years.

[14] *Id.*, at art.45, provides that, the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

[15] *Id.,* art.46, provides for Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections

age of children are not ill-treated. It provides that the citizens are not bound by economic necessity to enter avocations unfitted to their age or capacity.[16] It further provides that the children are given adequate chances and amenities to develop in a healthy manner and with freedom and dignity, and also that the childhood and youth are guarded against exploitation, abuse and material abandonment.[17]

Besides these constitutional pre-commitments, India has fulfilled its international obligations by enacting different laws to this effect.

4.2. The Indian Penal Code, 1860

The first basic criminal law of the country, defining the offence of trafficking, is the Indian Penal Code, which has an explicit provision dealing with the offence of trafficking and other offences related to it. Under section 370 of the Indian Penal Code, the definition of trafficking is given in line with the protocol and prescribes punishment ranging from 7 years to life imprisonment according to various circumstances. On the other hand, under section 370A of the code, exploitation of trafficked persons is dealt with, which is punishable with 5 to 7 years of imprisonment and with fine. Other offences are procuration of a minor girl,[18] importation of a girl from a foreign country,[19] selling minors for purposes of prostitution, etc.[20], buying minors for purposes of prostitution, etc.[21]

4.3. The Immoral Traffic (Prevention) Act, 1956

The Immoral Traffic (Prevention) Act, 1956 (ITPA) was enacted by the Government of India to implement the International Convention for the Suppression of Immoral Traffic in Persons and the exploitation of the Prostitution of others. The legislation mainly provides for preventing trafficking, especially for commercial sexual exploitation. To make the Act more effective, amendments have been anticipated which would widen its scope. This provides for the focus on the traffickers and perpetrators of crime and prevention of re-victimization of

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[16] *Id.*, at art.39(e).
[17] *Id.*, at art.39(f).
[18] The Indian Penal Code, 1860 (Act 45 of 1860), s. 366A.
[19] *Id.*, at s. 366B.
[20] *Id.*, at s. 372.
[21] *Id.*, at s. 373.

victims. The offence of trafficking is defined in the act as "Whoever recruits, transports, transfers, harbours, or receives a person for prostitution by means of threat or use of force or coercion, abduction, fraud, deception; or abuse of power or a position of vulnerability; or giving or receiving of payments or benefits to achieve the consent of such person having control over another person, commits the offence of trafficking in persons."[22] The related offences included are, keeping or allowing premises for a brothel,[23] utilizing money made out of prostitution,[24] seducing any person in custody or manipulating anyone for prostitution,[25] detaining any person where prostitution is being carried out,[26] asking for prostitution[27], etc.

At present, the Immoral Traffic (Prevention) Act, 1956 (ITPA) provides that the State must establish protective Homes for children in need of care and protection.

4.4. The Juvenile Justice (Care and Protection of Children) Act, 2000

The prime legislation that deals with the rehabilitation, reintegration and protection of the child victim of trafficking, is the Juvenile Justice Act, 2015 (JJA). The Juvenile Justice Act, 2000 for the first time dealt with the aspect of restorative justice for the children in need of care and protection which is now repealed and replaced by the Juvenile Justice Act 2015. The 2015 act also retains many of the provisions of the previous act. The act defines that a child, who is found susceptible to be drawn into drug abuse or trafficking or who is or is likely to be mistreated, tortured or subjugated for sexual abuse or illegal acts, can be considered as *'child in need of care and protection'*.[28]

According to this, all persons under 18 years of age are considered as a child. JJA provides for the institution of Child Welfare Committees (CWC) for the care, protection, development, treatment and rehabilitation of children in need of care and protection. JJA binds the government to provide the basic needs and protection to children 'in need of care and

[22] The Immoral Traffic (Prevention) Act, 1956 (Act 104 of 1956), s.5A.
[23] *Id.*, at s.3.
[24] *Id.*, at s.4.
[25] *Id.*, at s.5.
[26] *Id.*, at s.6.
[27] *Id.* at s.8.
[28] The Juvenile Justice Act, 2015(Act 2 of 2016), s.2(14).

protection'.[29] A child in need of care and protection shall be taken before the CWC within 24 hours. Mandatory reporting has to be done if a child is found separated from his/her guardian. Non-reporting shall be treated as a punishable offence. On production of a child, the CWC has to submit reports to the District Magistrate quarterly about pendency and the nature of discarding of the cases. The District Magistrate is likely to conduct a review of the CWCs and recommend corrective measures to address the pendency quarterly, on which he shall also make a report. The report of his review shall be sent to the State Government which may further constitute additional committees if required. [30]

According to the JJ Act, the chief object of a Children's Home/ Specialized Adoption Agency/ Open Shelter shall be the rehabilitation and protection of a child.[31] The CWC shall direct the 'child in need of care and protection' to Child Care Institution (CCI). The CCI shall formulate Individual Care Plans for the 'children in need of care and protection' or the 'children in conflict with law', if possible, through family care, such as, by restoration to family, or by adoption or foster care.[32] Any child leaving a CCI on attaining the age of18 years may be assisted with financial support to enable him/her to re-integrate into the mainstream of society.

4.5. Protection Of Children From Sexual Offence Act, 2012

Last but not the least, is the Protection of Children from Sexual Offences Act, 2012 which protects the children from all forms of sexual assault, sexual harassment, pornography and provides for institutions of special courts for the trial of such cases. The act punishes the person who commits the offence of penetrating sexual assault against any child (below 18 years of age) with minimum of 7 years of imprisonment and which may extend to life imprisonment and shall be liable to fine.[33]

Having a glance at these legal provisions, it is very clear that, India has tried to deal with all the problems concerning child trafficking and sexual exploitation including the matter of

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[29] *Id.* at s.29.
[30] *Id.*, at s.36.
[31] *Id.,* at s.40.
[32] *Id.*, at s.39.
[33] The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012), s.4.

rehabilitation and restoration. As per the notification released by Public Information Bureau, Government of India dated 7th of February, 2020, the Ministry of Women and Child Development is going to implement a centrally sponsored Child Protection Services (CPS) Scheme for assisting children in difficult circumstances. The duty of implementation of the scheme lies upon the respective State Governments/UTs. The institutional care is to be served through the Child Care Institutes (CCIs), as a rehabilitative measure. The programs and arrangements in Homes shall include age-oriented education, access to occupational skill and training, recreation, health care; counselling etc.[34] Moreover, the CPS also offers "Aftercare" services on completion of the age of 18 years to support them to survive during the shift from institutional to independent life.

4.6. Judicial Pronouncement

Constitutional commitments bind the State to build preventive, rehabilitative and restorative models for combating child trafficking. In *Dr. Upendra Baxi and others* v. *State of UP and others*[35], a PIL was filed to ensure the basic fundamental rights of the inmates in protective homes. The Court issued directives to afford better services in the protective homes. The Court further asked that every time on the expiration of the period for providing shelter to any girl, the Superintendent of the Home shall instantaneously inform the matter to the District Judge, and the latter will decide whether such girl shall be freed or not. If he or she discovers that such a girl should not be kept in the protection home any longer, accordingly he shall issue directives for her release therefrom, but only after making requisite provision for taking her to her home or parents or any other close relations. This is to be done with a view that she is not being forced into prostitution.

For determining the issues relating to rehabilitation of the children of prostitutes and minor prostitutes, the Apex Court in *Gaurav Jain* v. *Union of India*[36] rightly upholds their right under various international instruments. The court held that women found in prostitution should more be viewed as victims of hostile socio-economic circumstances rather than as

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[34] Press Information Bureau Government of India, "Rehabilitation Centres for Children" (Ministry of Women and Child Development, 2020).

[35] *Dr. Upendra Baxi and others* v. *State of UP and others,* (1983) 2 SCC 308

[36] *Gaurav Jain* v. *Union of India,* AIR 1997 SC 3021

wrongdoers in our society. They have the right to life and human dignity under Article 21. Under Part IV of the Constitution, the state must protect them. Equally, the children of the prostitutes are the owners of such rights and the constitution extends its protection to them as the other children in the society. In the light of these values the Juvenile Justice Act, 1996 then was interpreted to give a quality life to child prostitutes and children of prostitutes, who were categorised under 'neglected juvenile'. Children, under the constitution, have the right to equality of opportunity, dignity and care, right to protection and assistance in rehabilitation by society. Society should keep both arms open for them to take them into the mainstream of social life without attaching any pre-stigma to them, as they are not faulty or has committed intentional wrong. In this case[37], the Supreme Court ordered the Union Government to constitute a committee to frame the National Plan of Action and to conduct an in-depth study into these issues concerning prostitute women and their children and to come up with suitable schemes for *rehabilitation of trafficked women and children*.

Another instance was the case of *Vishaljeet* v. *Union of India*[38] where the distressed situation of child prostitution was brought before the court. This was a PIL filed under Article 32 of the Constitution, to look into the problems of 'Red Light areas' and forced prostitution from the law enforcement perspective. Thereby to save the victims of commercial sexual abuse and offer them proper medical aid, shelter, education and so on, to provide a dignified life; and to look into matters pertaining to the dedication of young girls as *Devadasi* and *Jogin*.

The Supreme Court, therefore, ordered the government to guarantee the care, development treatment, protection, and rehabilitation of sufferers of commercial sexual exploitation and advised to establish a central advisory committee to this effect. The government was also asked to figure out the insufficiencies of the law, system, and agencies related to the prevention of trafficking in India. In pursuance of the judgment, the state governments have also constituted State Advisory Committees.

These progressive judgments of the Supreme Court shall be taken as an enlightened path to be followed by us. The one drawn into the flesh trade business has some unfortunate circumstances behind it. The attitude of the people to traditionally attach a stigma to the

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[37] *Ibid*.

[38] *Vishaljeet* v. *Union of India,* AIR 1990 SC 1412

trafficked people or the prostitutes has to be changed and these views of the judiciary should reach every individual to progress towards an inclusive society.

5. REHABILITATIVE MEASURES BY THE GOVERNMENT TO DEAL WITH RESCUED VICTIMS OF TRAFFICKING

Rehabilitation is the combination of multiple procedures. psychological healing, economic enablement and civic identity.[39] Fulfilment of the objectives of restorative justice would result in effective incorporation of a survivor in the society. Although institutional care preferably is the last option, there is categorically no doubt that to facilitate all-inclusive rehabilitation, momentary and transit institutionalization is certain. However, the duration of stay in safe custody depends on numerous factors such as the legal position of the case, family willingness, family security, etc.

5.1. The Prajwala Scheme

Prajwala Scheme has explored multiple strategies. Several programs are being run by Prajwala to address all aspects of rehabilitation of the victims of human trafficking in collaboration with the government. Being a multi-dimensional crime, the responsibility to fight trafficking falls upon different ministries namely, Ministry of Home Affairs, Ministry of Labor, Ministry of Overseas Indian Affairs, Ministry of External Affairs, etc. However, the Ministry of Women and Child continues to be the nodal ministry with regard to the protection and care of trafficked victims.

The protection of trafficked victims involves abrupt care and security, long-term rehabilitation, and restoration. Laws like, the Juvenile Justice Act 2000 and the Immoral Traffic Prevention Act 1956, commands the Ministry of Women and Child, to build such institutional machinery and frame programs and schemes for safeguarding the interests of women and children who need care and protection. Some of the various initiatives of the Ministry of Women and Child are discussed as under:

5.2. The Ujjawala Scheme

[39] Rehabilitation, *available at:* http://www.prajwalaindia.com/rehabilitation.html, (Visited on February 28,2021).

The Ujjawala scheme was launched in 2007, which primarily aimed to prevent trafficking as well as to rescue and rehabilitate victims. According to the existing data, there are 228 projects maintained by the Ministry in 21 States, among which 117 are Protective homes and Rehabilitative homes. This scheme is implemented via NGOs. The beneficiaries of this scheme are women and children who fall prey to the hands of traffickers for commercial sexual abuse. A proposed mechanism is under construction to keep a check into the scheme, and the states have been entrusted with the duty to engage officers at the district level for efficient monitoring.

5.3. The Swadhar Greh Scheme

The Department of Women and Child Development in 2001-02 launched the Swadhar Greh Scheme, for Women in Difficult Circumstances[40]. This scheme endeavours to rehabilitate women and children in difficult circumstances by providing shelter, food, clothing, therapy, training, clinical and legal aid aims. For the children, girls till the age of 18 years and boys till the age of 12 years would be permitted to stay in the Swadhar Greh with their mothers.

5.4. The Integrated Child Protection Scheme

The Integrated Child Protection Scheme (ICPS) , an initiative by the GOI, was launched in 2009 for forming and to confirm eminent child protection agencies in the country. The ICPS has expressively donated in accomplishing the responsibilities of the state to some extent, in affording efficient child protection mechanisms and a conducive environment in that regard. It is based on fundamental principles of 'protection of child rights' and 'best interest of the child'. The ICPS aims to contribute to the welfare of children in difficult circumstances, as well as to lessen possibilities of exposure to circumstances and actions that lead to exploitation, neglect, abuse, relinquishment and parting of children. The ICPS is being executed by the MWCD.

6. RESEARCHER'S FIELD OBSERVATION

In the present research paper, the author finds it relevant to brief the field observation made during the Internship under the *Darjeeling District Legal Aid Forum* (DDLAF), a registered

[40] Swadhar Greh, A Scheme that caters to primary needs of women in difficult circumstances (2015), *available at:* https://wcd.nic.in/sites/default/files/Guidelines7815_2.pdf, (Visited on January 24, 2021).

society that follows the Legal Service Authorities Act, 1987 and works in collaboration with District Legal Service Authority, Darjeeling. The organization mainly deal with the growing menace of the society such as domestic violence, child marriage, human trafficking, sexual offences against children, etc. occurring in the adjoining areas and gives legal assistance to the victims within their jurisdiction and matters incidental thereto. A different field study was done under the guidance of Mr. Amit Sarkar, the secretary of DDLAF.

In one of the field visits, Mr. Sarkar briefed the interns about the child trafficking channel that the organization mostly deals with. It was observed that victims were mostly trafficked from the Nepal – border tea-belt, followed by Bhutan- border tea-belt and Bangladesh. Then, the organization was dealing with a case of a minor girl, aged 15 years, from Nepal- border tea-belt, whose home was in Naxalbari (near Nepal-border tea-belt) which falls within the jurisdiction of the organization, was trafficked to Kanpur by a pimp giving the girl hopes of good education and job and was consequently sold to some other persons. When she realized she was trapped, she tried to escape the place but she was not able to and was locked up in a room. Later on, she was taken to a prostitute area. They sexually exploited her which she could not resist alone. After a day or two she tried to escape from the area, finding her at that moment they tried to chase, subsequently pushing her from the 2nd floor of the building. The girl was severely injured. However, receiving the information the Team rescued her and provided treatment. She was then put into a rehabilitation program as conducted by the organization.

The organization took up a unique endeavour of litigation free village adoption program, mainly for the protection and care of children from the crime like trafficking, child marriage, domestic violence, sexual abuse, etc. by way rehabilitation. A specific area or ground of such designated village is used to carry on the programs of rehabilitation. The rehabilitation scheme includes *game therapy* (table tennis and football), *bio-diesel tree plantation*, *quiz competition*, *Legal literacy and legal awareness camp* and so on. As per the recent sources these areas seem to be under crime-free village areas with the ADR concept.

The DDLAF also establishes tea garden Lok *Adalat* to deal with certain notable issues like, old-age pension, widow pension, ration card, pension for physically challenged persons, and

mainly to discuss the issues of child care, child marriage, child trafficking, POCSO Cases, counselling of children and so on.

7. CONCLUSION AND SUGGESTIONS

As mentioned earlier, the Constitution of India is the sovereign rule of law, which aims to administer justice in all spheres of life. The state is under the constitutional obligation to protect the interests of children. The cumulative understanding of the constitutional provisions suggests that the trafficking of children for sexual exploitation can be prevented and punished only when *both state and non-state actors work collectively* in fulfilling the standards, which are prescribed under international law and the constitutional law of India in this regard.

The state has to take preventive as well as restorative measures to prevent and stop the offences against children. The foremost duty of the State is to *strengthen the primary institutions*- food, education and health. *Education, health and necessities are important* for the complete development of the child in any society. The state needs to impart education among all the members of the society. Health issues among children weaken them before the child abusers. The state through its educational and health institutions can continuously make a strong connection with the child, and the connection informs the State about the social milieu of the child.

However, the State has failed to *create a healthy environment for children* in India. The underdeveloped socio-economic conditions of a child cause child trafficking and prostitution in India. Poverty stands as the dominant and most common factor for human trafficking. Another main factor specific to child trafficking is their tender age. The children are the soft targets of traffickers because of their being more submissive, less empowered, insecure, vulnerable, non-complaining and weak. Social and cultural practices are still another factor aiding the growing menace of trafficking. Social evils like the Devdasi system and Jogins are still deeply rooted in the mindset of people in India. Illiteracy, unawareness of rights, violence by a spouse, and unemployment also intensify the vulnerability of children to trafficking.

Increasingly, r*estorative justice* intends to protect the victim from post-traumatic stress disorder (PTSD). Child trafficking generates a huge negative impact on the life of the victim child, which sometimes even becomes irreversible damage to him/her. Due to trafficking and

consequential exploitation, the victims suffer a hell lot, which has serious health, social, legal and societal effects. Victims suffer severe mental and physical distress. In many cases, victims of trafficking are treated as illegal immigrants and deported.

Social exclusion of the victim is the secondary victimization of the person. Blameworthy approach of society and other institutions outcasts the victim from all of its spheres. Women who have been in the flesh trade are stigmatized when they return home and try to get into the mainstream society for leading an ordinary life. They have limited opportunities for employment and it may be impossible for them to marry. When the victim of trafficking is child he /she may face ample problems such as lack of safety and social security, exclusion, emotional distress, homelessness, substantive exploitation, mental illness, learning disabilities, developmental delay, childhood sexual abuse, promotion of sexual exploitation by family members or peers.[41] Being the caretaker of all members of the society, the State is bound to establish rehabilitative, protective and restorative institutions so that the victim's person should be restored. However, despite the Court's directions, the State has failed to constitute a sufficient number of child welfare committees, and to construct the requisite figure of places of safety in a particular city or district.

Finally, it can be said that the State is escaping from its constitutional responsibility to protect the children's interests. State outsources education, health and child care services to private service providers and non-government organisations. In the absence of effective regulations, private service providers may perform the constitutional functions for commercial purposes only. Commercial exploitation of education, health and child care services would defy its holistic principles. Even if the State has hired the commercial entities to perform its constitutional obligations, victim jurisprudence holds the State vicariously responsible for the wrongful actions or omissions committed by the proxies.

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[41] Kailash Satyarthi, "Trafficking of Children: Causes and Possible Solution", (Sage Publications India Pvt. Ltd., New Delhi , 1st edn., 2013).

The Footprints of Trademark Law in a Booming Market Economy

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Abstract

The world saw a shift in behavior of states from being a closed economy to entering the era of globalization in the 90s. Transactions in a global market offers a variety of new products and services. Such products and services may or may not be novel, meaning thereby, apart from the "creating-effort" as recognized by other branches intellectual property rights **("IPR")**, like patents and copyright, the focus must equally be shifted towards "entrepreneurial-effort". Branding and advertising of a product plays a vital role in establishing goodwill and reaching the intended customer base. However, the trademark law does not enjoy enough consideration as compared to other branches of IPR in terms of its economic value.

This paper aims to analyze the role of trademark law in the global economy. It also explains how trademarks increase the economic value of a product or service with which it is associated, its relevant competitive advantage and its potential to generate more value in an economy. Additionally, the paper also seeks to differentiate the function of trademarks in the market and non-market economies.

The scope of this paper is to understand the utility of trademark law in a market economy which can thereby be used to generate more surplus, value and income. Further, the paper highlights the impact of the reluctant approach of various jurisdictions around the world, particularly, India, the European Union and the United States of America, towards non-conventional trademarks (smell marks, taste marks, colour marks, etc.) which have sometimes resulted in a loss to the economy. Lastly, the paper seeks to address the issue of market monopoly with respect to trademark law and suggest the benefits of welcoming non-conventional marks on the economy.

KEYWORDS: Trademarks, a market economy, non-conventional trademarks, IPR

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1. INTRODUCTION

Trademarks **["mark(s)"]** are the symbols, slogans, words with which a consumer associates a product. Examples may be understood as Mac Donald's "yellow M" or Vadilal for ice-creams. Such market could be a sign, a phrase, a word, a numeral representation or even some particular and distinguishable smell, colour, taste or sound[1]. In the era of globalization, a consumer has ample options to choose from, however, depending upon the class of goods, the consumer's choice is highly dependent upon the goodwill of a product. For this issue, it is relevant, for a consumer to identify the source of a product, only after which, he or she would be able to distinguish the particular product from other like or similar products available in the market.

This attracts the importance of legally registered trademarks. Businesses around the world, use them to the best of their competitive advantage, by giving their trademarks, economic and legal value. Apart from acting as a source identifier, it helps in providing relevant information to the consumer about the description of the product, the quality and durability etc. Thus trademarks, around the globe, has been used as a commercial tool by the business to boom their market economy.

This commercial tool, although, is used to increase the market value, is also quite expensive for businesses. Branding and advertising are often considered one of the most expensive parts of a business. It requires creativity and funds. Despite these factors, the business considers it one of the most crucial factors in developing a brand name over time for the particular product or service, they wish to offer.

The purpose of having trademark law in the first place is commercial and is thus, market-oriented. This may be understood as, unlike other intellectual property rights **("IPRs")**, like the patents and copyrights, a trademark is not granted to protect an invention or creativity in the form of art, music or drama. Rather, it is associated with competition and branding- useful

[1] Article 15(1) TRIPS Agreement.

as a tool of advertising the product and increasing its market value. Thus, the idea of trademark law is not "intellectual" in its true sense[2].

Further, another notable distinction that may be seen in other branches of IPR and trademarks, it its association with the public goods theory. This theory has had a justifiable foundation in terms of patents and copyrights. It talks about a lawful restriction put forth in granting an author or creator limited patent or copyrights, to avoid the creation of monopolies. The ideology behind this concept lies with the fact, that inventions and subject matter of copyrights are considered to be for the public good and if restricted to some creator's monopoly, it would restrict the general public to utilize them for a larger benefit.

However, authors around the globe have considered trademarks as private entities and not "public goods". This argument ignores the fact, that the information associated with trademarks is what attracts the public in choosing a particular product. Thus, this paper aims at rejecting this approach of considering trademarks as "private goods" and makes an argument in favour of trademarks being hit by public goods theory.

Thus, for better articulation, this paper is primarily divided into six parts, wherein, *foremostly, it talks about the benefits of the trademark in the market* ***(1)****, moving ahead with highlighting the economics of acquisition of trademarks and their transfer* ***(2)****. Thereafter, the paper examines the value of branding* ***(2.1)****, goodwill* ***(2.2)*** *and its impact on income* ***(2.3)****. Further, the paper argues trademark as "public goods"* ***(3)*** *followed by highlighting the potential monopolies that may be created therein* ***(4)****, and, thereafter, concluding the paper with a way forward.*

2. RELEVANCE OF TRADEMARK IN AN ECONOMY

After globalization, there are several products available for consumers to choose from. This is true for both consumer goods and luxury goods. Also, choices are available within a class of products. The consumers get to choose from several unobservable characteristics and features. This availability of choice offers the business to maintain desired quality and variety

[2] David W. Barnes, "A new Economics of Trademarks*",* Vol 5 No. 1, 2006 *Northwestern Journal of Intellectual Property,* (2006), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1048&context=njtip.

standards and also give way to a healthy competitive environment, in different dimensions, including quality, price, advertising, features etc.[3]

The primary reason for the protection of a trademark is two facets. First, they have the potential to alter consumer's choices and enhance their purchasing decisions. Second, they offer incentives to the business to make their goods of desired standards both in terms of quality, quantity and variety, also when such features are non-observable before purchasing the physical product. Both these benefits are because of the capability of consumers based on the trademark attributed to the product, to distinguish between different products, which might be identical in all observable aspects before purchasing the physical product.

From the eye of economic perspective, the argument with respect to the relevance of trademark is quite simple. It is seen, that sellers usually are in a much knowledgeable position with respect to unobservable characteristics of a product, as compared to the buyer, this concept is known as information asymmetry. Unobservable characteristics serve as an influential factor from the perspective of the consumer in determining the overall value of a product.

In cases, where the goods are identical in all observable characteristics, consumers tend to decide the purchasing option with respect to the unobservable characteristic, which comes along with the trademark attributed to the product, including but not limited to the branding, advertising and pre-committed advertising of the product. Further, the businesses tend to reach out to the cheapest potential unobservable criteria for a product, because a higher degree of unobservable characteristics, do not result in increasing the price of a product, thereby increasing the profit margins[4].

Therefore, the economic relevance of trademarks is to enhance the unobservable characteristics of a product and to assist the consumer in identifying the same. This kind of information is provided to the consumer in a pre-determined written form in the forms of labels on the packaging, it is done by way of the packaging itself and the symbols, words, or a combination of both (i.e. the trademark). The consumer ends up attributing the symbol, word,

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[3] Daniel McClure, *Trademarks and Competition: The Recent History,* 69 Trademark Rep. 305 (1979) https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4321&context=lcp.
[4] George Akerlof, "A Market for Lemons", Vol 84 No. 3, *Quarterly Journal of Economics*, (1970).

phrase used therein with the quality of a product. An example may be taken of advertising strategy of Maggi by Nestle, i.e. “Meri Maggi”, this makes the consumer automatically identify Maggi being close to it, instead of any other brand of instant noodles.

The original intent of having a trademark in the ancient era was found in its function of serving as a source identifier, to eliminate potential fraud and countervailing particularly in cases of jewellery makers and pottery makers. However, by the introduction of the 20th century, trademarks gained popularity for their function of attributed goodwill in terms of standard of quality[5]. Presently, the trademarks are utilized for both features i.e., working as a source identifier and working as a product identifier. Its function of being a product identifier helps the consumer to distinguish the product from other products of like nature based on taste, utility, features, price, quality, and other like characteristics - all of which is highly subjective in a way that it varies concerning personal preferences of the consumer.

Further, from the perspective of businesses, it helps the market players to utilize the unobservable characteristics of a mark (attributed to the product) and make a better market reach to the consumer, making the distinction much more visible to the consumer. In the environment, where profit maximization is a goal of the businesses, they tend to deviate from the practice of making identical products, thus, they make a difference in terms of unobservable characteristics. This makes the consumer enjoy a choice from a widely available variety of products and classes of products.

Furthermore, to keep up with the function of economic value, the trademarks must avoid duplication. The failure of such obligation would involve two kinds of costs, First, in the relevant market of a particular product to which the trademark is attributed to and Second, the relevant market concerning language.

As far as the market of trademarked products is concerned, it requires the producer or seller of the goods to maintain the desired quality of the product in question for a consistent duration, across all the intended consumers. Thus, it can be alternatively put as the protection of trademark encourages the businesses to invest upon the quality of the product. This can be understood as, if a consumer, develops loyalty with brand “A” and wishes to purchase the

[5] Sidney A. Diamond, “The Historical Development of Trademarks”, 65 TMR 265 (1975).

product of some kind again, he or she may not potentially incur a cost of conducting the preliminary enquiry again, to find the brand which offers equivalent features as brand "A". He or she would simply find the trademark of brand "A" and purchase its product directly.

Herein, goodwill serves an as integral factor. This makes the consumer develop a certain amount of confidence in the fact, that he need not conduct the enquiry again, which he possibly had conducted in the past and he just needs to identify the trademark, under which it enjoyed the services and quality of the product earlier.

Coming over to the next kind of cost involved in the market in language, it involves a huge investment by the business, not only in the quality of the product but the new invention of marks[6]. Businesses tend to invent or improve the language of trademarks in many ways, including using generic words with completely different products, they are generally used with; creating novel generic words; using phrases that the consumer value for the intrinsic information it provides.

3. ECONOMICS OF ACQUISITION AND TRANSFER OF TRADEMARK

As far as cost is concerned in acquiring a trademark, the available literature from various jurisdictions suggests that trademarks may be acquired in three ways, i.e. by registration, by first possession rule and lastly, by a combination of registration and first possession rule. Further, the transfer of a trademark is generally prohibited because of the economic nature of the trademark. Thus, for better understanding this section first deals with the different modes of acquiring the trademark along with their respective advantages **(3.1),** followed by a sale of trademarks **(3.2).**

3.1 Acquisitions of Marks

Trademarks may be acquired in any one or more than one out of three different ways throughout jurisdictions. The first and most common being, by way of registration of a mark. The second way is highly influenced by common law jurisdictions i.e. based on 'first-to-use', herein, the person who first used the mark is deemed to be the owner and creator of the mark.

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[6] Rishi Ram, *Economic Perspective of Trademarks,* Vol 9, The Saptagandaki Journal (2018), https://www.nepjol.info/index.php/sj/article/view/20882/17149.

The third way is a result of American culture, whereas, a combination of the first two methods, i.e. registration and first-to-use technique is used.

The economics of the "first-to-use" or "first possession" way of acquiring trademarks, is determined in terms of the general course of trade and commerce. That means, when did the product was introduced to the intended consumer. This approach comes with a lot of advantages. First, it reduces rent-seeking. Meaning thereby, if a business is allowed to register a mark before using it, the business might end up utilizing many resources to make up for a new and unique mark. On the contrary, in countries like Japan, where an 'only registration-based system exists, the entry cost is much more as compared to countries with a "first-to-use" approach or countries that follow a combination of first use and registration approach.

The second advantage of having the first-use approach is the reduction in administrative cost, which is levied while deciding an opposition application as to who was the first one, to ever think of that mark. Since, trademarks are capable of involving some common words, symbols or colours, which are distinct enough, it would be a tedious task to determine who came up with it first. Therefore, it is cheaper to determine who used it first, due to the availability of evidence in the public domain therein.

The third advantage of this approach is that to determine, who used the mark first, one needs to gather information with respect to the public or intended consumer. This serves the additional purpose of making the second user aware of the existence of a prior trademark and thus, helps him avoid potential duplication costs. Lastly, this approach satisfies the social feature of a trademark of being categorically more identifiable and distinctive.

However, this paper suggests, that the best method of acquiring a trademark is not only "first-to use", but also registration of marks, i.e., a coupled method. This is followed in American and Indian Jurisdictions. The reason behind this being, the legal sanctity involved. It is true, that the first-to-use doctrine ensures the best interest of trademark holders, however, often cases of honest and concurrent use occur. Additionally, such questions purely question of fact and require evidence-based scrutiny. Registration, on the other hand, signifies the awareness of the trademark holder to get his mark registered to protect his interests and rights. Thus, in

cases of dispute, if registration is checked as a secondary factor, first use being the primary factor, it would save time and cost of the adjudicating authority and the parties at dispute.

Another issue with using only the first-possession rule is that the product to which a mark is attributed to have no fixed physical locus. This may be understood as, Whirlpool Ltd. was not a known name in India till the late 90s, however, and today whirlpool is one of the leading brands in India for washing machines. Under such a situation, when Whirlpool was not dealing in India, it is debatable, whether a seller in India, can use a similar trademark in India, with an argument that Whirlpool Ltd. has no market in India.

3.2 Transfer of Trademarks

The law usually does not recognize the sale or transfer of trademarks excepted in some specific instances[7]. This specific exception is applicable in the fact where the right to produce the particular product to which the trademark is attributed, is sold to other businesses. However, this legal position is flawed in the way that it lacks any legal rationale for the same. However, one possible argument to support this approach lies in the economic characteristic of a trademark, i.e. the useful information, which the trademark indicated about a product is much more costly to sell.

This may be elaborated as if Company "A" sells his trademark to Company "B" and people are aware of such transfer, this would lead to the attribution of A's goodwill to B. This allows company "B" to obtain a higher price of the same product making use of the goodwill of A. However, an aware and knowledgeable consumer would not be interested in buying the same product for a higher price, just because the product now has got a new name.

4. THE FUNCTION OF THE TRADEMARK IN THE MARKET AND NON-MARKET ECONOMICS

The importance of legally enforceable trademarks increases in a growth-oriented society. This is where the consumers are conscious and capable enough to make choices about the product

[7] Pepsico Inc vs Grapette Co. 416 F.2d 285 (8TH Cir. 1969).

or services they use in their daily lives[8]. In contrast, a society that is not so growth-oriented, i.e. it is inclined towards a very steady or no growth, confers a comparatively lesser interest over trademark protection.

Such a society, which favours a steady growth or no-growth approach is primarily when a society is more focused upon the spirituality perspective among its people and thus restricts its people, the consumer from having personal comfort and wealth. Herein, the market does not offer a lot of competition and thus, trademarks are useful only to the extent of being a source identifier and does not relate to the competitive advantage of a brand. This depicts that social factors are directly proportional to the economic value of a trademark. The more restricted a society is, the less economic value trademarks hold therein.

5. ARE TRADEMARKS PUBLIC OR PRIVATE?

Contrary to the legal prepositions of the part, this paper suggests that trademarks are not private goods and are public goods, therefore liable for all the restrictions faced by the public goods theory. The benefits of the categorization of a good into a public good is that multiple people can benefit from its use, without being prejudicial to the interest of others, and hence these are non-rivalrous[9].

In contrast to the traditional approach that trademarks are different in categorization as compared to the ideas and expressions, and that this approach does not lead to market failure, the paper argues that the trademark holder marks their contribution to the pool of information and this effort is quite similar to the efforts put in by inventors of patents and authors of copyrights.

This may be elaborated as, people in the United States of America and the United Kingdom, trace their coffee by tracking down the "Starbucks logo". Now, this simultaneous use of words as a source identifier and do not harm or prejudice other consumer's interest or use. The theory giving trademark protection to the seller was to save the consumer from confusion

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[8] William Hennessey, *The Role of Trademarks in Economic Development and Competitiveness*, Franklin Pierce Law Center, https://www.ipmall.info/sites/default/files/hosted_resources/Hennessey_Content/RoleofTrademarksinEconomicDevelopmentandCompetitiveness.pdf.

[9] Richard Cornes, *The Theory of Externalities and Public Goods* (Cambridge University Press, 2nd ed. 1996).

and protect the interest of the original holder. Therefore, it can be safely concluded that, from the perspective of consumers, the use of a trademark is non-rivalrous, whereas from the perspective of sellers it is completely rivalrous[10].

Going with this line of thought, the trademark law does not restrict and in fact, permits the referential use of trademarks. Further, if a seller uses the same mark for a different class of goods in the same market as the original holder of a trademark, it is doubtful, the argument of dilution in the eyes of the consumer would suffice here. However, if other sellers use the mark repeatedly, it would result in loss of distinctiveness of the particular mark. This loss of distinctiveness would gradually fail the function of a trademark to work as a source identifier. Thus, simultaneous uses which are non-competitive can be understood as partially rivalrous.

In the same line of thought, this paper argues that trademarks are impure or mixed, i.e., for some characteristics they are rivalrous, for some others they are non-rivalrous and for the remaining partially rivalrous. Thus, for further elaboration, this header is divided into two parts i.e., public goods theory and market-failure theory.

5.1 Public Goods Theory

This paper puts forth an argument in favour of the categorization of a trademark as a public good, to be more specific, a category of mixed public goods. Further, proprietary uses attributed to a trademark is in some instances purely rivalrous and some other instances congestible. Public goods theory showcases that there is no difference in using market failure to justify regulation of trademarks, like patents and copyrights.

Further, considering the first argument i.e., categorization of a trademark as non-rivalrous and hence, pure public goods, it is submitted, that in instances of referential use of the trademarks by the consumer the mark qualifies for Professor Samuelson's theory[11]. This may be elaborated as once a seller decides to use the trademark in the usual course of trade and commerce, this mark is available for all (consumers) to be used for referential purposes[12]. One consumer's use of a trademark as a source identifier or in search of a product does not

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[10] J. Thomas, "Trademarks, Antitrust and the Fedral Trade Commission*",* 13 *Marshall Rev.* (1979).
[11] Paul A. Samuelson, "The Pure Theory of Public Expenditure", *36 Rev. Econ. & Statistics 387* (1954).
[12] John Head, "Public Goods and Public Policy", *176 Public Sector Economies*, (1990).

anyhow prejudice similar benefits of other consumers. Therefore, in this sense trademarks are non-rivalrous and public goods.

5.2 Market-Failure Theory

The significance of categorizing trademarks as public goods lies in the prefix that these are non-rivalrous. This prefix implies, that once a particular product is produced, to which the trademark is attributed, simultaneous consumption by various consumers do not result in the imposition of any additional cost over other consumers. This can be further extended to mean that once a product is produced, it involves no additional cost of a product to make it enjoyable for other consumers. Meaning thereby, the marginal cost of making the product reach another person is theoretically zero.

The traditional approach of equating the marginal cost to the price of the product is flawed and ambiguous, because of the concerns of static efficiency and is a short-term approach. It is an established principle of trade and commerce that resources are limited in nature and thus their allocation on an additional unit of the particular product can prove to be efficient if it is established that the benefits arising out of the product would be greater than the cost involved therein. In cases where the marginal cost becomes zero, further resources shall be allocated to make the product reach the desired consumer, who have a positive value for it.

However, the arguments of marginal cost pricing fail to address the concerns of providing an efficient supply of the product to the general public (comprising of both the person, who may or may not attach any positive value to the product) in a competitive market environment. The sellers fail to recover their production costs in cases of public goods, or else they would have to give away their product for free to the consumers. Thus, the sellers need to recover the total costs to remain in the competitive arena, and this is a long-term approach and thus involve dynamic efficiency[13].

This is where the market failure in respect of public goods arises, i.e., the conflict between dynamic efficiency and static efficiency. Even if we consider that the seller can exclude a certain class of consumers and charge a positive price and the revenue earned therein is

[13] James M., *The Demand and Supply of Public Goods,* Vol. 5 (1999).

sufficient to cover the initial costs, the static efficiency criteria fail. This situation of a dilemma is a situation of market failure and it occurs only with respect to public goods. This is so because the marginal cost of private goods can never be equal to zero. Thus, in such cases, the sellers would easily be able to recover their initial costs.

6. TRADEMARKS VIS-À-VIS MONOPOLIES

Advertising of a product leads to a mental image created in the mind of consumers about the product and its associated qualities. This formation of an image may lead to various results, including but not limited to the ability of the consumers to distinguish between two goods of the same class, confer profits and power over a certain business due to its pre-committed advertising and advertising may also create a perception over the minds of consumers which would impact their purchasing decisions[14].

The latter mentioned impacts could probably create a monopoly in a way that it would result in the entry of businesses, more than what is required and might lead to underproduction. The critics of trademark law consider it as a threat to the creation of a monopoly. Almost every jurisdiction has had stricter norms to restrict monopolization of a market by way of their respective competition laws[15]. This argument might seem relevant *prima facie*, since, if for instance, Company "A" gets a trademark "xy", it has a monopoly over the mark "xy" and no other company could use the particular mark or could not sell identical products (trademark also works as an identification factor of a product). However, if dig into this argument, it fails to answer the ability of other companies to produce a similar product, which may be identical in all aspects as that of Company "A" except their symbol or mark "xy".

This may be further strengthened as, it is true that a consumer is more attracted towards a product because of the mark associated therein, however, the purchasing decision is not 'only' gets impacted by this market[16]. The ultimate utility of the product, quality therein, goodwill, quantify, price etc. also serves as a determining factor. This may be understood with an example as, every Black Tea player in the market have a trademark, but, not every black tea is successful. Consumers tend to consume Tata Tea more as compared to Hindustan Uniliver's

[14] Edward Chamberlin, "The Theory of Monopolistic Competition", 8th ed., *Harvard University Press*, (1969).
[15] *Ibid.*

Tea. The shift in consumer preference is not because of the packaging or trademark of Tata Global Beverages Ltd, but factors like taste, quality, price, the market reach of Tata Tea, contribute evenly. Therefore, a trademark could be one of the factors affecting a consumer's purchase decision, but it cannot be considered a sole factor in creating a monopoly in the market.

This implies, if there is no direct pleasure, involved whatsoever, by the trademark in question, particularly the symbol, word, colour, number, or a combination is involved therein, two products of different brands will seem similar to a consumer and hence, Company "A", which is the monopolistic holder of trademark "xyz", will no longer hold a monopoly for the particular product it deals in.

The same argument, if put up differently, may be understood as, another product of similar kind, to that of product produced by Company "A" would serve as a substitute to each other. Substitutability increases competition and does not monopolize a market. An increase in competition means, a company holding the particular trademark, will be under a constant threat of substitutability from similar products of other companies and would thus, lose the power to control the prices of the product since a significant monopolistic increase in price would thereby cost such company to lose a huge market share to its substitutable product. Both such internally substitutable products would thus be subject to perfectly elastic demand, thereby would require to be priced at a marginal cost, with nil monopolistic price.

Another facet of this issue is the issue of advertising. A significant change in a product's advertising has the potential to change the image of the product in the eyes of the consumers, where in fact, the product is the same as previous advertising. This is so because the advertisement of a product adds additional attributes to it. This phenomenon is often cited as "persuasive or perception advertising". This is contrary to active advertising, since, unlike persuasive advertising, the former refers to the advertising limited to information of the product concerning prices, location of outlets etc.

In persuasive advertising, the brand aims at creating a mental image of the product in the minds of the consumer, even before they have brought the product. This highly impacts a consumer buying decision, since it tends to buy the physical product along with the attributes

of the mental image of the product created by way of advertising, whereas, in essence, the consumer only gets the physical product. Such “perceived features” are associated by the consumer to the product like any other descriptive feature of the product including but not limited to the quality, utility, service, price etc.

The fact, that such perceived attributes do not necessarily mean to be evident in the physical product is often ignored by the consumers because of the strong mental image therein, which they believe to be true. Trademarks make such perceived attributes possible and more inflammable. Thus, it is contested that such creation of a perceived attribute creates a monopoly in the market. However, this paper denies this statement with an argument, that trademark, by increasing the perceived attribute does not, in essence, create a monopoly, but actually, increases the competition. It offers the market players to compete in an additional dimension, which ensures competition in the first place, that is before the product is presented to the consumer.

To elaborate this further, perceived advertising may give rise to three aspects of a competitive economy. The first being opening competition in an additional dimension, i.e., advertising. Unlike the usual belief of legal fraternity, competition is not always fruitful for the society and economy. In a situation where the resources are limited, and such limited resources are used to establish a new brand. Additionally, the cost of products also reduces when an increased quantity of such products is produced, the economy does not need more brands than what is required. This happens because the number of brands is inversely proportional to the number of units. Meaning thereby, when the number of market players increases in a market, the quantity of products (each brand) decreases. At an instance of equilibrium at the entry stage, different players end up making less or even quantity of products.

This concept is further related to the concept of social welfare. It can be calculated by subtracting the cost of production from the amount which the consumers are willing to pay for a particular product. This factor is generally increased by a reduction in the number of active market players in the product spectrum. Therefore, the factor of social welfare maximization tends to limit the number of market players to the count below the count which is prevailing in market equilibrium. This position of economics coupled with social welfare stands true,

where the products are distinguished only based on observable characteristics and not trademarks.

However, when trademarks are introduced within a market, and non-observable characteristics come into play, there are two possible effects. First is the welfare gain which comes attached with the function of trademark working as a source identifier. Second, is the ability of a business to compete in a new dimension of creating perceptions. Herein, the market players are free to produce products that are identical or similar in all observable aspects, except for the perception factor. This unobservable non-physical factor is so important to compete in, that it has the potential of using an identical product to target a different audience. The best example of this is toothpaste. The identical or similar paste, by way of perceived advertising and perceived notions, is used to target a different audience, including kids, adults and the old aged.

However, in the way of competing in the perceived characteristics of a product, the market players or businesses gain a certain degree of monopoly in the market, wherein, they are empowered to decide the prices of their product based upon the flexibility of demand which arises. This monopolistic power gives rise to increased profits. The threshold of the impact of perceived advertising over social welfare maximization is highly dependable upon the capability of businesses to pre-commit their product by way of advertising it. Such pre-committed advertising leaves an impact on the consumer's mind even before the prices of the product is determined by them.

The way of pre-committed advertising is used by the business as an aggressive competitive strategy in front of their competitors. This is so because, by this medium, they target higher profit, where in essence, everything else about the product remains the same. Such competition removes the entry barriers to the market, whatsoever, and increase the entry of new businesses. When the perceived image of the product (made through perceived or pre-committed advertising) is coupled with the actual physical product, it gives rise to increased production of such product by each market player[17].

[17] William Oakland, "Public Goods and Welfare*",* 1 *Pub. Econ.* (1972).

The last impact of such preconceived notions or pre-committed advertising about a product may be seen in a way when it has the potential to change the purchasing decision of a consumer in terms of desirability. Thus, this paper argues that pre-committed advertising benefits the consumers in a way, that opens up new dimensions of competition and no not hamper the competitive environment in a market. Additionally, it results in an unobservable characteristic of a product, which have the potential to impact a consumer's buying decision. Further, the paper suggests that such advertising is mostly seen in products of daily use and not luxury goods, since, a consumer while purchasing a luxury good tends to conduct a better enquiry about the physical characteristics of the product than the consumer goods. Thus, pre-committed advertising does not impact luxury goods.

7. CONCLUSION AND WAY FORWARD

The role of the trademark in the market economy is undeniable. While buying a product, a consumer is not only attracted by the observable characteristics of a product, including the quality, ingredients, quantity and personal preferences with respect to taste, smell, colour and other like attributes of a product but the use of trademarks welcomes a new dimension of unobservable characteristics.

Further, the analysis on the subject suggests that the relevance of trademark protection is not only to ensure the existence of sufficient words. There is no end to creativity, BATA was not a dictionary word before the footwear brand came into existence in India. This is also somewhere related to the spectrum of trademark distinctiveness propounded by Justice Hand in the case of Abercrombic vs. Hunting. Herein, the trademark must be either inventive, descriptive or in some cases suggestive to qualify for protection. Thus, the paper argues that the relevance of trademark is purely commercial and is also to protect the interest of the sellers so that the consumers are not kept under any dilution.

Further, the paper suggests that out of all the possible modes of acquiring a trademark, that is, by way of registration or based on first possession rule or by making use of both these positions, the best way is to use a combination of both, as in India and all-American states. This reason is based upon economic consideration including the costs. Further, the paper recommends, that despite giving an option to dispute to the potential plaintiff after the mark is

registered, more scrutiny must be done before the mark is registered. This is so because, the purpose is not only commercial and to protect the interest of the seller, it is equally meant to save the intended consumer of possible dilutions and confusion. In a case, where the seller might not have an issue, the consumer still suffers. Thus, enquiry before registration saves the consumer and additionally, reduces the cost of possible litigations that may persist after conflicting trademarks.

The paper then argues that the nature of the trademark is not of private goods, but mixed goods. This may be elaborated as the public goods theory concentrates upon the non-rivalrous nature of the trademark with respect to its referential use. Further, trademarks could be both rivalrous and non-rivalrous depending upon the context in which is categorization is sought for. Therefore, it would be wrongful o suggest that trademarks are purely private goods in nature since it involves the characteristics of being a public good. Further, the debate between static and dynamic efficiency with respect to marginal cost pricing of the trademark can never be contested in a competitive environment. Therefore, the paper recommends in cases of any dispute and policy framing with respect to trademark, it must not be treated leniently to that of other IPRs. In line with the same, the duration of a trademark must not be perpetual. Presently, in most jurisdictions, it is limited for a time duration subject to renewal which has no limit.

Furthermore, the paper rejects the argument of economists that trademarks are capable of creating a monopoly. This argument is made on the basis that having a trademark might monopolize the particular symbol, colour combination, words, combination of words or letters, a combination of numerals and words etc., however, it cannot monopolize the full market. Other sellers are free to sell identical or similar products with different branding and trademarks. The fact that a mark carries the goodwill of the seller with it and the consumer attributes the trademark with the source of the product, opens an additional dimension for competition and does not restrict the scope of competition.

Lastly, it is seen that jurisdictions around the world are restrictive in granting unconventional trademarks on the ground that they lack the requirement of graphical representation and distinctiveness. This is specifically the scenario in the European community. However, the

paper suggests that after looking at the economic nature of trademarks and the associated factors therein, even unconventional trademarks must be given protection. The benefits of this proposition are that it would reduce costs, offer new dimensions of competition and would thus be more profitable and in the interest of consumers.

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Rainbow Embedded in The Indian Culture

Deeksha Kulshresth*

Abstract

Since times immemorial the Indian culture has been guided by such beliefs. A culture which has been known and acknowledged to include everyone and tie them in the threads of love and acceptance. The Vedic literature such as the dharma shastras and sutras have touched almost every bit of the human life and have spoken vividly on matters such as economics, astrology, geography, love and pleasure and many more. They are an eminent example of how the purpose of a human being is just not worshipping the upper self but that it has to be achieved by various other acts during the life span of a being. It is pertinent to mention that the times when the idea of love, pleasure and sexuality was 'hushed' in the contemporary civilizations, Indian culture accepted and addressed these in the form of scriptures such as the 'Kama Sutra'. Such ideas were also termed as just part and parcel of life in the 'Srimad Bhagvatam' and were also simply tolerated during the Islamic regime. However, what we see today is a grotesque version of such beliefs and practices. When Indians began reading and exploring their sexualities and gender identities way back, how did we end up marking all these things as a stigma and taboo? Apart from the aggressive ideas of Victorian Morality under colonization, what went wrong? The largest democracy in the world struggles today to ascertain basic human rights to the people who don't fit into the fanatical dichotomy of 'man' and 'woman'. We have our one hand up straight bearing the flag of 'human rights and 'inclusiveness' while the other hand dipped in the horrendous waters of discrimination, conversion therapy and shaming people who are self-aware of their identity and sexualities. The paper is an effort to address this journey of the Indian Subcontinent and the path still left to cover to achieve the very essence of Equality and Liberty as guaranteed by the Constitution of India.

Key Words: *Third sex, Homosexuality, Tritya Prakrati, Indian Culture, Vedic Literature, Laws and regulations*

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1. INTRODUCTION

Throughout Vedic Literature, the sex or gender of a human being has been divided into three categories according to nature. These are: pums-prakrati or male, stri-prakarati or female and the tritya prakrati or third sex.[1] The times when contemporary civilizations were still trying to understand the basic human behaviour, the Vedic Literature was way ahead of its time and had acknowledged how 'gender' and 'sex' are not the terms that can be interchangeable and how these two aspects largely affect the life of a human being. Considering the foundation laid by such texts and literature, the Indian subcontinent was supposed to have a bright understanding of sex, gender, love, pleasure, choice and 'prakrati' of a being. But the present scenario is an outcome of various invasions, political and 'ethical' agendas of our colonizers. Years after years, the world saw various struggles of the gay community for their 'identification'. They all had a voice but not a unanimous one. The issue was addressed by artist, activist Gilbert Baker in 1977 who created the 'Rainbow' flag to symbolize the belonging of the gay community.[2] The flag which symbolizes powerful values such as Vitality, Healing, Sunlight, Nature, harmony and Spirit through vibrant colors were chosen to resemble all the attributes of those who embrace in themselves the 'Tritya-Prakrati'. The Rainbow became the gay community's banderole and 'Pride', their power. And thus, the idea of 'Gay Pride' emerged and started challenging all the orthodox and oppressive ideas of 'sexual orientation' and 'gender identities'. After years of tyranny when the ideas of 'sexual identities' were submerged under the veil of 'morality' as laid by the British, it was not before the year 1999 that India encountered its first Pride rally in the city of Kolkata.[3] The 'Rainbow' flag touched the fair skies of Kolkata and became the first thread to weave the fabric of 'pride culture' all over again in our country which had been long forgotten.

2. RAINBOW IN OUR ROOTS

2.1 The Vedic Era

[1] Available at: https://www.galva108.org/single-post/2014/05/13/tritiyaprakriti-people-of-the-third-sex-1 (visited on 1/7/21).
[2] Available at: https://www.britannica.com/story/how-did-the-rainbow-flag-become-a-symbol-of-lgbt-pride (visited on 1/7/21).
[3] Available at: https://feminisminindia.com/2019/06/24/pride-parades-india-history/ (visited on 1/7/21).

After the Vedas were realized by the Brahma at the beginning of the creation of this universe, Manu set aside the verses concerning civic virtues and ethics in the form of a manuscript and named it, the Dharma Shastra. The work of compiling issues related to economics, politics, prosperity, spirituality and many other aspects of life was given to different Gods and Goddesses at the time being. Verses concerning pleasure and sexuality were compiled as the 'Kama Shastra' by 'Nandi' who is depicted as a bull, guardian deity of Kailash and a companion to Shiva in the Hindu religion. The same was finally put in writing by the sage Vyasadeva about five thousand years ago. It was then divided into parts by brahmana sage, Vatsyayana during the 'Gupta period'.[4] The same is today referred to as 'codes of sensual pleasure' and gives a sneak into the sexual understandings of ancient Vedic India in totto. Human beings as according to the Vedic Literature could be of two categories. The ones who could procreate and it was their 'Dharma'. The second ones, the 'third sex' who were duly respected even though they couldn't procreate. They were duly welcomed in all the auspicious occasions and were usually involved in occupations such as those of artisans, performers, masseurs, etc.

People with tritya prakriti, according to whether their appearance is masculine of the feminine: Kilba, or gay males, Svairini' or lesbians, 'Shandha' or transgenders and 'Napumsa' or intersex, contrary to the conservative word 'Eunuch' which is used for everyone regardless of their differences in identities.[5] Crossdressing was highly accepted and respected in the ancient Vedic Culture. It is said the fabric and authenticity of a society can be judged by how it treats its minorities. In the Vedic times, the women, cows, Brahmanas, women and the people belonging to neutral gender (tritya prakrati) were all offered protection as an extension of social responsibility. Nature, sexual preferences and the way people expressed themselves (gender identity) were not the basis to set anyone's 'social morality'. The Hindu religion is famous for preaching its essence and its beliefs through incarnations of deities. Even as we go through all those sonnets and tales, we can see the incarnations in various forms which also include the characters in resemblance to the third sex! The Brahmanada Purana mentions how Lord Shiva was assumed to have taken the form of Sri Ardhanarisvara after duly worshipping shakti. Sri Ardhanarisvara was believed to be a hermaphrodite. Also, in the famous epic, Mahabharata, one of the

[4] Available at: https://www.galva108.org/single-post/2014/05/13/tritiyaprakriti-people-of-the-third-sex-1 (visited on 2/7/21).
[5] Available at: https://www.galva108.org/single-post/2014/05/13/tritiyaprakriti-people-of-the-third-sex-1 (visited on 2/7/21).

protagonist characters 'Arjuna'(disciple of Lord Krishna and husband to Draupadi) takes the form of a male-to-female transgender 'Brihnala' to take disguised salvation and is truly welcomed and respected by the people of highest encounters in the kingdom of Maharaja Virata.[6] These scenarios and incarnations are an explicit example of how the tritya-prakrati made a wholesome and revered part of ancient Vedic India.

2.2 The Islamic Regime

The most beautiful and revered memory of how Islam had accepted the presence of homosexual behaviour is the story that it was the eunuchs who were given the responsibility to guard Prophet Mohammad's tomb. Given such a responsibility in the life of Prophet himself, attached a sense of authority and importance to the eunuchs in the Mughal regime as well. The account of various travellers had vividly mentioned how eunuchs were most respected by the Nawabs and given the responsibility of guarding and administering the Harem (place of the Begums to live). The accounts of various foreign travellers into the Mughal Court mention the importance of eunuchs to the emperor as well as the Muslim women. They were known as 'Khwajasara' in the Mughal, were treated as 'sacred' and expected to serve not only as servants but as officers as well. The reality of the Indian Subcontinent is believed to be far more different than as painted by the once carrying westernization.[7] The Mughal texts also had a sense of 'querness' even though the essence was arranged delicately by those writing it. the myth that prevails today is that 'Khwajasara' had their place only in the Harems for the queens and princesses, on the contrary they were usually employed by the Emperor in different administrative works or other clandestine virtues for the State. The account of such scenarios is found in the writings of Francois Berner, the French Traveler who visited the Mughal Court in the seventeenth century.[8] Even though the holy book of the Quran holds contrary views to such homosexual behaviours, the queer identity was fairly protected and tolerated by most of the Mughal Emperors. It was not before the sixteenth century, that the acceptance started taking the shape of fear, hatred and neglection, apparently, it was the same time when the British had started landed on our soil and had started to capture our heritage as well our rich culture.

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[6] Available at: https://www.galva108.org/single-post/2014/05/13/tritiyaprakriti-people-of-the-third-sex-1 (visited on 2/7/21).

[7] Available at: https://servantspasts.wordpress.com/2019/08/12/third-gender-and-service-in-mughal-court-and-harem/ (visited on 2/7/21).

2.3 REFLECTION OF VICTORIAN MORALITY

The Victorian Era was accompanied by the ideas of treating homosexuals as 'abnormal' or 'sinners'. This vague idea of morality set up around 19th century Britain was called to be the 'Victorian Morality'. It was an amalgamation of the treatises of the Catholic Church, the extremist preach of the Royals and the Priests to maintain the pleasures of their power. The attempt to distil people's identities resulted in penalizing homosexual behaviours. Even though writers such as Virginia Woolf tried their hands writing around eroticism, sexuality and lesbian behaviours but the attempts were usually accompanied by a fear of being executed by the State.[9] This was the same timeline when the British disguised as East India Company had successfully captured our country and laid their colonial roots in our Hindustan. The struggles for freedom were seen in every arena from trade to the regime. However, the shackles of our colonizers were strong enough not only to captivate our heritage but also our cultural values, beliefs and ethics. The perception of morality in India which was woven by the Vedic Literature was replaced by an altogether new concept of westernization and 'Victorian morality'. The impact of these concepts was hypnotical and the people of India started questioning and looking down upon their religion, ethics and morals. Somehow, the hypnosis that we were moved into remains in the form of various discriminatory laws in practice today which were codified by our colonizers with the motive of suppressing our heritage and social norms.

The 'Kama Sutra' one of the most revered and eminent Vedic scripture in Indian history was first brought to a translation by East India Company political agent Sir Richard F Burton (1821-1890) in the years around 1880[10]. A text which was a sacred piece of literature as written by the famous Sage Vatsayana, which indulged in the topics of not just love and pleasure but acted as a guide for the people of that time to explore their nature, gender identities and sexualities and was indeed a scientific piece, was poorly and partially translated by the British officer and was seen as nothing more than an erotic piece manual for the western world. The Vedic literature had entrusted enough freedom to the ones who read and believed it. From acceptance to cross-dressing to vividly talking of the 'Tritya-prakrati' (third gender), the text was way ahead of its time. The sexological

[9] Available at: https://www.theatlantic.com/magazine/archive/2017/03/before-straight-and-gay/513812/ (visited on 2/5/21)

[10] Available at: https://www.firstpost.com/art-and-culture/how-richard-f-burtons-the-kama-sutra-symbolised-fantastical-orientalism-that-shaped-late-19th-century-imagination-about-india-9284531.html (visited on 2/6/21)

manual was seen by the British and the western world as 'unethical' and an invasion over their ideas of 'morality'. And thus, in an attempt to 'civilize' the Indian subcontinent such practices were first shamed, condemned and then penalized. Cross-dressers were stopped from appearing in public. The ones who identified themselves as the 'third sex' were forced to remain outside the civic gatherings and eventually pushed out of the city as well. With such social neglect, the community was forced to succumb to poverty and fill their bellies by taking up practices such as prostitution and other meagre occupations. The community which was once regarded as 'good luck' was now seen as an eyesore to the society of 'colonizers' and also to the ones 'colonized'.

The first strategic penalization over the 'third sex' was seen in the form of the Criminal Tribes Act, 1871. Part II of this very act was titled 'Eunuch' and contained all the laws and regulations for registration of eunuchs in the area and punishment to be awarded in case they appear in public dressed as females.[11] The Act which was codified to control and penalize the castes, class or group of people who were seen as 'born criminals' in the eyes of British, saw the 'Eunuch' as kidnappers or castrators of children. The 'Hijra' class of the society was seen as an obscene nuisance to the civilized society.

Secondly, the private acts and behaviours of the third sex were penalized under the Indian Penal Code, 1860 under Section 377 which reads as follows:

"377. Unnatural offences. - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation. - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

The inclusion of this section under the Indian Penal Code was a major step towards the exclusion of the third-sex from the society for it termed their very identity, behaviour, pleasure and sexual gratification as 'unnatural'.

3. THE 'FLAWLESS' SEXUALITY

[11] Available at: https://www.himalmag.com/long-history-criminalising-hijras-india-jessica-hinchy-2019/ (visited on 3/7/21)

Conversion therapy is a "pseudoscientific attempt aimed at changing a person's sexual orientation, gender identity, or gender expression"[12]. Along the nineteenth century, even after worldwide movements, homosexuals, or the same-sex desire was seen to be an 'illness' or a 'mental disorder' that could be 'cured'. The whole perception that homosexual behaviour nature was 'flawed' and that sexual desires are supposed to be 'particular' was the belief behind this notion of illness and treatment. The therapy uses various aversion techniques which were used for those addicted to drug abuse or alcoholism. However, the same was then seen as a 'cure' for homosexuality around the late nineteenth century. The horrendous character of the technique pushed the people of the third sex to associate their nature with discomfort and unacceptance. Electric shock therapies, showing sadist videos to develop traumatic cycles associated with 'same-sex desire' and corrective rapes were some of the many terrific methods taken up to eradicate same-sex eroticism. It was only around the 1970's that India started adapting such techniques to cure the 'illness'. Heterosexuality was supposed to be the only acceptable sexual desire and everything else was seen as 'unnatural' and as opposed to 'God's will'. The whole process was published in the Indian Journal of Psychiatry titled, 'Treatment of Homosexuality by Anticipatory avoidance conditioning technique' in the year 1979[13]. The western techniques were more deterrent, Indian techniques were focused on 'behavioural programs' which wanted to redirect homosexuality to heterosexuality and procreation. The whole practice is a clear violation of the human, civic and legal rights of a person. Even though homosexuality was officially removed from the WHO list of mental disorders in 1990[14], it is only now, in the year 2021 that Madras High Court became the first to ban conversion therapy in India in the case of *S Shushma V Commissioner of Police (W.P no 7284 of 2021)*[15]. Further upholding the rights of the LGBTQA++ community, the judge held that "any attempts to medically cure or change the sexual orientation of LGBTIQA+ people to heterosexual or the gender identity of transgender people to cisgender, is the frustration of Article 21 of Indian Constitution which guarantees Right to dignified life and Liberty to an individual".

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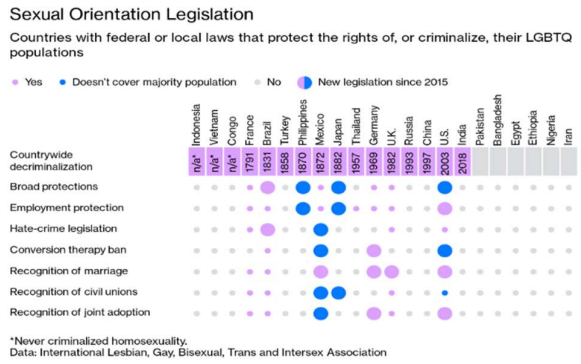
[12] Available at: https://www.bbc.com/news/explainers-56496423 (visited on 6/7/21)
[13] Available at: https://theconversation.com/lgbtq-conversion-therapy-in-india-how-it-began-and-why-it-persists-today-140316 (visited on 6/7/21)
[14] Available at: https://www.galva108.org/single-post/2014/05/08/a-timeline-of-gay-world-history (visited on 6/7/21)
[15] SCC Online (visited on 4/6/21)

Even in this 21st century, when the freedom of speech and expression is given the highest regard, various teenagers and adults who come out expressing their 'pride' are forced into such therapies. Unfortunately, such cruelty has caused people to succumb to depression, anxiety and even suicide.

4. JUDICIAL JOURNEY AND LAWS

We broke our colonial prison back in the year 1947, ended up repealing various oppressive laws and codified new ones to achieve the real significance of the Constitution of India. Since then we have struggled to fit in the boxes of idealism and perfection, however, the very nature of democracy is quite contrary. Democracy requires painstaking brawls and a dynamic society motivated to change with the need of time. The state of the LGBTQA++ community was left in shambles after our colonizers moved out of our land. The community which was once self-aware and empowered was now doubtful of their existence and feared coming out to people. They were even subjected to physical violence, while harassment, exclusion, shaming and other hate crimes ran parallel. Legislations that addressed the issues of LGBTQA++ were often avoided and were deemed unnecessary.



It was only in the years around 2000 that people started pushing their limits to grab their rights to safeguard and honour their sexual orientation and gender identities. The fight was just not about getting basic credentials but to change their association with 'unnatural' to 'natural'.

Timeline

- First Pride Parade in Kolkata, 1999
- Naz. Foundation Govt. V. NCT of Delhi –

Background – In July 2001 the police raided a park and detained a few men at the suspicion of them being homosexuals and pressed charges against them under Section 377, IPC.

Judgement – Finally held in 2009 By the High Court of Delhi that section 377 of IPC imposed unreasonable restrictions on two adults engaged in consensual intercourse in private. Thus, it was violative of their basic fundamental rights enshrined under Articles 14, 15, 19 and 21.

- Suresh Kumar Koushal Vs. Naz Foundation –

  Background – Various individuals and religious groups rejected the idea of decriminalizing homosexual relationships, based on the contention that India's culture and tradition did not support such values. Reconsideration of the constitutionality of section 377 was appealed in the Supreme Court of India.

  Judgement – The judgement of the Delhi High Court was overturned in 2013. The stance of the Apex Court of India faced criticism worldwide and gave fuel to another surge of LGBT movement in the country. Protests and activism were at par and people now demanded the recognition of the 'tritya-prakrati' unanimously.

- National Legal Services Authority V. Union of India-

  Background - The LGBTQA++ community has been subjected to exploitation and degradation for a very long time. The history of discrimination towards this community is unfortunately long trodden and runs in every aspect such as economic, social, educational, etc. These people were never considered to be a part of our society and humiliated for their choices, sexual desires and sexual preferences. The constant neglect had forced them to resort to poverty, prostitution and beggary. This community is much more vulnerable to hate crimes, oppression, prejudice, STD's and human trafficking.

  Judgement – The landmark judgement passed by the Supreme Court in 2014 gave recognition to 'third gender' status for the hijras or transgenders. It also directed the government to make policies for the upliftment of this class and grant them reservations in jobs and educational institutions.

- The Transgender Bill,2014 was tabled in the Upper House, Rajya Sabha but never discussed in the Lok Sabha. The Bill still lies pending and is yet to be discussed. The bill is focused on providing anti-discriminatory regulations for the

Transgender community and also upon providing rehabilitation, educational and employment opportunities.

- K.S. Puttuswamy V. Union of India-

  Background – The Right to Privacy was discussed at length in front of the honourable Supreme Court of India. The evolution, jurisprudence and scope of the right to privacy were debated and taken up for reconsideration.

  Judgement – The Right to Privacy was declared as an eminent part of Article 21 of the Constitution of India which guarantees the Right to dignified life and liberty to every individual. Justice Chandrachud also acknowledged that 'sexual orientation' also falls in the preview of privacy. This judgement sparked a ray of hope among the queer community.

- Navtej Singh Johar V. Union of India-

  Background – After overruling of Delhi High Court judgement in 2013, the LGBTQA++ community people were again seen as criminals, and were marginalized. The increasing protests in the country led Supreme Court to reconsider the constitutionality of section 377, IPC on a petition by some high profile names of the society.

  Judgement – The verdict was passed in September 2018 which was seen as a great triumph in this fight for the right for the LGBTQA++ community. Section 377 was held unconstitutional and in contravention to basic fundamental rights guaranteed by the Constitution. It also gave the right of autonomy, identity and intimacy to individuals. The Court further held that the language of section 377 which gave a distinction between natural and 'unnatural' intercourse was too ambiguous and primitive.

- Three years past the judgement of the Supreme Court laid these guidelines for the treatment of LGBTQA++ people, the community still struggles to fit in the societal norms. There have been no regulations that address the marriage, adoption, inheritance and succession rights of the queer people. further, the Indian Penal Code, 1860 still uses 'man' and 'woman' in its language rather than gender-neutral terms. This leaves no resort for the LGBTQA++ people who become victims of rape, molestation, harassment etc.

- The LGBTQA++ people make a large section of society engaged in surrogacy. The lenient laws still don't address much the plight of the queer and remains a blunt weapon to entail.

5. CONCLUSION AND SUGGESTIONS

अयं बन्धुरयंनेति गणना लघुचेतसाम्

उदारचरितानां तु वसुधैव कुटुम्बकम् ॥

The mantra finds its place in *Maha Upanishad* which belongs to the *Samveda* tradition[16].

Meaning: "The distinction "This person is mine, and this one is not" is made only by the narrow-minded (i.e. the ignorant who are in duality). For those of noble conduct (i.e. who know the Supreme Truth) the whole world is one family; one unit)

(The meaning of words like 'family' etc. should be understood in the context of what the Upanishad is talking about. It is describing the quality of a man who understood the Truth, transcending the multiplicity of the world)."

The mantra is another eminent example of how the Indian Culture and Vedic Literature have the values of unity and acceptance embedded in themselves since time memorial. It is only because of the wrath of time, that we have moved into believing otherwise and have forgotten our roots.

Such ethics and beliefs in our manuscripts stand as answers to all those who attach pseudo standard of 'morality' with the Indian *Sanskriti* and to those who double-standardly categorize things, beings, identities and sexualities into 'natural' and 'unnatural'. It is the time that we go back to where we belonged and enlighten ourselves with the true essence of our culture. It is also to be understood that the Vedic literature should not be just seen as religious texts but a 'way to life' and thus its knowledge and guidance extend beyond any geo-political-social-cultural structure.

And as it has been held in the well-known case of Indian Young Lawyers Association and others (Sabrimala Temple Re) V. State of Kerala & Others:

> *"….in the public law conversations between religion and morality, it is the overarching sense of constitutional morality which has to prevail- It*

[16] Available at: https://vasudaikakutumbam.wordpress.com/2015/03/05/vasudhaiva-kutumbakam-% (visited on 6/7/21).

is the duty of the courts to ensure that what is protected conforms with fundamental constitutional values and guarantees, and accords with constitutional morality….. While the Constitution recognizes religious belief and faiths, its purpose is to ensure a wider acceptance of human dignity and liberty as the ultimate founding faith of the fundamental text of our governance…..”

A consensus has to be brought with consideration to such precedents of our Apex Court which not only bind the public law but also the very ‘action’ and ‘thought’ of every individual of this nation. We as the largest democracy have always been the advocate of peace and being the country where the oldest religion of the world is seated have always propagated ‘acceptance’. Neglecting those whose identities, expressions or sexual desires stand beyond our notions of ‘right’ or ‘wrong’ and ‘black’ or ‘white’ is just contrary to our foundational values. For peace to prevail, we shall extend our hands to some ‘grey’ as well.

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Role of Hostile Witness in Criminal Justice and Administration: Issues and Challenges

Milind Rajratnam*

ABSTRACT

The Indian Judiciary follows an adversarial system which requires evidence supported by a witness to do justice. This implies that witnesses are important players in the judicial system that help the judges to arrive at a correct factual finding. In a search of truth, witnesses act as a shining sun that illuminates the face of justice. In the absence of any legislative protection and welfare measures, such instances of danger have encouraged them to turn hostile which has been the major reason for the downfall of conviction rate. Witness turning hostile leads to the failure of justice resulting into the wrong acquittal of the accused. This paper highlights the problems that arise in the criminal justice system due to hostile witnesses coupled with the ill-treatment faced by the witnesses during the trial that encourages them to turn hostile. The authors juxtapose the current laws in India dealing with witnesses and the measures adopted in other Nations along with the guidelines laid down by various international organizations. Further, a comprehensive analysis Witness Protection Scheme, 2018 has also been done. This paper concludes by stressing on the need for enacting a comprehensive legislation aimed at the welfare and protection of witnesses.

Key Words: Witness, Hostile, Criminal Justice, Jurisprudence

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1. INTRODUCTION

There are numerous stances where the courts have nullified the testimony of the witness on the basis of him turning hostile. Be it the criminal justice system of India or of any other country. Hostile witnesses create a major problem in achieving the ends of justice. Majorly, the Court faces difficulty in disposing of a case when an important witness turns out to be hostile as the Indian judiciary runs on an adversarial system, relying upon witnesses. Therefore, witnesses turning hostile results in the delaying of cases, making it impossible to reach a just and fair decision.

One such incident of witness turning hostile occurred in the year 2013, when Anil Ambani, the chairman of Reliance Communications, was brought as a witness in the 2G spectrum case and asked for the veracity of statement given by him under Section 161 of CrPC, he evaded his previous statement by stating that he doesn't remember what he has said two years ago. When the prosecution cross-examined him by asking questions relating to the Board meetings, etc., he relucted to answer any of them and took the plea of forgetfulness. Therefore, the Court has to declare him Hostile. Nevertheless, Anil Ambani didn't face any legal repercussions for his actions but the 2G spectrum case was affected as he was a prime witness in that case. This paper extensively deals with the circumstances which make a witness hostile, consequences on the cases involving hostile witnesses, provisions in Indian laws, suggestions for dealing with the problem of a hostile witness along with international stance on the problem.

2. HOSTILE WITNESS AND ITS IMPORTANCE IN A CRIMINAL CASE

A witness possesses paramount status in the criminal justice system of any country. According to the words of legal philosopher, Bentham, "witnesses are the eyes and ears of justice." A criminal case demands the availability of evidence whether direct or circumstantial which must be verified by witnesses who have solemnly affirmed to tell the truth. At the beginning of the trial, the prosecution gets a chance to begin his case by producing witnesses in support of available evidence produced by him to verify its veracity. The witness undergoes a series of questions prescribed by law which is further corroborated with the other shreds of evidence present to determine the facts. Hostile witness means a witness, who, on being called

by a party to testify the facts in his own favour, either acts against the party calling him or remains silent. This situation arises particularly when the witnesses refused to support their earlier stated version of facts which consequently leads to the weakening of a criminal case and interferes with the court's voyage to the shores of justice and fair trial.

This term has its origin in the Common law tradition and was intended to provide adequate safeguards to prevent the witnesses from ruining the cause of the party calling. This action is considered to be per se destructive not only because it ruins the painstakingly constructed cases by the prosecution but also wastes the time of the courts and makes a mockery of the investigation process. It should be duly noted here that a witness cannot be declared hostile merely because his statement is in favour of another party.[1] It must be properly established by putting forward such information that is sufficient enough to indicate that the witness is not desirous of telling the truth to the court or is trying to suppress the truth.[2] The Supreme Court of India in *State Tr. P.S. Lodhi Colony* v. *Sanjeev Nanda*[3]observed that there is growing trend of witness turning hostile, primarily in high profile cases, either due to monetary allurements or life threats thereby eroding people's faith to demand justice. There are two criteria for determining the degree of hostility of witness as per Section 154 of The Evidence Act which are as follows:

1. Whether there is any belief of statement to be false?
2. Whether the witness is legally bound to state the truth?

3. EVOLUTION OF THE CONCEPT OF HOSTILE WITNESS

3.1 Ancient Hindu Period-

Under the English Law, there are three categories of witnesses, *viz.*, and favourable, adverse and hostile witness. Justice Wilde differentiated between adverse and hostile witness and stated that an adverse witness is the one who gives evidence which is contrary to the

[1]*Satpaul v. Delhi Administration,* AIR 1976 SC 294.
[2]*Luchiram Motilal Boid v. Radha Charan Poddar,* AIR 1922 Cal 267.
[3]*State Tr. P.S. Lodhi Colony v. Sanjeev Nanda,* 2012 (7) SCALE 120 (SC).

expectations of the party calling him, while a hostile witness is the one whose manner of providing evidence shows that he is not desirous of telling the truth to the court[4].

Subsequently, Chief Justice Porter in *Wawanesa Mutual Insurance Co. v. Hanes* has also distinguished between an adverse witness and hostile witness.[5] According to him, the term 'adverse' is more comprehensive than 'hostile' and therefore an adverse witness is the one who is opposed to the interests of the party calling him. In the same case, the 'adverse testimony test' was laid according to which if a witness is giving evidence that is against the interest or is proved adverse to the party calling him, then the witness will be regarded as a hostile witness.

3.2 Evolution in Indian Law-

Under Indian Law, although the term "hostile witness" is not expressly defined anywhere, the *Indian Evidence Act* deals with it without defining the same by permitting the party calling the witness to cross-examine the witness if he is declared hostile by the court on the basis of his previous testimony.[6] The Supreme Court of India (hereinafter "SC") has defined 'hostile witness' as a witness who is not covetous of telling the truth at the instance of the party calling him.[7] There are several reasons responsible for a witness turning hostile and the primary ones are discussed in later parts of this paper. As of now, there is an absence of concrete codified law that could deal with the challenges faced by the witnesses so as to avert them from turning hostile. The hostility of witnesses has the tendency of not only weakening the foundation of the administration of justice but also obliterating it.

4. PROVISIONS IN INDIAN LAW FOR DEALING WITH A HOSTILE WITNESS

4.1 Indian Evidence Act, 1872

Under the Indian legal system, there are certain provisions dealing with hostile witnesses and those are discussed in this section. **Section 118** of the Indian Evidence Act, 1872 lays down

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[4]S.C. Sarkar, *Sarkar's Commentary on the Law of Evidence* (16th ed. 2007) 460.
[5]*Wawanesa Mutual Insurance Co v. Hanes* [1961] OR 495 P 499.
[6] The Indian Evidence Act, 1872, s. 154.
[7]*Gura Singh v. State of Rajasthan,* AIR 2001 SC 330.

the qualifications of the persons who are competent to testify. Moreover, **Section 154** of the Indian Evidence Act is regarded as the prime provision dealing with hostile witnesses. It empowers the court to permit a party to cross-examine his witness if the witness has given and unfavourable evidence against the party calling him. In the said provision, a hostile witness is nowhere defined, but the sole intent of the provision is to determine the truth when a witness retracts from his previous testimony.[8]

4.2 Code of Criminal Procedure (CrPC)

Section 160 of the CrPC empowers the police officer conducting an investigation to require the compulsory attendance of any person who seems to possess something related to the facts and circumstances of the case and if a notice is being served to such a person by the police officer, then he is bound to attend.[9] Section 160 is read with Section 161, and any statement recorded under Section 161 can be reduced to writing, provided that it is not an oath or affirmation.[10] There shouldn't be any unusual delay as it will lead to throwing doubt on the authenticity of prosecution,[11] but this delay can be justified if proper explanation is given.[12] However, the statement made to the police officer which is reduced to writing will not be admissible in a court of law.[13]By virtue of Section 145 of the Indian Evidence Act, 1872, such statement may be used to cross-examine the witness if he contradicts it.

With respect to **Section 162** of CrPC which talks of the inadmissibility of statement made before a police officer, the 4th Report of National Police Commission stated that this provision is operating at a great disadvantage to the police officers as the witnesses feel that they are in no way bound by the statement made before the police officer and they could easily deviate from it at any subsequent stage of proceeding without any penal actions against them.[14] The Law Commission in its 41st report has opined that a contradiction arises when the

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[8]S.C. Sarkar, Sarkar's Commentary on the Law of Evidence (16th edn,2007) 460.
[9]Code of Criminal Procedure, 1973, s. 160.
[10] Code of Criminal Procedure, 1973, s. 161(3).
[11]*Ram Singh v. State of MP,* 1989 Cr LJ NOC 206 (MP); *BrijNandanRai v. State of Bihar* 1922 Cr LJ 942 (Pat).
[12]*JodhaKhodaRabari v. State of Gujrat* 1992 Cr LJ 3298 (Guj).
[13] Code of Criminal Procedure 1973, s. 162.
[14]N. Krishnaswamy Reddy, Fourth Report of the National Police Commission, 1980.

statute prohibits the admissibility of a statement made before police officer in a court of law and allows the use of such statement for cross-examining the witness at the same time.[15]

Under **Section164** of CrPC, the police officer is required to produce the witness before a magistrate and the magistrate is required to record the statement of the witness. This statement is recorded under an oath and is regarded only as substantive evidence as a conviction of a person cannot be based upon this. This statement may also be used to contradict the further statements of the witness and if it is found at any later stage of the proceeding that the witness has made a false statement, then the witness can be booked under the offense of perjury under the IPC. As it creates a fine balance between the interests of both the accused and the investigating agency, the SC has observed that Section 164 of CrPC will be insignificant if the procedure prescribed therein is not held mandatory.[16]

Section 171 of CrPC protects the witness from any inconvenience that may be caused while he is on his way to the court by providing that, on his way to the court, the witness shall not be required to accompany any police officer and shall not be subjected to unnecessary restraint or inconvenience.

Section 273 of CrPC prompts that except in cases where it has been already provided, all the evidence has to be taken in the presence of the accused or his pleader in his absence, during the course of the proceedings. However, the SC has held that despite the necessity of the presence of accused under Section 273, it is dependent upon the discretion of the court to examine the witness using video conferencing[17] without the physical presence of accused, as video recorded evidence has been held to be admissible in *Maharashtra v. Dr.Prafful B. Desai.*[18]

For the purpose of reimbursement of necessary expenses of the witness, Section 312 of CrPC provides that a criminal court, may order for the payment of reasonable expenses on the part

[15]The Law Commission of India, *The code of criminal procedure ,1898 (Vol 1*, 1969).
[16]*State of UP v. Singhara Singh,* AIR 1964 SC 358.
[17]*Sakshi v. Union of India*, 2004 (6) SCALE 15.
[18]*State of Maharashtra v. Praful Desai*, 2003 4 SCC 601.

of the Government, that have been incurred for the purpose of any trial, inquiry or any other proceeding before such court.

4.3 Indian Penal Code

Under **Section 191** of the Indian Penal Code, giving false evidence is an offense. It provides that if a person who is legally bound by an oath or a provision of law to state the truth makes a false statement which is known or believed by him to be false, then the person is said to be liable for giving false evidence. **Section 193** of the IPC talks about intentionally giving false evidence at any stage of a judicial proceeding and it also prescribes imprisonment of up to 7 years and also fine for the offense of giving false evidence.[19]

Apart from the criminal consequences, there are certain other legislations that provide for the protection of the identity of the witness such as Terrorist and Disruptive Activities (Prevention) Act, Unlawful Activities Prevention Act, Juvenile Justice (Care and Protection of Children) Act, etc.

4.4 Terrorists and Disruptive Activities Act, 1987 (TADA)

Section 16 of TADA explicitly provided for the protection of the identity of witnesses by prescribing the mode of proceedings to be held in camera. It also stated that the designated Court shall take all such measures that it deems fit in order to protect the identity and address of the witness. In the subsequent years, TADA was repealed by Prevention of Terrorism Act, 2002 (POTA). Section 30 of POTA also talks about protecting the identity of witnesses and states that the proceedings under POTA should be held in camera, if the special court so desires. It also states that the special court should take all reasonable measures that it deems fit to protect the confidentiality of the identity provided that it is satisfied that the life of such witness is in danger. Section 44 of Unlawful Activities (Prevention) Amendment Act, 2004 talks about the protection of witnesses in the same way as POTA does.

4.5 Juvenile Justice (Care and Protection of Children) Act, 2000

[19]Indian Penal Code 1860, s. 191.

In this regard, **Section 21** of the Juvenile Justice (Care and Protection of Children) Act, 2000 also lays emphasis on the protection of the identity of the witnesses by prohibiting any detail that has the tendency of revealing the identity of the witness or the victim associated with any proceeding under the Act.[20]

4.6 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

Moreover, **Section 15A(6)** of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 empowers the Special Court or Exclusive Special Court which is trying a case under the Act, to provide complete protection to the victim, his dependent, informant or witnesses in order to secure the ends of justice. Further, **Section 15A(8)** of the Act also provides for the protection of the identity and addresses of the victim, his dependent, informant or witnesses, if an application is made by them in this regard.

There are other provisions which stress upon the protection of identity such as Section 372(2) CrPC which prompts that the trials involving offense of rape be held in camera and Section 228A of IPC which talks about the protection of identity of the victim.

5. JUDICIAL TREND TOWARDS ADDRESSING THE ISSUE OF HOSTILITY

According to the reports of the National Crime Record Bureau 2019, there has been a sharp decline in the conviction rates which was merely 50.4%. Notwithstanding this, Kerala emerged as the best performer with a conviction rate of 85.1% in the year 2019 whereas Bihar emerged as the worst performer with a small figure of just 6.1%.[21]Considering the old figure in this respect is that of 1953, which recorded decent rate of conviction of 60% although it received a tremendous decline after the 70s dropping to less than 40% in 2012.[22]On analyzing these figures, it was observed that witness turning hostile is one of the reasons behind low conviction rates resulting in acquittal of the accused. The following are some of the major reasons that encourage the key witnesses for turning hostile particularly in high profile cases and grave offenses.

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[20]Juvenile Justice (Care and Protection of Children) Act, 2000, s 21.
[21]*National Crime Record Bureau Report* (Ministry of Home Affairs, 2019).
[22]Divya Shukla, *An Analytical study of decreasing Rate of Conviction in India* (4thedn, 2018) 91-94.

- **Delay in Disposal of Cases:** Frequent Adjournments without examining the witnesses and delay in disposal of cases play a vital role in encouraging a witness to turn hostile and extend the witnesses' ordeal. The police investigation and trial often take a long period which also leads to the fading of memory. As a consequence, when a witness is summoned upon after years for verifying the facts, it becomes facile to find contradictions in contrary to the statement made to the police under section 161 of Code of Criminal Procedure at the time of filing the case. In light of this, section 309 of the Code of Criminal Procedure directs that there shall not be a delay in examining the witnesses and the same must be done in an expeditious manner.[23]Further, the court shall refrain from giving adjournment which, in turn, may trouble the witness to have psychological and financial stress, unless necessary, for the reasons to be recorded in writing.[24] However, there is no strict provision which might encourage courts to adhere with this provision strictly.[25]To deal with this, an amendment should be introduced to impose costs against the party who deliberately obtains frequent adjournments on flimsy grounds.[26]
- **Inadequacy of Allowances:** The Law Commission in its 154th report has concluded that the allowances paid to the witnesses are very meagre because the rates of allowances against the expenses incurred are quite inadequate.[27] Nevertheless, section 312 of the CrPC has been incorporated to provide allowances to the witness, but it is subjected to the discretion of the court.[28]The word 'reasonable' has not been defined anywhere in the Act which creates a sense of ambiguity as to what types of expenses shall be covered under the domain of reasonable expense incurred by the witness.[29] Even the Supreme Court has recognised the grief of witness and expressed that:[30]

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[23]Code of Criminal Procedure, 1973, s. 309.
[24]S.C. Sarkar and P.C. Sarkar, *Law of Criminal Procedure* (8th edn, 2004) 1013.
[25]*State of Uttar Pradesh v. Shambhu Nath Singh,* 2001 (4) SCC 667.
[26]MALLIMATH COMMITTEE, *Report of the Committee on Reforms of Criminal Justice System* (2003) 295.
[27]The Law Commission of India, 154th report on *The Code of Criminal Procedure (Act No 2 of 1974) (*Vol I, 1996).
[28] Code of Criminal Procedure,1973, s. 312.
[29] Purnima Khanna, Viney Kapoor, 'Importance of Witness Protection in the Criminal Justice System of India'(May 9 2020)Shodhganga<*http://hdl.handle.net/10603/103375*> (Last Modified 27 March 2021).
[30]*Swaran Singh v. State of Punjab,* AIR 2000 SC 2017.

“"...appropriate diet money for a witness is a far cry. Here again, the process of harassment starts and he decides not to get the diet money at all."

The discretion rests with the Magistrate to decide whether the expenses incurred by the witness for appearing before the Court appears to be plausible. However, it is mandated that such discretion shall be exercised on sound principles and not arbitrarily.[31] The Apex Court shall lay down appropriate guidelines to make the procedure less cumbersome and they shall be reimbursed proportionately according to the expenses incurred throughout the court proceedings.

- **Impolite treatment of Witnesses:** Despite being recognized as a backbone in the decision-making process, the facilities provided to witnesses are insufficient. It has been observed in the 154th Report of Law Commission that the witnesses are inhumanely treated in the court such as adjournment of a case after making the witness wait for the whole day, non-consideration of witness' convenience while fixing the next date and taking up harsh steps against the witness if he is unable to turn up on the said date. The veracity of these concerns has been properly identified by the Law Commission in its 154th Report wherein it is stated that:

  "In the present system a poor witness is caught between the devil and deep sea if he fails to attend the court, he shall be penally liable and if attends, he undergoes an agonizing experience resulting in great inconvenience and loss."[32]

  Further, it has been reiterated in the Mallimath Committee report that the witnesses are treated very shabbily by the system. There is no adequate facility for their seating and drinking water.[33]They have to wait outside the courts for long and end up finding their cases adjourned or are sometimes subjected to prolonged and unchecked cross-examination.[34]They are not treated with respect by the police and are subjected to hectic legal procedures. As a result, they get exhausted with this inhumane treatment

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[31]*KV Baby v. Food Inspector,* 1994 Cr LJ 3421.
[32]The Law Commission of India, 154th report on *The Code of Criminal Procedure (Act No 2 of 1974) (*Vol I, 1996).
[33]MALLIMATH COMMITTEE, *Report of the Committee on Reforms of Criminal Justice System* (2003) 295.
[34]Purnima Khanna, Viney Kapoor, 'Importance of Witness Protection in the Criminal Justice System of India'(May 9 2020)Shodhganga<*http://hdl.handle.net/10603/103375*> Last Modified 27 March 2021.

and turn hostile to avoid being called again and again thereby affecting the merits of the case.

- **Frequent threats to life and property:** Threat to the life of witnesses or their family members is the most prevalent factor responsible for discouraging the witnesses to give their testimony in most of the high profile cases like rape, gang rapes or murder, etc.[35] Nevertheless, punishment for criminal intimidation of witnesses has been incorporated under section 195-A of IPC. In the case of *Union of India v. V. Sriharan*[36], the Apex Court stated that:

  "*The witnesses turn hostile apparently because of the threat meted out to them by the hardened and professional criminals and gangsters. It is the inability of the State machinery to protect or guarantee the life and dignity of a common man who helps to achieve the justice."*

  These practices lead the witnesses to turn hostile thereby leading to the acquittal of the accused. To tackle these incidences, it was suggested by the Court that threatening of witnesses shall be considered as a ground for the cancellation of bail.[37]Enactment of witness protection scheme by the Legislature is the need of the hour for achieving criminal justice as recognized by the Apex Court in the case of *National Human Rights Commission v. State of Gujarat*.[38]However, some categorical Acts provide for the protection of witnesses like the Whistle Blower Act, 2011, Prevention of Child from Sexual Offences Act, 2012, the Scheduled Caste and Tribes (Prevention of Atrocities) Act 1989 but there has been no formal legislative structure laid down by Parliament yet.

- **Use of Money Power:** In most of the high-profile cases involving accused belonging to strong political or rich family backgrounds, money power is used to allure the witnesses for not co-operating with the investigation process or for turning hostile.[39]One such use of money power is observed where the police are unable to identify the witness, stock witnesses, though not a party to the case is being used by the police for giving false

[35]*Kartar Singh v. State of Punjab,* 1994 (3) SCC 569.
[36]*Union of India v. VSriharan,* 2016 7 SCC 1.
[37]*Ram Govind Upadhyay v. Sudharshan Singh,* 2002 3 SCC 598.
[38]*National Human Rights Commission v. State of Gujarat*, 2003 (9) SCALE 329.
[39]*Zahira Habibullah H Sheikh v. State of Gujarat,* 2004 (4)SCC 158.

testimony regarding the incident in reciprocation for a meagre amount of money. These types of witnesses are highly prone to favour the accused on being offered a more preponderant sum of money thereby making a mockery of the whole judicial process.

6. CONSEQUENCES OF WITNESS TURNING HOSTILE

- **Offense of Perjury:** Giving false testimony before the court which the witness believes to be false exposes him to the offense of perjury.[40]The practice of giving false evidence implies attempting fraud on the judicial process when the person is legally bound by the oath made by him to state the truth. Section 8 of the Indian Oath Act, 1873 states that the Court is empowered under law to penalize the witness for the offense of perjury.[41]Further, section 191 of the Indian Penal Code acts as a safeguard against those witnesses who deliberately deviate from their earlier version of statement recorded under the supervision of Magistrate under S. 164 of Code of Criminal Procedure.[42]

  When a witness wilfully tries to conceal the truth before the Court but accepts his false statement through cross-examination, still, his admission of false statement should not be allowed to dilute his offense of perjury.[43] The proper test to determine this is whether the witness himself corrected his error before getting exposed.
- **Low Conviction Rates:** The efficiency of the criminal justice system can be ascertained from the conviction rates by analyzing the numerical figure of cases undergoing a trial to that of conviction ordered in those reported cases. According to the National Crime Record Bureau Report, 2018, for the offense of murder under Indian Penal Code, the number of case trial was 16,867 and the total conviction ordered under this head was merely 391.[44]According to the recent survey by the Directorate of Civil Right

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[40]Dr. Shabnam Mahlawat, *Hostile Witnesses and Evidentiary Value of their Testimony under the Law of Evidence* (2nd edn, 2017).
[41] Indian Oath Act, 1873, s. 8.
[42] Aakash Chaturvedi, Shivangi Sharma, *Witness and Hostile Witness: Emerging Issues and Challenges* (6th edn, 2016).
[43]G.S. Bajpai, *Witness in the Criminal Justice Process: A study of Hostility and Problems associated with Witness*, Centre for Civil and Criminal Justice Administration National Law Institute University Bhopal (2009) 49.
[44] *National Crime Record Bureau Report* (Ministry of Home Affairs, 2018).

Enforcement, hostile witnesses contribute a major share of 26% as a reason for the low conviction rate.[45]

- **Testimony of Witness turning hostile not to be discarded:**. In some cases, even if the witness is declared hostile as per section 154 of the Evidence Act, their testimony is not discarded altogether.[46]On turning hostile, the witness is further subjected to cross-examination as per the procedure prescribed by law to negate the adverse testimony of the hostile witness by the party calling him.[47]Nevertheless, it is the discretion of the Court to look into the authenticity of testimony in light of the other corroborative evidences to verify whether it should be relied upon or not.[48]
- **Loss of faith in Judiciary:** Owing to the frequent incidences of harassment of witnesses resulting in the wrong acquittal of the accused in grave offenses leads to the loss of faith in judiciary imposed by public.[49]These incidences form the notion in the mind of common people that justice can be achieved only by the influential people through the use of money and power.

7. NEED FOR LEGISLATION ON WITNESS PROTECTION

The efficacy of the criminal justice system is indicated by the willingness of the victims and the witnesses to come forward to testify and report the crimes committed against them. The concern of the protection of witnesses was not recognized merely in this decade, but, way back in the year 1952 in the case of Gurbachan Singh v. State of Bombay where the Court ordered the shifting of accused for security reasons.[50]A Witness Protection Bill was introduced in the Lok Sabha in the year 2015 with the objective of providing a safer environment to the witnesses. However, the Bill was not passed further on account of non-consensus among the states. Now, the Apex Court has finally come with a resolution concerning witness protection.

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[45]G. S. Bajpai, *Witness in the Criminal Justice Process: A study of Hostility and Problems associated with Witness*Centre for Civil and Criminal Justice Administration National Law Institute University Bhopal (2009) 41.
[46]*Krishan Chander v. State of Delhi*, AIR 2016 SC 298.
[47]*Sakshi v. Union of India*, 2004 5 SCC 518; *Kushal Rao v. State of Bombay*, 1958 SCR 552.
[48]*Anil Rai v. State of Bihar*, 2001 SCC (Cr) 1009.
[49]Purnima Khanna, Viney Kapoor, 'Importance of Witness Protection in the Criminal Justice System of India'(May 9 2020)Shodhganga<*http://hdl.handle.net/10603/103375*> Last Modified 27 March 2021.
[50]*Gurbachan Singh v. State of Bombay,* 1952 SCR 737.

- **Witness Protection Scheme 2018:** In the recent cases like *Sakshi v. Union of India*[51] and *NHRC v. State of Gujarat*[52], the Court stressed that there is a dire need to come up with legislation for the protection of witnesses. The Apex Court while defining fair trial in the case of *Zahira Habibullah H. Sheikh v. State of Gujarat* said that, "if the witnesses get threatened or are coerced to give false evidence, that also would not result in a fair trial."No country can afford to expose its morally correct citizens to the peril of being harassed by the gangster, goons or rapists.[53]With this objective, the Court finally came up with a Witness Protection Scheme 2018 in the case of *Mahendar Chawla v. Union of India*[54]which was a first of its kind in the country as an effective measure for protecting the interest of witnesses.

  However, there is no specific legislation on this and has been told to be passed by the Parliament in due course.

  Nevertheless, the objective of the scheme is to safeguard the interest of witnesses but the scheme is presented in its nascent form. There is a requirement of further clarification and certain loopholes shall be addressed to make it an effective piece of the scheme.

  1. **Allocation of funds:** The scheme provides for the collection of funds through an annual budget of the State government, fines imposed in criminal trials and through charity from philanthropist.[55]However, it does not talk about the assistance from the funds of the Central Government in certain cases where the state is unable to meet the expenses for the smoother functioning of the programme.
  2. **Possibility of undue Influence:** The paramount feature of the Witness Protection Scheme is the analysis of the Threat Perception Report specifying the nature of the threat faced by the witness or his family to their life, reputation or property. However, it has been stated that the report shall be made by the head of police in a district. This leads to the possibility that the police officer

[51]*Sakshi v. Union of India*, 2004 5 SCC 518.
[52]*NHRC v. State of Gujarat*, 2008 16 SCC 497.
[53]*Zahira Habibullah H Sheikh v. State of Gujarat*, 2004 4 SCC 158.
[54]*Mahinder Chawla v. Union of India*, 2019 14 SCC 615.
[55]The Witness Protection Scheme, 2018 Rule 4.

may be subjected to dilute the threat level on account of political pressure in high profile cases which is quite obvious. Rather, it is suggested that the report shall be made by the officers who are specially trained for this purpose with clean service backgrounds in the Witness Protection cell under the direct supervision of concerned High Court to evade politicization.

3. **Absence of Deterrence:** The entire witness protection scheme lacks penal provision providing punishment in case of breach of witness's critical information and identity by the officials. There is a requirement of deterrence under Rule 13 of the scheme which shall encourage the officials to refrain from revealing witness identity against political and monetary benefits.[56]A clause shall be inserted, which will act as a deterrence under this rule which provides as follows: *Any other authority or unauthorized individual who access any record, document or information in relation to the proceedings under this scheme without an order from a concerned court shall be in the contempt of court and be liable to criminal proceedings.*[57]

   However, the provision under Rule 6(e) of the scheme that provides to meet the person under threat directly to ascertain the level of threat is a welcoming one.

   Additionally, Rule 6(b) provides for interim protection of the witness depending upon the urgency owing to the imminent threat. In this provision, there is a requirement of insertion of the time limit in these critical moments for the protection of witness through the amendment reading, "*within a reasonable time, the time not being extended to more than 24 hours"*.

4. **Inclusion of Associate People for Protection:** The Witness Protection Scheme provides for the protection of witnesses along with their family members. The definition of a family member under Rule 2(d) of the Scheme includes parent/guardian, spouse, live-in partner, siblings, children, grandchildren of the witness. However, the relevant section failed to include other people who has some bearing or connection with or has an association or connection with the

[56] NR Madhava Menon, *A Training Manual for Police on Human Rights*, NLSIU Human Rights Publication Centre, Bangalore (1997) 343.
[57] Witness Protection Bill, 2015, s. 6(3).

witness, threat to whom could affect the witness's action.[58]To deal with this, the marginal note shall be replaced with "Associated People". The objective of this scheme shall be achieved only when the witness feels a safer environment from all extent to state the truth.

8. NEED OF PSYCHOLOGICAL ASSISTANCE IN WITNESS PROTECTION PROGRAM

The most untouched aspect in dealing with the problem of hostility is the psychological impact and measures to rejuvenate the effect. Participation in criminal justice as a witness can be a great source of anxiety. Psychological counselling has been recommended for ages in all the criminal trials, concretely for victims and witnesses. The witness and the victim undergo a plethora of emotional and mental tortures from family, society and accused even consequently leading them to depression and anxiety. Ignoring the fact as to how much they are paramount in criminal justice, these tortures encourage them to get away from revealing their grievances and truth in front of the court. According to a survey conducted by the Centre for Criminology and Victimology in 2015, out of 16 cases of sexual assault, only 2 cases were reported where the victim received psychological assistance.[59] The 198th Law Commission report on witness protection recommended that it must be ensured that the witnesses and victim receive psychological assistance along with other benefits.[60]

The UN Guide of Good Practices for the protection of witness provides: "*Psychological assistance must be provided to witness to instil confidence before and during the trial to cope with the psychological and practical implications of testifying in a court of law".*[61]In a number of countries, police, prosecutors and the judicial system have institutionalized psychological assistance such as the United Kingdom, Portugal etc. In Australia, under the National Witness

[58] Witness Protection Bill, 2015, s. 4.
[59]Centre for Criminology and Victimology, *Towards Victim Friendly Responses and Procedures for Prosecuting Rape: AStudy of Pre-trial and trial stages of Rape Prosecutions in Delhi* (2015).
[60]The Law Commission of India, 198th Report on *Witness Identity Protection and Witness Protection Programmes*, (2006).
[61]United Nations Office on Drugs and Crime, *Good practices for the protection of witnesses in criminal proceedings involving organized crime* (2008).

Protection Program, a psychologist has been appointed who can be called upon in case a witness required assistance to testify before a court of law.

Drawing inspiration from these countries, there must be a provision for psychological assistance under the Witness Protection Scheme, 2018 which would enable the witnesses to gain confidence and the competency to cope with the trauma of all categories faced during the trial. Nevertheless, the cost incurred in providing these services has been a major concern in implementing these services for most of the countries. Irrespective of these reasons, the Indian judicial system is required to adopt these mental assistance services to witnesses to ascertain fair justice. Particularly, when the country is facing such a low conviction rate on account of witnesses turning hostile due to mental tortures, an effective psychological mechanism is the need of the hour.

9. LEGAL POSITION IN OTHER NATIONS

9.1 United States of America

The law on witness protection in the United States of America can be traced back to the *Organised Crime Control Act* which was passed in the year 1970. It empowered the Attorney General to grant security to the witnesses who have appeared or are appearing in cases involving organized crimes.[62] Security was to be granted under the supervision of the Attorney General and the Act also provided relocation along with a new identity to the threatened witness.

Subsequently in the year 1984, the *Organised Crime Control Act*was repealed by the*Witness Security Reform Act.* Under the new Act, the Attorney General is empowered to necessary actions in order to protect the witness from bodily injury as well as any social or psychological harm.[63] He is also empowered to enable the witness in establishing a new identity by providing suitable documents. The witness may also be provided housing and other necessary

[62] United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organised Crimes* 8(2008).
[63] Yvon Dandurand, Kristin Farr, *A Review of Selected Witness Protection Programmes* (2010) 33.

things that are required to meet basic living expenses. However, the protection is liable to be impeached by the Attorney General, if the witness breached any terms of the MoU.

9.2 Australia

The Parliament in Australia has enacted the Victorian Witness Protection Act, 1991 in order to facilitate the security of persons who have become part of a criminal proceeding as witnesses.[64] Under Section 3A of the Act, the Chief Commissioner of Police is empowered to take necessary actions that he deems fit for the protection of the witness and his family members. Under Section 3B of the Act, the Chief Commissioner is required to enter into an MoU with the witness that contains the terms and conditions of the witness protection. The protection can be terminated under Section 16 of the Act if the witness fails to abide by the terms of the MoU or he himself asks for such termination.

In the National Capital Territory of Australia, there is a separate legislation, the Witness Protection Act, 1996, which is quite similar to the Victorian Witness Protection Act, 1991. The only difference is that in the Victorian Witness Protection Act, 1991, the Chief Commissioner of Police is empowered to take necessary actions in the interest of protection of the witness, while in the Witness Protection Act, 1996, this power is vested with the Chief Police Officer. Apart from this, all the provisions are almost similar in both the legislations.

9.3 Netherlands

The Supreme Court of Netherlands has held in a number of cases that the testimony of anonymous witnesses can be used in criminal cases due to which the Parliament came up with a succinct solution by enacting the Witness Protection Act, 1994.[65] Through this Act, the Legislature laid down two categories of anonymous witnesses. The first comprised of those who have probabilities of incurring problems in connection with their testimony or interference in the exercise of their daily profession. These witnesses are to be granted limited anonymity and are heard by the Trial Court or the examining magistrate.

[64]The Victorian Witness Protection Act (Act 15 of 1991).
[65]The Witness Protection Act (Act No 1 of 1994).

The second category comprised of those who have a fear of life, health or socio-economic existence. They are to be granted full anonymity, based on the discretion of the examining magistrate. For the grant of full anonymity, the primary conditions that are to be fulfilled are, the witness must be recognized as a threatened witness by the examining magistrate and there must be a serious criminal case in question for which remand or detention is permitted.

9.4 Philippines

Philippines has the *Witness Protection, Security and Benefit Act* which provides witness protection, security and benefit through a program that is implemented by the Department of Justice.[66] A person who has testified; is testifying or will testify regarding the commission of a serious crime, before any judicial, quasi-judicial or investigatory body is entitled to be admitted in the program.

By virtue of **Section 5** of the Act, the witness is required to execute a Memorandum of Agreement containing the terms and conditions of the protection, breach of which could lead to punishments. **Section 8** of the Act contains a provision for the security of the family members of the witness and also a burial benefit of not less than 10,000 pesos to the heirs of the witness, in case of death of the witness.

Under **Section 17** of the Act, any person who interferes with the rights and benefits of the witness guaranteed under the Act or causes any hindrance in the testimony of the witness by delaying or preventing the witness from attending or testifying before a judicial, quasi-judicial or investigatory authority, shall be punished.

9.5 United Kingdom

In the United Kingdom, the witnesses are provided protection by the police and law enforcement agencies under the Serious Organized Crime and Police Act, 2005. **Section 82** of the Act specifically talks about the protection arrangements for the persons at risk. By virtue of **Section 82(5)** of the Act, the arrangement for the protection of witness is made by the

[66]The Witness Protection, Security and Benefit Act (Republic no. 6981).

police and while providing the protection, the nature and extent of the risk of the person's safety, cost of the arrangement, etc. are also taken into consideration.[67]

9.6 Queensland

In Queensland, there is the Witness Protection Act, 2000 and Witness Protection Program is administered by the Crime and Misconduct Commission (CMC). Sections 6 of the Witness Protection Act, 2000 provides for persons who are entitled to be given protection by the CMC and according to it, if the Chairman of CMC considers that if a person is in need of protection from danger arising because of his involvement or help in a criminal proceeding, then that person and his family members may be included in the Witness Protection Programme.

The Parliament of Queensland has also enacted the Evidence (Witness Anonymity) Amendment Act, 2000, which has brought an amendment in **Division 5** of the Evidence Act, 1977 by inserting the term "witness anonymity". After this amendment, the witnesses are issued Witness Anonymity Certificate which ensures their safety and protection.

9.7 Japan

After the amendment in the Code of Criminal Procedure of Japan (CCP) in the year 1999, a comprehensive Witness Protection Programme has been evolved in Japan.[68] Under Article 96(1)(iv), in relation the Article 89(v) of the CCP, if there is reasonable ground or suspicion that the accused may threaten or cause harm or bodily injury to the witness or his relatives, then the bail application of the accused may be denied on such ground.

10. GLOBAL INITIATIVES FOR WITNESS PROTECTION

At the global level, there have been a number of initiatives taken in order to protect the witnesses as it is essential in securing reliable testimonies, especially in cases that involve serious crimes. This section will be analysing various initiatives that have been taken at the international level to protect the witnesses form any harm.

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[67] The Serious Organized Crime and Police, 2005 Acts 82(4).
[68] Code of Criminal Procedure, Part I and Part II (Act No. 131 of 1948).

10.1 International Criminal Tribunal

The International Criminal Tribunal for Former Yugoslavia (ICTY) was established in the year 1993 under the 7th chapter of the UN Charter. It was the first international tribunal that was established for the purpose of prosecuting war criminals who are accused of violating international humanitarian law.

The **ICTY** has a special unit constituted as per Rule 34 of Rules of Procedure and Evidence (RPE), namely, the Victims and Witness Section (VWS), dedicated to providing protection to the witnesses regardless of whether they have been called by the defense, prosecution or the chambers.[69]

VWS has trained professional staff which is available 24-hours to help the witnesses in facing their problems relating to social, psychological and practical needs before and after their testimony. VWS has created its own policies and measures in order to ensure that there is no further harm or trauma caused to the witness after testifying.

Rule 69of the RPE provides that in exceptional circumstances, the Judge or the Trial Chamber may order for non-disclosure of the identity of the witness until he is brought within the protection of the tribunal if an application regarding the danger that is associated with the witness is made by the prosecutor.[70]

Rule 75of the RPE provides a range of measures for the protection of the identity of the witnesses.[71]It states that upon a request being made by either party or the concerned witness, the Judge or the Chamber may order for taking up of appropriate measures to protect the privacy of the witness, provided that such a measure is not in contravention with the rights of the accused. Usually, the witness is required to give his testimony in an open court but by virtue of **Rule 75(B)**. In order to prevent the disclosure of the identity of the victim, witness or any person associated thereto, the chamber may hold *in-camera* proceedings. **Rule**

[69]ICTY Rules of Procedure and Evidence (as amended on 13 December 2001) Rule 34.
[70]ICTY Rules of Procedure and Evidence (as amended on 13 December 2001) Rule 69.
[71] International Criminal Tribunal for Yugoslavia Rules of Procedure and Evidence, Rule 75 (Adopted on 11 Feb 1994).

75(D) states that wherever necessary, the chamber should control the manner of questioning in order to avoid any harassment or intimidation of the witnesses.[72]

10.2 International Criminal Tribunal for Rwanda (ICTR)

ICTR was established in the year 1944 by the United Nations Security Council Resolution No. 955.[73] It was established to adjudge the people who were responsible for genocide and other serious violations of International Law in Rwanda. Articles 14, 16, 19 and 21 of the ICTR Statute deals with witness protection.[74]

Article 19 reflects that the notion of a fair trial is not restricted to the accused but extends to the victim and witness as well.[75] Article 19 prompts that the trial chamber shall ensure that full respect is being given to the rights of the accused as well as of the victims and witnesses during the proceeding.

By virtue of Article 16, a four-division Registry is created for the ICTR,[76]one of the divisions being the Witness and Victims Support Section which is implemented through the Rules of Procedure and Evidence enshrined in Article 14.[77] However, Article 14 provides that for the purpose of proceeding before the ICTR, the Judges shall adopt the rules of procedure and evidence of the ICTY with appropriate changes as they deem necessary.[78]

Article 21 for the purpose of creating a fair public trial, limits the rights of the accused and balances with that of the witnesses.[79] It prompts that ICTR in its RPE shall provide for measures, not be limited to the conduction of in-camera proceedings, for the protection of victims and witnesses.[80]

10.3 International Criminal Court (ICC)

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[72] Measures for the Protection of Victims and Witnesses Rule 75(D) (Adopted on 11 Feb 1994).
[73] Resolution 955 adopted by the Security Council at its 3453rd meeting (8 November 1994).
[74] Resolution 955, Statute of the International Criminal Tribunal for Rwanda, M SCOR (1994).
[75] Bachrach, Michael, *The Protection and Rights of Victims Under International Criminal Law*, 34 Int'l Law 7 (2000).
[76] Resolution 955, Statute of the International Criminal Tribunal for Rwanda, M SCOR (1994).
[77] Directive for the Registry for the International Criminal Tribunal for Rwanda.
[78] Statute of the International Criminal Tribunal for Rwanda, 1994 art. 14.
[79]Momeni Mercedeh, *Balancing the Procedural Rights of the Accused against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia* (1997) 41.
[80] Statute of the International Criminal Tribunal for Rwanda,1994, art. 21

Under the Rome Statute of the International Criminal Court, the rights of victims and witnesses are elaborated in a more comprehensive form than any other ad hoc tribunal.

Article 68 of the Rome Statuteprovides for a more complete protection to the victim and witnesses than any other tribunal.[81] Article 68 prompts that it is the duty of the prosecutor to protect the witness by keeping all the information relating to him confidential and anonymous.

In order to protect the witness' identity from being disclosed, **Article 69** of the Statute prompts that the testimony of a witness can be taken outside the courtroom through audio/video recordings and that will be admissible too.

10.4 United Nations Convention against Transnational Organized Crime (UNCTOC)

Article 24 of UNCTOC invites the member nations to build co-operation for taking appropriate measures that are required for protecting the witnesses from threats, corruption, intimidation or bodily injury.[82]

Although the term "witness" is not expressly defined in the Convention, Article 24 operates by limiting its scope to the persons who give actual testimony in a Court regarding the offenses that have been covered under the Convention.

11. CONCLUSION AND WAY FORWARD

Since ancient times, hostile witnesses are being disregarded and in the present time too, the Courts should not take lenient measures against those who easily retract from their earlier testimony. In almost all the major offenses like rape, murder etc, the witnesses turn hostile on account of life threats, the financial crisis, thereby leading to the collapse of the justice system. The Indian Legislature needs to curb down this menace by effectively addressing the issues and ensuring the dignity of the witnesses. To deal with this, the author has proposed the

[81]The Rome Statute, art. 68.
[82]United Nations Convention against Transnational Organized Crime, 2003, art. 24.

following recommendations which would be helpful in curbing out the menace of hostility in criminal justice.

- A comprehensive law is required to be laid down before the Parliament to give a solid effect to the Witness Protection Scheme, 2018 approved by the Apex Court. The Apex Court has authoritatively mandated to make it operational as a law under Article 141 of the Constitution until efficacious legislation is presented before the Parliament. Unfortunately, no legislation has been presented so far by the Central Government to give effect to a Witness Scheme.
- The Witness Protection Cell under the Witness Protection Scheme 2018 shall be entrusted under the direct supervision of retired Judges of the concerned High Courts or the Supreme Court as per the parameters set up in the Witness Protection Bill 2015. It must be done to avoid politicization and pressure in high profile cases so that the protection of witnesses is not compromised at any stage. Regular monitoring of the program shall be conducted to prevent the misuse of programs and measures to ascertain transparency at all stages shall be adopted.
- The current scheme provides for the protection of witnesses initially for a period of 3 months, provided that the level of the threat must be updated by the monthly report. According to the 198th Law Commission report, it was suggested that the protection shall be provided at four stages namely: investigation, inquiry, trial, and post-trial. Further, section 161 of the CrPC provides that a male under fifteen years of age shall not be required at any place other than the place of his/her residence for the purpose of investigation. This provision shall be amended to include threatened witness also who has been subjected to threats or where his security is at stake. Additionally, psychological assistance must be provided under the scheme to help them cope with mental trauma faced during the trial.
- The witnesses under the Witness Protection Scheme 2018 shall be provided interim protection within 24 hours of receiving the application, in case of an imminent threat to his life or property or to any of his family members. Additionally, the definition of a family member shall be broadened to include all those people, a threat to whom could affect the witness's action. Nevertheless, due to practical limitations, it is not possible

to give protection to every witness. Therefore, security must be provided by properly analysing the situation according to the level of threat.

- Implementing the recommendations made by the 154th Law Commission, the witnesses shall be paid reasonable allowances for the expenses incurred by them on being summoned to appear before the Court. Additionally, the Court shall examine the witness only on the day of being summoned and frequent adjournments/delays in disposal of cases should be avoided meticulously. Besides, general guidelines by the Apex Court shall be laid down especially for the police and prosecutors to treat the witnesses with utmost respect. Proper seating arrangements and availability of drinking water shall be provided for their stay in the court premises in order to avoid any inconvenience.
- Cost shall be imposed upon the defence counsel or accused for seeking frequent adjournments. Further, threatening of witnesses in any form shall be considered as a ground for cancellation of bail as laid down in the case of Ram Govind.[83]

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[83] Supra 44

Analysing the Concept of Court – Ordered Consolidation in Multi – Party / Multi – Contract Arbitrations

Paras Sharma*

Abstract

At present, arbitration is one of the popular and trusted methods of dispute resolution in the commercial realm. The level of party-autonomy and the comparative simplicity of the proceedings make the parties fond of this mode of dispute settlement. However, even arbitration is not free from issues and problems. One such issue pertains to the multi-party/multi-contract arbitrations. Arbitrations are simpler only where it involves two or three parties. But when the numbers increase, the level of complexity also escalates. Likewise, in a situation where multiple contracts are involved between multiple parties in a single business transaction (say construction) a single dispute can lead to a whole maze of disputes. In such cases, separate arbitrations in each dispute can lead to some serious issues like conflicting awards, enforcement of such awards, loss of time and money etc. Different arbitral institutions have come up with their own rules governing the problem. However, in ad-hoc arbitration, parties confronting such situations are left in utmost chaos. Thus, to resolve this situation, various methods have been adopted. One such method is court-ordered consolidation. Though the concept is gradually losing its girth on the issue, it is still significant concept in the arbitration jurisprudence. Multi-party/Multi-contract arbitration is an issue addressed by many but hardly a few have analysed the concept of court-ordered consolidation as a prospective solution to this issue. Moreover, the level of complexity of such analyses makes it difficult for a beginner to understand the issue. This manuscript aims at analysing the concept of court-ordered consolidation in multi-party/multi-contract arbitrations and the issues attached to it in a fairly lucid manner.

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Keywords: *Court-ordered Consolidation, International Commercial Arbitration, Multi-party Arbitrations, Multi-Contract Arbitration, Party Autonomy.*

1. INTRODUCTION

Globally, the Alternative Dispute resolution (ADR) jurisprudence has recognised the principle that an agreement (or the consent of the parties) is a prerequisite to an arbitration proceeding. The contractual nature of arbitration affords the parties greater control over the choice of the arbitrator(s) and the procedural adjustments depending upon the nature and pith of the dispute.[1] This flexibility is one of the major reasons why parties often resort their disputes to arbitration. Generally stating, arriving at an agreement to refer the dispute to arbitration is quite straightforward, when there are only two parties involved in a dispute. Both the claimant and respondent can forthrightly arrive at a mutual settlement to resort the matter to arbitration in case of an existing or a future dispute. However, this fascinating 'simplified angle' of arbitration, while it may hold to be true in many disputes, is not always the case.[2]

Things change a little in the disputes involving more than two parties and/or more than one contract. The actual international business setups today, involve a complex maze ofcontracts, be it only between two parties or more than two parties. The premise lies in the fact that today, the majority of business entities perform multiple operations. These multiple operations, in turn, are backed by a proper legal setup in the form of contracts. Thus, there can also be no denial of the fact that a business setupcan involve multiple contracts with multiple parties for one task. For a simple instance, take a hypothetical example of a simple construction contract, where a cliententers into a contract with a builder for constructing a multiplex in the heart of a city. The builder, in turn, makes several contracts with the sub-contractors, who in turn can have even more contracts with (say) the suppliers of the concrete, labourers, and so on.Even this small hypothetical example involves numerous contracts between numerous parties for a single subject matteri.e. construction of a multiplex. In the actual sense, as we shall see in the upcoming sections, there can be even more complex

[1]Gary Born, *International Commercial Arbitration: Commentary And Materials*1 (Transnational Publishers, 2nd ed.,2001).

[2]Julian David, Mathew Lew,*et. al.*, *Comparative International Commercial Arbitration*3 (Kluwer Law International, 2003).

contractual arrangements in a business. These different contracts may each have a specified clause for dispute resolution mechanism (either an ADR mechanism or traditional litigation), which could obviously be different from that contained in other contracts.

Such a situation can lead to a complex situation involving a lot of concurrent arbitrations and litigations all relating to the same subject matter or the similar issues arising out of a dispute. The consequences of such a farrago involve high costs in terms of both money and times, loss of business, and most importantly the complexities involving the enforcement of 'conflicting decisions' coming out of these concurrent arbitrations and court actions.

The civil litigationmechanism in almost all countries provide for ample provisions to deal with multi-party/multi-contract situations. These include joinder of parties, consolidation, joinder of claims, intervention, interpleader, impleader, class action etc. These devices are, generally, not as easily available in case of arbitration. It is for this reason why it is generally said that multi-party/multi-contract disputes are best resolved in traditional courts.[3]

Focusing solely on arbitration, many arbitral institutions have developed certain mechanisms to deal with the above situation.[4] However, the parties are left at a difficult and a complex juncture in case of ad-hoc arbitration. In such cases the best solution can be arrived at, if all the matter arising out of a single subject matter can be resolved together in a single arbitration rather than being subjected to numerous dispute resolution boards. A number of methods have been adopted worldwide to accommodate these multi-party/multi-contract arbitrations. These methods include:[5]

1. String Arbitration;
2. Court-ordered Consolidation;
3. Concurrent hearings (with the same arbitrator for all the separate arbitrations);&
4. Consolidation by Consent

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[3]Richard Garnett,*A Practical Guide To International Commercial Arbitration* 15 (Oceania Publication Inc., 2nd ed.,2000).

[4]*Id*. at 19.

[5]Alan Redfern, *Law and Practice of International Commercial Arbitration* 315 (Sweet & Maxwell, London, 4th ed., 2004).

However, despite all this, there are a series of problems associated with the ad-hoc arbitration in multi-party/multi-contract situation. This paper aims at analysing some of these problems and the adequacy of 'court-ordered consolidation' as a method for resolving these problems.

Section two of the paper deals with the research approach (methodology) adopted by the author. This section also discusses the scope to which this article extents. Section three provides an understanding of the concept of Multi-Party and Multi-contract disputes. This section also provides for some diagrammatic illustrations of the respective concepts. Section four of the paper deals with the concept of court-ordered consolidation to provide a glace of the concept to the reader. Some major issues and problems that arise in the case of court-ordered consolidation are discussed in section five. Then, section six provides for the Indian stand on the issue of court-ordered consolidation. The paper finally concludes in section seven that the concept of court-ordered consolidation is a good solution to the problems that usually arise in multi-party/multi-contract disputes though the issues that arise with it must be paid attention to while consolidating the arbitrations.

2. RESEARCH APPROACH& SCOPE

In the instant article, the author has analysed the concept of court-ordered consolidation as a solution to multi-party/multi-contract arbitrations. Multiple arbitrations pertaining to same or similar issues in one subject-matter can have serious repercussions. To avoid these repercussions, court-ordered consolidation is one of the modes adopted worldwide. This article is a theoretical study based on literature and internet study. Multi-party/multi-contract dispute are the matters of utmost complexity and are equally intriguing. Thus, to avoid such complexity, this article does not include all the issues pertaining to the concept. The author has only touched the major issues that arise in the court ordered consolidation. Various arbitral institutions worldwide have come up with their own rules to tackle the problems in multi-party/multi-contract disputes. However, ad-hoc arbitration still faces a lot of problem when it comes to disputes involving a maze of parties and contracts in a single business transaction. Except for where it is otherwise mentioned, the article does not deal with the approach of different institutions towards multi-party/multi-contract dispute. The article only focuses on ad-hoc arbitration.

3. MULTI-PARTYAND MULTI-CONTRACT DISPUTES

Multi-party arbitration can arise in a situation involving more than two parties to a dispute. The International Chamber of Commerce, in 2012, reported that more than one-third of arbitrations, worldwide, involve more than two parties.Such disputes, generally stating, can arise in two circumstances, *viz.*, first, involving more than two parties to a single contract, and second, involving several parties to several contracts,all relating to the same subject matter of the dispute.[6]Here it becomes imperative to analyse each of these circumstances in some detail.

3.1 More than two parties to a single contract

In our day to day commercial environment, we come across many such instances where more than two parties are involved in a single agreement. Joint-venture agreements are a common example, where two and mostly more than two parties come together in a business relationship dealing with the same subject matter. Partnerships can be another prominent example of this kind. Fig. 1 is a diagrammatic illustration of the abovementioned arrangement.

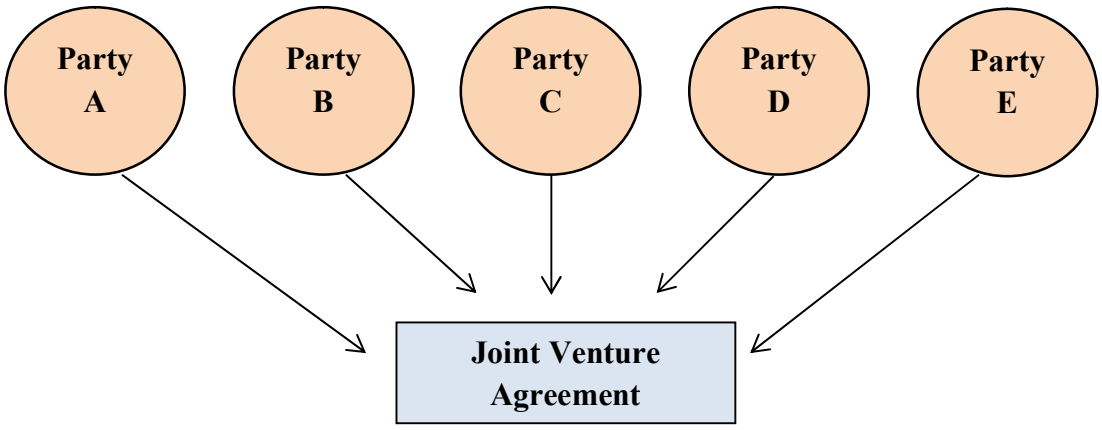

Figure 1:<u>Diagrammatic illustration of several parties to one contract arrangement</u>

In the illustration provided above, there would be a single arbitration clause in the joint venture agreement itself governing a dispute amongst all the five parties to the agreement. Normally, such agreements are comparatively easily dealt with in case of arbitration. Since

[6]*Id.* at 16.

there is only one clause governing all the parties to the dispute, the situation does not turn out to that complex as it happens in the other case, as we shall see next.

However, even such an arrangement faces some problems in the practical sense. A widely known problem is the one of appointment of the arbitrators. Such a problem does not arise in case of litigation where there is, usually, no party autonomy and parties have no say in the appointment of a judge to hear the matter.

Each party would want to nominate/appoint its own arbitrator in a panel comprising of three arbitrators, leaving the choice of the third arbitrator either on the two chosen arbitrators or on some arbitral institution. No party would be generally willing to 'let go' the opportunity of choosing an arbitrator for the panel, since it gives the party a sort of confidence that the working of the panel would be neutral. However in the situations, as diagrammatically illustrated above, it would be outrageously complex to allow all the parties to choose its own preferred arbitrator. It would be highly impractical in the situation involving even more parties, say ten or fifteen. Even where the arbitration is one to be presided over by a sole arbitrator, it would be practically very difficult to get all the parties to agree to one party's choice of arbitrator, as would generate a sense of partiality in the minds of other parties.[7] The absence of any express provision in this regard in the agreement itself can cost the parties a lot.

The gravity of the matter can be identified from the fact that such situation can lead to the challenge and incidental annulment of the arbitration award coming out of such arrangement on the ground of inequality in the appointment of the tribunal.[8]

3.2 Several Parties to Several Contracts

Such type of arrangement is majorly encountered in big business endeavours. Parties rarely take into consideration, while negotiating an agreement, the impact that the dispute resolution mechanism can have because of subsequent agreements with new parties.[9] This results in the

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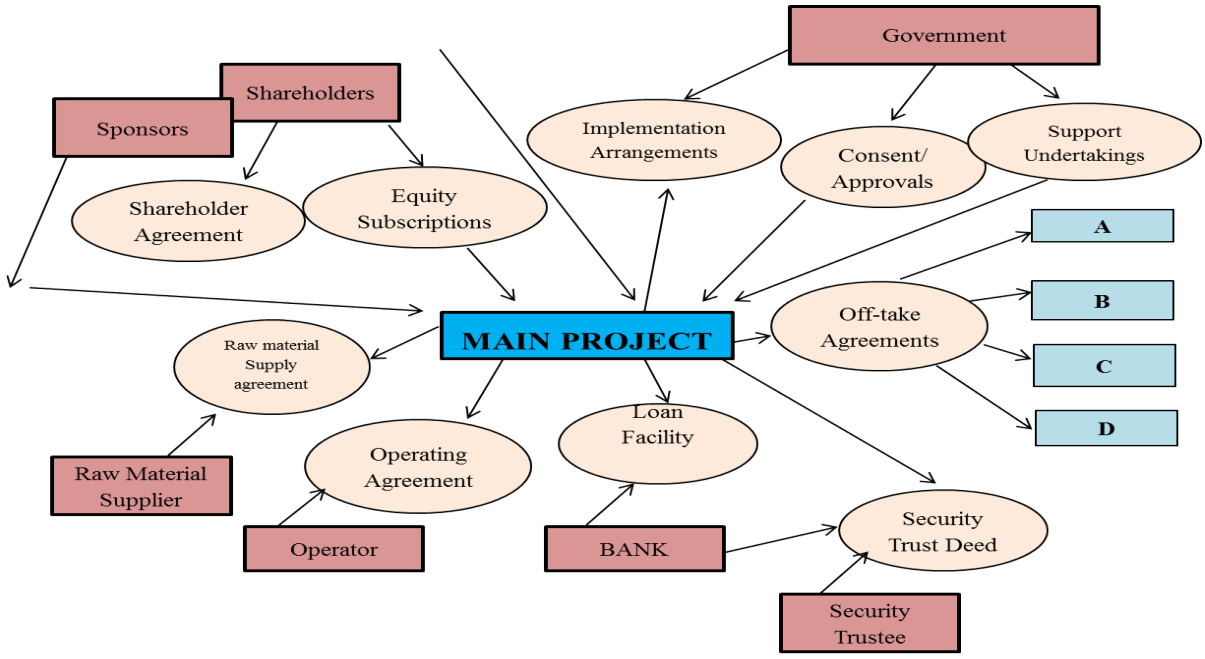
[7]Volodymyr Rog, "Joinder of Multiple Disputes between same parties: Issue of single arbitration",*available at:* http://www.etd.ceu.hu/2014/rog_volodymyr.pdf (last visitedon July 06, 2021).

[8]*Siemens AG/BKMI v.Ducto Construction Company*, XVII YBCA 140 (Cour 'd appel France 1993).

[9]AnchitOswal, "Consolidation of Arbitration-Where is India Headed?",*Kluwer Arbitration Blog*, December 1, 2017,*available at:* https://rb.gy/hkwzr2 (last visited on July 06, 2021).

complex problem of multiple dispute resolution clauses between different parties. Construction projects can be the best example. In large construction projects, a number of parties come together and enter into a number of different contracts with each other. These numbers increase even further in the international business setups. Being linked to one subject-matter, these contracts often tend to have a back-to-back effect on each other in terms of liability.[10] The problems would turn out to be even more complex if each of these contracts has a separate dispute resolution clause. That is to say, if there are, say, fifteen contracts between thirty parties relating to a small construction project, each of these fifteen contracts may have fifteen different dispute resolution clauses, which can obviously be different from the others. Some contracts may have an arbitration clause, others may, at the same time, have resorted to traditional litigation. In the event of a dispute, all the fifteen contractual relationships will resort to their individual dispute resolution clauses. Such arrangement results into what we call—Conflicting decisions of different dispute resolution forums. Even if we imagine that all the parties would have included an arbitration clause in their respective contracts, it may, as aforesaid, result in conflicting awards coming out of different arbitrations over same the subject matter.



[10] *Supra* note 5, at 321.

Figure 2: Diagrammatic illustration of Several Parties to Several Contracts arrangement

Fig. 2 illustrates such a maze of several-parties to several contracts arrangement. The above illustration is a hypothetical arrangement involving multiple parties and multiple contracts between them relating to one 'Main Project'.

In such circumstances, there is a high probability that each of these several contracts could contain separate arbitration clauses resulting in multiple arbitrations on same or similar issues and eventually resulting in conflicting awards. These awards could be inconsistent to each other, which ultimately gives rise to another problem of enforceability of inconsistent awards. Such problems can be avoided at the best where all the matters arising out of one subject can be addressed and resolved together, and not separately, in one arbitration proceeding.

Such a situation was once confronted by the English Court of Appeal in ***Abu Dhabi Gas Liquefaction case***.[11] In this case, the gas plant owner (plaintiff) started arbitration proceedings against the plant constructor (main contractor) under an international construction contract for defective construction of a gas tank. The main contractor alleged that it was the fault of the sub-contractor, which in the case was a Japanese firm. Thus, he, in turn, initiated arbitration proceedings against the sub-contractor. The matter subsequently came before the English Court of Appeal regarding the appointment of an arbitrator. There, Lord Denning observed that in order to save time and money, it would be appropriate if the two arbitrations could be consolidated and heard together. This would even avoid the problem of conflicting awards. However, it must be noted here, that Lord Denning also indicated in this very case that court has no power to consolidate two separate arbitrations without the consent of the parties involved in the dispute.[12]

4. COURT-ORDER CONSOLIDATION

As discussed earlier, there are four possible measures adopted popularly to tackle the multi-party/multi-contract arbitrations. One of these measures is 'Court-Ordered Consolidation'. By

[11] *Abu Dhabi Gas Liquefaction Co Ltd v. Eastern Bechtel Corp*,(1982) 2 Lloyd's Rep. 425.
[12] *Ibid*.

consolidation is meant the act or process of uniting several pending arbitrations into one hearing before the same panel of arbitrators. Although the parties may not necessarily be the same, we do find the same or similar subject matter, common questions of law and fact, and substantially similar issues and defences.[13]Court-ordered consolidation, as the name suggests, refers to a scenario where national courts order consolidation of two or more separate arbitrations revolving around the same or similar issues of law and fact.[14] In a multi-party/multi-contract dispute parties often seek to resolve all the matters together, in a single arbitration only. Thus, in the absence of any contractual arrangement, parties often resort to tribunals or courts to decipher the intentions of the parties and allow consolidating multiple arbitration proceedings.[15] Consolidated arbitration is without a doubt a prominent way in resolving associated disputes in no more than one arbitral proceeding. This arguably saves time, money, and relationships of course.[16]

The sort of power of courts to consolidate arbitral proceedings is a jurisdictional issue. Some jurisdictions have express legislative provisions allowing such consolidation while others have no such express provision.[17] There are several countries where express provisions have been enacted in this regard.

In Hong Kong, the Hong Kong Arbitration Ordinance expressly permits the compulsory court-ordered consolidation in arbitrations, where there exist common issues of fact and law and the relief claimed is in respect of the same transaction.[18] In the Netherlands, the power of the courts to consolidate arbitral proceeding is implied in a contract which does not expressly excludes it.[19] In the United States of America, the Federal Arbitration Act is silent on the issue of compulsory consolidation.[20] Under English Law, the compulsory consolidation of

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[13]Matthew D. Schwartz ,"Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma"22 *Case Western Reserve Journal of International Law* 342(1990).
[14]*Supra* note 5, at 325.
[15]*Supra* note 9.
[16]Niyati Ahuja, "Research guide on International Arbitration", *available at:* DOI: 10.13140/RG.2.2.16221.67047 (2019).
[17]W. Michael Reisman, *International Commercial Arbitration. Cases, Materials and Notes on the Resolution of International Business Disputes* (University Casebook Series, Foundation Press, 1997).
[18] Hong Kong Arbitration Ordinance, 2011, schedule 2, s. 2.
[19] Netherlands Arbitration Act, 2015,art. 1046.
[20]*Supra* note 17.

arbitration by courts is not allowed.[21] The English Statute clearly respects the party autonomy and the parties have been given the exclusive right to decide whether to resort to tribunals or courts to consolidate the proceeding or not. Similarly, French law does not seem to have recognized the court-ordered consolidation.[22]

Court-ordered consolidation may seem to be a prominent solution in multi-party/multi-contract arbitrations but there are a series of issues that arise with this seemingly fascinating concept.

5. PROBLEMSWITH COURT-ORDERED CONSOLIDATION

Where different parties to different contracts relating to the same subject-matter are struggling for resolving their dispute before multiple arbitrations, in the absence of an express clause in the respective contracts to consolidate such arbitration, resorting to the national-courts is one of the solutions to the complex problem. However, court-ordered consolidation may seem to be a convenient way of dealing with a maze of multi-party/multi-contract disputes, it does come with some serious issues. These issues are dealt with hereunder:

5.1 Consensual Nature of Arbitration in Conflict with Court-Order Consolidation

Arbitration is typically characterised as a creature of a contract.[23] The nature of arbitration as a dispute resolution mechanism is such that its validity derives its essence from the consent of the parties.[24] A fundamental objection to court-ordered consolidation of multi-party/multi-contract arbitrations is that it strikes the very basic element of arbitration, which is, party autonomy over the contract. Some authors even go to the extent of saying that where a statutory provision empowers a court to order consolidation of arbitrations, it contravenes the

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[21] English Arbitration Act, 1996,s.35.

[22]George M Vlavianos, Consolidation of International Commercial Arbitral Proceedings in the Energy Sector, *Lexology,* January 31, 2019,*available at:*https://www.lexology.com/library/detail.aspx?g=425d0485-ad65-44be-b679-916347209fad (last visited on July 06, 2021).

[23]Gary Born, *International Commercial Arbitration: Commentary And Materials*1 (Transnational Publishers, 2nd ed., 2001).

[24]Angela Carazo Gormley ,Institutional Approaches To Multi-Party And Multi-Contract Disputes In Arbitration, *Mondaq*, May 9, 2016,*available at:* https://www.mondaq.com/arbitration-dispute-resolution/489396/institutional-approaches-to-multi-party-and-multi-contract-disputes-in-arbitration (last visited on July 06, 2021).

contractual nature of the arbitration. Craig observes the above-mentioned issue in the following words:

> "…In view of the nature of arbitration as a contractual institution, the issue is whether the effect of the law at the place of arbitration, when it permits such consolidation, overcomes the lack of contractual intent on the grounds that the contractors must be deemed to have contracted in the knowledge of, and subject to, provisions of such law."[25]

It has also been argued that ordering consolidation by a court is, in a way, rewriting the governing agreement between the parties.[26] Many authors also argued that where the parties to a dispute agree to submit for arbitration in a country which has a statutory enactment allowing court-ordered consolidation (like the Netherlands), it should be deemed that the parties have tacitly submitted to the prospective court-ordered consolidation as well.[27] However, such international setups also come up with some significant difficulties, the foremost being the enforcement of the award under the New York Convention, and the inconsistency in the law applicable to the contracts where the contract was made and the law of the place of such consolidated arbitration.[28] Thus, in a way, court-order consolidations can work best only in the domestic atmosphere and not in the international setting.[29]

5.2 The Selection of Arbitral Tribunal

In a multi-part/multi-contract arrangement, there is generally seen that different agreements have different clauses for the appointment of the arbitral tribunals. Some agreement may provide 'x' number of arbitrators; some for 'y'; some of 'n'. Also, different agreements could have different modes of appointment of the arbitrator(s). When a court orders consolidation, it obviously would alter and interfere with the agreement between the parties, thereby, refining the argument that court-ordered consolidation contravenes the party autonomy over the

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[25]Manjirao Chi, "The Fading of Compulsory Consolidation of Arbitration: A Fight between the Principles of Efficiency and Party Autonomy in International Commercial Arbitration", *Research Gate*, September 2008,*available at:* https://rb.gy/uaeeh7 (last visited on July 06, 2021).
[26]*Ibid.*
[27]Fraser Davidson, *Arbitration* (Scottish Universities Law Institute, 2000).
[28]*Supra* note 5, at 327.
[29]Second report of the Departmental Advisory Committee on Arbitration Law (DAC),May 1990.

agreement. Such consolidation leads to impediments in ascertaining the number and method of appointment of the arbitrators.[30]

However, there are certain statues which have dealt with the problem. Article 1046 (4) of the Netherland Arbitration Act, 2015[31] *inter alia* provides that where the parties could not reach on an agreement over the appointment of the arbitrator(s), the president of the District Court ordering consolidation (the concept of *third party* not touched for being beyond the scope of this article) would make an appointment for them. He can also fix procedural rules which shall apply to the consolidated proceedings. Section 11 of the Arbitration and Conciliation Act, 1996 (as amended in 2015) also contain similar provisions.[32]

5.3 Procedural Inconsistencies

The above two issues only relate to the pre-arbitration stage. Once the proceeding commences, some procedural irregularities and issues come to surface. Procedural aspects are, as such, relaxed in arbitral proceedings in comparison to traditional civil courts. However, the procedural leash starts to tighten when multiple parties are involved.

One such problem is one of ensuring confidentiality. International commercial disputes often engage such situations, where the parties have to disclose some of the confidential information before the arbitrators. However, where multiple parties are involved, it would be highly likely that some of the parties may not be comfortable in sharing their confidential information in relation to only, say, one party in front of all the parties. For instance, where some crucial data is involved in the matter between 'A' and 'B', disclosure of such data in front of 'C', 'D', 'K', 'X', etc. who, no doubt, are parties to the consolidated proceeding, can also take undue advantage of that disclosed data against 'A'. Thus, 'A' would not be comfortable in disclosing this information. But consolidated proceedings can turn out to be negative in this situation.

Another fundamental principle in international arbitration (even in domestic arbitrations for the matter being) that all the parties must be treated equally. Both the UNCITRAL Model

[30] *Supra* note 5, at 328.
[31] Netherlands Arbitration Act, 2015, art. 1046.
[32] Arbitration and Conciliation Act, 1996, s. 11.

Law and the New York Convention recognises the cardinal requirement of equal treatment in arbitrations. Enforcement of an award can be refused where such equality is not granted in a proceeding.[33] Thus, for instance, the question of how much time is to be granted to each party can lead to serious problems if inequality comes to picture.[34]

Along with this, another issue that can come to the surface is the 'opposite' of what is generally believed to be an advantage of consolidated proceedings. The supporters of court-ordered consolidation believe that such consolidation saves time and cost of the parties. However, the opposite can also be true. There are high chances where such proceedings can take even more time and cost due to high complexities involved. The benefits of the court-order consolidated arbitrations are often enjoyed by the big sharks over the expense of small fishes which just are involved in a minor issue. For these parties, the consolidated proceedings are even costlier than separate arbitration.[35]

Thus, it can be observed that court-ordered consolidation comes with a series of issues and problems which are more likely to affect the usefulness, as believed by the supporters, of the concept as a whole.

6. INDIANPOSITIONON COURT-ORDERED CONSOLIDATION- A BRIEF

The Arbitration and Conciliation Act, 1996 under the ambit of Section 11 provides for the provisions of court-ordered consolidation in India. Section 11, in general, deals with the 'Appointment of Arbitrators'. Sub-section (4) of the said section provides for a mechanism where the Supreme Court or, as the case may be, the High Court or any person or institution designated by such court, can make the appointment, on the request of a party, in two condition*viz.,* if the party fails to appoint an arbitrator within thirty days of receiving the request to do so from the other party; or where the two appointed arbitrators fail to agree on the third arbitrator within thirty days of their appointment. Likewise, sub-section (5) of the said section also provides that where the parties fail to appoint a sole arbitrator, the Supreme

[33] UNCITRAL Model Law on International Commercial Arbitration, 1985(adopted on 21 June 1985) and New York Convention, art. V 1(b).
[34] *Supra* note 5, at 325.
[35] B Ted Howes and Allison M Stowell,"The Consolidation Dilemma: Is There Finally a Pragmatic Solution?" 10 *Dispute Resolution International* 3 (2016).

Court or, as the case may be, the High Court or any person or institution designated by such court, can make the appointment. Further, sub-section (6), (6A), (6B), (7), (8), (9), (10), (11), (12), and (13) deal with the court's power to appoint arbitrator(s) on the request of a party to dispute. However, the Act does not expressly provide for the provisions concerning multi-party/multi-contract disputes.

However, time and again various High Courts and the Hon'ble Supreme Court have played predominant roles in consolidating multi-party/multi-contract disputes. One such case was the infamous ***'Sukanya Holdings'*** case in 2003.[36] Though the case was involving multiple domestic parties to the dispute, the Supreme Court built a strong observation in the consolidation jurisprudence in India. It was observed by the Apex Court that where the subject matter of the dispute can be covered both under arbitration and a traditional suit, which also involves non-signatory parties, the court is not empowered to bifurcate the cause of action and thus, cannot make only a 'partial reference' to arbitration. It was the view of the top court, before the amendments of 2015 in the Arbitration and conciliation Act, that the court cannot refer a suit to arbitration, without the consent of all the parties to such reference.[37]

Another case of reference can be the ***Chloro Controls***case of 2013.[38] In this case, the Indian counterpart to the dispute filed a suit seeking an injunction order against two non-signatory parties. Relying upon the observation of the Supreme Court in ***Sukanaya Holdings***[39]the plaintiff contended that the parties must not be referred to arbitration since they are non-signatories. Interestingly, the Supreme Court observed that all the multiple agreements involved in the case where parts of a single composite transaction. The court further said that all the agreements involved in the dispute, by and large, were supplementing the shareholders' agreement which was a 'parent agreement'. Thus, the court held that even a non-signatory can be referred to arbitration, provided, if it is proven that such party is claiming through a signatory party.

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[36]*Sukanya Holdings (P) Ltd v. Jayesh H. Pandya*, (2003) 5 SCC 531.
[37]*Afcons Infrastructure Ltd v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24.
[38]*Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641.
[39]*Sukanya Holdings (P) Ltd v. Jayesh H. Pandya*, (2003) 5 SCC 531.

The judicial barricade constructed in the ***Sukanya Holdings***[40]in referring non-signatories to arbitration was done away with the Arbitration and Conciliation (Amendment) Act, 2015. Post this amendment, even non-signatories, claiming through or under a signatory party, can seek reference of a dispute to the arbitration from the court in domestic arbitration. This is widely recognised as the 'through or under test'.

Recently, in ***DuroFelguera, 2017***[41] a tricky situation was involved. The dispute involved multiple contracts and multiple parties having some contracts between an international (foreign) party and a domestic party and some more contracts between two domestic parties. This maze-like situation brought the dispute under the ambit of both domestic and international arbitration. DuroFelguera contended before the Supreme Court of India that all the agreements between the parties were separate agreements and each of these agreements contained a standalone arbitration clause and that the parties do not have any intention to consolidate arbitrations.[42]The resistance to the consolidation was based on the argument that such consolidation would amount to the consolidation of domestic and international arbitration and if that would be the case, the Indian Subsidiary of *Duro (DFSA)* i.e.*Felguera (FGI)* would lose the opportunity of challenging the award under Section 34 (2A) of the Arbitration and Conciliation Act, 1996. Section 34(2) states that:

> *"(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:*
>
> *Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."*

This is a wide power provided by the Act, available only in domestic arbitration. The Supreme Court observed that being a combination of both domestic and international

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[40]*Ibid.*
[41]*M/s DuroFelguera S.A. v M/s Gangavaram Port Ltd.*,2017 SCC OnLine SC 1233.
[42]*Supra* note 9.

arbitrations, 'a composite reference' of the dispute will not be proper.[43] The Supreme Court, thus, constituted six separate arbitration tribunal with common arbitrators out of which two were international arbitral tribunals and four were domestic arbitration tribunals.[44]

Recently in ***Global Infonet, 2019,*** [45] the Delhi High Court gave a significant judgement in context of consolidation of arbitration proceedings. The court observed that all the three arbitration agreements were the parts of three principal distribution agreements which altogether constituted a single transaction between multiple parties. The court, following the now settled law that a reference in case of non-signatories to all the arbitration agreements can be made, as discussed above, rejected all the objections. Further, the court consolidated the three potential arbitration proceedings into one single arbitration proceeding.[46]

7. CONCLUSION

After analysing the concept of multi-party/multi-contract arbitrations, it can be concluded that though the concept is a fascinating solution in tackling the multi-party/multi-contract disputes, it also has some issue connected with it. Deciding which dispute is suitable for consolidation and which is not is absolutely dependent on the facts and circumstances of each case. Merely consolidating the proceedings that have a same subject matter can cost the parties in long term. The court consolidating the proceeding must analyse certain questions, pertaining to the party-autonomy, need and necessity of such consolidation etc., before consolidating the arbitrations.

The approach of the world towards court-ordered consolidation has changed today. Where initially various countries had the provisions for'compulsory court-ordered consolidation', now such consolidation respect party autonomy and such consolidation initiates at the request of a party to dispute only. There is a significant need for a critical revaluation of the concept worldwide. The arbitral institutions are coming up with specific rules dealing with multi-party/multi-contract disputes. However, the parties resorting to ad-hoc arbitration have to face

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[43] *Ibid.*
[44] *Ibid.*
[45] *Global Infonet v Lenovo*, CS(COMM) 658/2017.
[46] Vijayendra Pratap Singh *et. al.*, Consolidation of Arbitration Proceedings- Global Infonet v. Lenovo and Ors, *AZB & Partners*, October 21, 2019,*available at:*https://rb.gy/smynaw (last visited on July 06, 2021).

a lot of trouble in dealing with the situation. Uniform rules must be formulated, internationally, that can govern such matters even in ad-hoc arbitrations for facilitate the smooth and efficacious functioning of arbitrations.

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Adultery: A Top- Down Approach Which Made Law Unconstitutional

Prakhar Dubey*

Abstract

Laws are driving forces for protection of rights and are working on the basis to regulate rules and regulation. The substantive law deals with area of crime, which were draft by Lord Macaulay in form of Indian Penal Code 1860. In this research analysis on have talked about crime against women with respect to Adultery have been discussed in detail manner. The study has been conducted from judicial perspective on grounds of constitutionality finding place under Article 14, 15 and 21 and humanity. The Supreme Court judgment which later change the stance to make adultery unconstitutional by Joseph Shine v. Union of India case. These laws create around160 years -ago a drafted, but with time change in society has led Indian judiciary have taken some positive aspect in dealing issue related to crime against women.

Key Words: Substantive Laws, Constitutionality, Indian Judiciary

1. INTRODUCTION

India saw a welcoming judgement coming on 27th September 2018 regarding a struggle for removing Section 497 of Indian Penal Code. The Honourable Supreme Court abolish Section 497 of IPC thus ending the war against adultery. After hearing both the parties in matter of Joseph Shine v. Union of India[1], the five- judge bench of Supreme Court unanimously agreed to scrap that had been prevalent from 158 years.

The 5- judge bench was headed by Chief Justice Dipak Misra, and include four other Hon'ble judges: Justice A Khanwilkar, Justice RF Nariman, Justice DY Chandrachud and Justice Indu- Malhotra. In ruling in favour from petitioner name Joseph Shine and thereby resulting in repeal the Section 497, the apex Court overturned famous judgement where legal authority was challenged with respect to Constitution, patriarchy and outdated laws.

1.1 ANALYSIS OF ADULTERY

Adultery has derived its meaning from Latin verb adulterum which comes out to be corrupt. It explains us that a person male has sexual intercourse with wife of another without having the permission or consent from the women husband is knows as adultery[2].

In India adultery was constitutional before 2018 and was enshrined under IPC Section 497-"Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to believe to the wife of another man, without the consent or connivance of that man such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall [not] be punishable as an abettor".[3]

Section 198[2] "For the purposes of sub-section [1], no person other than the husband of the woman shall be deemed to aggrieved by any offence punishable under Section 497 or Section- 498 of the said Code: Provided that in husband and some person who had care of

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[1] 2018 SC 1676.
[2]K.L Vibhuti, Adultery in IPC: Need for gender equality perspective [2001] SCC[CJ] 16
[3] Indian Penal Code 1860.

the woman on his behalf at time when such offence was committed may, with the leave of the Court, make a complaint on his behalf."[4]

1.2 HISTORY

It is pre-constitutional law of 1860 where males were in dominant position and women had no right and they were considered a property of husband thus adultery as an act was considered theft over the property by the offender. During the time when Code was prepared Lord Macaulay was not in the opinion to include the act of adultery being a criminal act prepared as per report of Law Commission of India in 1837[5]. Then when code drafted in 1860 it defined adultery as offence under Section 497 of IPC 1860.

1.3 ELEMENTS OF ADULTERY: SECTION 497 IPC 1860

1. There should be sexual intercourse between a man or third party [male] and married female who is not her husband as per marital status.
2. The other men had intercourse with should be knowing or have any reason for believing that the person with whom he had intercourse is wife of another mam:
3. The consent should be attached with the nature of intercourse otherwise it will fulfil the criteria of Rape under Section 375 of IPC.
4. The course of intercourse is without the consent of husband.

2. PREVIOUS RULING OF THE COURT

1. **Yusuf Abdul Aziz v. State**[6]

The first instance when the controversial law had been challenged was as early as in the year 1951, in the case of Yusuf Aziz vs State of Bombay.[7] The petitioner had contended that Section 497 of IPC violated the rules of equality guaranteed in articles 14 right to equality and 15[3] discrimination of women on special grounds the Indian Constitution and hence should be scrapped. The main contention in this case was that the governing adultery law, discriminated against men by not making women equally

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[4] Supra
[5] 1st Law Commission Report 1837 recommendation
[6] [1954] SCR 930

culpable in an adulterous relationship. It was also argued that adultery law gave a license to women to commit the crime. 3 years later however, i.e. in the year 1954, the Apex Court held that section 497 did not give women the right to commit adultery. Special provision for women is permissible under article 15(3) of the constitution. Furthermore, the judgment held that man is presumed to be the common seducer. A woman can only be the victim of adultery, not the perpetrator of the crime.

2. The second instance when the section was challenged happened in the year 1985 in the case of Sowmithri Vishnu versus Union of India[8]. In this case the prime contention of the prosecution was that the law was partial towards women and that women should also be brought under the purview of section 497. Even the classification between men and women is violative of equality given in Constitution under Article 14.

    a. Here men are allowed to prosecute person who committed adultery but not women

    b. Section 497 does not the wife power to get her husband prosecuted if husband has committed adultery

The Apex Court however held that bringing such an unmarried woman in the ambit of adultery law under Section 497 would mean a crusade by a woman against another woman. Hence the law should remain as it is and time has changed so law will be amended appropriately.

3. The third case challenging the adultery law was in the year 1988 during the case held in **V Revathy versus Union of India**. [9] The was challenged by the wife whose husband committed adultery under Section 198[2] of Cr. P.C upholding its view on the matter in the previous two occasions, the court held that not including women in prosecution of adultery cases promoted "social good". It offered the couple a chance to "make up" and keep the sanctity of marriage intact. The court also cited that the law was a shield and not a sword. Even Justice Thakkar said 1. Women cannot be prosecuted for adultery 2. Bar on wife is because it develops unfaithful relationship.

4. The fourth occasion of challenge was in **W. Kalyani v State through Inspector**[10]. Here going through the judicial opinion Justice Lodha and Justice Aftab pointed out

[8] [1985] Supp SCC 137
[9] [1988] 2 SCC 72
[10] [2012] 1 SC 358

that that what ever court is doing is under the precedence that have been held by the apex court and in case Parliament is there to bring new law into demonstration.

2.1 Analysis of Joseph Shine Vs Union Of India[11]

The case was filed under PIL, Supreme Court to hear the validity of Section 497 of IPC read with Section 198 of Cr. P.C. where the petitioner argued that these sections are violative and breaching the constitutional protection guaranteed under Article 14, 15 and 21. It is carrying social stigma which discriminate women on the grounds of gender, consent for women is equal as that of married husband, women right to her own body and to make decision on her own.

The apex court discussed over 18 question such as-

1. Who may file complaint?

It was seen only husband of women can file complaint but in case some person may file complaint on behalf of husband under Section 198[1] of Cr. P.C then also whom court deems fit. Women cannot take her stand to file complaint for herself.

2. Women right to file Complaint?

Women has no right to file complaint if his husband commits adultery.

3. Who may be prosecuted?

Here also why only adulterous man is alone guilty and why not adulterous women.

4. Women treated as property of Husband?

If the act is committed it is considered trespass over the property of female and her husband has full right over it. In simple manner to suffice no consent= no offence it was because when IPC was drafted condition of women in society was stereotyped.

5. Does Section 497 violative of Article 14?

Men and women are treated equally as far constitution says equality before law but not here in the case as adultery is projected.

6. Section 198[1] violative of Article 14?

[11] ibib

Neglecting the women to aggrieved person for filing complaint is act towards injustice. The rationale behind equality seems subjugated.

7. Violation of Article 15[1]?

The adultery as grounds sees which sex you belong then grant right here women being at loggerhead due to gender which they are born.

8. Violative of Dignity under Article 21?

The society has created stereotype on basis of consent. As everyone is same in eyes of

9. Everyone has his /her own choice Right to Privacy?

The constitution has regarded sexual privacy as natural right, sharing intimacy is private right of personal so thus female must have sexual freedom.

10. Married women agency and depend upon husband?

Here we see adultery committed by person is liable and women has protection under the act but with social stigma is attached which works detrimental to her. To maintain the fidelity of husband the man has power to attach criminal sanction.

11. Women of her sexual autonomy Section 497 denudes?

Women consent is what taken by male husband the women dignity is not above her husband wish.

12. Adultery is opposed to Constitutional Morality?

Equality for all and non-discrimination of all member of the society

13. Premised on Sexual Stereotype?

Feminist scholar has criticized the condition of women

14. Breakdown of marriage?

Adultery has led breakdown of marriage due to reason

15. Case of Pending divorce proceeding?

Marriage breakdown will result women cannot go back to her husband if process of divorce is going on then she cohabits without another it will led to separation

16. International Treaty

Very few nations consider adultery unconstitutional.

17. Whether to treat Adultery ground of divorce?

Can the married couple plead as ground to take divorce and break their bond in some cases taking advantage of other spouse?

18. Why Supreme Court is waiting for legislation to take call on Adultery?

Cessante rational legiscessatipsa lex = where reason of law ceases the law also ceases so Supreme Court should struck this foul play.

2.1.2 Analysing the judgement with respect to Constitutionality

The apex court observed that while the threat of criminal prosecution does indeed have deterrent effect on any action which has such implications, it is not supposed to be prejudicial to any gender. While article 15(3) does grant the state the right to make special laws for women, such rights shouldn't grant exemption for what would be a criminal offence for her counterpart.[12]

Furthermore, the court observed that the law treats women as a commodity of her husband. The husband can prosecute the man she had intercourse with, and she is helpless to defend her though the intercourse was voluntary. Also, while a husband can extract vengeance on the man who had sexual intercourse with his wife, the wife can do nothing to a husband who has intercourse with another woman. This gives the men literally the right to have intercourse with unmarried women, but the woman enjoys no such benefit, despite being personally exempted from the scope of the section. Thus, the law, while on face is prejudicial towards men, it is in the depth prejudicial towards women. The law treats the women as a commodity or product of her husband. This is at the same time disgraceful and insulting for the women.

To quote the words of Justice D.Y. Chandrachud, "a law which fails to uphold the dignity of an individual, is a law that should cease to be".

CJI Dipak Misra commented that upon perusal of the documents and upon hearing the contentions of both the parties, it seems a wise decision to scrap the prevailing adultery

[12] The Constitution Of India, 1950

law. However, while writing the order, he had commented that it shouldn't be misinterpreted that this was entertaining adultery or that this made committing adultery any less of a crime than it had been before. Adultery shall remain to be a valid ground for divorce and all courts should view it with the same rigor in case of matrimonial issues.

However, the 5-judge bench unanimously agreed that for all the reasons mentioned above, with due regard to the previous cases and with regard to many other cases cited in the order, the existing law incriminating adultery was discriminating, prejudicial, derogatory and vexatious in nature and should thus be repealed.

3. SHORTCOMINGS OF SECTION 497 OF INDIA PENAL CODE

Apparently, the section sounds unfair, since a man having consensual intercourse with the wife of another person can be penalized under this section, but the woman he had intercourse with is spared of any consequences. The purpose of this section is to keep the sanctity of marriage intact. However, this section does nothing to penalize a man for having intercourse with an unmarried woman, though that disturbs the sanctity of marriage equally. Also, the section does nothing to prevent the wife from having intercourse with another man (married or unmarried). The man having such intercourse may have to face consequences, but the woman is exempted.

While this is apparently prejudicial to the man having such intercourse, it is also prejudicial to the woman having intercourse with such man, since the husband of the woman can prosecute the man she had intercourse with, and the woman was helpless to save the man though she had voluntarily had sexual intercourse with that man.

Citing this point, Justice Indu Malhotra quoted:

" Thus, the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her. Thus, both the husband and the wife are disabled from striking each other with the weapon of criminal law. The petitioner wife contends that whether or not the law permits a husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her disloyal husband"

4. CONCLUSION

Section 497 is violative of Article 15 of Indian constitution as a married man who has an affair with an unmarried woman is not prosecutable under the existing adultery law while the same man if indulges in such activity with a married woman would be at the risk of facing a prosecution. There exists an inequality in the treatment depending upon the marital status of the woman.

Further, it also indirectly discriminates against women by holding them to be the "property" of their husbands, for it does not consider adultery an offence if done "with the consent of the husband of the woman".

Now situation is changing society is matured and we talk of women should be promoted they are not less than boys every aspect there is neck to neck competition either it is education, sports, profession at office working day and night to serve family; so, why such difference? The decision of doing adultery unconstitutional is steeping stone in direction to promote justice and fair treatment of all. This can be step to move away from patriarchal steps developed during colonial time with the passage of time.

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C. Kishan Chand V City Bank N.A (2016) – Case Analysis

Pratik Maitra*

1. INTRODUCTION

Our study is on the case, C. Kishan Chand v City Bank N.A (2016) which deals with malicious prosecution, we shall analyze the case while taking into consideration the dynamic concept of malicious prosecution in detail.

In our nation everyone has the right to file a civil action in order to obtain justice. The justice system that we follow is established or builds on the idea that a hundred offenders should be acquitted but one innocent person should not be prosecuted. Malicious prosecution will be taken into account in order to justify the status of the wrongly accused person and also to avoid wasting the precious court time. Cases that lack adequate proof are seldom tried in criminal or civil court. Criminal charges or civil litigation are occasionally brought maliciously to threaten, annoy, defame, or otherwise harm the other party. If it's an unscrupulous lawyer filing false charges against a political opponent or a company suing a small business to drive the competitor out of business, those acts are referred to as malicious prosecution. This tort serves as an important check on alleged abuses because prosecutors have tremendous control over which prosecutions are prosecuted

Malicious prosecution is a deliberate "dignitary" tort that may be brought against anyone against whom a criminal or civil suit has been brought without probable cause and with malicious intent. A dignitary tort is one in which the plaintiff argues that his or her human dignity has been violated, a term that often encompasses emotional distress and process violation, which is well illustrated and described in Khagendra Nath v. Jacob Chandra[1].

The case dealt with malicious prosecution in particular. *"In Black's Law dictionary 'punitive/ exemplary damages' is defined as 'Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specific damages assessed by way of penalizing the wrongdoer or making an example to others.*"[2] Real damages resulting directly from the malicious prosecution which includes non-monetary

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[1]Khagendra Nath v. Jacob Chandra ,A.I.R 1977 N.O.C 207
[2]Blacks Law dictionary, 9th ed. (2009)

injuries, as well as monetary expenses) are included in compensatory damages. Be it unfounded criminal charges or a baseless civil suit, being the target of a malicious investigation can result in a broad variety of injuries. The plaintiff can seek compensatory and, in some cases, punitive damages. The plaintiff's damages are the focus of a malicious prosecution lawsuit, Justice Bhagwati reiterated the view in the case of Dhananjishaw Rattanji Karnani,[3] but there are cases were such damages are not compensated, for instance Justice Sen of the Bombay High Court (Nagpur Bench) declined to pay punitive damages in the case of Mehtab v. Balaji Krishna[4] Rao.

Summing up this slanderous litigation aims to safeguard the public from false accusations. Malicious prosecution is a civil action brought without fair or probable cause. It can also be characterized as criminal prosecution or civil suit brought with malice.

We will discuss the nature and definition of malicious prosecution in this project.In this research paper, we will look at what elements are required for malicious prosecution to be legitimate. We'll also talk about the different forms of damages that malicious prosecution can cause. The paper will also describe what types of wrongdoings will result in malicious prosecution. "The Supreme Court has taken into consideration, various definitions of malicious prosecution and defined malicious prosecution as A judicial proceeding instituted by one person against another, from wrongful or improper motive and without probable cause to sustain it, is a malicious prosecution.[5]"

2. LITERATURE REVIEW

According to the researcher's preliminary investigation, at the time of research, there are no extant literary works examining the case of *C. Kishin chand V City Bank*. Starting from the facts, the researcher moves on to the lower court procedures, the High court, and finally the Supreme court. The tort of malicious prosecution is the subject of the current case. To have a thorough understanding of the situation, the researcher consults Ratanlal & Dhirajlal's ***The Law of Torts*[6],** which is a thorough treatise on tort law. The book provides a comprehensive overview of the tort of hostile prosecution, with examples from both English and Indian courts.

[3]Dhananjishaw Rattanji Karnani ,AIR 1945 Bom. 320 at 325
[4]Mehtab v. Balaji Krishna, AIR 1964 Nag. 46
[5]SINGH, ANUSHKA. "Criminalising Dissent: Consequences of UAPA." *Economic and Political Weekly*, vol. 47, no. 38, 2012, pp. 14–18. *JSTOR*, 20 Apr. 2021. www.jstor.org/stable /41720156.
[6] RATANLAL & DHIRAJLAL, THE LAW OF TORTS (Lexis Nexis, 28th ed., 2019)

To make the research more efficient, the researcher consults a number of journal publications on malicious prosecution as a broad topic. A journal article titled ***Malice as an Ingredient of Tort Responsibility***[7] draws a link between malice and tortious liability. In the current instance, the term "malice" has been heavily debated. In the above-mentioned journal paper, the same has been discussed.

Another work that adds value to the present case study is ***Law of Defamation and Malicious Prosecution***[8]. The book contains a detailed description of several jurists' definitions of malicious prosecution. This would make it easier to compare the references made in the present case's judgement. There are numerous cases involving the tort of malicious prosecution. The researcher, on the other hand, chooses to focus on those who have significantly altered people's perceptions of that particular crime. In the English case of ***Hicks v. Faulkner***[9], the plaintiff claimed that the defendant had persecuted him maliciously.The defendant was not liable since the prosecution had a reasonable and probable cause. ***Kamta Prasad v National Buildings Constructions Corporation Pvt Ltd***[10]**.** was an Indian case with a similar reasoning to Hicks v. Faulkner. ***Girija Prasad v Uma Shankar Pathak***[11] is another case in which the defendant was found guilty of malicious prosecution. In the present case analysis, other cases are referred to in order to compare and contrast them with the current instance. Such a comparison would improve the current case study's quality.

1. RESEARCH OBJECTIVES

- To study related cases about malicious prosecution and draw references from them.
- To study the facts related to the case.
- Judicial approach towards malicious prosecution.

2. RESEARCH QUESTIONS

- How does the malicious prosecution mechanism work?
- What all could be termed as malicious prosecution?

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[7] Murphy, J., Malice as an Ingredient of Tort Liability 78(2) CAMBRIDGE L. J., 355–382.
[8] H.P. GUPTA, LAW OF DEFAMATION AND MALICIOUS PROSECUTION (Thomas Reuters, 2nd ed. 2016)
[9] Hicks v. Faulkner, (1878) 8 QBD 167
[10] Kamta Prasad v. National Buildings Constructions Corporation Pvt Ltd., AIR 1992 Delhi 275
[11] Girija Prasad v Uma Shankar Pathak, AIR 1973 MP 79

- Is the present form of the concept of malicious prosecution content or does it require some changes?

3. RESEARCH METHODOLOGY

To better understand the current research subject, a doctrinal research method is needed. The doctrinal analysis approach focuses primarily on legal propositions and doctrines. The main goal of this research approach is to define malicious prosecution and achieve the study's goals or objectives. The researcher had to review the various details of relevant casespertaining to the concept of malicious prosecution.The legal precedents and prior rulings to which the researcher could refer include both English and Indian case laws, since tort law is understood to have originated from English law, and a reference to it will aid the researcher in understanding the general concept of the current tort. A doctrinal review entails both the interpretation of terminology and the citation of precedents relevant to the current case. As a result, the researcher recommends doctrinal research because it better suits the current subject's study.

4. CHAPTERISATION

Chapter 1 – this chapter epitomizes the facts of the case, which helps us in ascertaining what actually happened in the case.

Chapter2 –In this chapter we went across the concept the malicious prosecution and also at the same time tried understanding what comes under malicious prosecution and what doesn’t

Chapter 3 – This chapter talks about compensation and punitive damages.

Chapter 4 – In this chapter we made a conclusive opinion about malicious prosecution and at the same time also gave suggestions.

4.1 CHAPTER – I

4.1.1 FACTS OF THE CASE

Plaintiff had a membership establishing agreement with the 1st Defendant/bank, under which Plaintiff requested approval for a credit card transaction made by a customer, and the 1st Defendant granted the request.

A complaint was filed by the 1st Defendant through its manager/2nd Defendant based on a letter issued by a foreign bank together with a letter from the cardholder, which resulted in the filing of a complaint against Plaintiff, which was acquitted following a trial.

Plaintiff filed this suit to recover money for damages caused by Defendants' malicious prosecution. Plaintiff claimed that the Defendants' actions were without reasonable and probable cause, and that the 1st Defendant acted with malice because they never contacted either the cardholder or the Foreign Bank to learn about the actual circumstances, but instead acted on a letter from the Foreign Bank.

Whether the 1st Defendant acted in good faith and with reasonable suspicion - Whether the 1st Defendant acted with malice? Whether a complaint was filed for and on behalf of the 1st Defendant by an employee of the 1st Defendant? Held, in order to win in a malicious prosecution complaint, Plaintiff must show that Defendant acted maliciously without reasonable and probable cause.

The 1st Defendant's goal was to stop fraudulent transactions and track down the real criminals Defendants had a plausible cause for their grievance over fraudulent transactions alone, therefore they filed a police report. There was no malice in prosecuting Plaintiff.

Complainant made no mention of the individuals involved, nor did he provide particular names of individuals. It cannot be stated that the complaint was vitiated by malice simply because the defendants acted in response to a letter from the Foreign Bank, which was in turn in response to a complaint from the cardholder.

When there is suspicion supported out by documents that would satisfy reasonable and probable grounds for prosecution. Findings of the Chief Metropolitan Magistrate are not binding on the Civil Court. The mere fact that criminal proceedings ended in an acquittal was insufficient to describe the proceedings as malicious. The examination of the complaint reveals that the 2nd Defendant behaved in his official capacity and performed the task allocated to him the lawsuit is dismissed.

Defendants claimed that the current litigation was flawed because relevant parties were not joined, claiming that the Foreign Bank and cardholder were not impleaded. Whether or not the suit was detrimental for the non-joinder of required parties Plaintiff had to choose a party to sue in order to file a claim against it since it was dominus litis. The facts on record establish that a claim was brought against Defendants, and while it would be appropriate

to include jurisdictional police who filed the final report, this was not necessary in light of the remedy requested. Because the litigation was solely brought against the defendants for their actions in filing the complaint and pursuing the matter, which was said to be tainted with malice, the cardholder and the foreign bank were not obliged to participate.

4.2 CHAPTER II

4.2.1 MALICIOUS PROSECUTION

The harm or damages are usually divided into three categories.

- The harm done to a person's reputation
- The harm that has been done to a person
- The cost of the harm to a person's property.

When a person's reputation is harmed as a result of an unjustified accusation, it will elicit widespread public outrage as a perceived violation of morality. As a result of the harm done to the individual. In the instance of property damage to a person, he is required to pay litigation costs in order to clear himself of the crime of which he is accused. These are the types of damages in more detail. The malicious prosecution plaintiff is entitled to reimbursement for any expenses incurred as a result of the malicious prosecution.

4.2.2 WHAT WRONGDOING CAUSES MALICIOUS PROSECUTION AND WHAT DOESN'T

Nagendra Nath Ray v. Basnta Das Bairagya[12] is a case where the plaintiff was Nagendra Nath Ray and the defendant was Basnta Das Bairagya. Following a theft at the defendant's residence, he alerted the police that he suspects the plaintiff. According to the defendant, police arrested him, but the magistrate later released him because the police investigation. There was no evidence that the plaintiff was involved in the theft., according to the report. The plaintiff filed a complaint alleging malicious prosecution, The court, however, rejected the case since there was no prosecution, and police and prosecution are not synonymous.

The high court of Rajasthan declared in *D.N. Bandopadhyaya v. Union of India*[13]that a departmental investigation by a disciplinary authority cannot be deemed a prosecution. An

[12] Nagendra Nath Ray v. Basnta Das Bairagya, AIR 1930 Cal 392
[13] D.N. Bandopadhyaya v. Union of India, AIR 1976 Raj 83, 1975 WLN 551

inquiry committee deemed the plaintiff, who worked as a way inspector for defendant railways, was found guilty of carelessness and fined., but the order of authority was overturned in the writ suit.. The high court of Rajasthan ruled in a malicious prosecution case that the disciplinary committee constituted a quasijudicial function that could not be considered judicial power, hence there was no prosecution.

At Dattatraya Pandurang *Datar v. Hari Keshav*[14], the defendant reported a theft in his shop to the police, citing the plaintiff, his servant, as a suspect. As a result, the plaintiff was arrested by the police and remanded in detention by the magistrate. He was discharged when the investigation revealed that there was insufficient evidence to establish he was a criminal. The plaintiff filed a malicious prosecution lawsuit against the defendant, but the court decided that the person who was being prosecuted was the plaintiff by the defendant did not exist. The information was given to the cops by the defendant. That's the limit. As a result, the defendant could not be deemed the plaintiff's prosecutor.

"The privy council ruled that the conduct of the complainant before and after the complaint has to be seen to decide whether he is the genuine prosecutor or not," according to Gaya Prasad v. Bhagat Singh. In this situation, even though the individual filing the complaint knew it was a fake complaint, he is deemed a prosecutor since he seeks to deceive the police with fake evidence in order to condemn the accused.

The defendant filed a suit against the plaintiff in *T. S Bhatta v. A.K. Bhatta*. Following that, he was appointed as a session judge in the revision and was called as a witness in the session trial. He also pleaded before the high court's criminal revision. He was acting without probable or reasonable cause since he knew the charge was bogus. As a result, the court determined that he was the true prosecutor in the case and that he was accountable for malicious prosecution.

We can conclude from these cases that submitting a false FIR or complaint will not result in Because they are not a judicial body and have no hostile intent, they are being accused of malicious prosecution. However, because the quasi-judicial body is not a judicial body, even if the case is false, there will be no malicious prosecution. When a defendant files a false case and provides false evidence or serves as a false witness, they are automatically charged with malicious prosecution and are accountable for the malicious prosecution.

[14] Dattatraya Pandurang Datar v. Hari Keshav, (1948) 50 BOMLR 622

4.3 CHAPTERIII

4.3.1 CRITICAL ANALYSIS

Damages are granted by Indian courts as compensation for the tort of malicious prosecution. Damages are the monetary compensation awarded by the law to a person for the injury he has suffered as a result of another's Damages are the remuneration given to a person by the legal process for the wrongs that another has done to him, damages are the recompense given to a person by the legal process for the wrongs that another has done to him.

When a person's right is violated, the law assumes that he has incurred harm as a natural and direct effect of the breach.Punitive damages have been interpreted in two ways by Indian courts.

Firstly punitive damages, should not be used in civil cases. This has been mentioned in our case I,e C. kishin chand v City bank(2016), If the facts and circumstances of the case support it, punitive damages should be awarded., according to the second viewpoint. Punitive damages do not belong in civil jurisprudence, and so should not be granted in civil litigation in circumstances of defamation, according to the courts.

Justice Sen of the Bombay High Court (Nagpur Bench) refused to grant punitive damages in *Mehtab v. Balaji Krishna Rao*[15]. Malicious prosecution was the subject of the case. "There is no technique of evaluating the monetary value of the losses caused to the plaintiff by the defendant's action, and the only restriction to the damages to be awarded is that they must be acceptable in size and have some relation to the wrong done and solatium applied," the learned court remarked.

Punitive damages were given in the cases of *Punnalal v. Kasturi Chand*[16] . Using the legal system for malicious purposes is a social plague that must be eradicated, and one of the goals of the justice system is to protect the rights of individuals who seek redress through the courts.

Furthermore, the judicial system and regulations in India in specific never address the concept of malicious prosecution. The terminology hasn't been taken into consideration in

[15] Mehtab v. Balaji Krishna Rao, AIR 33(1946)
[16] Punnalal v. Kasturi Chand, (1945) 2 MLJ 461

any of our regulations, whether criminal or civil. Neither the definition nor the essence of the phrase are included in any of our legal provisions. Additionally we know the fact that many states, as well as the federal government, are striving to come up with a infusion or solution to the problem of vexatious and malicious litigation, demonstrates that malicious prosecutions are a widespread problem in our country, and that the current legal system and legal provisions are insufficient to address it.

Furthermore, the concept of malicious prosecution is not particularly addressed in Indian law. Our laws, whether civil or criminal, do not include the term in any way. None of our legal provisions include either the definition or the essence of the phrase. This, combined with the fact that various states and the federal government are attempting to address the problem of vexatious and malicious litigation, shows that malicious prosecutions are a widespread problem in our country and that the current legal system and legal provisions are insufficient to address it.

4.4 CHAPTER- IV

4.4.1 CONCLUSION

It is self-evident that there are two opposing general sorts of interests in tort law: the individual's interest and the public's interest in law enforcement. The process of balancing the two, on the other hand, necessitates an understanding of the many shades and gradations of social value associated with diverse sorts of human activity. The legislation's purpose is to balance the public good and the harm to the individual affected in order to establish policy, properly adjust the interests at stake, and provide further legal protection to one or both sides.

True, everyone has the right to use the court system to safeguard his or her own rights or the public interest, but that person should not do so at the expense of others' rights by initiating unlawful legal actions in order to harass them through unjustified litigation.

Furthermore, the laws in our country neverAddress the concept of hostile intent in particular. Neither the definition nor the essence of the phrase are included in any of our legal provisions. This, combined with the fact that various states, as well as the federal government, are attempting to come up with answers to the problem of frivolous and malicious lawsuits, demonstrates that malicious prosecutions are a widespread problem in our country, and that the current legal system and legal provisions are insufficient to

address it. As a result, the researcher believes that including laws dealing with malicious prosecution into our country's main stream laws is the most effective way to combat this threat.

4.4.2 SUGGESTION

It is self-evident that there are two opposing general sorts of interests in tort law: the individual's interest and the public's interest in law enforcement. The process of balancing the two, on the other hand, necessitates an understanding of the many shades and gradations of social value associated with diverse sorts of human activity. The law's purpose is to strike a balance between the public good and the harm to the individual who is harmed, so that a policy can be developed that strikes a balance between the competing interests and provides additional legal protection for one or both parties

It is imperative that this issue be addressed as soon as possible. It is vital to include legal provisions that serve as an effective deterrence to such "malicious prosecution" and recompense victims This could be accomplished by amending the Indian Penal Code's Code of Criminal Procedure to include a chapter dedicated to malicious prosecution, or by enacting a new law along these lines.

1. The person who starts a malicious prosecution (aggressor) faces a sentence of imprisonment and/or a fine equal to the punishment specified for the allegations In the malicious prosecution, he was charged with.
2. An additional fine is imposed on the aggressor to compensate for the deprivation of livelihood and reputation, which is calculated after taking into account the victim's income, qualifications, and social status.If the aggressor's bank accounts or property are not promptly paid, the stipulated sum can be secured by attaching the aggressor's bank accounts or property.
3. Immunity should not be granted to prosecuting and investigative organisations that pursue someone with malice. This is the least we can do in a country like ours, where Even the most powerful judicial bodies are held responsible for their actions.

Harms or damages is considered at the heart of the remedies for malicious prosecution, that underpins them can be a matter for further research. Furthermore, our country's long-standing laws are insufficient to fully accommodate this concept. A study could be

conducted to revise ancient laws to meet current demands, similar to how new legislation is attempting to include.

LIST OF CASES

- Khagendra Nath v. Jacob Chandra ,A.I.R 1977 N.O.C 207
- Mehtab v. Balaji Krishna, AIR 1964 Nag. 46
- Hicks v. Faulkner, (1878) 8 QBD 167
- Kamta Prasad v. National Buildings Constructions Corporation Pvt Ltd., AIR 1992 Delhi 275
- Girija Prasad v Uma Shankar Pathak, AIR 1973 MP 79
- Nagendra Nath Ray v. Basnta Das Bairagya, AIR 1930 Cal 392
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Mediation In Family and Matrimonial Disputes: A Critical Study

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Abstract

The two very foundations of Indian society are marriage and family. Marriage is the most fundamental societal building block. Marriage has always been the pillar of stability in society. The Indian family is a web of complicated relationships, emotions, and sentiments. As the smallest unit of society, family is often affected by dissolution, separation, and all types of disputes. A Court case involving family matters necessitates a unique approach. Bad communication is the root of all relationship issues. Family or matrimonial problems are deemed to be too delicate to be left to the whims or combative jurisprudence of the current legal system, which entails a great deal of mudslinging on both sides by its very essence. Today new approaches of resolving matrimonial disputes are crucial to save the family system, particularly mediation, which saves time and money. Through this article the concept of a mediation and its role in resolving the matrimonial disputes is discussed by taking into account the country's diverse culture, and current legal and social situation.

Key Words: *Matrimonial disputes, traditional courts, consensual decision-making, mediation*

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1. INTRODUCTION

Marriage is a stable, long-term partnership between two individuals who have mutually supported each other. It serves as the basis for the family and the organization, and it is defined by six social functions: sexual behavior regulation, succession, child care and protection, socialization, growth, and consumption, and the transmission of assigned statuses like race. The most critical of these ideals is inheritance, which underpins marriage and family life.[1]Marriage is a social event as well as a legal obligation.[2] Tolerance, adjustment, and mutual respect are the foundations of a healthy marriage. There are many variations between and among individuals, classes, and nations in life. There are cultural variations, personal factors, point of view variations, and contextual variation. Disagreements arise as a result of unresolved discrepancies. Disagreements are a source of problems. Unresolved disagreements become a conflict. Unresolved disagreements transform into conflicts.[3] A matrimonial dispute occurs when a couple has a disagreement about the institution of marriage. A disagreement may turn into a conflict. The family, as the smallest unit of society, is often targeted for dissolution, separation, and other types of conflict.

The constantly changing social and family climate has posed new challenges, particularly to the younger population, such as growing insecurity, shifting roles of husband and wife, and the pressures of fast living. All of this has led to a breakdown in marital peace. Divorce rates are that alarmingly and in a geometrical pattern around the world.[4]Marriages on their knees need help and treatment. They act with a limp and require medical care.[5]Family or marital concerns are considered too sensitive an area for the pity or the unfavorable jurisprudence of the present legal system.[6]

2. MATRIMONIAL DISPUTESIN INDIA

The social structure of India is constantly evolving, and with increased literacy and economic freedom among couples, matrimonial conflicts are on the rise. When modern partnerships become open to divorce, the opposition mechanism does not comply with the requests of the parties concerned. These disputes, unlike other contractual disputes, are accompanied by various emotional, social and personal dimensions. The standard process of litigation is often incompatible with these requirements. The unsatisfied side turns to appeals, reviews petitions and so on in the hope of reaching a favorable judgment due to court orders that do not have mutual consent of the parties.[7]This results in a time-consuming and emotionally exhausting

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[1] Hemendranath Reddy & Manohar Gogia, Marriage & Divorce Law, ALT publications, Pg.8.
[2]V. Hemalatha Devi, Rural Women Legal Awareness, Supreme Court Journal - 1990, Vol-3(Sep-Dec).
[3]http://supremecourtofindia.nic.in/MEDIATION% 20TRAINING% 20MANUAL% 20O F% 20INDIA.pdf accessed on 10 April 2021 .
[4] Vijendra kumar, Expending Horizons of Divorce under the Hindu Marriage Act, 1955, A L T 2013 (5) 21-29
[5]www.lawsenate.com/../courts -to-settle. matrimonial disputes accessed on 11 April 2021.
[6] Nagasila, Family courts - Anti women accessed through manupatra visited on 11 April 2021.
[7]http://brewminate.com/social-institutions-family-religion-and-education visited on 13 April 2021

process with no meaningful results much of the time, the costs borne by the parties are rendered ineffective as compared to the expense of the subject of the suit property.

There are a number of factors which can cause conflict and subsequently dispute a couple due to their families or children. Thus, most spousal conflicts occur early in the marriage, and when a couple is recently married, they are not very forgiving, whereas a couple is generally more familiar and tolerant of the other in long term relationships. Another reason for a dispute is that both husband and wife participate in two different areas of career, have little time for the other, and have various aspirations for life.[8]

Some scholars say that children can also trigger marriage stress, while others claim they can provide stability to a married life, but that the expenditure increases and that marriage breaks significantly. Another point of contention is household chores. Women also face this challenge since they care for their families and children for several years. For a woman it is a struggle and it gets harder as she gets it as she is charged with two responsibilities: care for her home and children and caring for her job and career. When a woman weds a man, and a man weds a woman, they both marry the family of each other. As a consequence, in India, there is a lot of involvement of each other's family in marital life, which can sometimes trigger issues.

3. ROLE OF MEDIATOR

All relationship problems stem from a lack of communication. Mediation is a means for the promotion of dialogue, understanding and settlement, through a neutral mediator. Mediation is particularly appropriate for divorce and other cases of family law, because the parties are likely to maintain a relationship, especially in the event of minor children. Mediation helps many divorcing wives avoid the high burden of litigating divorce. Costs are reduced because normally the settlement is quicker. Mediation also helps pairs avoid trial uncertainty, preserves confidentiality and decreases stress. Mediation allows couples to escape the possibility of a lawsuit, preserve confidentiality, and reduce volatile conflicts. Mediation may also shield the children of the m arrival from the pain of parental conflict. Couples who mediate their divorce settlement are far happier than those who go to trial because the parties sign their own contracts. Furthermore, pairs learn how to resolve future disputes.[9]

During mediation, the parties may choose to either part ways on mutually agreeable terms or patch up and remain together. In this case, the suit must be dismissed in order for the settlement to go forward. In that case, they will go to the High Court to get the lawsuit dismissed. They will, however, pursue the case if they refuse to settle. There is no one who loses in this exercise. If a settlement is reached, the parties will be spared the trials and tribulations of a criminal case, and the pressure on the courts will be reduced, which is in the public interest. Obviously, the High Court can dismiss the case only if it considers a number of factors. The High Court will obviously only quash the case if it deems the arrangement to

[8]https://www.psychologicalscience.org/journals/cd/12_1/Fincham.cfm visited on 13 April 2021
[9]http://family.findlaw.com/divorce/divorce -mediation- overview.html#sthash.KzIKVRbt.dpuf accessed on 13 April 2021

be fair and real after consideration of all circumstances. Such a course is useful to those who sincerely wish to give their marriage disputes some peace of mind. The courts also consider 'mediation' as an appropriate alternative means of settling matrimonial conflicts and that's why the courts want the parties to examine the possible resolution of marriage disputes by mediation.

Frequently, the source of a matrimonial dispute's confusion is minor and easily resolved. Mediation is now legally recognized as a form of alternative dispute resolution. Several matrimonial disputes were also referred to mediation centers by the courts.[10] As a result, we believe that the dispute should be referred to mediation centers at the earliest possible time, i.e before it is taken up by the Family Court or a court of first instance for hearing.

In its 10th report, the Law Commission of India emphasized that when dealing with family disputes, the Court should take a somewhat different approach than in ordinary civil cases, and that it should make fair attempts at arbitration before proceeding to trial. Furthermore, it is a legal requirement to resolve such conflicts quickly and fairly for the litigants, and it is highly recommended that marriage and divorce cases be treated separately. Since they have been trained in the art of mediation, they produce positive results.[11]Mediation before trial has become more commonplace now. Following widespread publicity, some mediation centers set up "Help Desks" in prominent locations, such as facilitation centers at court facilities, to conduct pre-litigation mediation.

4. MEDIATIONUNDER LEGISLATIONS

All the laws and legal rules relating to the settlement of matrimonial disputes are the Hindu Marriage Act of 1955, the Special Marriage Act of 1954, the Family Court Act of 1984, Civil Procedure Code, 1908 and the Legal Service Authority Act of 1987. The Legal Services Authority Act laid down the concept of arbitration, mediation, conciliation and agreement in order to dispute resolution. Where conflicts in courts of law are pending, the said law allows for the holding of Lok Adalat's. The concept of a family court means that dysfunctional families are provided with integrated, broad-based programs to sustain the family and help to stabilize marriage. To avoid the conventional adversary or fault-oriented approach, the family Court system envisions establishing a less formal process in which legal technicalities and technical protocols are not to be followed. The aim should be to provide a dignified means for parties to resolve their disputes and negotiate amicable settlements without resorting to litigation; to help prevent unnecessary litigation; and to promote pre-trial negotiation and resolution.

The main purpose of the Act[12] is to create Family Courts in order to facilitate conciliation and ensure a timely resolution of disputes relating to marriage and family affirms and related matters. Despite the fact that the Family Courts Act of 1984 was conceived on the simple

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[10]http://www.lawyersclubindia.com/articles/Arbitration-and-its-relation-to-family-laws-7229.asp visited on 13 April 2021

[11]*Sushil Kumar Sharma* v. *Union of India* , AIR 2005 SC 3100 Para 18

[12] Family Court Act, 1984

assumption of quick resolution or reconciliation, litigation in metropolitan cities has become extremely contested and involves high financial stakes. In metropolitan cities, matrimonial litigation is becoming increasingly complex, extending well beyond the idea of a quick settlement or reconciliation.[13]

Mediation is an excellent choice for matrimonial disputes, especially those involving child custody, support, and other issues. Section 9[14] of the Family Courts Act allows the Family Court to make fair efforts to settle matrimonial disputes, and Counselors' assist the Family Court in this effort. Even if the Counselors' efforts fail, the Family Courts should refer the parties to mediation centers where competent mediators can mediate the conflict.

The law is explicit that the intention of the Legislature, not the language used to convey that intent, determines whether a statute is mandatory or advisory. The purpose and significance of the legislative body should prevail, and this should be decided by looking not only at the phraseology of the provision, but also at the essence, the design and the implications of its construction. If the family court does not direct the parties to reconcile, the final judgement of the court is not rendered invalid for non-compliance with Section 9 of the Family Court Act, 1984.As a consequence, the provision is neither "mandatory" nor "directory," but imposes on the Court an onerous duty to make a fair attempt to find a compromise in order to keep the estranged pair from drifting apart.

5. COURTAS A MEDIATOR

The judiciary is now leaning toward mediation as the most realistic method for resolving disputes. While an offence punished under Section 498 - A of the IPC is not compoundable, the Apex Court[15] recently stated that in appropriate circumstances, if the parties are willing and the criminal court believes there are elements of resolution, it should order the parties to explore the possibility of settlement by mediation. This is clearly not to water down the rigor, efficacy, or purpose of Section 498-A of the IPC, but to identify cases where a matrimonial conflict can be resolved fairly. In their qualifications, the judges must guarantee that this exercise is carried out correctly. In their experience, the judges must guarantee that this exercise does not proceed to the wrong partner by means of mediation in order to escape the rules.

The educated owners of the Bar have a huge social duty to ensure that the social fabric of family life is not ruined or destroyed. They must be such the exaggerated versions of minor events do not appear in felony charges. The vast majority of lawsuits are lodged on their recommendation or with their approval. The learned members of the Bar who belong to a noble career shall uphold its noble values by treating any case filed under Section 498A of the Indian Penal Code as a simple human issue and making a sincere effort to assist the parties in reaching an amicable settlement. They must carry out their responsibilities to the government.

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[13]Flavia Agnes, Family Law Vol. II, Marriage, Divorce, and Matrimonial Litigation, Oxford Publication Page.319

[14] Ibid

[15]*Ram Gopal* v. *State of M.P* , 2010 SCALE 711 .

They must carry out their responsibilities to the best of their ability in order to maintain the social fabric, stability, and tranquility of the society. Members of the Bar can therefore ensure that a single complaint does not result in several instances.[16]

Unfortunately, the claimant does not fully comprehend the ramifications and repercussions of filing the case, which will result in unimaginable harassment, agony, and discomfort for the complainant, accused, and his near relatives.[17]The ultimate goal of justice is to discover the facts, punish those who are guilty, and defend those who are innocent. In the vast majority of these allegations, uncovering the facts is a Herculean task. It is also not unusual for the husband and all of his immediate family members to be implicated. And after a jury proceeding has ended, it will be impossible to determine the true facts. In dealing with these cases, the courts must be highly vigilant and cautious. In dealing with these grievances, the courts ought to be exceedingly vigilant and careful and must consider pragmatic facts in the context of matrimonial litigation. The claims of abuse of intimate contacts between husbands who lived in other cities and who had never visited the site where the claimant was residing would have very different facial characteristics. The complaint's claims are to be carefully and carefully examined.

Length and drawn-out jury cases have a history of causing animosity, acrimony, and resentment in the parties' relationships. It is also common knowledge that in lawsuits brought by the wife, whether the husband or the husband's relatives are required to stay in prison for even a few days, the hopes of an amicable solution are completely ruined. Suffering takes a long time and is excruciatingly uncomfortable. In India, there is an increasing need for matrimonial mediation.

"In recent years, there has been an uptick in matrimonial disagreements. Marriage is a religious ceremony whose primary goal is to help the young couple settle down in life and live happily ever after. However, small matrimonial quarrels escalate out of nowhere, frequently leading to the commission of heinous crimes in which family elders are also implicated, rendering those who should have counseled and brought about reconciliation powerless as they are named as defendants in a criminal case. There are numerous other reasons that matrimonial lawsuits need not be encouraged so that the partners can reflect on their mistakes There are several other reasons not to be mentioned here for failing to promote legal proceedings such the parties can consider and resolve differences friendly by mutual agreement instead of fighting it in a Court of Justice, in which a "young" time is taken for years and years to conclude, in chasing cases in different courts. the parties lose their "young" days."[18]

The aim in law is to reconcile or alleviate as much suffering as possible. The aim of law, like life itself, according to Bentham, is to achieve the greater benefit of the greater number of

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[16]*Preethi Gupta* v. *State of Jharkhand,* AIR 2010 SC 3363

[17]*SatishSahni&Others* v.*StateofPunjab&Another* at https://indiankanoon.org/doc/138110329/ visited on 13 April 2021

[18] National Judicial Data Grid https://njdg.ecourts.gov.in/njdgnew/index.php visited 14 April 2021

people.[19] There is an urgent need for family law issues to be resolved through a proper legal system. Arrest is humiliating, restricts mobility, and leaves permanent scars. There is a need to establish a system for resolving disputes that would secure relationships.[20] Matrimonial conflict resolution forums may be traditional or new, legal or non-judicial, political or non-governmental.[21]

The Court[22] is a crucial and extraordinarily powerful tool for maintaining and controlling social order. Courts play a critical role in achieving peace, harmony, and long-term congeniality in society, and resolving a dispute by a compromise between two warring groups should draw the immediate and prompt attention of a Court, which should strive to give full effect to the compromise, unless it is incompatible with the society's lawful composition or willfully violates the law. As a result, the High Court has unrestricted authority to dismiss criminal proceedings relating to such cross - fig. As a result, the High Court has unrestricted authority to quash criminal prosecutions relating to such cross-fights based on a lawful arrangement. The law established in the above judgments is "mutatis mutandis" completely valid in this case and provides a complete solution to the problem at hand.

In the case of S.Thankikodi v. Ramuthayee[23], the Court, when dealing with matrimonial cases, was required by section 23(2) of the Hindu Marriage Act, 1955 to attempt to reconcile the parties in the matrimonial case in the first instance. However, the Court states that it can only attempt to reconcile if it believes there is a possibility of saving the marriage, and not otherwise.

"Before proceeding to grant any relief under this Act, it shall be the duty of the Court, in the first instance, in every case where it is possible consistent with the nature and circumstances of the case, to make every effort to bring about reconciliation between the parties," says Section 23(2) and (3) of the Hindu Marriage Act, 1955. This responsibility must be carried out in accordance with the essence and circumstances of the situation.[24]The aim of this provision is to provide all assistance to the estranged couple in maintaining marital relations and restoring peace. However, it is emphasized that the Court should take action "in the first place" to facilitate reconciliation between the parties. To put it another way, the effort should be made right at the start of the event. This does not, however, imply that attempts at mediation should only be made at the beginning of the case and not at any other time. The court should make an effort in this direction if the circumstances of the case warrant it.

The Supreme Court of India issued a historic judgment in “Salem Advocate Bar Association, Tamil Nadu v. Union of India”[25], holding that mediation, conciliation, and arbitration must be used in court cases. The Supreme Court of India's decision would be a watershed moment in

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[19] A.V. Dicey, Law & Public Opinion In England, 414 (Universal Law Publishing Co. Delhi, 3rd Indian Reprint, 2003).
[20] Madabhushi Sridhar Alternative Dispute Resolution, Lexis Nexis pg.79
[21] Prof. Kusum Family Law Lectures Family Law 1 third edition Lexis Nexis Pg.425
[22]*Sanjeev Kumar & Others* v. *State of U.P & Others 1999 (1) AWC 853*
[23]AIR, 1986 Madras 263
[24] Section 23(2) of Hindu Marriage Act,1955
[25] (2003) 1 SCC 49

the history of mediation in India. However, the expansion of mediation should be carefully shaped so that the mechanism earns the confidence and respect of litigants.

6. CONCLUSION

Matrimonial disputes account for the majority of cases referred to mediation in court-administered systems. As a result, society requires mediators in this area that can handle disputes with compassion and empathy and assist parties in finding solutions to the issue of the dissolution of deeply personal relationships. Parties will quickly discover that mediation far outweighs the other types of conflict settlement, and they will seek it out sooner rather than later.

Marriages cannot be quickly dissolved or interrupted because it is in the best interests of society's peace. It is in the public interest to preserve matrimonial relations and, to the extent practicable, to prevent them from being disrupted at the request of any of the parties to a marriage. This form of conflict resolution not only saves time, but also reduces acrimony and strained relationships that may arise from litigation. In India, mediation is becoming increasingly common, especially in the case of marital disputes.

If relief is deferred in a marital proceeding, the whole object of relief is nullified, and the parties are physically and emotionally wrecked, with little to no hope of remarriage. Alternative conflict resolution strategies are preferred to maintain future relationships and should be the remedy for peace. The situation was so tumultuous that there has been an unprecedented increase in divorce proceedings in recent years, but mediation provides a ray of hope for many couples seeking to settle their differences. Via advice and conciliation services, it is our duty to protect marital relationships.

Suggestions:

The following suggestions for the effective implementation of mediation to resolve the matrimonial disputes are purposed as under:

1. Mediators should be given periodic trainings so that they are able to identify the cases in which mediation is suitable.
2. Mediation can only be used effectively if it is properly implemented and widely publicized. Awareness campaigns, such as seminars and conferences, should be held to inform the general public about the benefits of such amicable conflict resolutions.
3. Lawyers play a significant role and would strive to resolve conflicts by mediation rather than gaining charge of the situation and profiting from increased disputes.
4. Legal education in this attire of conflict resolution must be offered to law students.
5. Advocates, judges, law students, and volunteers must all actively participate in the growth of mediation.
6. The role of non-governmental organizations (NGOs) in the promotion of mediation should be encouraged because they are the nearest to the underprivileged and ignorant segments of society.

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Prefixing 'Desi' Before Food Product Ghee- A Legal Perspective

Swetanka*

Jyotsna Nisha**

Abstract

The market is flooded with food products describing them as 'desi', most of these products are ghee. The use of expression desi may not be justified in light of existing legal provisions under the Food Safety and Standards Act and Rules& Regulations made therein. The existing provision under these regulations requires that the labelling of the product should describe the true nature of the product contained in the package. It is possible that the ghee described as 'desi' may not be describing the true nature of the product and therefore, is misleading under the present food safety laws. The expression 'desi' may be used to refer to indigenous cows – Indian-origin cows. The indigenous breed is generally known by the names - Gir (Surati/ Kathiwar etc), Red Sindhi, Sahiwal, etc. The product obtained from these species may be referred to as 'desi'. Ghee is a standardized product under the Food Safety and Standards Act, 2006 (referred to as the Act). The standardised product is those which have been described in the FSS (Food Product Standards and Food Additives) Regulations, 2011(referred to as the Regulations). These regulations describe the various parameters which need to be adhered to. Similarly, there are labelling regulations that prescribe the nature of information required w.r.t product mandatorily on the label of it. The use of expression desi or any such adjectives, if mentioned, should justify its usage on the label of the food product. The use of such adjectives is also regulated under the FSS Advertisements and Claims Regulations. These specifically prohibit usage of adjectives like real, traditional, natural etc in the name of the product if it misleads the consumer and allows such usage only if a disclaimer that the use of such expression is not related to nature, origin etc of the product is given on the label. If this disclaimer is not given then it means the expression describes the nature of the product and if something contrary is found then the product will be declared to be misbranded and the expression to be misleading. In this paper, I have analysed the legal provisions w.r.t use of expression 'desi' for ghee and tried to explain as to when the use of expression desi would be justified.

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Keywords*: Desi Ghee, Misleading, Misbranded, Claim*

1. INTRODUCTION

The food business is one of the most promising, income-generating businesses which is worth billions of rupees. In the last few decades, the food market has grown steadily. With the expansion of the food market, the desire of providing better products at a competitive price has also increased among the food companies. Everyone wants to sell their product in the market and try every means to make their product stand out from others. For this, various means of representation, advertisement, marketing etc are used. One of the most common methods adopted by them is the "nomenclature of the food product". The companies try to name their product in a very attractive way to gain the trust and confidence of the consumers. This has led to the rampant use of adjectives like real, desi, pure, and many other prefixes in food products. If one visits any of the food stores, they would surely notice these fancy names written on the food products. Such usage definitely attracts one's attention. Here, I will be talking about one of such products which have the suggestive adjective "desi", attached to it by almost every manufacturer. The product in mention can be easily found in almost all Indian households. It is clarified butter or 'Ghee', as we commonly call it in India. The market is flooded with "Ghee" products at very competitive prices. The starting price of one litre of ghee is 378 rupees[1] and it goes up to 3000 to 4000 a litre.[2] Some of these products are labelled as "desi". The question here is why ghee is referred to as "desi". What is the meaning of the expression "desi" prefixed before ghee? We need to understand the meaning of the expression "desi" and provisions under the Food Safety and Standards Act, Rules & Regulations governing the labelling, standardisation, claims etc w.r.t the food product. In this article, I have analysed the legal provision under the Food Safety and Standards Act w.r.t the food product ghee and use of the expression desi.

2. MEANING OF THE EXPRESSION "DESI"

[1] https://grofers.com/prn/grocery-desi-ghee/prid/439969 last assessed on 4th July 2021.

[2] https://bodhishop.in/products/govedic-gir-cow-bilona-ghee?variant=32305255383087&currency=INR&utm_medium=product_sync&utm_source=google&utm_content=sag_organic&utm_campaign=sag_organic&gclid=CjwKCAjwuIWHBhBDEiwACXQYsZdbLyxanbovLNkHmvqUOjlkihTDMeNgQ6945igz03n59tIiM1JhNxoC9wkQAvD_BwE last assessed on 4th July 2021.

The interpretation of statutes requires one to first look for the general/literal meaning of the expression or word before going to its scientific meaning. Therefore, I looked for the dictionary meaning of the term "desi" (as an adjective). The dictionary meaning of the word desi is "indigenous, authentic" [3]; "unadulterated or pure".[4] The literal meaning of the term "desi" gives a clear understanding that the expression "desi" is used to describe a product that is of local origin and is pure. The product of local origin means those products which are either grown locally or obtained from indigenous breeds of animal. In the present case, we are considering the product "ghee", thus here indigenous refers to ghee obtained from the desi breed of cow or buffalo or goat or camel or any other milking animal whose milk is consumable. However, in India we generally consume milk or milk products obtained from cow and buffalo; thus, we would restrict to ghee obtained from milk products of two animals cow and buffalo. Considering the above, the ghee can be described as "desi" if obtained from indigenous & pure breeds of milking animals cow and buffalo. The above-deduced meaning of the term "desi" is one of the ways of describing the expression w.r.t food product ghee.

However, for a better understanding of the expression "desi", we need to look at the legal provisions under the FSS regulations on food product standards (Food Safety and Standards Regulations).

3. THE CONTEXUAL MEANING OF THE EXPRESSION "DESI" AS USED IN THE UNAMENDED REGULATION

The expression "desi" also found mention in the original regulation on food product standards under the FSS Act.[5] The expression has been used in the definition of ghee wherein it is stated that ghee is derived solely from milk or curd or "desi" cooking butter. The food product "desi cooking butter" is a standardised food product under the original FSS Regulations.[6] The use of expression "desi" is w.r.t the cooking butter, the cooking butter is different from table butter as the latter contains salt in it as an ingredient. Here the word "desi" is used in a different context, the meaning of it has to be deduced from

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[3] https://www.collinsdictionary.com/dictionary/english/desi last assessed on 4th July 2021.

[4] https://in.search.yahoo.com/search?fr=mcafee&type=E211IN1289G0&p=desi+meaning powered by Oxford Dictionaries, last assessed on 4th July 2021.

[5] https://www.fssai.gov.in/upload/uploadfiles/files/Food_Additives_Regulations.pdf last assessed on 4th July 2021.

[6] Regulation 2.1.10 of the original version of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011.

the various contextual use of it in the regulations. The other place where the expression desi has been used is with "khadsari sugar"[7]. This type of sugar is different from white or refined sugar, the difference lies in the process of manufacturing. Khadsari is prepared using the traditional method wherein it is minimally processed and tried to retain the natural form. Thus, from the above, it can be said that the expression "desi" refers to the traditional process of manufacturing and therefore, the expression "desi" w.r.t cooking butter would mean the butter prepared using the traditional way. In simple terms, it can be said that the "desi" refers to the traditional methods used in India for manufacturing products. In the case of butter, the traditional method used is continuous churning of malai. Thus, from the above, it can be deduced that "desi" used before the food product "ghee" may refer to the traditional Indian method of ghee production. In India, the most common ancient method of ghee production is the "bilona" method. In this method, the milk is heated at around 80 degrees Celsius and malai is collected. This malai is then fermented and thereafter continuously churned to obtained butter. The butter obtained is called desi cooking butter and is used for preparing ghee. This ancient way of preparing ghee gives it a special flavour and texture. [8] So, from the above, it can be said that "desi", if mentioned on the label of food product ghee may refer to the traditional method of manufacturing ghee as followed in ancient India. The importance of this lies in the special developed flavour and texture of the obtained ghee which differentiates it from others. However, the present regulation on food product standards and food additives does not use the expression "desi" and the food product "desi cooking butter" no longer finds mention in the regulations.

4. DEFINITION OF "GHEE" UNDER THE PRESENT REGULATIONS ON FOOD PRODUCT STANDARDS AND FOOD ADDITIVES

The present FSS (Food Products Standards and Food Additives) Regulations, under the definition of ghee, mentions that ghee is a product obtained "exclusively from milk or milk products by the process which completely removes water and milk solid non-fat". Also, ghee develops a special natural flavour and physical structure because of the

[7] Regulation 2.8.1:3 of the original version of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011.

[8] http://ecoursesonline.iasri.res.in/mod/page/view.php?id=5795#:~:text=Some%20follow%20slightly%20different%20method,to%20get%20the%20desi%20butter last assessed on 4th July 2021.

process of manufacturing.[9] Thus, the definition of ghee under the present regulation states that ghee is produced from milk or from milk products which will include "desi cooking butter" or any other form of butter and it does not make any differentiation among the ghee obtained from any of them. Further, it also clarifies that the special flavour & physical structure of ghee is because of the manufacturing process; thus, the justification that ancient traditional method issued will no more be relevant for mentioning "desi".

From the above-referred meaning of the expression "desi" and the current definition of ghee under the existing regulation, it can be said that the expression "desi" is not relevant for describing ghee products manufactured using the traditional Indian method i.e., bilona or any other. The existing regulation has removed the expression "desi" and thus, differentiation made using the contextual meaning of it may no longer seem to be justified. Nevertheless, the literal or dictionary meaning of "desi" may still be relevant and can be used to differentiate one's product from the other. However, the question is when it can be used before the food product ghee? For this, we need to analyse the relevant provisions under the FSS labelling and

5. PROVISIONS UNDER FSS ADVERTISING & CLAIMS AND LABELLING REGULATIONS

A claim is defined under the advertising regulations; claim means any representation made on the food product which gives an impression that the quality of food is related to its origin, nature etc.[10]The regulations further restrict the use of adjectives like real, natural, etc. Such expression, if used on the food product, should not mislead the consumer as to the nature of the product. However, if it is likely to mislead the consumer as to the nature of the food in that case a disclaimer that the use of such adjective only represents the brand or trade name and has no relation to the nature of the product has to be given explicitly on the label of the product. In this context, it can be said that if the food product ghee is derived from milk or milk product obtained from indigenous breed of cow or buffalo then the use of expression "desi" seems to be justified. The use of it will refer to the qualities which are related to the origin of an animal breed which is an Indian breed in the present case.[11]

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[9]Regulation 2.1.8:1 of the present Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011.

[10] Regulation 2(d) of the Food Safety and Standards (Advertising and Claims) Regulations, 2018.

[11] Regulation 4(7) of the Food Safety and Standards (Advertising and Claims) Regulations, 2018.

Furthermore, the labelling regulation states that the name of the product should contain either the trade name or the description of the product contained in the package. This means that an exact description of the product contained in the package has to be given. In the present case, the use of expression "desi" w.r.t ghee will be justified and will give the true description of it only if it has been derived from the milk or milk product of indigenous breed of cow and buffalo.[12] Thus, the regulations are very much clear on the use of adjectives like real, natural, desi etc to describe a food product. The individual company or any manufacturer of ghee should accordingly use the expression in light of these provisions. Here it is also important to highlight the differentiation made with respect to the types of milk referred to as A1 and A2.

6. A1 AND A2 MILK- DIFFERENCE?

The internet is flooded with an ample number of texts/documents differentiating A1 and A2 milk. The basic difference is in the chain length of protein beta-casein. Based on this difference, they are categorised as A1 and A2 milk. The study has found that originally all the indigenous breeds of cow contained A2 milk but the cross-breeding of an indigenous breed with Jersey/Holstein breed is responsible for the production of A1 milk.[13] However, in this regard, the FSSAI came up with a clarification that the "Scientific Panel on Milk and Milk Products did not come to any conclusion on this issue due to lack of clinical data/risk assessment done at scale so far." Therefore, such differentiation is not accepted and is of no significance in differentiating milk and product obtained from it like ghee in the present legal system.

7. CONCLUSION

In light of the above discussion on the use of the expression "desi" w.r.t ghee, it can be concluded that the literal meaning of the expression "desi" is found most suitable. The use of the expression "desi" before ghee seems justified only if it is derived from milk or milk product which has been obtained from indigenous breed of animal i.e., cow or buffalo. Ghee, even if it obtained from milk or milk product which is an admixture of both cow and buffalo, still the expression desi can be used, the only condition is that both

[12] Regulation 2.2.2:1 the Food Safety and Standards (Packaging and Labelling) Regulations, 2011.
[13] https://www.thehindu.com/sci-tech/health/milk-a1-a2-or-entirely-avoidable/article29876733.ece last assessed on 4th July 2021.

the breeds of animals (cow and buffalo) should be indigenous and pure. The word pure refers to the originality of breed meaning thereby that no cross-breeding of the indigenous animals has been done with the foreign breed i.e., purity of the Indian breed has been maintained. Therefore, the food companies or any individual manufacturer of food product “ghee” if using the expression “desi” before it should do it in light of the existing legal provisions under the Food Safety and Standards Act & Rules and Regulations made thereunder. If these provisions are not followed in naming the food product “Ghee” then there are chances that the FSSAI may declare the use of expression “desi” as misleading and the food product “Ghee” is misbranded. Also, this may lead to the initiation of legal proceedings and if allegations are proved it will culminate into the imposition of penalty or any other legal consequences.

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Principle of Sustainable Development: Need for Environmental Protection

Mihir Kumar*

Abstract

The theory of Sustainable Development has originally understood within the framework of international environmental law. The universally accepted theory of sustainable development for the protection and improvement of the environment has been unanimously accepted by the countries of the world as a strategy that meets the needs of the present without depriving future generations of the right to available natural resources.

It clearly suggests that economic development and environmental protection are mutually reinforce and motto to provide a practical solution to the basic argument between above two. It is truly said that Sustainable Development is tool to make a balance between developmental activities for the assistance of the human and environmental protection and is, therefore, "a assurance of the present and bequeath to the generation to come". The theory of sustainable development seeks to reconcile the clash among development which may be trade, financial or social and the right to a good environment. There are lots of studies show that environmental issues raised of developed countries are different from development countries it's a game of money and technology. While one hand its raised under developed countries due to industrial & technological development, ion other hand under undeveloped countries its raised due to poverty, population and illiteracy. Definitely, it is in the socio-economic concern of a nation to encourage and promote developmental activities, but it not cost of environmental degradation, as it will not only affect the present generation but will have an adverse effect on the generations to come. Therefore, It is the necessitate of the time, so that both development and environmental protection move together while maintain a balance. In the light of above, we shall attempt to present the concept and general principles of sustainable development and environmental protection.

Keywords: *Sustainable Development, Humanity, Bio-diversity, Eco-system and pollution.*

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1. INTRODUCTION

> *"The Earth we abuse and the living things we kill will, in the end, take their revenge; for in exploiting their presence we are diminishing our future" – Marya Manes*

Long ago poet Words Worth lamented on "*What man has made of man*" "*Little do we see in nature that is outs*", he said. The poet has expressed pithily the heart of the problem, alienation of man from nature. All life, human, animal and plant, depends on the environment which is ethos. The famed mantra in the Riga Veda, the world's ancient text, portrays the beauty of Artha. Veneration & Ushash its glory. Our forefathers were ethos worshippers because worship is a form of greatest appreciation for nature. It reads nature with sanctity not to be defined by man. This healthy approach of man to nature declined with increase of population and growing stress on environmental property. Today humanity and particularly India is facing its greatest problem of the degradation of natural resources threatening the very existence of life.

Right from the mother's womb, a person desires fresh air to breathe, pure water to drink, nitrous meal to eat and clean atmosphere to live in. These rudiments are essential for the development of individual qualities. God was created this world and things in it. Everybody is assigned a particular job to perform and the physical condition is also made accordingly. Man is an integral part of the natural eco-system. He is not above or outside it. Nature balances itself; but man by his extraordinary intelligence is capable of distributing this balance. Science and nature are both permanent for the survival of man. But man in his technological and scientific lust has ravished natural assets formed desert, drought and how the exercises with atom and power of nuclear weapons in the earth atmosphere warn even the continuation of ozone layer and the incredibly atmosphere without which the men can't exist at all unless immediate and urgent steps are taken to put a stop to the environmental pollution, a very terrible and bleak future avails the humanity.

The novel technologically phase does not remove, but intensify, the clash between nature needs and development. Due to which many grave issues have arisen which are eye-opening and create a solemn intimidation to the entity of human.

The environmental protection isn't a local issue it's global. When we see international concern. When we touching about 21st century, mankind is faced among the frightening challenges of conveniences on the planet. Facing shrinkage forests land, ground water level, vanish teller kind, depletion of ozone layer, climate change and the extinction of biodiversity requires paradigm shifts while making all nations aware of their activities in harnessing natural resources. We have to be careful about environmental protection and development.

International environmental law is related with what sets standards for national activities and interdependence at the municipal, international and multinational levels to protect the environment and what constitutes environmental law goes beyond the boundaries of municipal law and is in line with international law.

In *Shubhas Kumar* v. *State of Bihar*,[1] the hon'ble Supreme Court of India has told that under Article 21 of the Indian Constitution 'Right to Life' also include live in pollution free Environment. The Supreme Court of India has observed:

"Right to life is a Fundamental Right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art. 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life".

2. SUBSTAINABLE DEVELOPMENT

It has been an inevitable truth at all stages of economic integration. The most of the government support for the perception of sustainable development makes concrete work in environmental matters all the more necessary and legitimate.

Its 16 principles define by the Sustainable Development Act, which should be added into the involvement of all concerned agencies. In a spirit, these theories are a manual for function in the views of sustainable development. They are an original expression of the theories of the "Rio Declaration on Environment and Development," a fundamental content that reaffirms the international obligation to sustainable development.

[1] AIR 1991 SC 420: (1991)1 SCC 598.

3. CONCEPT OF SUSTAINABLE DEVELOPMENT

In the Vedic Period, the most important aim of life of human being has to live with friendly with Environment.[2] Saints and Seers have brightly revealed that. "God sleeps in minerals, wakes in animal, thinks in man." Further the literature of Vedic times reaches that all the creatures and plants stand a sole of the God and they be accepted like that. It like this from there that loss to any element of nature is a hurt to the lord. Thus, the whole environment was held in the highest admiration as if it symbolized the Almighty.[3]

As civilization advanced, there has been a great deal of change and increase in human activities. Man developed in him a sense that he was a supreme of the planet. Gratitude towards environment, which was taught by the religions gradually withered and proved to be inefficient and inadequate to deal with the growing activity. Science and technology crept into civilization and they became the guiding forces of activities of mankind.[4] Many Westerners then believed that there was nothing that science or expertise could not achieve or solve. Pollution was one of necessary evil of progress, which could regulate, just as dreaded bugs like small pox and plague had been. With gearing up of industrial revolution, this human tendency towards nature became much stronger.[5] It was only during 1970's that our activities on earth became much more obvious and it was realized that man needs both 'development' and 'healthy environment'.

So, development and Environment are in alt co-related to each other. Human have to pay every development cost like economic growth or industrialization in form of pollution like Air, Water and Land. But it's necessary to economic growth.[6] The environmental issues developed countries differ from undeveloped countries, while one hand in developed countries environmental issues developed due to technological development, on other hand in poor countries these issues are raise un-development reasons. Therefore, the rich countries are deal with environmental disaster; they are inferring that the un-developed countries also have

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[2] Sweta Deshpande, 'Environment and Sustainable Development: An Analysis', Indian Socio-legal Journal, 34, 2008 p. 83.
[3] Ashok Desai, Environment Jurisprudence, 5 (New Delhi: Vikas Publishing House Pvt. Ltd., 1998
[4] Ibid.
[5] Id at P. 58.
[6] R. P. Anand, "Development and Environment: the case of Developing country", LJ.IL. Vol. 20 (1980) p. 1.

to deal the similar problem if they formulate the similar growth. On the other hand, poor countries face that the best source of pollution is poverty.[7]

On the light of the above statement, word development is co-related to developing countries, while degradation of pollution is due to developed countries not through developing countries. As we earlier discussed environmental pollution not a local issue its global. When we see in 21st century we found that human beings are struggling for their sustainability in our earth. Human beings face many environmental issues like shrinking of forest, Acid Rain, detraction of Ozone Layer, losses of under water levels, climate change, Bio-diversity and so many issues related to environment. Every country should have harness of environment and controlled their action on this side, not only controlled also aware damages of natural resources and industrial terrorism.

On the first-time global society seat together in Stockholm conference 1972 for make a political boundary between environment and development. In this way Stockholm deceleration emerge as face of human development. Take a sprit from Stockholm deceleration 1972 global society steps towards green fraternity and make a principle of one nation and one earth. Make a centralized revolution for making an international pollution policy, its known as Sustainable development. Therefore, most of the International and municipal law are codified for the achieve goal of sustainable development. It was a thought whereas was responsible for different making of environmental law in India. which make not only environmental protection rather than its make for stop environmental pollution. Indian judiciary make important role to implementation of these environmental law and they have used public interest litigation as a tool for making environmental jurisprudence in India.[8]

The incentive was taken by the world commission on environmental development. A report published by the general assembly of the United Nation in 1982, and In 1987 a common feature was published. The commission's membership has split between developed and developing countries and the Prime Minister was chaired it, *Gro Harlem Brundtland*. The report submitted by the committee came to be known as '*Brundtland Commission Report'*

[7] Ibid.
[8]Mohd. Zefar Mahamood Nomani, "Law Relating to Environmental Liability & Dispute Redressal; Emergence & Dimension" 11th ALJ 85 (1996).

which exhaustively dealt with concept of Sustainable Development and it did a committed work for the unity of environment and development. Brundtland explained relationship between environment and development thus;[9]

We do not separate the existing environmental field from human action, passions, requirements and attempts to separate it from human concerns have given the very wondering 'environment' connotation of simplicity in some political areas. The term 'development' has also been strutted down by some to a very limited spotlight, along the lines of what undeveloped nations must do to become rich. But the 'environment' is where we live; and 'development' is what we all do in an attempt to improve our position within that abode.[10]

4. SUSTAINABLE DEVELOPMENT: INDIAN PERSPECTIVES

When we talked about developing countries as India, utilization of inartificial resources is necessary for economic development through industrial expansion. Whereas the global and municipal laws and policies have been ahead granted several instructions legal or administrative, the theory of sustainable development needs still a specific concentration and consequence to take understanding between industrialist and others engaged in the sucking of natural resource for monetary development. through this vision to reach this aim, the Hon'ble Supreme Court of India in a important landmark judgments not only exhorted the concept of sustainable development but also inflicted provinces for obedience therewith.[11]

In India, State policy on environment protection is based on the global norms. Environmental regime in India consists of four specific legislative enactments. Two of them i.e. "*The Water Prevention and Control of Pollution Act-1976 and The Air Prevention and Control of Pollution Act 1981*" object at prohibition and regulate of the water and air pollution. Among other two one is The Environment (Protection) Act,'1986, which is considered as a comprehensive enactment for the protection of environment. The last one is the Biological

[9] A. Narsing Rao, "Sustainable Development and Environment Protection in India" A Study of Judicial Response (SCC) 3, 2012-p. 18.
[10] World Commission on Environment and Development (WCED), Our Common Future, New York, Oxford University Press, 1987. P. xi
[11] A Narsing Rao, "Sustainable Development and Environment Protection in India- A Study of Judicial Response", (SCC)3, 2012, p. 20.

Diversity Act, 2002 which is enacted for purpose of the conservation and protection of India's rich biodiversity.

5. CONSTITUTIONAL MANDATE AND SUSTAINABLE DEVELOPMENT

When we see to The Constitution of India, we found that there are no any make any special law or rule for environmental problems directly. But Article 47 indirectly discuss environmental issues, Article 47 of the Constitution of India says that, "*The state shall observe the raising of the intensity of nutrition and the standard of life of its people and the upgrading of human wealth as along with its fundamental duty*."

After the Stockholm Declaration, to comply with the provisions of the declaration the Indian Government, by the 42nd amendment Act, 1976 in the Constitution of India makes the direct laws for the safety and encouragement of environment, by the foreword of Articles 48(A) and 51(A)(g) which form the part of Directive Principles of State policy and Fundamental Duties correspondingly.[12]

Article 48(A) runs as under: "The state shall endeavor to protect and improve environment and safeguard the forest and wildlife of the country."

Article 51 (A)(g) states that, "It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures"

Thus, as a result of 42nd Amendment to the Constitution, now the courts are vested with the duty to intervene in the environmental problems and also take measures for the environmental protection.

6. SUSTAINABLE DEVELOPMENT- INTERNATIONAL PERSPECTIVES

Every anthropogenic activity has its impact on the environment. More often than not, it would be harmful to the environment than the mankind. Human activities cause raise impression in the get together of ecosystem which provides necessary resource & work for the goodness of

[12] Sweta Deshpande, Environment and Sustainable Development-An Analysis, India Socio-Legal Journal, vol. 34, 2008. p.85.

mankind. Environmental consequences require assessment and consequential adjustments while undertaking industrial or other productive activities for socio-economic development. Environmental auditing is one such strategies of balancing environment and industrial production. 'United Nation World Conference for Sustainable Development emphasizes for above aspects. This envisages so man in his greed for progress should permit sustainable conditions not only to the human and other creatures but also to the very Nature and natural resources. The following are some of the international efforts where greater emphasis is paid on achieving environmental safety and protection, through the doctrine of "Sustainable Development".[13]

6.1 STOCKHOLM DECLARTION, 1972

The period of 1972 makes a watershed in the account of environmental administration in the all countries, a submit organized by United Nation on Human Environment which was solemnized on June 1972 in Stockholm, and in this conference the numbers of strategies were evolved for protection of environment. The Stockholm Declaration is called the Magna Carta of environment. It is the first international document which expressing declares the right to environment as an important independent right. It is therefore necessary to look into the Stockholm Declaration and International Conventions, Chapters and Developments on environmental protection so that the right in our country may be raised to the international standard.

On the celebration of United Nation submit on Human Environment at Stockholm late the Prime Minister Mrs. Indira Gandhi had share her view before the world community, she said that: *"For the developed countries development might be the cause of destruction of environment, for a country like India it was the Primary means for improving the standard of living, to make available food products, water, cleanliness, shelter, to bring about greenery in deserts and to make hills and mountains worth living."*

6.2 JOHANNESBURG DECLARATION ON THE SUSTAINABLE DEVELOPMENT-2002

[13] N. Maheshwara Swamy, Sustainable Development: The objective Behind Environmental Legislation-A Critical Analysis. ALT, Vol. iv, 2003, p. 23

All the delegates of different countries of the world community, participated in the Conference on Sustainable Development in South Africa, Johannesburg city held on 2nd to 4th September 2002, reaffirmed their assurance on sustainable development. In between Rio and Johannesburg, the countries of the world met under the guidance of the United Nations at many major conferences, inclusive the Monterey Conference on economics for Development, as well as the Doha Ministerial Conference. These conventions laid down a broad vision for the future of humanity of the world.

The Declaration of Johannesburg observed, inter alia, that the world environment continues to undergo. Damage of bio-diversity sustains, fish stores continue to decrease, many fertile land become desertification, the opposite impact of climate change are already manifest, more frequent of natural disasters and more devastating and developing countries more vulnerable and air, water and marine pollution is robbing millions of civilized lives. The fight against worldwide conditions that pose severe threats to the sustainable development of the people was pledged to be focused upon.

It accepted that world community is capable with the resources to deal with the defiance's of poverty alleviation and sustainable development facing all mankind. Extra steps are said to be undertaken to guarantee that these presented resources are used to the assistance of humankind.

Johannesburg Declaration has also taken note of the fact that in order for achieves the objectives of sustainable development; we have needed more efficient, self-governing and responsible world and polygonal organizations.

7. SUSTAINABLE DEVELOPMENT AND ENVIRONMENT PROTECTION

Within the last decade, serious about the nature and development have grown to be a central characteristic of growth, ideologies and discussions in the Third World. Working in the direction of sustainable development is no longer the special right of the government, but is promising as a leading concern of our civilized society. human and countries are beginning to recognize that the present ways of progress centered on Western illustration is not inter alia sustainable and there is a requirement to participate a more active responsibility in the growth

process. Information and communication technologies perform a major character in the whole activities of achieve sustainable development and this is a necessity from the beginning of the 'Sustainable Development Networking programmed.'

On the occasion of the new millennium, human livelihood in under developed nations suffer incomparable deviances related to sustainable development due to the altering world economy, political change, environmental digressions and demographic pressure. The mission of driving sustainable development by the systems that obtain the essential requirement of the community even as defending the nature and authorizing the poor is stiff. People-oriented progress can comprehend its full probable merely when societies, developers, policy-makers and civil-society are concerned and inspired and there is constant distribution of information. The increasing space between what the world has and does not have is more aptly reflected in the gap between those who have access to information and those who do not.[14]

8. UNSUSTAINABLE TO SUSTAINABLE DEVELOPMENT

Last two decades before until, the world recognized only at financial condition as a determine of human growth. Thus, nations which were financially well progressed and where human were comparatively wealthier were called 'developed' countries, while the rest of the countries where penury was pervasive and financially rearward were called developing nations. Mainly of the nations in North America and Europe, which became industrialized at an prior levels, are more financially superior. They not only speedily browbeaten their own natural resources, but used also the natural resources of developing nations to growth yet bigger economy. So as growth progressed, wealthy nations got wealthier while poor countries got poorer. However, the urbanized world has also started to recognize that their lives are being fatally exaggerated by the environmental penalty of expansion based solely on financial development. This form of progress did not add to the superiority of life as environmental circumstances began to depreciate.[15]

9. SUSTAINABLE DEVELOPMENT AND ECOLOGICAL BALANCE

[14] www.sdnp.delhi.nic.in Vikas Nath "*the Sustainable Development Networking Programme (India)*".
[15] Erach Bharucha, Environmental Studies for Undergraduate Courses, University Press. P. 158.

Open spaces are the lungs of a city. In 1996 the Supreme Court made an order to close down or shift 'H' category industries and surrender the lands to provide for 'Lung spaces' in Delhi. Though some of them relocated their industries, they were reluctant to surrender the land. This disturbing state of affairs provoked the Supreme Court to remark in *M.C. Mehta* v. *Union of India*,[16] that though not unknown in the adversarial litigation, law's delay ought not to enter the arena of public interest litigation concerning environment. The purpose of the order was to provide open space for the benefits of the people. Even after more than four years, the purpose stood unfulfilled. There are certain industries that are permissible under the master plan for Delhi. Such industries, newly started in the place after obtaining clearance from various agencies, were not to surrender the land. However, the position is different in the case of others.

These theories and other similar ones are incorporated into the exercises of a developing amount of government authorities, non-profit or personal agencies and those in service in sectors such as education, business, construction & research, development, Management etc. They illustrate motivation from these theories to progress their method in relation to the ideas of developing new areas of skills, manufacture & spending, national contribution, environmental liability and involvement.

10. CONCLUSION

We are succeeding our for-father habit of protection of environment, when been see in our Vedic Period, According to Padpuran tree are very important we are worship like God. In revival India the policy of "*Stainable Development*" drive it means we use and protect tree for future and in a modern India our judiciary play very important role in protection of environment.

Sustainable Development such type of question which makes a balance between needs of present generation and requirement of natural resources for future generation. The requirement for this stability becomes clear in the context of large-scale financial incorporation as in Indians. Parliamentarians are undeniably in a position to make a

[16] AIR 2001 SC 1544 p. 1566

significant contribution towards achieving sustainable development and enabling countries of Indians to act in solidarity with respect to their common asset, the environment. More specifically, they are best situation to be de facto emissaries for sustainable development and the key mediators between the public and decision makers in facilitate in sequence flow, collaboration and mediation, thereby ensuring that objectives in this area are achieved is obtained.

Modern law relating to environment protection has the objective of achieving "Sustainable Development". This problem has been taken up for enforcement by the United Nations Organization (UNO) ever since the Stockholm Conference on the Protection of Human Environment, 1972 since then, a number of consequential Conventions Declarations and Protocols such as Nairobi Declaration, Rio Declaration, Kyoto Protocol to the UN Framework Convention on Climate Change, Johannesburg Declaration on Sustainable Development/ World Summit on Sustainable Development, the Delhi Ministerial Declaration on Climate Change and Sustainable Development etc., have been witnessed at the International scenario. The improbability of technical evident and its altering frontiers from time to time has led to great changes in environmental theories through the era between the Stockholm Conference of 1972 and the Rio Conference of 1992.

The concept of sustainable development in fundamental to the present and future growth of environmental law and plan. It requires that development should take place in a manner whereby the ecology is sustainable the two essential legal principle basing the sustainable development is, "Precautionary Principle" and "Polluter Pays Principle". In other words, in countries like India "Sustainable Development" has the revolve which connect the two tiers of development, i.e., economic progress & environmental protection.

In growing nation like India, a use of natural resources is necessary for Economic development throughout Industrial growth. While the international and municipal laws and policies have previously make available different procedure legal or administrative, the principle of sustainable development needs still a specific concentration and focus to bring consciousness between industrialists and other occupied in the utilization of natural resources for economic development. Through a vision to attain this objective, the Hon'ble Supreme

Court of India in a series of land mark cases not merely explain the theory of sustainable development but also enforced responsibility for observance thereto and it has raised the status of fundamental right.

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3. Baruah, Aparajia: Preamble of the constitution of India, Deep and Deep Pub. Pvt. Ltd., New Delhi, 2007.
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5. Secretary, Department of Environment, Government of India R.P. Anand ed. Law, Science and Environment (1987) p. XXIX.
6. Rajeev Dhavan; The wealth of nations revisited; http://www.indiaseminar.com/2000/492.
7. Eugene P Odum; Fundamentals of Ecology; Law and the Environment a Multidisciplinary reader; Roberty V Percinal and Dorlthy C Alevizatos; Temple University Press, Philadephia, p. 16.
8. V. D Mahajan, Jurisprudence and Legal Theory, 5th Edition, Eastern Book Company 2004, p. 128.
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Right to Recall: A Way Forward for Democracy

Shipra Mishra*

Abstract

"There can be no doubt, that if power is granted to a body of men, called Representatives, they like any other men will use their power not for the advantage of the community but for their own advantage, if they can."

— *James Mill*

Democratic countries like India have numerous political parties. Party who has desirable number of seats in election would form the government and rule the country. For securing majority in election, political parties make various promises during election. It makes no difference to political parties, whether work is being done or not. The primary importance of political parties is that the work is properly promoted. Such statements are made solely for political purposes by the leaders. It makes no difference to them whether it is good for the country or not.

The most serious issue is that there is no law to prohibit and criminalize such false claims and promises. There is no penalty provision. It's a need of hour to implement the "Right to Recall", so that if a leader demonstrates that he is incapable of fulfilling the promises made during his political campaign, the public has the right to elect him before he is able to remove that leader. In this Article, the author attempts to demonstrate how false promises influence voters, as well as mentioned some examples of countries where Right to Recall prevails. The author has also analyzed the advantage and disadvantage of 'Right to Recall'.

Keyword: Election, Political Party, False Promise, right to recall, Electoral Reform.

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1. INTRODUCTION

In a democracy, MPs and MLAs are directly elected by the people. The Citizen assumes that there is free and fair election. They cast their votes freely, fairly and after due consideration. Their votes are based on the candidates' promises or the performance of the incumbents in power, as well as a perception generated by information provided by the media, including social media.[1] If an electorate is dissatisfied with their elected representative, they have no recourse.[2] In such a case, electorates have no choice but to wait until the next election to remove the representative from office.

To address this shortcoming, some democratic states have adopted the 'Right to Recall' (henceforth, Recall) and the No Confidence Motion (henceforth, NCM), which involve the re-election or replacement of one elected representative with another for the same position in the house. Although not identical, both measures seek to hold elected governments more accountable for promises made to voters. Recall gives the right to vote to his elected representative any time before the representative's usual tenure expires. In other words, it gives voters the power to 'de-elect' their representatives from legislatures through a direct vote.[3] In a parliamentary democracy, on the other hand, No-Confidence Motion means there are no more confidence in the elected government either partially or entirely.[4]

In a direct democracy, Recall authorizes the governments to be responsible to the voters even after being elected for a time period. For example, in the US, the right to recall allows the voters to demand recall of an elected representative at the city and state levels for specific reasons, which included dissatisfaction with their works.[5] A recall

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[1] Philipose Pamela, can an election be retweeted to victory, (June 5, 2021, 10:05 AM), http://www.epw.in/Journal/2015/7/web-exclusives/can-election-be-tweeted-victory.html.

[2] Ipsita Mishra, Right to Recall- Can this clean up the Indian political system? The Hindu, Sept 30, 2017

[3] Bajpeyee, Sonika, Right to Recall Elected Representatives: Whether Viable in the Indian Scenario? (June 5, 2021), http://www.indialawjournal.org/archives/volume6/issue_1/article8.html.

[4] Kota Neelima, Right to Recall in India: An Analysis, 49 JCPS 1(2015)

[5] National Conference of State Legislatures (2016), Recall of State officials, (june 8, 2021) http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx.

decision is made at a special election in which voters in a constituency decide whether an elected representative should remain in office or not. If the elected representative fails to win the Recall election, the position is declared vacant and new elections are held.

However, it is pointed out that the founding fathers of the Indian Constitution did not envision the right to recall elected representatives. Although right to recall is discussed in Constituent Assembly. The founding fathers could not have predicted the rise of an unhealthy role for money and mafia power, criminalization, corruption, communalism, and casteism in Indian democracy.

2. MEANING OF RIGHT TO RECALL

Recall means removal of an elected person during his term of office by the electorate.[6] In a democratic country, right to recall can be used for removal or de-elect a member of parliament before the end of his term of office by citizen. The recall power is a tool to analyze an elected representative's performance. The recall process can be said as a unique political device that can be used to remove the particular member of legislature for nonperformance of his duty.

Right to Recall means if you are dissatisfied with the performance of your elected representative, you have the right to recall him or her and elect a new representative. If they do not fulfill their *'Chunavi Jumla'* (false election promise) during election, they can be removed from the office.[7] The members of parliament, legislatures or other local bodies can be removed either by the action of legislature through expulsion or by the voters through a recall procedure. Procedure of expulsion is a function of internal authority of legislative body. It is their general powers and proceedings over the members. Whereas recall is a special process that is practiced by the people. Recall is exercised as a special procedure outside the legislature. Procedure of recall for the

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[6] Ipsita Mishra, Right to Recall- Can this clean up the Indian political system? The Hindu, Sept 30, 2017
[7] Ajay Amitabh Suman, Right to Recall, The Times of India, Jan 17, 2021

officers of state as well as local bodies became popular particularly in western countries during early 20th century. It is known as “Progressive Movement”.

3. COUNTRIES WHERE RIGHT TO RECALL IS PERMITTED

There are few countries all over the world where Right to Recall is prevails. United States of America, Philippines, Switzerland, Province of British Columbia in Canada, Venezuela as well as South Korea, Taiwan, Argentina, among other places are some important examples of it.

3.1 The United States of America

In 1903, provision of recall was first time come into the light in United States. New city charter for Los Angeles 7 was approved by voters. After this, recall of state officials was permitted in the United States.

In the United States, only two state officials (governors) were eliminated successfully with the help of right to recall. Lynn J. Frazier in North Dakota was removed in 1921. Gray Davis in California was eliminated in 2003. In the case of Arnold Schwarzenegger's election, sufficient signatures were received to eliminate the Arizona Governor Evan Mecham through the provision of right to recall but Representatives of state's House impeached him before the date of recall election.[8]

Recalling members of state legislators in the United States has been somewhat more successful than in other countries, though it is still uncommon. Previous history shows that 107 attempts have been made for a recall election in the state of California from the year of 1911 to 1994. Among these recall elections only four recall elections were successfully completed with the necessary number of signatures on the petition of recall.[9]

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[8] Rose Richard, International Encyclopedia of Elections, 2000.

[9] Ibid

These four petitions are mentioned below-

1. Recall election of a state senator in 1913.
2. Recall election of a state senator in 1914.
3. Recall election of a state senator in 1994. State senator survived election with 59% vote.
4. Recall election of two Assembly members in 1995.

3.2 The Switzerland

There is a limited literature on Swiss recall procedures. Although recall is not used at the federal level in Switzerland, recall provisions for cantonal legislatures exist in six of the country's 26 cantons. It has been observed that for the further proceeding of recall petition, signature of required number of voters were not based on the percentage of the whole voters in case of Switzerland.[10]

3.3 The Philippines

Recall is also permitted in the Philippines. It was noticed that because of funding problems, recall elections were suspended for a short period of time in 13th November, 2008. Order of suspension was uplifted after three-year. The recall election can be held only after the signatures of 25% on the recall petition. In this election, the name of the candidates as well as representatives is mentioned. If the representative receives the most votes, the recall is deemed a failure, and they retain their position. If, on the other hand, another candidate receives the most votes, then they are duly elected. (The Philippines Commissions on Elections: Press release)

3.4 The Venezuela

[10] Sanjeev Kumar Chaswal, A *Paradox of Right to recall and Reject- A Boon or Bane,* Dissertation, The Institute of Constitutional and Parliamentary Studies, https://www.academia.edu/7768945/A_Paradox_of_Right_to_Recall_and_Reject_-_A_boon_or_bane.

In Venezuela, provision of recall was appeared in 1999 after the approval of new Constitution by the electorate in a referendum. The provision of recall is used in this country with subject to the provision of new constitution.

3.5 The Uganda

In Uganda recall provision allows to recall election of a member of parliament for any of reason given below- physical incapacity, mental incapability, and incapacity to perform the office function, contempt, and continue deserting of the electorate without reasonable cause.

3.6 The British Columbia

The Recall and Initiative Act 1995 was passed in the Canadian province of British Columbia in 1995. This act gives the right to replace the member of legislative Assembly in the mid of office of term. A successful recall petition under the Recall and Initiative Act of 1995 provides the replacement of the Legislative Assembly member. If a recall petition is passed with majority, the Chief Electoral Officer considers it and within 90 days an election must be held.

There are also some other countries which have adopted Right to recall for better ruling.

3.7 The India

India, as the world's largest democracy, is viewed as a role model by the world's new and emerging democracies. The Indian constitution's founding fathers chose parliamentary democracy as the best model for a large and diverse country like India. The Indian constitution guarantees the people political justice. As a result, there is a free and fair election.

It can be said that the principle of Right to Recall was not a new concept in India. It is prevailing as a “Rajdharma” during Vedic times. “Rajdharma” means the removal of a king when he cannot run his kingdom with a proper rule and regulation.

The issue of recalling elected representatives has a long history in Indian democracy; it was even debated in the Constituent Assembly (Sardar Vallabhbhai Patel on 18 July, 1947 while discussing proposed amendment on power to recall). Manabendra Nath Roy suggested decentralization of government in 1944 and allows the recall of representatives in the term of office. Somnath Chatterjee also supported the view of M. N. Roy by saying that right to recall is necessary for the responsibility of elected person.

Debate over Article 8A (3) was focused on the belief that the Right to Recall must go with the Right to Elect, and voters must be given with a remedy if things go wrong (Loknath Misra on Nov 29, 1948 while proposing amendment in Article 8A (3). Dr. Ambedakar denied this Amendment. While some members believed that recall would help in political education and encourage voters to think (Debate on July 18, 1947 in Constituent assembly debates: Official Report, 2009). Other members argued that it would not be proper to give a Recall provision at the childhood of Indian democracy. It was feared that recall would turn the constituencies into a battleground for candidates, making them unnecessarily victims of political rivalry.[11]

Further, India embraced democracy system in which the elected person is removed by the Parliament. This is a fact that people elect the representative but the office of term of representative is not with the choice of the people. It is strange to think that the elected persons are firstly the member of political party rather than the elected representatives.[12] The representatives are elected because they belong to a particular political party.[13] It can be said that there is no importance of their work and commitment. The candidates for election are selected by the head of political party. Generally, in the process of the selection of candidates, the principle of particular party is not followed. For the selection of candidates in election, the political party should consider the choice of the public. The choice of the people should be given importance

[11] Vinod Bhanu, Recall of Parliamentarians: A Prospective Accountability, 42 EPW 20-23 (2007) https://www.jstor.org/stable/40277121

[12] Jennings Ivor, *Parliament,* 25, (Cambridge University Press, Cambridge, 2nd edn.) (1957).

[13] Tomkins Adam, Talking in Fictions: Jennings on Parliament, (67 The Modern Law Review 777) (2004)

in the selection of a candidate for the election. The consideration of a public choice in candidate selection is the base of free and fair election.

Further, Right to Recall is also included in The Representation of Peoples Act, 1951. Although, there is no provision of recall under the Representation of Peoples Act, 1951 in case of dissatisfaction or incompetence of the elected person. There is only some provision regarding the vacant of seat in case of certain offence. Varun Gandhi presented the 'Representation of the People (Amendment) Bill in 2016 regarding the recall of MPs and MLAs in case of avoiding their duties.[14] In present time, Right to recall is prevailing in Bihar, MP and Chhattisgarh.

The Representation of Peoples Act (RPA) 1951 talks about Right to Recall. RPA does not account the ground of incompetence or the dissatisfaction of the electorate as the ground for recall and vacation. It only provides for the vacation of the office upon the commission of the certain offence. In 2016, Varun Gandhi introduced the 'Representation of the People (Amendment) Bill' in Lok Sabha, with the intention of recalling MPs and MLAs for non-performance.[15] Presently, Right to recall exists in the local bodies of Bihar, Madhya Pradesh and Chhattisgarh.

4. ADVANTAGES OF RIGHT TO RECALL

- It gives the authority to decide the commitment of an elected person.
- There is less chance of criminals for entering in politics.
- It promotes dimensions for direct democracy.
- For strong democracy, the right to recall must be granted as well as the right to vote.
- The recall system restricts candidates from spending crores of dollars during election because of recall procedure.
- Election promises would be kept by the representatives due to the fear of being kicked out if he did not keep promises.

[14] Ipsita Mishra, Right to Recall- Can this clean up the Indian political system?, The Hindu, Sept 30, 2017
[15] Ibid

- The very essence of democracy is a free and fair election. People should vote, who should be elected and who should be removed based on their trust in the elected official.

5. DISADVANTAGES OF RIGHT TO RECALL

- There is uncertainty about how long an elected representative will retain in the office. Because of uncertainty, it is difficult to make a plan for public welfare.
- Opposition member can make issue in the smallest mistake of elected person and can favour a recall election.
- An elected person would continue to spend large sums of money in order to please the public.
- There would be constant political turmoil, and politicians would be preoccupied with retaining their seats rather than working for development.
- Although the right to recall is an innovative idea, it must be avoided because of the pragmatism test.
- In a democratic country like India, it can be pointed out whether the right to recall has accomplished its purpose in the minimum local government frameworks that gives such a right to the voters.
- It gives an additional burden on Election Commission because of re-election.
- There is a more chance of misusing right to recall rather than public welfare.
- The elected person works under continuous pressure for best performance.

6. CONCLUSION

Before implementation of the Right to Recall, democratic country should analyze this system whether it is easily understandable by the public. The evolution process would not end there; we would need to educate people about the issue, its pros and cons, and the results of anti-incumbency votes or signatures. It would need to be audited by an independent authority under the election commission or some newly formed agency.

For example, if ten lakh people sign a petition against the incumbent in a constituency, who will verify and audit the signatures? Who will be in charge of the recall process? What if the incumbent files a legal challenge? Isn't it likely that the court would take years for deciding the matter, and then it will cause instability in the system?

No one can deny that because of this situation, it would be very easy for the defeated candidates to support against the winning candidate. Furthermore, no one, no matter how good they are, can satisfy everyone. As a result, in the absence of a proper evaluation system and with widespread ignorance about the government's policies and procedures, many people are likely to make decisions based on perception and ignorance rather than reality.

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Arbitrability of Fraud in India: An Evolution from Contention to Clarity

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ABSTRACT

Currently arbitration is the most dynamic form of justice delivery mechanism in India and has become a convenient way for resolution of disputes after a surge in the commercial disputes leading to the matters adjudicated by the arbitrators, considering its time efficiency. Fraud in the world of legal jurisprudence have always been scrutinized by stringent measures and precedents. However, when it comes to arbitrability of fraud in India, it has seen its fair share of vague advancements and a tumultuous evolution. Recently there have been various decisions by the courts which aims to solidify the scattered decisions of previous judgements to give a concrete test for determining the arbitrability of arbitral frauds in India. This article aims to explain the philosophy behind the initial anomalies present in the decisions pertaining to arbitral frauds and critically analyze the recent legal developments which actively try to diminish the disparities present in the legislative realm of arbitral fraud cases.

Key Words: Arbitration, Mediation, Conciliation, Criminal Laws

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1. INTRODUCTION

Arbitration is one of the most common means of conflict settlement because it is rapid, respects party autonomy, and maintains party equality, all of which are foundations for arbitration.

"The rise of arbitration in India is not attributable to the success of arbitration, rather to the failures of the Court," *Justice Fali S. Nariman* has said several times.[1]

The aforementioned statement accurately and forcefully expresses the evolution of Indian arbitration law. The understanding and application of the theoretical frameworks and principles of arbitration in the realm of Indian law has grown steadily, and substantial developments in its jurisprudence may be related to the increasing judicial comprehension on the topic.

However, this technique of dispute redressal has a number of shortcomings, and it is critical to evaluate the arbitrability, which is among the most crucial matters and restraints of arbitration, and also whether the Arbitration Tribunal's jurisdiction stretches to all types of conflicts or if some of the disputes are beyond the Tribunal's ability to address or solve and must be settled through other means. Various judicial rulings have addressed the topic of whether or not cases involving frauds in arbitration agreements are arbitrable.

2. CONCEPT OF ARBITRABILITY AND FRAUD

Arbitrability denotes to "whether or not a particular type of issue may be resolved by arbitration. In practice, arbitrability solves the question of whether a claim's subject matter is or is not reserved to domestic courts under national legislation". Disagreement if cannot be set through arbitration, the jurisdiction of arbitral tribunal shall remain restricted, and the assertion then must be conveyed before the traditional litigation courts. Arbitrability refers to "whether specific kinds of disputes are banned from arbitration due to national legislation or

[1]VidyaDrolia vs Durga Trading Corporation, AIR 2019 SC 2042

judicial authority". The basis of the bar is frequently referred to as "public policy" by courts.[2]The term `arbitrability' has diverse connotations in different circumstances.

In the case of "*Booz-Allen & Hamilton Inc vs SBI Home Finance Ltd. & Ors"*[3], while presenting the triple pronged test for determining arbitrability, the Supreme Court divided the conflicts related to *"rights in rem*" and "*rights in personam- personal rights*" and ruled that the "personam" would be arbitrable while "rem" would not because it has more probability to distress civilization hugely. The Court also identified some types of disputes that were not arbitrable, and evolving jurisprudence has added new types of disputes to this list.[4]

The three aspects of arbitrability linked to "the arbitral tribunal's jurisdiction" are cited as follows:

(i) Can the conflicts be adjudicated and settled by arbitration? That is, "whether the conflicts, given their nature, might be settled by a private forum selected by the parties (the arbitral tribunal) or whether they would be entirely the domain of public fora (courts)".

(ii) "Do the disputes fall under the purview of the arbitration agreement? That is, "whether the disputes are enumerated or defined as issues to be determined by arbitration in the arbitration agreement, or whether the disputes fall under the 'excepted matters' excluded from the arbitration agreement's purview".

(iii) Whether the parties have referred the disputes to arbitration? That is, "whether the conflicts fit within the scope of the arbitral tribunal's submission or whether they do not derive from the statement of claim and counterclaim presented before the arbitral tribunal."[5]

Arbitrability refers to "whether an arbitrator has the authority to rule on a dispute". This, in turn, depends on "whether certain parties have agreed to have certain disputes between them resolved through arbitration and thereafter is potentially, in any dispute, a question of whether the parties did agree to arbitrate and how the issue should be resolved".[6]According to the

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[2]Laurence Shore, **,** *Defining 'Arbitrability' The United States vs. the rest of the world,* New York Law Journal, Litigation, 15/06/2019, available at https://indiacorplaw.in/wp-content/uploads/2016/08/shore-definingarbitrability.pdf **(**Last visited on 22/06/2021)

[3]SC (2011) 5 SCC 532

[4]ShuchiSejwar and ArpitLahoti, *Arbitrability of Fraud: Is the Anomaly Solved*, SCC Online, 27/02/2021, available at *https://www.scconline.com/blog/post/2021/02/27/arbitrability-of-fraud/* (Last visited on 22/06/2021)

[5]*Supra* note 3 para. 21

[6]Baker McKenzie, *Who decides arbitrability?,*Lexology, 30/11/2012, available at https://www.lexology.com/library/detail.aspx?g=c4a9dadf-8b80-4ed5-81f4-c9ba50a35d21 (Last visited on 22/06/2021)

courts, "some types of conflicts may not be competent of adjudication by arbitration." Issues involving public offences, disputes deriving from unlawful agreements, and conflicts involving statuses, such as dissolution of marriage, are not eligible for arbitration.[7]Certain examples of disputes that are not arbitrable disputes[8], "intellectual property rights; anti-trust or competition laws; insolvency and winding up; bribery/corruption; fraud; [9]criminal matters"

Certain restrictions can be there on a party's ability to enter into arbitration agreements, denoting that certain entities (like States or State entities) due to structural considerations, you may not be authorized to enter into arbitration agreements or you may need specific authority to do so ("subjective arbitrability"), or restrictions founded on the main subject material ("objective arbitrability").The arbitrability of a dispute may change from one country to the next, first because of various policy concerns, and second, because of how open the State is to arbitration. [10]In law, fraud is defined as "deliberate deceit for the purpose of obtaining an unfair or unlawful advantage or depriving a victim of a legal right" .Fraud can be a "violation of both civil law or criminal law[11] , or it can result in no loss of money, property, or legal right but yet be an ingredient of another civil or criminal wrong". Fraud may be committed for monetary gain or for other benefits.[12]

The Contract Act describes "fraud" as "a fact knowing it to be untrue, knowingly active concealment of a fact, making a promise without intending to fulfil it or any other act which is capable of deceiving and is committed by a party to a contract, or with his participation, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract".[13]The arbitrator has jurisdiction only to the degree that the arbitration

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[7]*A Ayyasamy Vs A Paramasivam & Ors*, AIR 2016 SC 4675 pt. 5
[8]Harshal Morwale**,** *The Concept of Arbitrability of Arbitration Agreements in India,* EFILA Blog, available at https://efilablog.org/2017/12/20/the-concept-of-arbitrability-of-arbitration-agreements-in-india/(Last visited on 22/06/2021)
[9]O.P.Malhotra & Indu Malhotra , *O.P. Malhotra on 'The Law & Practice of Arbitration and Conciliation'* 6.1.9 – 6.1.12, (Thomson Reuters India ,3rd edn, 2014)
[10]*Supra* note 2
[11] Wikipedia, *Fraud*, Criminal Law, available at https://en.wikipedia.org/wiki/Fraud (Last visited on 22/06/2021)
[12]Legal Dictionary, Fraud, Law.com, available at https://dictionary.law.com/default.aspx?selected=785 (Last visited on 22/06/2021)
[13]The Indian Contract Act,1872 (Act No. 9 of 1872) , s.17

provision grants it.[14] . Some issues, irrespective of whether they are enclosed by the arbitration clause, are not sanctioned to be handled by arbitration. For example, disputes ascending out of '*rights in rem*', ie rights enforceable against and affecting the world at large, will normally not be acquiescent to arbitration.[15] While disputes concerning contentions of fraud ascend out of "rights *in personam"*, the arbitrability of fraud has been a vexed question in India.[16]

3. EVOLUTION OF LEGAL JURISPRUDENCE THROUGH PRECEDENTS AND AMEENDMENTS INITIAL JUDICIAL PRONOUNCEMENTS

Over the years, the process of arbitrating fraud in India has undergone a turbulent development. When dealing with issues involving fraud, an arbitrator or arbitral tribunal, as a creature of the arbitration provision in the agreement, may or may not have competent authority. "Section 16 of the Arbitration and Conciliation Act of 1996" allows for a challenge to the decision. This oddity can be traced to the Indian laws' silence on arbitrable and non-arbitrable issues, whether it is the Arbitration and Conciliation Act, 1996[17] (or its recent modifications in 2015 and 2019) or the former Arbitration Act, 1940[18]. Because of this ambiguity, a party or parties may object to arbitration on the basis of nonexistence of the arbitration agreement, invalidity of the arbitration provision, inability of the issue to be addressed via arbitration, or incompetence of the arbitral tribunal in determining the dispute.[19]

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[14]*S.P. Singla Constructions Pvt. Ltd. v. Government of NCT of Delhi*, 2015 (1) Arb. LR 33 (Delhi)
[15]EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE (EUIPO), Part E Section 3 (1.2) EUTMs and RCDs as objects of property, available at https://guidelines.euipo.europa.eu/binary/1803468/2000260001 (Last visited on 24/06/2021)
[16]Ritvik M. Kulkarni, *Challenging Arbitrability of Fraud before a Tribunal in India*, Koinos Indian Arbitration Blog, 13/01/2020, available at https://indianarbitrationlaw.com/2020/01/13/challenging-arbitrability-of-fraud-before-a-tribunal-in-india/(Last visited on 24/06/2021)
[17] ACT No. 26 OF 1996
[18]ACT NO. 10 OF 1940
[19]Mekhla Chakraborty, *Arbitrability Of Fraud In India*, White Code via Mediation and Arbitration Center (Latest News), available at https://viamediationcentre.org/readnews/MjUw/Arbitrability-of-fraud-in-India (Last visited on 22/06/2021)

The arbitrability of frauds has been a source of dispute not just in Indian law, but also in the legal systems of the United States, the United Kingdom, and other nations. The question of "arbitrability of fraud" emerged initially in the case of *Russel*, where it was deciphered that" if there is prima facie proof of fraud, the court might refuse to submit the subject to arbitration".[20]

The preceding legislations of the 1996 act i.e., the 1899[21] and the 1940 acts precisely apportioned with the query of "arbitrability of fraud". "Section 19" of the 1899 Act, is crucial because it provided the Court the authority to issue a stay of judicial proceedings. When parties have submitted their issues to arbitration, the stay may be granted.

The query of arbitrability of fraud initially came up in "*Abdul Kadir Shamsuddin Bubere v/s Madhav Prabhakar" Oak* "[22] when the Arbitration Act, 1940 was in presence, on the basis that it contained difficult factual concerns, the SC totally ruled out the possibility of arbitrating issues of fraud.

A succession of pronouncements has molded the evolvotion regarding "arbitrability of fraud" under the "Arbitration and Conciliation 1996" Act. In "*Smt. Bhagwati Devi Bubna and Ors vs Dhanraj Mills Private Ltd"*[23] the Patna High Court discoursed that accusations of fraud shouldn't be taken up by arbitral tribunals and it's better to take the traditional litigation route for the same.[24]

The Supreme Court's judicial pronouncement in "*Abdul Kadir*" sustained to grip its significance over the coming fifty years. The next key judgment came in 2010 by the Supreme Court where in *"N. Radhakrishnan v/s M/S. Mastero Engieers & Ors"*[25], depending upon the case of *Abdul Kadir*, fraud accusations in addition to significant or grave misconducts shall be resolved judicially through the "presentation of comprehensive evidence by either party", and hence the arbitrator shall not be involved.

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[20]Russel *v/s* Russel (1880) 14 Ch D 471
[21]Arbitration Act, 1899
[22]AIR 1962 SC 406
[23]AIR 1969 Pat 206
[24]Advait Ghosh and Akash Yadav, *The Arbitrability of Fraud – A Perspective*, The Arbitration Workshop, 09/12/2021, available at https://www.thearbitrationworkshop.com/post/the-arbitrability-of-fraud-a-perspective (Last visited on 22/06/2021)
[25](2010) 1 SCC 72.

Ban enforced by *N. Radhakrishnan* case clashed with the 1996 Arbitration and Conciliation Act's pro-arbitration objective. More so because, in *N. Radhakrishnan*, the Supreme Court neglected to examine the following crucial factors:

"Hindustan Petroleum Corporation. Ltd /s M/S. Pink city Midway Petroleum's"[26]was also referred in the *Radhakrishnan* case, the ratio was not dealt with. Indeed, the decision of Hindustan oil was contrary to *N. Radhakrishnan's* decision. *Hindustan Petroleum* had, following an examination of the text of "Section 8 of the 1996 Act", concluded that it was obligatory to civil court that it should refer the argument to an "arbitrator", if there existed an "arbitration clause" in a contract or agreement.

In *"P. Anand Gajapathi Raju & Ors v/s P.V.G. Raju & Ors"*[27] the same was quoted. The SC decided not to succumb the plaintiffs and defendants to an arbitral proceeding, notwithstanding the unambiguous wording of Section 8, as the case contained serious charges of fraud which the civil courts were supposed to handle. The SC decided not to submit them to the arbitration, notwithstanding the unambiguous wording of "Section 8", as the case contained serious charges of fraud which the civil courts were supposed to handle.

The court also neglected "Section 16 of the 1996 Act" which stipulates explicitly that" ipso jure does not entail the illegality of the arbitration clause in the determination of the arbitral tribunal that the contract was null and void".
The fore mentioned judicial pronouncement caused in an impediment in a legislative development on the "arbitrability of fraud" in the 1996 Act as it demonstrated distrust in "arbitral tribunals to adjudicate on the disputes related to fraud" and it also displayed "unwillingness of courts to refer parties to arbitration, despite the unambiguous linguistic of Section 8".

[26]Hindustan Petroleum Corpn. Ltd. v/s Pinkcity Midway Petroleums (2003) 6 SCC 503.
[27]P. Anand Gajapathi Raju v/s P.V/SG. Raju (2000) 4 SCC 539

In *Swiss Timing Ltd. v/s The Commonwealth Games Organizing Committee*[28], the decision in the *N. Radhakrishnan* has been found to be "per incuriam" for above grounds. The *Swiss Timing* judgement rejected the argument that, if a contract had been declared "invalid ab initio, the courts exercising jurisdiction under Sections 8 and 11 of the 1996 Act would have no competence to submit issues to arbitration". The *Swiss* case judgement diverged *from N. Radhakrishnan's* ratio. The SC specifically reaffirmed the nomination of an only arbitrator noting that "accusations of fraud do not lead to the arbitral tribunal being removed from competence."[29]

4. LANDMARK JUDGEMENT: TESTING THE ARBITRABILITY OF FRAUD

In 2016 the SC established the legal position with the *A. Ayyasamy v/s Paramasivam and Ors*[30] that originated after the "Section 8 of the 1996 Act" concerning fraud arbitrability. In order to analyze fraud arbitrability, the SC devised a dual paradigm. The Apex Court ruled those problems of complicated fraud cannot be addressed by arbitration but the arbitration panel can decide situations of simple fraud. In the case dealing with a question of simple fraud the Apex Court appointed an arbitrator. A larger SC bench in the instance of Rashid Raza has now reaffirmed the proportion of SC.

The *Ayyasamy and Booz-Allen case* was also bound by the decision of the case of *N. Radhakrishnan*. Unavoidably, the judiciary gave substantial strain on the prerequisite of "seriousness of allegations of fraud" for an arbitrable dispute. However, the Court executed a harmonizing act by integrating the principles enumerated in the test for enumerating fraud arbitrability in "*Booz-Allen".*

Although "*Swiss Timing"* decision gave us a positive approach on the contention of "arbitrability of fraud", it agonized from a different context of discontent, and as a result, it was "impliedly overruled" as having no judicial worth in *Ayyasamy*. The proposition of law

[28](2014) 6 SCC 677
[29]*Supra* note 24
[30](2016) 10 SCC 386

set forth in *N. Radhakrishnan* has to be resurrected as a result of this. Nevertheless, it was widely agreed that *Radhakrishnan case* did not present the accurate legal position. The Supreme Court in *Ayyasamy* warned against putting too much faith in *N. Radhakrishnan* and defined the legislation on arbitrability of fraud in the simplest terms. It said that "just the claim of fraud is insufficient to render the arbitration agreement between the parties null and void". It also focused on the point that "Arbitration can only be sidetracked in cases involving severe charges of fraud that result in a criminal offence or cases involving complex allegations of fraud that necessitate a civil court decision based on extensive evidence. Thus, fraud that effectively nullifies the validity of the contract itself, the entire contract that contains the arbitration provision, or the validity of the arbitration clause, such as forgery/fabrication of documents in furtherance of the fraud plea, would necessitate the involvement of the civil court."[31] Also that "Where there are basic charges of fraud involving the party's internal operations that have no public implications (the dispute has to be about activities in rem), the arbitration clause does not need to be evaded, and the parties can be assigned to arbitration".[32]

As a result, the Court has integrated the "Booz-Allen test", which determined that issues involving "acts in rem" essentially can't be arbitrated. This obligation of "implication in the public domain" was accredited in *"Ameet Lalchand Shah v/s Rishabh Enterprises"*[33]. Nevertheless, while it was deemed one of the conditions in that situation, he did not classify it as an essential criterion.[34]

The *Ayyasamy* judgement was clarified in this case and laid that to differentiate between "serious allegations" and "simple allegations" of fraud, the principles can be explained in these two examinations:

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[31]ibid para. 25

[32] Naresh Thacker, *Revisiting Arbitrability of Frauds in India* ,Economic Laws Practice, Lexology, 20/04/2021, available at https://www.lexology.com/library/detail.aspx?g=cfde86e9-07d0-4558-815a-4ec760718010 (Last visited on 22/06/2021)

[33] CS(COMM) No.195/2016 Delhi HC

[34]Shubham Jain **and** Prakshal Jain**,** *Arbitrability of Fraud in India – Is Ayyasamy only about "Seriousness"?* India Corp Law, 21/12/2017, available at https://indiacorplaw.in/2017/12/arbitrability-fraud-india-ayyasamy-seriousness.html (Last visited on 22/06/2021)

"(1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or

(2) Whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain" [35]

More recently the courts have argued that merely alleging illegality does not absolve a tribunal of its responsibility to resolve the issue, including the matter of illegality.[36]

5. THE RELEVANCE OF CONTRADICTING PROBLEMS

The contemporary law illustrates the intricacy of the arbitrability of fraud and most crucially, it has been overcrowded with many tests that make it more likely to interfere with the judiciary. There is no logic to differentiate among "fraud simpliciter" and "fraud complex" because the arbitrators are also authorized to pursue support to record evidence in accordance with section 27 of the 1996 Law on Arbitration and Conciliation, thus determining the question of fraud on the basis of evidence, as is ordinarily done by courts. It is obvious that this distinction is needless and unworkable because the SC itself has suggested a new and complex element after proposing this differentiation in *Ayyaswamy* case and has made it erratic and hesitant.

Even the Law Commission, in its 246th Report, proposed "adding sub-section (6) to Section 16 of the Act, empowering the Tribunal to pass an award even if there were allegations of fraud, leaving the parties with the option of raising the issue of arbitrability before the arbitrator at the pre-award stage, thus adhering to the principle of Kompetenz-Kompetenz, and if rejected, raising the issue of arbitrability before the arbitrator under Section 34[37] at the post-award stage, thus adhering to the principle" .[38]

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[35]Bhavana Sunder , Kshama Loya Modani and Vyapak Desai, *Arbitrability Of Fraud – 'Simply' Put By SC*, Nishith Desai Associates, Mondaq, 23/12/2019, available at https://www.mondaq.com/india/white-collar-crime-anti-corruption-fraud/877876/arbitrability-of-fraud-simply39-put-by-supreme-court (Last visited on 22/06/2021)
[36]Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press 2017) pg. 35
[37] The Arbitration and Conciliation Act 1996, s.32cl.2 sub cl.b
[38]Law Commission of India, Report No. 246 on Amendments to the Arbitration and Conciliation Act, 1996 (2014).

Further, the SC in the case of "*Mauritius World Sport Group Ltd*. v/s *Singapore MSM Satellite Pte. Ltd".*[39], the court determined that any sort of "fraud is arbitrable" and that therefore there is no reasonable contrast among international and domestic arbitration while engaging with an international seated panel of arbitration.

Upon inspection of the ideologies laid down in *Ayyasamy*, when benches are approached with an request for nomination of an arbitrator under "Section 11 of the Act", one could argue that the SC has potentially decreased the bar for identifying "serious allegations of fraud."

It should be emphasized, however, that in *Ayyasamy*, an "application under Section 8" of the Act was filed. This section gives the Court more leeway in evaluating charges of fraud for the purpose of directing or refusing the issue to arbitration. In an application under Section 11 of the Act, on the other hand, courts have a limited jurisdiction to consider only the presence of an "arbitration agreement" when choosing an arbitrator. It is thus questionable whether *Ayyasamy's* suggested working standards for deciphering the "arbitrability of the accusation" in profundity which then inspire the judges to not just analyze the presence of an "arbitration agreement" and investigate the "seriousness or simplicity" of the charges pertaining to fraud.[40]

Some can contend that the Supreme Court examined the existence of the "arbitration agreement" while setting forth the first operational test, namely, if the "arbitration agreement's" existence has not really been irrevocably tainted by the claim of fraud. On the other hand, the other functional assessment is focused on the impact of "deception/fraud" between the counterparties or in the "public domain". There'll always be an influence "inter se" between both the sides if this rule were applied uniformly to corporate conflicts. Due to the fact that fraud is both a "civil and criminal offence", the investigation would be a matter of fact in all specific cases.

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[39] "CIVIL APPEAL No. 895 OF 2014- SC of India"

[40] Mr. Naresh Thacker and Mr. Samarth Saxena, "*DOES FRAUD VITIATE ARBITRATION? REVISITING ARBITRABILITY OF FRAUDS IN INDIA"*, RGNUL Student Research Review (RSRR), 07/02/2021, available at rsrr.in/2021/02/07/arbitrability-fraud-india/ (Last visited on 22/06/2021)

In all cases, the SC's decision establishes a favorable and can be relied upon judgement, requiring courts to exercise care and minimal interference in cases including cases of arbitration and charges of fraud. It also establishes faith in the "arbitral tribunal" to resolve these disputes.[41]

6. RECENT LEGAL DECISIONS AIMING TO SOLVE THE PROBLEM

In "*Rashid Raza v/s Sadaf Akhtar"*[42] a controversy emerged between one partner in the partnership act against another on the claims of syphoning monies and several commercial misappropriations. The partner went to HC for arbitration in accordance with paragraph 11. The HC held nonetheless that the fact that the case is fraud-related and is not arbitrary. The petitioner therefore challenged the SLP's opinion of the HC in the SC. The fundamental question was whether serious claims of fraud can be addressed with in an arbitration. The Supreme Court stated that when serious allegations of forgery or fabricating documents are made in addition to the plea, or when the allegation is of fraud in the arbitration clause itself, or when the alleged fraud is applicable to the entire contract, such fraud will have an impact on the contract's or arbitration clause's validity. This would have ramifications not only for the parties' internal issues, but also for their external affairs. Before dealing with the significant claims of fraud, the court should determine whether the arbitral tribunal's jurisdiction has been revoked. The main source of concern should not be the forfeiture of the jurisdiction of court. The court should determine whether the dispute is arbitrable or not, even if an agreement for arbitration exists. If there is an "arbitration agreement" between the said sides to the contrary, the question should be whether the nature of the dispute prevents it from being sent to arbitration. Furthermore, when substantial claims of fraud are made, it is critical that special attention be paid to the investigation when such allegations are made in order to distort the arbitration agreement. The charges are arbitrable, according to the Supreme Court, because they come under the class of "simple allegations". Overturning the High Court's decision, it progressed to employ an arbitrator under "Section 11 of the Act" to address the parties' differences. By using the *Ayyasamy* test, the SC determined that no such claim existed that

[41] *Supra* note 35
[42] (2019) 8 SCC 710

would invalidate the whole partnership agreement, including the arbitration clause. Moreover, any charges of fund syphoning fall under allegations against the partnership and have no bearing on the public domain. As a result, the SC overturned the HC's decision because both tests were negative. It should be noted that this judgement only pertains to India-seated arbitration, not international arbitration, as international arbitration would be controlled by the World Sport case and would have the authority to arbitrate on any sort of fraud.[43]

The "*Avitel Post Studioz Limited and Ors. v/s HSBC PI Holdings (Mauritius) Limited and Ors".*[44]was the primary case to clarify the legal ambiguity surrounding the arbitrability of fraud. The SC stated that the "judgement in this case would be based on Indian substantive law on the arbitrability of fraud". When deliberating the lawful locus in profundity, the Supreme Court referred to the "*Swiss Timing"* decision, noting that while the decision was not binding, it had a strong persuasive value.[45] The SC then dependent upon the judgment of "*Booz Allen"*[46]and "*Afcons Infrastructure Ltd. v/s Cherian Varkey Construction Co. (P) Ltd"*[47] , to deal with a condition in which the similar set of particulars can lead to both "civil and criminal" action. The Supreme Court concluded that "the mere fact that criminal proceedings could be brought or have been brought in relation to the same subject matter does not mean that a dispute that is otherwise arbitrable has lost its arbitrability". This decision reaffirms the 1996 Act's dramatic departure from precedent in order to improve the effectiveness of the adjudication of arbitration. It was deciphered that "as long as the arbitration agreement is found to exist, mere allegations of fraud or the filing of criminal charges will not make the disputes non-arbitrable. Only under exceptional circumstances, when a contract containing an arbitration clause is deemed to be void, does the arbitration clause become void as well".

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[43]Diganth Raj Sehgal, *Important judgments on the Arbitration and Conciliation Act*, 1996, iPleaders, 01/12/2020, available at https://blog.ipleaders.in/important-judgments-arbitration-conciliation-act-1996/ (Last visited on 23/06/2021)

[44]2020 (4) ArbLR 1 (SC), CIVIL APPEAL NO. 5145 OF 2016

[45]Sayantan Bhattacharyya, MokshRanawat, *The arbitrability of civil fraud in India: analysing the SC of India's decision in Avitel Post Studioz Ltd,* Arbitration International, Volume 37, Issue 1, March 2021, Pages 355–360,**2**6/11/2020, aviablabe at https://doi.org/10.1093/arbint/aiaa042 (Last Visited On- 22/06/2021)

[46]*Booz Allen and Hamilton Inc.* v/s *SBI Home Finance Ltd*SC (2011) 5 SCC 532

[47](2010) 8 SCC 24

According to Section 17 of the Contract Act, "an inter-se allegation of fraud by one of the parties merely renders the contract voidable, and applying the principle of reparability of the arbitration clause/agreement from the underlying contract, parties cannot be allowed to avoid arbitration solely on the basis of such allegations of fraud". Conversely, where "serious charges of fraud" have public ramifications, the court may consign the parties to civil court rather than arbitration if the court determines that "it will be just and in the best interests of all parties not to proceed with arbitration".[48]

In "*Deccan Paper Mills v/s Regency Mahavir"*[49], The Supreme Court cited its decision in *Avitel Post Studioz*, which stated that "when the claimed fraud falls within the limits of contract performance or falls under Section 17 of the Indian Contract Act, 1872, the dispute is arbitrable". The Supreme Court went on to say that the "*N. Radhakrishnan* decision was bad law and didn't stand up to scrutiny". It was emphasized that just because a transaction has criminal undertones does not make the subject matter of the transaction un-arbitrable. It was noted, in light of recent rulings, that "there has been a sea of change in Section 8 as we perceive it in the Arbitration Act today, compared to Section 20 of the 1940 Arbitration Act". If a case is filed in court and all of Section 8's requirements are completed, the court must send the parties to arbitration unless it determines that there is no legitimate "arbitration agreement" prima facie.

In *Vidya Drolia v/s Durga Trading Corporation*[50], the law on arbitrability in contemporary jurisprudence was thoroughly examined by a three-judge bench of the Supreme Court. While the major issue was the law governing the "arbitrability of landlord-tenant conflicts", the court also did consider the "arbitrability of fraud". According to the decision in *Vidya Drolia*, "It would be completely incorrect to mistrust arbitration and see it as a faulty or inferior adjudication method unfit to deal with public policy issues of legislation". The Supreme Court of India made a comparison between arbitral tribunals and courts. Arbitrators, like courts, are required to be impartial and independent, to follow natural justice, and to follow a fair and

[48]VikasGoel and Vivek Gupta, "*The Viewpoint: Does allegation of fraud vitiate Arbitration Agreement*, Singhania& Partners, Bar and Bench" ,09/08/2020, available at https://www.barandbench.com/view-point/the-viewpoint-does-allegation-of-fraud-vitiate-arbitration-agreement (Last visited on 22/06/2021)
[49]AIR 2020 SC 4047
[50] "CIVIL APPEAL NO. 2402/2019- SC of India"

just procedure. The judges in *Vidya Drolia* reverentially approved with the conclusion in "*Avitel Post"* on the legitimacy of the "*N. Radhakrishnan*" decision. Finally, the *N. Radhakrishnan* decision was overturned, and the *Vidya Drolia* bench stated that "claims of fraud might be considered the subject of arbitration where they arose out of a civil dispute. The only exception to this rule is a disagreement deriving from fraud, which would render the arbitration clause null and void".

In *"M/S N.N. Global Mercantile v/s M/S Indo Unique Flame Ltd"*[51],the SC stated that the "former rule that fraud was non-arbitrable was still in effect because it would require a large amount of evidence and be too sophisticated to be decided in arbitration". In today's arbitrations, however, tribunals must sift through large amounts of information in a variety of conflicts. As a result, the Supreme Court ruled that the "notion that claims of fraud, forgery, or fabrication are non-arbitrable is a relic of the past and must be abandoned".[52]

7. ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

The Arbitration and Conciliation (Amendment) Act, 2021[53] was enacted on March 11, 2021, following the introduction of the Arbitration and Conciliation (Amendment) Bill, 2021 in the Lok Sabha on February 4, 2021. It aims to amend the 1996 Arbitration and Conciliation Act. The Act includes rules for domestic and international arbitration, as well as a definition of the law governing conciliation proceedings. The Bill repeals an Ordinance enacted on November 4, 2020 that had the same requirements. The judgments, as well as the subsequent revision to the primary act of 1996, have clearly shows the legislators' determination to advance India as an "arbitration-friendly and pro-arbitration environment".

The Act includes two significant amendments. The first is to allow awards to be automatically stayed in specific circumstances if the court discovers prima facie evidence of "fraud" and

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[51] "CIVIL APPEAL NOS. 3802 - 3803 / 2020- SC of India"

[52]Vasanth Rajasekaran , Saurabh Babulkar & Reshma Ravipati, "*The Evolving Jurisprudence Of 'arbitrability Of Fraud' In India – Where Do We Stand?"*, Phoenix Legal (Mondaq), 24/02/2021, available at https://www.mondaq.com/india/arbitration-dispute-resolution/1039916/the-evolving-jurisprudence-of-39arbitrability-of-fraud39-in-india-where-do-we-stand (Last visited on 23/06/2021)

[53]The Arbitration and Conciliation (Amendment) Act, 2021 (NO. 3 OF 2021), available at https://egazette.nic.in/WriteReadData/2021/225832.pdf (Last visited on 24/06/2021)

"corruption" in the contract on which the award is based. Other is the regulations, qualifications, experience, and standards for arbitrator certification were removed from the basic Act's eighth schedule[54].

The adjustment to “Section 34” governing the automatic stay of awards granted under the Principal Act of 1996 is the most prominent change in the Act of 2021. A party can move to the Court under “Section 34 of the 1996 Act” to have a judgement of the arbitration proceeding set aside under the current system. However, following the 2015 modification to the Act, an automatic stay on the award's implementation would not be granted simply by filing an application to set it aside.

The Amendment made a significant change by adding a proviso under section 36(3)[55] to “ensure that if courts are prima facie satisfied by the case based on either (i) the arbitration agreement or contract that is the basis of the award; or (ii) the award was induced or influenced by fraud or corruption, the award will be upheld. It will stay the award indefinitely pending the outcome of the challenge”.

It is interesting to note that the above stated circumstances have previously been anticipated and effectively enumerated by the Act's current sections.

Fraud or corruption in the arbitration agreement or contract: At any given time, the parties want to claim and thereafter substantiate the accusations pertaining to fraud in an “arbitration agreement”, the very suitable place to do it is in tribunal where arbitration proceedings are held and the most viable is doing at the phase of reference. It has already been seen that tribunal where arbitration proceedings are held are very much proficient to do an in-depth analysis on the evidence and the case to decipher if there is a taint of “corruption or fraud” in the said arbitration agreement or fraud. If any contenders of the fraud claim are dissatisfied with the decision/finding of the tribunal or if it not considers their “allegations of fraud” altogether, litigants can set aside the same after giving an application under “Section 34 of the 1996 Act”. After this also if the litigants are not content, they have the option to appeal the order under “Section 37(1)(c)”.

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[54] *ibid* . pt.4
[55] *ibid*. pt.2

During the awarding process, if there was fraud or corruption.: Section 34(2)(b) [Explanation 1] (i) The parties have the right to ask for the award to be set aside if the arbitral tribunal's decision was influenced by fraud or corruption, or if the award is in contradiction of India's "public policy". Yet again, if the litigants are not content, they have the option to appeal the order under "Section 37(1)(c)". The current amendment doesn't appear to give somewhat of a reasonable fresh provision or liberation to the "aggrieved party" who is faced with a situation of "fraud" as defined in the revision. Consequently, this isn't unreasonable to conclude that enacting of the amendment is just analogous to imposing a supplementary phase of judicial or legal inspection in regards of "appellate review", which was intended as a stopgap measure with no effective safeguards. The ramifications of this expanded area of meddling are disastrous.[56]

8. CONCLUSION

All the aforementioned Supreme Court cases have tried their level best to give a clarity on the scattered and erroneous topic of arbitrability of contentions pertaining to fraud (severe accusation of fraud). The court has also cleared its stance as to by what means it is coherent to the Indian communal policy and is for sure evolving to achieve a pro arbitration approach. However the view laid by the Supreme Court that "those frauds which vitiate or renders the arbitration clause invalid would still be non-arbitrable" leaves a half empty contention as still there can be a scope for judicial intervention in the arbitrability cases where court can still strongly present its stance into the validity of arbitration clause and leaving a scope for intervention in the said matter. This intervention goes against the primary principle of arbitration law that is Kompetenz-Kompetenz. The doctrine of kompetenz establishes that a tribunal which arbitrates is permitted and competent to regulate the jurisdiction of its cases themselves, which includes determining all the matters with regards to the jurisdictional as well as the actuality or reasonableness of an arbitration agreement.[57]

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[56]Mr. Shubham Joshi, *IMPLICATIONS OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021: ENSURING (UN)EASE OF DOING BUSINESS IN INDIA?,* RSSR, 20/03/2021, available at http://rsrr.in/2021/04/20/implications-of-the-2021-arbitration-amendment-act/ (Last visited on 24/06/2021)

[57]Vasanth Rajasekaran & Saurabh Babulkar, "Kompetenz-Kompetenz Principle Reiterated By Supreme Court Of India : Issue Of Limitation Is Not To Be Examined At The Section 11 Stag"e**,** Phoenix Legal (Mondaq),

In a number of judgments, including the historic *Henry case*[58], the US Supreme Court has declared that "in all matters involving arbitrability, the issue should be resolved by the arbitrator rather than the civil courts. In circumstances when a party to a dispute claims that the allusion to arbitrability is unfounded or even without basis, the arbitrator should decide." The approach taken by the Supreme Court of the United States of America is perfectly in line with the foundational concepts of arbitration, which will aid in the establishment of a more favorable pro-arbitration regime. Although the Indian Supreme Court has given judgements in consonance of propagating the pro arbitration regime but severely lacks in adhering to the primary principle of Kompetenz-Kompetenz.[59]

Through the passing of the amendment act 2021 the law makers have impliedly tried to make fraud not proficient of arbitration, thus diminishing its arbitrability. The parties to the dispute now have to make a consciously driven decision to take the route of arbitration or not when allegation of serious fraud is alleged by them or the opposite party. Another contention is that if there is an existence of an arbitration agreement between the parties then it will become tedious to move to the civil court for the dispute resolution as the court believes in minimum intervention and interference regarding these matters. Only during the staying of the enforcement proceedings or in the event of appeal to the arbitral award can it be determined whether the accusation of fraud is serious or not. This will negate the arbitration mechanism's main benefit of quick disposal of cases and monetary effectiveness.

The law makers could have shown its seriousness about resolving the ambiguity in the claims pertaining to arbitrability of fraud or more specifically the severe allegations thereof it should have focused on amending the Sections 8[60] and 11[61]of the 1996 act rather than completely focusing on the staying and enforcement of arbitral award post judgement. The contrast and interdependence between the above-mentioned sections, as well as the plethora of cases decided on the issue of arbitrability of fraud, will go in opposition to the said amendment

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16/12/2019, available at "www.mondaq.com/india/arbitration-dispute-resolution/875332/kompetenz-kompetenz-principle-reiterated-by-supreme-court-of-india-issue-of-limitation-is-not-to-be-examined-at-the-section-11-stage" (Last visited on 23/06/2021)

[58]*Henry Schein Inc.* v. *Archer and White Sales* 586 U.S. ___, 139 S. Ct. 524 (2019)

[59]*Supra* note 4

[60] Indian Arbitration and Conciliation Act, 2021 "s.8- Power to refer parties to arbitration where there is an arbitration agreement"

[61] Indian Arbitration and Conciliation Act, 2021, "s.11- Appointment of arbitrators"

of section 36, that infringes on the unconditional adjudication of the awards if there is a claim of fraud in coherence to the fundamental arbitral agreement. [62]Many legislators in the Lok Sabha criticized the 2021 Bill regarding the unconditional stay on awards. Many legal experts that the phenomenon of unconditional stay will present an obstacle in the direction of the active effort of towards the implementation of ace arbitration administration. The primary reason for this is the ease for the opposite party to allege serious fraud and automatic stay on the enforcement of arbitral award.

The main purpose of ADR mechanism is defeated by compelling the parties to see the doors of court and taking the route of litigation. One of the most prominent drawbacks of the amendment is that it does not aim to elucidate the legislative meaning of either corruption or fraud which creates a vagueness for the dispute parties where the party at the defense side may have to endure the extensive litigation process even if they are not wrong. The retrospective nature of the amendment may also open a way for the abundant litigation cases over burdening the courts.

The case petitioners in cases pending adjudication for an application under Section 36(2) [63] the court will now have to renew their petitions based on the primary grounds outlined in the current modification. This will in turn delay and increase the cost of the cases unless the courts on its own motion (suasaponte) take notice of the provision in the current amendment and dispose off the said cases with the filing of new submissions.

Under response to criticism of the revision, the law minister claimed that, "notwithstanding any utilization of phrases, fraud and corruption were essential in Section 34 because corruption did not offer an automatic stay of the award. He went on to say that the administration wants to avoid predatory attempts by parties to gain from an award contaminated by corruption as soon as possible."[64]

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[62]*Supra* note 24

[63] Indian Arbitration and Conciliation Act, 2021, s.36(2)- "Enforcement- Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose"

[64]Shubham Prakash Mishra, *Impact of The Arbitration and Conciliation (Amendment) Act, 2021 on India's Pro Arbitration Outlook, Bar and Bench*, 30/03/2021, available at https://www.barandbench.com/apprentice-

This amendment takes a reverting and degenerating way and doesn't ease the objective to obtain pro-arbitration dominion in India. Statements and claim by the law minister are unpersuasive as he doesn't provide a viable reason for the same. The legal luminaries supporting the amendment claim that the changes in the amendment will help relive the claimants and parties adversely distress with regards to the elements of fraud in the enforcement of arbitration award. Same was seen in the case of *Venture Global Engineering Llc vs Tech Mahindra Ltd &AnrEtc*[65].

The fraud in the aforementioned case came to light 3 years subsequent to award enforcement and it resulted in the revisiting of the award and then accordingly was set aside. Although, it still remains unclear how the broadening of the act's scope would in turn help in protecting numerous guiltless parties wherein the allegation is solely contemplated for the prolongation of the award enforcement.

Despite the probable scope for misuse in the two prominent examinations for formatting the fraud arbitrability in India i.e., in *Ayyasamy* and *Avite*l case, the Supreme Court have actively tried to offer as to what makes a claimant's allegations a case of "serious fraud". We can see the substantial difference in the initial and current position of the Supreme Court as we can see the apparent change in the arbitration aversion approach leading to minimum intervention in the matters of the same. The court has eventually adopted a pro-arbitration regime rhetoric albeit and with it having a pro-protectionist approach. This is developed to re instate the rights of citizen in the public forum and not to create a deficiency of self-assurance in the realm of arbitration. However, precluding the use of the second test (about "states and their instrumentalities") as a pretext to avoid arbitration, a legal tendency of constant solicitation of the latter test (in regards to the "states and their instrumentalities") must be shaped. As a result, in practice, a pragmatic approach to arbitration is required.[66]

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lawyer/impact-of-the-arbitration-and-conciliation-amendment-act-2021-on-indias-pro-arbitration-outlook (Last visited on 24/06/2021)

[65] SC CIVIL APPEAL NO(s.) 17756 OF 2017

[66]Sarah Ayreen Mir, "*The Tests for Determining Arbitrability of Fraud in India: Clearing The Mist, Kluwer Arbitration Blog"*, 08/06/2021, available at http://arbitrationblog.kluwerarbitration.com/2020/10/06/the-tests-for-determining-arbitrability-of-fraud-in-india-clearing-the-mist/ (Last visited on 24/06/2021)

Visibly the arbitration mechanism while dealing with arbitrability and arbitral referral among the allegations of “serious” fraud has had a tumultuous path.

The recent judicial decisions are a positive step forward. By embracing supplementary concepts of contemporary jurisprudence of arbitration law, the arbitral regime of India will be able to come closer to its aim of being a mature jurisdiction. The verdicts not only accomplish the goal of eliminating judicial interference in the arbitral process, but they also demonstrate the Indian courts' trust and faith in alternative dispute resolution mechanism.

In a court of justice where implementation of a verdict or award has been difficult, a radical change from courts of India after enforcement methodology to enabling courts to bestow an unequivocal reservation on arbitral award enforcement is counterproductive to the inalienable entrenched privilege of implementation, finality, and legally enforceable essence of an arbitral award. This has an influence on contract enforceability and is likely to cause businesses to be uneasy about operating in an environment where it is more probable for the parties to get into more litigations after arbitral award enforcement, depriving them of the arbitral award's benefits.

The amendment act, on the other hand, is a two-edged blade that can be used in either direction. In India the applicants frequently utilize fraud as an initial defense to evade any kind of arbitral procedure. Recent court judgments continuously limited the latitude in regards to the judicial intervention in any kind of cases related to fraud, the amendment can possibly be a setback. In future we shall lookout the judicial decisions to witness the interpretation of Indian courts of the expression included in the current amendment including "inducement," "fraud," and "corruption” as these words are not expressly defined in the amendment act which poses disparities in future cases.

Respondents desiring to avoid the arbitral procedure will continue to allege accusations of fraud as we move forward. These instances would next be evaluated in light of almost all of the prior guidelines. Albeit the rules underlying in India regarding the "arbitrability of frauds" are certainly solid, their efficiency in restraining potential respondents who seek to avoid arbitration is yet to be determined. From the legislative approach seen in the 2021 amendment we can decipher that we still have not reached the ultimate clarity needed in the

cases pertaining to arbitrability of fraud in India. It will be interesting to see the implementation of the recent precedents in consonance with the current amendment in the future case.

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Legal Challenges and Cyber Crimes Faced in Times of Huge Data and Diverse Storage Systems

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Abstract

Over the last 20 years the storage devices in the cyber world have changed its shape and capacity. The storage devices have increasingly turned smaller in size, while the storage capacity is increasing. Even as we look back in the last two decades the storage capacity of devices has changed in a big way. At the start of the century, floppy disks were considered for storage of data as well as transferring data from one computer system to another computer system. With the passage of time floppy disks became outdated and their place was taken over by compact disks commonly known as CD. There was a huge difference in the storage capacity of floppy disks vis-a-vis CDs. People were able to store much more data on the CD drive as compared to floppy disks. Towards the start of last decade CDs started becoming obsolete, so much so that the new laptops do not even support CD Drive. Hard drives and pen drives came into existence. These drives also saw a transformation where in initially they were much bulkier as compared to what is being produced in the current times. External hard drives became much more popular as they would store many GB of data at one location and they were easy to move around from one place to another.

As we entered into the current decade, we saw that the data that is being generated across the world is much more than what was generated 20 years back. The number of people who are using devices has increased in terms of millions. The number of people who are using the internet has also increased many times. The types of devices have also changed. Mobile phones brought in a revolution in the storage of data as well. Earlier the data stored in the mobile phones was only related to some message or some small files. With every new generation of mobile phones coming in the market the capacity of storage has also increased. As the world looks at such a huge amount of data the world is also trying to solve the problem of storage of this data. Another challenge that is being solved is the transfer of data from one person to another or from one source to another. This is where

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the cloud systems. Cloud is nothing but a shared storage system where data from multiple people can be stored at big servers which can accommodate millions of data records. People are putting up data in the cloud. It gives the advantage that the data can be stored at a central location without being worried about deleting data accidentally.

The smaller storage devices have also presented a challenge for law enforcement agencies in solving cyber related crimes. In the earlier times it was much easier to retrieve data from a computer hard disc and use it as evidence.

This paper talks about the issues and challenges faced by the law enforcement agencies in investigating the crimes in the times of increasing data and the diverse storage devices, particularly when crimes are committed in the cyber world.

1. HISTORY OF DATA STORAGE DEVICES

It was the first attempt at creating a data storage device. Holes in a punching card stored a sequence of instructions which were used to communicate with different types of equipment. Some of the equipment in which punching cards were used includes a piano and textile looms. Punch cards found a lot of their usage in the second half of the 20th century.

In the 1960s, "magnetic storage" gradually replaced punch cards as the primary means for data storage. In 1965, Mohawk Data Sciences offered a magnetic tape encoder, which was dubbed as a replacement for punching cards. In 1990, the combination of personal computers and magnetic disk storages became popular and punching cards made their way out of the system[1].

In the past data storage and memory were the two words which were used interchangeably. Now data storage is the superset which includes memory. Memory is more of a short-term while data storage is considered forever.

IBM is primarily responsible for driving the early evolution of magnetic disk storage[2]. They invented both the floppy disk drive and the hard disk drive and their staff are credited with many of the improvements supporting the products. A floppy disk was a removable device with very less storage but was easy to use. It had a magnetic film and was pretty inexpensive to make. The flip side was that it was easy to damage as well.

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[1] https://www.dataversity.net/brief-history-data-storage/ (Visited on 28-Jun-2021)

[2] https://www.ibm.com/ibm/history/exhibits/storage/storage_chrono20.html (Visited on 27-Jun-2021)

Floppy disks were soon replaced by compact discs. These used light as a medium to record. James T. Russel[3] invented these and it led to CDs (Compact Discs) and DVDs (Digital Video Recordings) and Blu-Ray. (The word "disk" is used for magnetic recordings, while "disc" is used for optical recordings. The storage capacity of these devices increased manifold and were used about the early part of the 21st century.

Flash drives appeared on the market, late in the year 2000[4]. A flash drive plugs into computers with a built-in USB plug, making it a small, easily removable, very portable storage device. Unlike a traditional hard drive, or an optical drive, it has no moving parts, but instead combines chips and transistors for maximum functionality. Generally, a flash drive's storage capacity ranges from 8 to 64 GB. (Other sizes are available, but can be difficult to find.)

The word moved into the 21st century and a new type of storage device came into existence, these are called flash drives. A flash drive could be plugged into a computer system which would already have a USB plug-in option. This made it very easy to plug in, remove and transfer from one system to another.

Advantage with the flash drive is that it can be rewritten any number of times[5]. These drives have capacities and can Store GB of data. This is the reason that Floppy disks and CDs are now out of the market. Flash drives are also named as pen drives, USB drives or solid state drives.

2. INTERNET USAGE AND INCREASE IN DATA STORAGE DEMAND

Across the world, the internet is growing at a fast pace. In 2019, the number of users using the internet across the globe was 3.97 billion[6], which means that more than half of the Global population is currently connected through the internet. As more and more people continue to get connected to each other, they also generate a lot of data which needs to be stored in a manner that is easily accessible and maintainable.

It is said that data is the new oil. It means that data will have the same value as the value of oil. What is the volume of data that we anticipate will be generated in future? This is a question which needs to be answered so that the future data storage needs can be

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[3] "Inventor of the Week - James T. Russell - The Compact Disc" (Visited on 27-Jun-2021)

[4] Harris, David; Harris, Sarah (2010). *Digital Design and Computer Architecture*. Morgan Kaufmann. pp. 263–4

[5] https://www.datadirectinc.com/blog/15-Ways-Why-Flash-Drive-is-a-Better-Recordable-Media-Device-than-Blu-Ray.html (Visited 26-Jun-2021)

[6] https://www.statista.com/topics/1145/internet-usage-worldwide/ (Visited 27-Jun-2021)

accomplished. According to projections from Statista, 74 zettabytes of data will be created in 2021.In the year 2020, 59 zettabytes of data was generated while in the year 2019, 41 zettabytes of data was generated[7]. If you look at this trend, the word is adding close to 15 zettabyte of more data every year.

The growth of data is not going to slow down. In fact the data protection is set to continue and is going to accelerate in future.

Following are some of the reasons that are increasing the growth of data:-

- Cloud computing
- Ever improving consumer electronics
- Ever increasing presence of people on social media
- Easy access of Smartphones which support various types of video filming
- Large development in field of new technologies
- Increase the usage of applications in daily life
- Introduction of machine learning and artificial intelligence

3. CHALLENGES FACED IN RELATED TO DATA AND DATA STORAGE[8]

As the data is increasing the word is also facing some challenges in managing this data. Some of the challenges are mentioned below: -

- **Security of data** - The increase in data is also creating a bigger problem of handling such a huge amount of data safely. As per an estimate an average data breach cost about $3.86 million[9]. With the increase of that, it is important to secure the data from both internal and external threats.

- **Quality of data** - The increase in data has also created a big problem of quality of data, such as which cannot help in providing any inference or information. It will be the focus that the data pipelines should be automated and the data is kept clean when it enters anyone's system.

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[7] https://www.cloverdx.com/blog/how-much-data-will-the-world-produce-in-2021 (Visited 28-Jun-2021)

[8] Agrawal, Rajeev & Nyamful, Christopher. (2016). Challenges of big data storage and management. Global Journal of Information Technology. 6. 10.18844/gjit. v6i1.383.

[9] https://www.ibm.com/security/data-breach (Visited on 29-Jun-2021)

- **Standardizing the data** - In order to and show so that everyone who is handling the data is on the same page and in order to enable collaboration among different teams and people accessing the data across the word it is important to use data modelling and standardise the storage of data, maintenance of data, transfer of data and manipulation of data.

- **Focusing on compliance** - There are many regulations which are very stringent and strict to follow. All the different countries have different ways of regulating the data. It is another challenge that is faced by the people who are involved in storage, maintenance and security of data.

4. CYBER CRIMES AND CYBER LAWS

It is said that a crime can take place only when there is a chance for a suitable target for the same, when the people who are supposed to protect the target are not capable and where the perpetrator of the crime is really sure of when to commit the crime[10].

More and more people are working on the internet. As people have started using the internet for various tasks, the criminals have also started using the internet for committing crimes. Cyber-crimes are nothing but crimes of the real world perpetuated in the medium of computers and hence there is no difference in defining a crime in the cyber world and real-world. Only the medium of crime is different.

Though many people have tried to define cybercrimes, the Council of Europe[11] adopted its convention on cybercrime Treaty known as Budapest convention which has identified different activities as Cybercrimes. Some of the important activities are: -

- Intentional access of a computer system without proper right
- Intentional interception of non-public transmission of computer data
- Intentional damage, deletion, alteration for separation of computer data
- Intentional and serious hindrance in the functioning of a computer system by damaging or suppressing the computer data
- Production, sale, procurement or usage of similar data with intent of committing a crime

[10] Talat Fatima, *Cyber Crimes* (Eastern Book Company, New Delhi, 2016)
[11] https://www.coe.int/en/web/cybercrime/the-budapest-convention (Visited 24-Jun-2021)

It is important to find out ways of convicting a cyber-criminal. If the conviction does not take place, there remains a threat to a person's reputation, the privacy of an individual which is against the right to privacy, to the data, which can harm the interest of an individual, to the financial transactions of the victim. The low conviction emboldens the criminal and they end up using the cyber methods in doing traditional crimes, in acts of terrorism and in financial scams which involve the movement of money in an unlawful manner. One of the issues that agencies face is the enforcing of cyber laws. As climate does not have a boundary, cyber world also is borderless. The law that governs the cyber world is different in different countries. A very different way of solving this problem of different laws in different countries is to come up with cyber laws which are applicable across the world. Though this thought is very radical but in order to tackle the increasing cyber-crimes and ensuring that criminals do not take the territorial advantage, this is worth considering.

As most cybercrimes are transnational in character, inconsistency of laws and regulations across country borders makes it especially difficult for countries to cooperate when investigating cross-border cyber-crimes. When a cybercrime takes place, a big problem faced is the jurisdiction[12]. In cases where origin of the crime is one jurisdiction while the target of crime is in another jurisdiction. Some of the other issues are related to privacy concerns, protection of data, issues related to IP, increase of cyber-crimes across the globe, potential increase of terrorism using cyber world, issues related to the pornography, particularly related to children. Countries are facing major challenges in tacking these cyber-crimes.

5. CYBER CRIMINALS AND FOCUS OF DIGITAL FORENSICS

First of all we need to understand the difference between forensics and anti-forensics. While the term forensics is quite specific and clear it is difficult to define the term anti-forensics. Anti-forensics can be understood as a set of tools, methods and various processes that are applied in order to avoid any such analysis that is important from an

[12] *Challenges to enforcement of cyber-crimes laws and policy*, By Ajayi, E. F. G. in the Journal, "Journal of Internet and Information Systems" Vol. 6(1), pp. 1-12, August 2016

evidence point of view in the court[13]. Different anti-forensics methods are employed by criminals[14]:

- **Hiding of data** - Tools can be used to hide the data. Data can be stored and manners which are difficult to figure out or in ways which are not easily accessible
- **Artefact Wiping** - There are different software's available for recovering the storage space on a computer system. This software is used for illegitimate purposes. Criminals also used such software's like evidence eliminator; secure clean and window washer to remove search data which can act as evidence[15].
- **Clearing the trail** - Different methods have been used in order to confuse the investigators. Email anonymizers or Web anonymizers ostensibly provide privacy services which prevent an investigator from finding out the source from where the crime has originated. Service logs are system event items files are deleted in order to clear the trail of any criminal activity.

Let us look at the focus areas for the cyber investigating agencies and cyber forensics team, particularly against the cyber-crimes which involve data and data storage[16].

- **Large volume and High Speed -** The investigating agencies have faced a lot of issues in storing, accessing and processing large amounts of data for forensic purposes. The volume of data which is due to the multimedia rich contents is a challenge for the investigating agencies in collecting clues and detecting infringements. This problem is compounded in the case of data which is transported from one system to another because capturing and storing the necessary information of data traffic is a huge task.
- **Complexity of the storage systems -** The increase in data has also resulted in coming up with innovative methods of storing the data. The Stored data is not

[13] Garfinkel, Simson. (2007). Anti-forensics: Techniques, detection and countermeasures. 2nd International Conference on i-Warfare and Security.
[14] Chhabra, Gurpal. (2014). Anti-Forensics Techniques: An Analytical Review. 10.1109/IC3.2014.6897209.
[15] https://info-savvy.com/anti-forensics-techniques-trail-obfuscation-artifact-wiping-encryption-encrypted-network-protocols-and-program-packers/ (Visited on 27-Jun-2021)
[16] https://www.computer.org/publications/tech-news/research/digital-forensics-security-challenges-cybercrime (Visited on 27-Jun-2021)

confined to just one single location, but it is now distributed among multiple physical or virtual locations such as service across the globe, on cloud, on social media networks and where there are other networks which are attached to the storage units. This becomes a challenge for reconstructing any evidence in a complete and correct manner because there is a depth of expertise and tools to do the same. Another challenge is the pace at which the data can be deciphered. Since the system has become more Complex it is difficult for forensic teams to convert the data in meaningful evidence.

- **Lack of standards -** There are a lot of technological advancements that have taken place over a period of time. Still files are the most popular digital artefacts to be collected, categorised and analysed. Researchers have tried to come up with some standards around data but haven't met with a lot of success. Lack of collaboration among various parties create a lot of problems for foreign six and investigation teams in understanding and deciphering the data stored in case of cutting-edge Cyber-crimes.
- **Securing the privacy of individuals -**The advancements in social media and online social networks has made personal information of people more vulnerable. We have seen multiple instances of Identity theft or identity fraud that have been committed after getting access to personal details of individuals who are on various social networks. It is a huge problem for forensics and investigating Agencies to collect information in order to locate the origin of an attack which can violate the privacy of individuals.
- **Anti – forensic methods** - There are many different methods of securing the data. For example, encryption of data, obfuscation of data etc. In order to create an airtight case for Cyber-crime collecting evidence is essential. To achieve the same, people investigating crime need to have the best tools available. There is a need to create new methods and new forensic tools which can help in tracking cyber-crime cases.

6. LEGAL CHALLENGES FOR FORENSIC TEAMS

Apart from different types of technical challenges faced by investigating agencies there are some legal challenges as well which digital forensic teams have to encounter[17].

- **Admissibility of evidence -** One of the biggest challenges is to ensure that the evidence that is being presented will be considered as admissible evidence.
- **Absence of guidelines and standards-**In India, there are no proper guidelines for the collection and acquisition of digital evidence. The investigating agencies and forensic laboratories are working on the guidelines of their own. Due to this, the potential of digital evidence has been destroyed.
- **Privacy issues** - The introduction of privacy legislation has created uncertainty in digital forensic about what is permissible behaviour in collecting and retrieving personal informant. These privacy provisions have not been adequately tested in the court to provide a comprehensive common law background.
- **Preserving the electronic records** -In the case where the electronic evidences could be admissible, an issue which is addresses the preservation guidelines uncovers the fact that preserving an electronic evidence, which may involve a technical process, is itself a challenge as there are instances where a case law lived up for more than 20 years. Preserving an electronic evidence for more than 20 years is not possible as within that period the technology may evolve many folds. The preservation of electronic evidence for a long time takes a lot of money and technology.

7. CONCLUSION AND WAY AHEAD

The world is becoming more interconnected and is generating large volumes of data. As people move from physical activities to digital activities; cyber criminals are also using the internet and digital devices to commit different types of crimes. These crimes are resulting in loss of a person's reputation, money and can also be a threat to his life. In order to investigate these types of crimes it is important that the investigating Agencies are ahead of the criminals. The field of digital forensics has to keep pace with the activities and innovations shown by criminals in the cyber world. It is all the more important due to the

[17] https://legaldesire.com/challenges-faced-by-digital-forensics/ (Visiting 29-Jun-2021)

emergence of new trends like Crime as a Service (CaaS)[18], which lets anybody execute serious cybercrimes. Hence it is important that the new forensic tools that are being produced should support different types of investigations, ensure that there is privacy of the victim as well as people who are involved in investigation and are easily scalable so that the investigating Agencies and forensic teams are always ahead of the criminal.

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[18] https://www.stickman.com.au/cyber-security-blog/what-you-need-to-know-about-crime-as-a-service-caas/ (Visited on 29-Jun-2021)

Sexual Offences #Me Too Movement & Its Legal Consequences- An Analysis

Sudhir Kumar Dwivedi*

1. INTRODUCTION

Sexual offences are so common occurrences these days that it surfaces in each and every sphere of the society whether it is educationally, politically rich are poor. Offences which fall in the category of sexual offences is not just a sexual offence but it falls in the category of sexual violence as well that typically causes grave and long-lasting harm not only physical but also psychological state of the victims. The physical injuries that are caused by these actions, associate degree augmented risk of a variety of sexual and procreative health issues and therefore the impact are not only on physical but also often and even in addition on psychological state of mind which causes more serious injury in comparison to physical injury caused by such acts. This doesn't and over here, such resulted sexual violence may result suicidal death, murder, loss of mind and sense etc. of victims of such sexual violence. This affects at large the social status of victim, her recognition in the society which ultimately affects the social standard of family as well. They are seen as a criminal not as a victim in neighborhoods. Sex related offences are now a universal problem faced frequently by women and that occurs in each and every type of society. Sometime effect of sexual violence is so deep that it becomes a permanent injury in the mind of victim. The most focus of this research article is to grasp and explore all sex act and offence in order to find out operative force behind it, weather the commission are such violent act maybe result of a particular reason or of general in nature, whether there is any common method for such crime and what may be preventive and controlling method.

Key words: *Sexual offences, Me Too Movement, sexual violence, physical and psychological injuries.*

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2. ANALYSIS OF SEXUAL OFFENSES LAWS

Law Reform Commission of North American nation (1978) defines Sexual offence as a "sexual interaction with another person (including touching of the sexual organs of another) or touching of another with one's sexual organs while not that person's consent." Sexual violence is not restricted are limited to home and work it may occur against any women weather c is in family are at work weather she is sitting with relatives are with strangers. Force plays a Pivotal role sexual violence. Such force may be sometime physical and sometime mental. If we analyze laws of different countries, we will find that a very narrow view on sexual offence and violence have been adapted there is a lot of holes in recognized laws of these countries. if we apply the definition of rape given in 19th century in common law the offence was outlined in gender specific terms and specifically associate degree act of male exploitation his phallus to penetrate a female's epithelial duct while not her consent.

Exploitation is used as a weapon and sometimes alternative instruments are adapted to violate lady sexually. The supreme court of United State of America recognized harassment as a form of discrimination in its decision in **Meritor savings Bank versus Vinson,**[1] 1986. In this case harassment was considered as a pervasive or CVR conduct so offensive has to alter the terms or conditions of the planet ape's employment. In India also abuse of power by public officers to obtain the consent has emerged a new concern for fulfilling the demand of law that is 'without consent'. In the early 1980 the lawmakers inserted a heavy offence of "custodial rape" into Indian Panel Code. The offence applies to public officer like police officer administrative controller and so on who have used their position controlling and trust over the victim.

Indian Penal Code, 1860 (IPC) in its chapter XVI that deals with offenses which affects human body and keeps an area for sexual offenses that too mentions solely regarding the offense of rape. This means two things.[2] Foremost everybody needs to read rape as associate offense that solely affects the flesh that is the body of female. But this view has

[1] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).
[2] Indian Penal Code (With the Criminal Law (Amendment) Act, 2018 Paperback by S.N. Mishra, Central Law Publication

not received any support from Victimologists, social scientists and medical practitioners. One branch of socio legal study that is victimologists suggest it that sexual offences specifically rape is not solely physical assault against the victim but also however conjointly a psychological assault. Second it looks like the father of Indian penal (T. B. Macaulay) code and later on even the legislature did not realize the need of classification of sexual offices that's why they did not assume it fit to keep all the offences which are offence especially against women and innocence are sexual offences or covered in broad domain of sexual offence. However, in IPC number of sections covered various offences that are in essence sexual offences either directly or in connection with some other which maybe flash trading, eve teasing, intimidation, indecency and so on.

In the case of some sexual offences our panel code has adopted the public private categorization and has enshrined the value which guarantees male power domain and authority. Let's take one example the general principle in rape case is that one who have sexual intercourse with a girl, who has not completed the age of 18 years, will be a rape weather the act of sexual intercourse was with or without her consent. In the cases where girl is 15 years old and if she is wife of some men then it will not be a rape even if sexual intercourse has taken place without her consent. In regard to punishment as well there is a great discrimination if it has been committed by husband against his wife who is below 15 years but above 12 years the punishment is imprisonment up to two years where wife is below 12 years then its shall not be less than 7 years. Same is Situation with respect to judicially separated wife; if rape is committed against judicially separated wife, is punishable only with imprisonment up to 2 years. This doesn't end here if the offence of rape against a married woman who is below 15 years has not been reported within one year from the date of the commission of such offence, then it will not be case of rape against husband.[3] If we compare this rape with rape against non-married women then punishment is not less than 7 years and that may extend to life imprisonment. Justice Verma committee and judiciary as well have given its opinion for the removal of exception 2 of section 375. Similar punishment shall be there whether rape has been committed against a married woman or against unmarried

[3] Indian Penal Code (With the Criminal Law (Amendment) Act, 2018 Paperback by S.N. Mishra, Central Law Publication

women. Supreme Court in **independent thought versus union of India**[4] express its view that "*exception to 2 of section 375 of IPC is in violation of article 14 as well as article 21 of the Indian constitution, which guarantees right to equality, because it discriminates between married women above the age of 15 and below the age of 15."*

On the other hand supporter of such provisions puts logic that not Putting search marital rape in category of general rape is that in Indian culture marriage is considered as matching of soul for 7 birth that is *'saat janmo ka sath* ' and sex is considered as a part and parcel of marriage. One remarkable protection which is available to such married women is provided in 'Protection of women from domestic violence Act, 2005' which provides that violence against women which obviously includes sexual violence is Prohibited and remedy is available against such action. It seems that law presumes that there is irrevocable consent for sexual intercourse in marriage. One of important and remarkable judgment given by supreme court in **State of Maharashtra versus Madhukar Narayan Mardikar**[5] Where court express its concerned on the situation of married women. court pointed out that "*it is strange that wife has not been given right to privacy over their bodies though even the tuition has that right and sex against her will is rape though it is her profession*." Marital rape is illegal in number of countries like New Zealand Canada France Sweden etc. But in India we are still following the concept that after marriage wife is property of husband at least for sexual intercourse.[6] In R versus R UK court held that non-consensual sexual intercourse will fall in the category of rape[7].

Again, the formulation of a number of the offences results in the presentation that solely ladies below and explicit age are possible to be the victim of such offences and that not ladies of any age. this has been mirrored by number of sections of IPC 1860 which are specifically deals in trading of minor for the purpose of whoredom or illicit intercourse are merchandising

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[4] (2017) 10 SCC 800

[5] AIR 1991 SC 207

[6] World Health Organization (2017) World Report on Violence and Health: Sexual Violence, Available at: http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf, (Accessed: 1st April 2018).

[7] Amanda Robinson and Kristy Hudson (2011) 'Different yet complementary: two approaches to supporting victims of sexual violence in the UK', Criminology & Criminal Justice, 11(5), pp. 515 - 533 [Online]. Available at: http://journals.sagepub.com/doi/pdf/10.1177/1748895811419972 (Accessed: 7th April 2018).

of a minor for whoredom or illicit intercourse which applies to males are females beneath and explicit age. One could moderately place an issue that the Indian penal Code presume that such offences are solely committed against the females below the age of 18 years.

Animesh bhai Bharat bhai Desai versus state of Gujarat[8] question before the court was weather oral sex amount to rape or not, the court expressed its view that *"assault by husband on his wife is offence under the IPC but if same is called is in the form of sexual intercourse then husband will not be liable for rape rather, he will be rather he will be e level for assault only if conditions after salt is fulfilled because there is valid marriage."*

The prime document of the country that is the constitution of India it is also supreme law of the country. The constitution of India provides a safeguard mechanism especially to ladies through various articles which are dedicated to the females and this has been confirmed by the judiciary as well in number of cases Indian judiciary has expressed its view that sexual offences are not only offence in criminal law but also violates the fundamental human right which are having core value in every human life. The constitution of India guarantees social economic and political justice through fundamental rights that includes, right to life with human dignity, right to equality and to work and profession or trade and also protection from sexual harassment.[9]

Supreme court in **Bodhisattwa Gautam versus Subhra Chakraborty**[10] held that *"rape is not only a crime but it also violates very basic human right and somehow fundamental right provided under article 21 of the Indian constitution, because a married woman also has a right to live with dignity."*

In **Justice K S Puttaswamy vs Union of India**[11] right to privacy was considered as fundamental right and that includes decisional privacy in respect to sex.

3. ANALYSIS

[8] 2018 supreme court cases online Gujarat 732
[9] The Constitution of India, 1950 Art., 14 and 15, Art.19 (1) (g)
[10] 1996 SCC (1) 490
[11] AIR 2017 SC 4161

Gender violence is in fact not restricted to rape. If we analyse the data of national crime record bureau, we find that around 8233 Dower death (which is an offence under section 302 read with 304 of IPC), 106527 cases of cruelty by husband and relatives (offence under Section 498-A of IPC), 45351 assaults against girls with aiming to outrage their modesty (offence under section 354 IPC) and 9173 cases of abuse to the modesty of ladies (offence under section 509 of IPC), are reported every year without any restriction to increase in number. Aside from the Dower deaths, each alternative crime against girls witnessed an increase of around 6% in 2012 as compared to 2008 which suggest that laws are not sufficient to deal with the issue. Situation is almost same even in 2020. The NCRB data further suggest that only 3.55 % persons after total accused arrested which indicates efficacy of laws as well as administration of criminal justice system.

However, there is another side of the story the same NCRB data also reveals that more than 62000 married men commit suicide every year which is just double of suicide committed by married women and the single largest issue behind such suicide is nothing else but the marital issues. What it suggests that lack of family bonding, not giving sufficient to each other may also be provable cause for marital suicide.

In recent years after especially after Delhi gang rape case (Nirbhay Rape Case)[12] there has been a lot of political as well as social pressure on the authorities to require speedy action against the accused. Taking into consideration public sentiments and public outcry the government established Fast track court for speedy trial of such cases. IN August, 2013one of the accused who was Juvenile at the time of the commission of crime was found guilty of murder and rape of the victim and was sentenced to 3 years imprisonment in a reform home. Four other accused were sentence to death for the murder and rape of the victim. Here again it is important to note that that sentence of these accused was executed in March, 2020 that also indicates the procedural loopholes because it took around 7 years for finality of the judgment. Taking lessons from the case and taking consideration the public sentiments judicial committee (Justice JS Verma committee) was formed in December 2012 for suggesting changes in criminal laws especially in reference to rape matters and offences against women.

[12] Mukesh & Anr V. State for NCT of Delhi & Ors 2017 (6) SCC 1

The committee e submitted its detail report and suggested a number of amendments to criminal laws. More than 90% off recommendations of committee were accepted and the Government of India passed criminal law amendment act 2013. By this few new sections were inserted in IPC and few sections were changed like Section 326A talks about voluntary inflicting grievous hurt by use of acid etc., Section 326B voluntary throwing or attempting to throw acid was made an offence. Section 354B- assault or use of criminal force against the lady with intent to disrobe; section 354C- Voyeurism, section 354D- stalking and section 370- trafficking of a person these were new sections which were introduced in IPC with intention to cover every aspect o sexual assault.

4. CAUSE AND CONSEQUENCES OF RAPE

Rape encompasses a long-lasting effect on the social life of victim. But it is not only the victim who experiences the black consequences of sexual violence that is rape but family of the victim also suffers a great societal.

In India where society e is considered as patriarchal society The impact of offence is not limited to victim, it totally affects all the person of the family of a victim and sometimes relatives of the family are also badly affected by such negative social reactions. Every member of the victim's family is considered not as a victim but as offender because it is general thought in the society that the family members were not able to control their female child. When gang rape is committed then it is not the family of the victim only but the family of the offender that is accused is also affected because each member of the family of the accused is considered as offender and society keeps a distance from such families which affect the social life of innocent family members as well. Argument that is generally placed against the victim is that girls should avoid the places which are known as men dominated places like bar etc. If we analyse the gang rape and even single rape cases in India then we will find that it is not the place which fix the happening of rape rather the mentality of men being is main cause of such cruel incidents. Rape is generally viewed as extreme violence act or torture and also the perpetrators are not altogether cases driven by the frustration of sexual inactivity our lust, however generally rape is additionally caused by displaced aggression. Displaced aggression is to be aforementioned on the committer is infuriated by particular

person or a specific state of affairs of personnel that is usually discharge against another and unconnected innocent personal or state of affairs. In number of cases, it has been noted that if there is no chance of direct aggression towards the person who is the main cause of any particular incident then that aggression is revealed to some innocent person as of act of frustration. In general, this can be chiefly because of the rationale that when put next to the supply wherever the anger has created the possibilities of revenge are less possible from the victim of displaced aggression.

5. INDIA AND ITS #ME TOO MOVEMENT

"Women named and shamed their abusers, most of whom control powerful positions in their individual fields as well as politics, Bollywood, journalism, and media. Despite the anticipated backlash, hate messages, and also the taboo hooked up to being a victim, ladies in giant numbers came out with their accounts of harassment and abuse." The "me-too" was foundered for supporting the survivor and victim of sexual violence in 2006, notably black ladies and women were those to search out this movement and shortly alternative young ladies of color from low wealth communities joined to because it was a path to justice and healing.[13] From the very beginning, the vision to form a community of advocates, if possible amongst the victims and survivors to handle each case carefully, they were in main role for finding the solutions and to stop sexual violence in their communities. In a very short spam, thanks to all social media platform, #Me-too movement led to every platform be it social media, news media etc., an important oral communication regarding sexual violence has been thrust into the national dialogue.[14] It was not like that #Me-Too was a fast rage that grown up all of sudden and in an immediate. This was absolutely the result of long yeas back movement and that ultimately cracked when fire caused extreme heat to unwanted sexual abuse. Even a number of the renowned and public

[13] Emma Brockes, Me Too Founder Tarana Burke: 'You have to Use Your Privilege to Serve Other People,' GUARDIAN (Jan. 15, 2018), Available at https://www .theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women -sexual-assault

[14] She Said: The New York Times bestseller from the journalists who broke the Harvey Weinstein story Paperback – 20 July 2020 by Jodi Kantor.

face personality were named within the movement did not influence be a stunning revelation[15].

In November 2018 a Public interest litigation was filled by Adv. Manhor Lal Shama seeking direction from supreme court that police should take suo moto (on its own) cognizance of the case reported on social media or any other public platform, of the offences or Cases of sexual harassment under the #Mee too movement. However, CJI rejected this demand on technical ground of procedure law that only complainants can initiate legal action against such cases.[16]

Sexual harassment allegation former CJI Mr. Justice Tarun Gagoi brings back spot light on # Mee Too movement. A junior court assistant made allegation through letter to 22 judges of the Supreme Court. However, this case was not properly reported and lost its identity later on. This gave suspicion on genuineness of the case and indicates misuse of such highly sensitive movement.

success or failure of the movement cannot be measured on one point conviction cannot be sole criteria of the success of #Mee Too movement it have mixed record, some women feel they are witnessing the beginnings of long- overdue legal and cultural shifts. #Mee too movement helped number of women to realize how widespread harassment and molestation are.

The # MeToo movement also reached politicians in government. “The right of reputation can’t be protected at the cost of the right to dignity”, remark of Ravindra kumar Pandy, judge Delhi District court in a case where a lady was charged for defamation of union minister M.J. Akbar, establishes that even a man of social status can be a sexual harasser. This movement brought into lime light such designated sexual abuser with no alternative to again mislead the media and public as the movement has already sharpen the sensitivity of the issue.

6. IMPACT OF #ME TOO

[15] #MeToo: Essays About How and Why This Happened, What It Means and How to Make Sure it Never Happens Again Paperback – Import, 3 November 2017, by Lori Perkins, Publisher : Riverdale Avenue Books

[16] Available at: https://www.livemint.com/news/india/sexual-harassment-allegations-against-cji-ranjan-gogoi-bring-back-spotlight-on-metoo-movement-1555859894701.html

Mee too movement in Asian nation especially in India has positive as well as negative impact on the workplace and in work culture. It started from arguments among folks regarding what is inappropriate behavior and what will harassment. It forced corporation and establishments to speculate represent internal committee which will look after complaints in this regard, this committee is known as ICC internal complaint committee and that ultimately follows the '**Sexual Harassment of Women at Workplace Prevention Prohibition and Redressal Act, 2013**' conjointly referred to as POSH Act. After creation of such communities in corporations and establishment a number of complaints were registered, additional registered complaints mean that girls have trust on their cooperation to confirm correct redressal mechanism.

Most significantly in number of cases men were not found guilty for their behavior because of lack of evidence for proper trial. Another problem that was seen that in cases where online trial was conducted it was a tough task for the victims to prove harassment because in online method it is very difficult to produce all type of evidence which may be important for the decision of the case. It has also been seen that in non metro cities ladies hesitate to complaint such cases because they feel more humiliated after the lodging of complaint. It also has been observed that in corporations and establishment where online platform is available to report such cases there is a great increase in number of cases.

7. CONCLUSIONS AND SUGGESTIONS

From study it can be concluded that sexual offence and all rape not solely e violates women's human rights but contain long lasting effect on the lives of such victims. Although in all rape case victims are raped and subjected to extreme physical and mental torture but the response of the police is generally inconsistent. The action of police to one particular case where the perpetrators was from slum and belong to lower level of the society was strong in comparison to cases where perpetrators are from renowned family are from high class of society. If we analyse the role of the police in cases of sexual offence then we will find that Indian police system does not respond systematically to issues. It is police special choice to deal accused of rape in different manner depending on their societal perspective. The offence of rape is not

different to victim it never saw any difference whether committed by elite group of people are slum people of the society law does not make any difference from the point of accused. But our administration of criminal justice does so and differ on numerous factors like gender class and caste in **Punita k Sodhi versus Union of India** [17]the High court of Delhi express its view that is remarkable in this regard "*the concept of limitation is not relay event in sexual harassment cases as the means of sexual harassment at not to be viewed as one time incident but the impact of social harassment must be taken into consideration to understand it as continuing wrong."*

Legislature should take into consideration the loopholes in the laws and equal protection and status should be given to married women.

Not only family members but neighbors as well should provide support to victim of rape.

Special care should be taken in case of minors and special shelter home should be established in every district for such victims.

National helpline number for reporting of case as well as for medical help shall be released.

Special legal aid and protection shall be made available because it has been noted in number of cases due to insufficient legal aid and insufficient protection such victims turns hostile during trial and ultimately justice fails.

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[17] WP © 367/2009& CMS 828 11426/2009

Tortious Liability for Sports Injury: Exploring A Possible Future in India Through Arbitration

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Ditipriya Dutta Chowdhury[**]

Abstract

Sports is a global phenomenon, that not only generates livelihood for the athletes but larger events contribute significantly towards the economy as well. For better governance of this phenomenon, up to date legal structure is vital to provide fair chances to sportsmen, ensure no discrimination on basis of race, religion or color and discourage prejudicial exploitation of the same. The researchers in this article have tried to explore the possibility of applying liability through tort law upon the wrongdoer for injuries incurred during sports. The authors believe tort is an arena where development is never ceased and hence since its evolution it has provided the experts with a much wider area for interpretation and application. This article emphasizes upon various branches of tort law and construes the same in the light of different sport injuries caused to sportsman, audiences and other stakeholders associated with it. This article also examines the emerging sports jurisprudence in India and highlights the shortcomings present in the legal structure with regard to administration of sports law and puts forward Arbitration mechanisms to cultivate and improve governance of sports in India. Sports Arbitration is still a comparatively fresh perception under Indian jurisprudence, but the author believes that the same can be helpful to readdress the victims rapidly and through these precautionary mechanisms can be adopted before it's too late.

Keywords: *Arbitration Law, Law of Torts, Negligence, Sports Injury, Sports Law.*

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1. INTRODUCTION

"Games might be and are the serious business of life to many people. It would be extraordinary to say that people could not recover from injuries sustained in the business of life, whether that was football, or motor racing, or any other of those pursuits which are instinctively classed as games but which everyone knew quite well to be serious business transactions for the persons engaged therein."

- *Cleghorn v Oldham*(1927)

Sport is considered as a worldwide sensation. It is a popular phenomenon, regardless of whether as a entertaining pursuit, serious playing at novice levels, the world class for the most part proficient level or as far as spectating, it accept enormous social criticalness. 3% of world trade is earned from sports activities across the globe. Hence, it needs legal framework to secure transactions and rights associated with the same. The insufficiency or vacuity present in the current legal framework, in meeting the difficulties presented by complicated circumstances, prompts the need to have more advanced and up to date laws for proper governance of sports related activities. In the current scenario, sports are not limited to playgrounds and fields, but has reached every household through various broadcasting and online mediums. This has now led to different fraudulent acts, scandals and wrongdoings. The vigilant administrative body is required to oversee and deal with these issues appropriately so that sports always stay as one of the vital act of entertainment and can also lead to sufficient revenue generation.[1]

Sports law makes sure that the sportsmen are not in any way deprived and gets their chances to participate in every field of their interest and are not discriminated on any grounds with one another. Every sportsman must get an appropriate chance to put forward their talent and abilities to grow in their respective fields and pertinent laws shall be applied to guarantee the same. Just like how workers and employees get harmed during work, players also suffer

[1]C. Gearty, "Tort: Liability for Injuries Incurred during Sports and Pastimes", 44(3) *The Cambridge Law Journal* 371-373 (1985).

wounds during play. In such situations, players are qualified for healthcare amenities and assistance by their respective employers as well. They additionally reserve a right to continue work after significant health improvement. However, if, a player suffers serious and permanent injuries, the person can also claim for necessary damages.

On a fundamental level, sports law can be categorized into two zones – administrative concerns and business/monetary issues. Administrative issues are centered upon the standard regulations of the game and the violations that may happen regarding the same. The opposite side of sports law is considerably more to do with the business idea associated with game. Competitor and sportsman contracts are a common concern yet sports law is intensely associated with stadium improvement, monetary issues, sponsorship arrangements and broadcasting rights.[2] Obviously, there are components that don't fit conveniently into either classification. Negligent acts committed during organizing sport events along with harm done to spectators or third party due to such carelessness has emerged as one of the growing concerns in Sports law. Involvement of *mala fide* intention upon such wrongs may even give rise to criminal liabilities in certain situations. Hence, sports law is wide-running and continually traverses into different zones of law.

2. SPORTS INJURIES UNDER LAW OF TORTS

The term "Tort" has originated from the Latin expression "*tortum*", which means "to twist". It implies and incorporates those behaviors which are not straight or legitimate, rather wrong or unlawful. Law of Tort is therefore that part of law which comprises of different "torts" or improper acts whereby the transgressor disregards legitimate right which are vested upon others. The Tort law puts an obligation to consider and respects the rights of the other members of the society and public at large.

Numerous games require difficult movement that might get strenuous for the body. Joints, muscles, bones and the skin are typically the initial segments of the athlete that are harmed. In order to increase the scores players may often fall or face severe injuries and sufferings. Much

[2] Erica K. Rosenthal, "Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play", 72 *Fordham L. Rev*. 2631 (2004).

of the time, the injuries are fixed with therapy or treatment. Yet, there are a few occurrences that can't be fixed even with long haul care. These conditions may require more clinical expenses than the typical injury on the playing field. Wounds and harms occurring because of purposeful torts, for example, battery or assault, similarly are entitled for damages and compensation.[3]

In certain situations, educational institutions are often responsible for harms and injuries caused to athletes. In case of that of an employee of the school/colleges, like the coach, trainer, or referee, miscarries his duties and do not properly supervise an apprentice and the player/student undergoes an injury as a result of faulty supervision, the school may be held liable for its employee's negligent act.[4] Generally, coaches, teachers, and referees should definitely undertake reasonable care to avert foreseeable injuries.

3. APPLICATION OF TORTIOUS LIABILITY TO DIFFERENT ARENAS OF SPORTS LITIGATION

In sport, not only an assailant can be sued but sportsman, club-owners, administrative entities and referees can be held legally liable. Along with those tortious liabilities can also be protracted towards the speculators, audiences and other third parties as well. Let us discuss these areas in details.

3.1 Tortious Liability for Injury Caused to a Spectator/Audience Present in a Stadium

Watching a sporting event or concert at an opening, stadium or race track is expected to be fun and secured.[5] Wounds may be common on the trajectory or field but however, regrettably visitors to public settings can unexpectedly turn out to be guiltless victims to unscrupulous behavior or negligent acts. Injuries caused at stadiums and sports locations tend to fall into various categories such as:

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[3] Jay A. Urban, "Sports Torts in Wisconsin", 8 *Marq. Sports Law Journal* 365 (1998).
[4] Russ VerSteeg, "Consent in Sports & Recreational Activities: Using Contract Law Terminology to Clarify Tort Principles", 12 *DePaul Journal of Sports Law & Contemporary Problems* 1 (2016).
[5] Daniel E. Lazaroff, "Torts & Sports: Participant Liability to Co-participants for Injuries Sustained During Competition", 7 *University of Miami Entertainment & Sports Law Review* 191 (1990).

a) **Slip and Falls at a Stadium or Sports Facility:** Wet floors or careless objects lying on floors may give rise to the issue of slipping. These threats could arise from mopping, climate, spilled drinks, plunged food wrappers and multiple similar reasons. The proprietors and maintenance establishments are entrusted with the duty to ensure preventive steps to avoid these hazards.
b) **Thrown or dropped objects** – Any item thrown or released from a balcony can be the cause for a serious injury to various innocent parties present at the event.
c) **Inappropriate construction and maintenance** –Due to improper or incomplete construction, what if a railing falls on the audience? A ramp constructed at a faulty angle can be perilous as well.[6]
d) **Crowd trampling** – In order to check upon this issue, it is important to understand whether the venue was over populated than its usual and prescribed capacity.

Occupants of sporting venues are obliged towards a duty of care towards all those who are present in the stadium and undertake necessary precautionary measures. Participants also have a duty to care towards the spectators in case of foreseeable injury from their end. Through various judicial pronouncements we have observed that failure to take reasonable care towards the people has led to cause tortious liabilities.

For instance, the judgment passed in the case of *Watson v British Boxing Board of Control (BBBC)*[7] enforced "liability on the governing body of BBBC as they have failed to ensure necessary medical facility at the ringside of a boxing fight and as an outcome of the delay to provide the appropriate medical care the claimant was somewhat physically and mentally disabled"[8]

Determining Liability

In order to be holding anyone responsible for any negligent act, the following conditions must be kept in mind:

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[6] *Id.*
[7] *Watson v British Boxing Board of Control*, [2001] QB 1134.
[8] *Id.*

- The proprietor of the location or an employee if have spilled, worn or torn spot, or other greasy or hazardous surface or item to be found on the ground or underfoot.
- The proprietor of the premises or an that of an employee was fully aware of the precarious surface but did nothing to stop such situation or occurrence.
- The proprietor of the premises or that of an employee should have known of the dangerous surface because a "reasonable person taking care of the property would have learned and removed or fixed it". [9]

In the case of *Mantovani v. Yale University*[10], the Connecticut Superior Court on February 6, 2008, maintained a jury decision for litigant Connecticut Baseball Inc. The offended party was harmed by a foul ball at a minor's game. The stadium structure had outdoor tables with siting arragements that confronted away from the playing field. Preceding preliminary, the court held that "general rule of negligence would apply on the grounds that the baseball rule applied distinctly to audiences in the stands"[11].The jury did not find it to be risky or in flawed conditions in the structure and hence no infringement by the defendant towards the plaintiff.

Plea of *Volenti non fit injuria*:

Along with the other issues, we might also consider relevant points such as, what are the various right available to a fan who is present to witness the event? Generally, on the backside of a ticket, few words are often mentioned which provides disclaimer with regard to legal liabilities and consequences of injuries that might be faced by the audience while watching the live match.

In various similar instances, the courts refer to the common law doctrine of *volenti non fit injuria* in these kinds of scenarios. This doctrine states that the plaintiffs were already aware of the risks that are involved in watching such sports closely and have voluntarily consented to the same. This consent, according to Lord Denning, can be implied or express. If the same

[9]*Slip and Fall Accidents: Proving Fault*, available at https://www.nolo.com/legal-encyclopedia/slip-fall-accidents-proving-fault-29845.html (last visited on June 26, 2021)
[10]*Mantovani v. Yale Univ.,* 2008 WL 544648.
[11]*Id.*

can be proved in the court of law, then the said charges can be released due to the application of this doctrine.

The application of this principle is well portrayed in the decision passed in the matter of *Lorino v. New Orleans Baseball & Amusement Co.*,[12] as here a viewer who voluntarily came to watch a match got injured by the batsman during the practice sessions from the "bleachers."[13] The court defined bleachers as unshielded seating, which is located within the range of 158 feet. "*It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted or thrown outside the lines of the diamond, and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk.*"[14] The bench realized that the plaintiff had presumed the threat of associated with various stages of the game and agreed to join the same. Thus, the suit was dismissed.

Again, we can find that in the case of *Turner v. Mandalay Sports Entm't LLC, (Nev. 2008)*[15] a viewer underwent grave wounds on her face when she was stomped by a ball while having food in the Beer Garden, which is a connected area associated with the Cashman Field. In this case the Nevada court stated that viewers are aware of the risks associated with the game, and after such knowledge this spectator had voluntarily chosen to not sit in the enclosed area. The Beer Garden is a risky spot compared to the other enclosed areas of the stadium and the same was known by everyone, hence the proprietor and his employees did not have a responsibility or liable to pay any compensation.

3.2 Tortious Liability for Injury Caused to a Sportsperson

Numerous games require arduous movement that might be exceptionally hard on the body and cause harm to the athlete's body. Often these injuries are so severe and require expensive treatments for recovery. Everybody who is out on the field has a duty of care towards others. The true spirit of sports lies where one's enthusiasm of winning shall not come in the way of

[12] *Lorino v. New Orleans Baseball & Amusement Co., Inc*., 16 La.App. 95, 133 So. 408 (1931).
[13] *Id.*
[14] *Id.*
[15] *Turner v. Mandalay Sports Entm't LLC*, 180 P.3d 1172 (Nev. 2008).

safety of another player. Hence, in case of violation of these terms, law of torts can be made applicable. Tortious liability for injury caused to a sports person and the extent of such liability can be categorized under the following:

a) Injury caused due to negligence of a Party;
b) Application of the principle of Vicarious Liability for the injury caused;
c) *Mala fide* and Deliberate intention to cause injury; and
d) Application of the test of Reasonable Foreseeability.

a) Injury caused due to negligence of a party: The law of negligence which is commonly applied to sports torts is, *prima facie*, identical to that which determines is based on Lord Atkin's popular 'neighborhood test', as stated in the landmark judgment of *Donoghue v Stevenson*[16]. The notable three essentials which has to be proved to construct a negligence in this test- "*the defendant must owe to the claimant a duty to take reasonable care not to harm him, the defendant's play of such standard must have breached that duty and that foreseeable harm was the result of the breach of duty (causation)*."[17]

   Again, the case of *Condon v Basi*[18], recognized and restated that the contestants in sports are obliged to have a duty towards every participants and should take reasonable care to ensure not to cause any harm or injury in the process towards them. In this case the defendant broke the leg of the plaintiff and injured him. The standard of care which should have been taken were missing from the end of the defendant and hence was held responsible in this case.

b) Application of the principle of vicarious liability for the injury caused: The principle of vicarious liability says that the employers can be held responsible for the act done by their employees towards another person during the course of their employment. However, this doctrine is only applicable to professional players who are working under a contract with their respective clubs.

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[16] *Donghue v. Stevenson*, [1932] A.C. 562.
[17] *Id.*
[18] *Condon v Basi*, [1985] 1 WLR 866.

As emphasized in *Gravil v Redruth Rugby Football Club Ltd*[19], each case must be examined on its own facts in order to truly establish whether the tortious act is so closely connected with the employment that it would be fair to hold the employer vicariously liable.

In the case of *Ben Collett (Manchester United FC) v Gary Smith &Middlesborough FC*[20], eighteen year old Collett was playing for Manchester United in a match against Middlesborough FC. In the course of the game, he was tackled by the first defendant. The tackle was high and over the ball and, as a result, Collett sustained a fracture of the tibia and fibula of his right leg.

Collett pursued damages for injury, loss and damage caused by the negligence of Smith. Collett chose to pursue Middlesborough FC (rather than Smith himself) arguing that they were liable for their employee's actions, given that he was connected to the club and acting in the course of his employment, as a professional footballer. In particular, Collett claimed for future loss of earnings as a result of not being able to pursue a successful career as a professional footballer and thereafter, as a football manager or coach. Middlesborough FC admitted liability and it was for the Court to determine the final settlement figure.

c) *Mala fide* and deliberate intention to cause injury: Individuals who participate in sports understand that there is an inherent danger in many of these activities that is a normal part of the game. This is particularly true for contact sports, such as hockey, rugby, football and soccer. However, when someone becomes injured by actions that are not deemed part of 'normal play' or within the expected risks of the game, then an injured person may be entitled to compensation from the party responsible for their injuries. One here has to understand the difference between injuries arising from inherent risk and those that are associated with reckless or malicious behavior.

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[19] *Gravil v Redruth Rugby Football Club Ltd*., [2008] EWCA Civ 689.
[20] *Ben Collett (Manchester United FC) v Gary Smith & Middlesborough FC*, [2009] EWCA Civ 583.

We can observe such deliberate acts in the case of *R v Davies*[21]. Here, in this case two football players bumped into each other and a free kick was given. As the two players included were taking situations for the free kick the respondent moved toward the other player and hit him in the face. Subsequently after the match, it was discovered that the plaintiff endured a cracked cheekbone. The court held this was an intense offense as there was no incitement with respect to the petitioner and the respondent purposely attacked him on the field. The broken cheekbone was considered as genuine injury and the wrongdoer was condemned to a half year detainment.

Basically, a player can be expected to take responsibility for wounds that outcome from actual contact if there was a conscious goal to harm or if the player's activity were outside the typical extent of play. Positively, each case is extraordinary and is surveyed on its own benefits accordingly the same are decided in the court of law

d) Application of test of reasonable foreseeability: In the instance of *Woods v. Rogers* (1997)[22] in the United Kingdom a golf player, the offended party, was harmed when he was hit by a ball shot by another golf player. The litigant asserted that he couldn't see the claimant party because of the structure of the course. The offended party's accomplice who was hitting the fairway with the offended party had waved him through, which the court concurred could be taken as a sign that the two golf players would have the option to shield themselves from being hit.

The decision taken in this case portrays how a few games have certain guidelines, which in themselves, teach observers and members of any dangers associated with it. For example, in golf where it is normal and acknowledged that members may incidentally hit the ball toward any path and observers and different members know about this hazard and can't guarantee carelessness for this situation.[23] Hence here such acts cannot be considered a justification or exceptions protection if reasonable moves were not made so as to forestall reasonably predictable mishaps or accidents.

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[21] *R v Davies*, [1991] Crim LR 70.
[22] *Woods v. Rogers*, unreported SASC, S6467 (5 Dec. 1997).
[23] Erica K. Rosenthal, "Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play", 72 *Fordham Law Review* 2631 (2004).

4. INDIA AND SPORTS JURISPRUDENCE

Sports has been perceived by the UN as a vital tool by which wellbeing, education along with development is progressed. India, being a nation of innumerable games, like cricket has been loved like a religion over every year. In any case, the circumstance has changed as of late and different games are presently being perceived just as sought after like never before previously. Thusly, India is currently facilitating different national and global games inside its region, and it is time that sufficient standards and rules are likewise set up to direct the equivalent. Further, India needs a solid arrangement of Sports Law since sports is often being manhandled commercial exploitation. It cannot, at this point simply be called as a relaxation action or wellspring of amusement because of the taking off rivalry and the immense measure of cash that is available just as being spent through sponsorships and establishments.

As an outcome of promotion and globalization, sports have become a commercial affair aimed towards economic exploitation. In any case, the difficulty emerges when individuals wind up abusing the action since it procures benefit and this occurs because of the absence of palatable laws to oversee the activities of the people involved. It must be considered that sports is a method of diversion and entertainment and numerous individuals livelihood depends on it. However, when there are no laws to direct an action, it becomes vulnerable and wrongs regarding famous occasions, to be specific, the Commonwealth Games, IPL, and Olympic Games Bidding and so on, has recently demonstrated the lacunae that exists in this field. Along these lines, it is essential for India to have a lawful framework which would be sensible enough to smooth out these exercises and appreciate the diligent efforts of the sportsman.

The Hon'ble Supreme Court, in *Zee Telefilms*[24] while explaining the nature of organization of sports in India had observed that:

"*The Union of India or the respective Governments of the States instead and place of making legislation have thought it fit to allow the sports bodies to grow from its grass-root level by applying the reverse pyramid rules and by encouraging all associations and federations from*

[24]*Zee Telefilms Ltd. & Anr vs Union Of India &Ors*., AIR 2005 SC 2677.

village level to national level. Whereas in each State there is a State federation, they must as of practice or precedent become a member of the Board (BCCI). State Federations and some other organizations essentially having regard to their respective nature of functions only are members of the Board. They include Association of Indian Universities, Railway Sports Control Board and Services Sports Control Board."[25]

BCCI – Whether a State under Article 12?

The question that arose in the case of *Zee Telefilms* was that "*whether a writ petition under Article 32 was maintainable against BCCI (the Board) by considering it to be State within the ambit of Article 12 of the Constitution?*"[26] The decision taken by majority (3:2) was that BCCI did not qualify as State. The principles laid down in case of *Pradeep Kumar Biswas*[27] was upheld by majority and it was observed that:

"*.....it would be clear that the facts established do not cumulatively show that the Board is financially, functionally or administratively dominated by or is under the control of the Government. Thus the little control that the Government may be said to have on the Board is not pervasive in nature. Such limited control is purely regulatory control and nothing more."* [28]

It was further held that since the monopoly status enjoyed by the Board was not State conferred, some of the public duties exercised by it would not qualify it to be called as 'State' for the purposes of Article 12.

However, the dissenting opinion treated the 'Board' to be 'State' and it was observed that: "*We, therefore, are of the opinion that law requires to be expanded in this field and it must be held that the Board answers the description of "Other Authorities" as contained in Article 12 of the Constitution of India and satisfies the requisite legal tests, as noticed hereinbefore. It would, therefore, be a State"*.[29]

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[25] *Id.* Para 272.
[26] *Id.*
[27] *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111.
[28] *Supra* note 15, Para 24.
[29] *Supra* note 15, Para 281.

In the given circumstances, it is the dissenting opinion which appears to be more rationale and agreeable. The decision adopted is very narrow and almost appears that it was the apprehension that a host of litigations would open up throughout the country, on issues related to sports, that the majority refrained from treating the 'Board' as 'State'.

5. TORTIOUS LIABILITY IN SPORTS LAW UNDER THE INDIAN PERSPECTIVE

The Tort law in India has evolved from the UK Tort Law and it is commonly known as "judge made law" since it is not codified. However, if compared to the number of cases that are filed under Tort law in the UK and US, litigation number related to Tort in India is much lower. The Hon'ble Supreme Court in various landmark judgments has helped shape the Tort law in India. In *Union Carbide Corporation*[30] case the Apex Court had held that tort cases can be dealt with under Section 9 of CPC and there are a number of instances whereby the courts and the government have recognized the same in their rulings and has awarded exemplary damages in case of negligence, provided compensation to the rape victims and acknowledged torts committed by government employees. However, due to its uncodified status, the knowledge and use of Tort law is not so popular amongst the general public in India. Despite being an important form of law, cases under this law are not pursued in India as enthusiastically as they are in the UK and US and thus it is necessary to call attention to the fundamental principles and concepts of Tort so that people are more aware of their rights and liabilities.

Various principles of the Tort law has found its place in the criminal legislation of the country, namely, assault, defamation, theft, malicious injuries to property etc. The wrongdoer (tortfeasor) in such cases are liable under both criminal and civil laws, by way of punishment as well as compensation or restitution, respectively.

The legislators need to explore the new contours of law related to sports and subsequently, the judiciary too is required to pick up the pace in relation to issues regarding sports and act more efficiently. If implemented correctly, tort law can be very helpful in dealing with the

[30] *Union Carbide Corporation and Others v Union of India and Others*, 1992 AIR 248.

grievances of stakeholders in sports because of its presence as a part of the common law, since a long time, and inclusion in the criminal and contractual provisions too.

With the recent developments and widespread of the sports industry, it is difficult to classify an issue categorically as a criminal or civil matter. Further, due to the existence of large number of laws, the foundation of criminal and civil jurisprudence in relation to sports law is extensive but the same is not applicable in case of Tort law. Therefore, it is necessary that the judiciary explores the incorporation of tort law in dealing with a sports related issue in the present setting.

6. ARBITRATION- WHETHER AN EFFECTIVE TOOL TO RESOLVE SPORTS DISPUTES IN INDIA?

In the year 2014, a PIL was filed before the Delhi High Court whereby the decision of International Boxing Association's (AIBA) to disbar boxer Sarita Devi for one year, for refusing to accept the bronze medal at the Asian Games, was challenged. It was contended that the Centre should take "due comprehension of the rules and regulations" as framed by Court of Arbitration for Sports (CAS), Lausanne for settling such disputes. It was further requested that the Centre be should exercise its intrinsic power to put across the respective local federations and associations to incorporate the CAS Arbitration Clause within their respective standards, which are situated within its respective jurisdiction. However, the mechanism or regulation available to challenge the decision of CAS remained unresolved. It was later found that CAS Rules specifically permit such an appeal within a specific time-limit. This distinctively shows that there is a trenchant absence of awareness within the sporting fraternity as the concerned sports administrators within various Federations and even within the Ministry are absolutely nonchalant and apathetic about gaining knowledge of newest advances in sports.[31]

[31]"PIL in Delhi High Court challenging boxer Sarita Devi's suspension by AIBA", *The Economic Times*, Dec. 10, 2015, https://economictimes.indiatimes.com/news/sports/pil-in-delhi-high-court-challenging-boxer-sarita-devis-suspension-by-aiba/printarticle/45457656.cms (last visited on June 26, 2021).

As observed in the case of Sarita Devi, it leaves the athletes competing under the tutelage of such federations in a stagger, as they are totally reliant on such federations. The current component in the Indian legal executive has prompted an enormous number of cases being accumulated which has deferred justice. Sportspersons have an extremely short period of career and in such situations, it is not possible for them to remain in the line of the court which may take a considerable period of time to determine the dispute at hand. Since, sports is at its most elevated public significance ever, it is necessary for dispute resolution mechanism to be effective. Arbitration is an appropriate strategy. It has diversity, quickness and professionalism. Litigation is not apposite option for dispute resolution due to the amassed number of disputes.

In India, National Sports Policy, 2001, Sports Law and Welfare Association of India, Sports Authority of India, the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, Youth Affairs and Sports Department of Sports are few of the overseeing bodies which deals with the administration of sports law. These administrative authorities look into the legal aspects and form newer regulations. Additionally, these administrative bodies advance sports in India and provide with a decent infrastructure to sports. However, implementation of these rules are challenging and difficult to ascertain any dispute arising out of the same. To fathom the disputes as earliest as possible, "International Olympic Association (IOA)" directed by the "International Olympic Committee" instituted an "Indian Court of Arbitration for Sports" (ICAS). Indian Court of Arbitration for Sports is comprised of eight retired Judges of higher judiciary. "All the disputes emerging in the connection of sports will be decided by the ICAS."[32]

Sports Arbitration is comparatively a fresh perception under Indian jurisprudence. A proposition can be put forward that "Sports Arbitration" as a class be introduced under the Arbitration and Conciliation Act, 1996, serving it an assured sense of Parliamentary acceptability or be amalgamated through that of separate model conduct regulations that federations can take as a remedy. “If such a mechanism cannot be undertaken, there are

[32]Karan Singh,”Sports Arbitration in India”, *iPleaders Blog*, available at https://blog.ipleaders.in/sports-arbitration-india/ (last visited on June 26, 2021).

always other Alternate Dispute Resolution approaches like Mediation and Conciliation that could be utilized from the existing legal framework to resolve such an stalemate".[33] There are instances where the principles of Tort law has been incorporated in legislations to smoothen the application, namely, the Environment Protection Act, 1986, the Consumer Protection Act 1986, the Human Rights Protection Act 1988, the Motor Vehicles Act, 1988. Therefore, if tortious liability can be implemented in case of Sports Arbitration too, it would provide a wider ambit to the law.

In fact these mechanism if extended to the arena of sports injury as well, where the victims can be readdressed rapidly, and precautionary mechanisms can be adopted before it is too late. It would ensure that the party injured receives justice in the manner the *lex loci* (law of the land) provides. Unfortunately, the delivery of justice in our nation takes a lot of time and fails to provide quick justice to the people who are involved in the sports fraternity, as the level carelessness of the wrong doer is hard to prove. The idea of tort and the available legislation of sports, together, will assist the courts to determine the wrongs and everyday occurring in the field of sports in a proficient way. If adequate and proper liability be imposed in the field of professional athletics, it would create the pitch a venue which is happy and healthy and not a field of fraud and extortion.

7. CONCLUSION

For as far back as five decades, sports as an industry, is one of the sectors that has expanded rapidly and has shown enormous development. Today the sports organization envelops sports telecasters, hardware producers, sports medication care suppliers, concessionaires who serve food and drink to fans at games, enterprises that support athletic occasions or competitors, and others that give sports related products and ventures. The huge number of partners infers

[33]Devyani Jain, "Judicial Trend of Intervention in Sports Arbitration and Its Future in India", 1 (1) *IJAL* (2020) available at http://www.ijal.in/sites/default/files/IJAL%20Volume%201_Issue%201_Devyani%20Jain.pdf (last visited on June 26, 2021).

tremendous interests which should be taken care of. To keep up the proficiency of the market, the problems associated with the same needs to be resolved efficiently.

Numerous fiddles have occurred in the field of different sports during the most recent couple of years, and, and yet serious legislative actions have not been taken. Different partners are associated with the games, and a ton of private cash is contributed to subsidize the games and the athletes. To secure the enthusiasm of such investors and to put limitations on some sporadic exercises, there is a need for an appropriate administrative instrument. The Central Government had proposed a bill known as the "National Sports Development Bill, 2013", but till now it has not transformed into an enactment. Undeniably, the bill too has few lacunae, sway appraisal of which is important. The present Indian situation on the legitimate concerns in the sports law is that there are dissipated enactments and there requires for an extensive sports law in India. Authorization of sports law ought to be a need in light of the fact that there are different issues which need consideration like sexual harassment, encroachment of media morals, authoritative issues, business issues, sports wounds, sports strategy concerning the competition law, and so on.

Sports and Sportsmen can only thrive, provided a Sports Law is there in India; the intercession of the Legislature is a must. India needs to comprehend that sports is no longer an immaterial cluster of athletes doing combating for the top position yet it likewise includes perplexing lawful issue and the whole vocation of the athletes is in question. Sports is unquestionably a compensating profession. Endeavor ought to be made to improve the donning condition with the assistance of law. Game isn't constrained to entertainment alone, it also involves national pride. The rise of Indian Premiere League and Indian Cricket League has begun to raise significant issues with respect to Competitive nature and deliberate damage that may emerge out of the ongoing occasions. This enough exhibits the need to improve Sports Law and adoption of faster mechanisms to approach sports disputes in India.

It ought to likewise be remembered that quick resolution of disputes will not completely resolve the issue. It is equally important that organizations are set up with a working knowledge of sports laws, which includes specific rules and guidelines of each discipline and

also outline a compact and clearly distinguishable dispute resolution practice that places prominence on "Alternate Dispute Resolution". These specialized forums can accurately looks after the disputes and frame hard time-lines which necessitate mandatory adherence by parties. The current circumstance obliges that the issues must be mediated through assertion with CAS on the worldwide stage and ICAS on the domestic stage. A hope can only be articulated that ICAS initiates to exercise its authority in regard to sports disputes within its jurisdiction and subsequently functions in a proficient way, by ensuring privacy and integrity.

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Corporate Social Responsibility- A Boon During Covid 19 Pandemic

Dr. Annapoorna Shet*

Abstract

The nation is witnessing a severe pandemic since 2020 in the name of Covid19. The pandemic has affected the whole world at large. Thousands have lost their lives and millions of people are affected by the attack of virus and the containment of which is totally out of the human control. No doubt this is not the first-time mankind is facing such a situation. Few decades ago, a similar situation has arisen. But the containment of the disease was easy as movement of people throughout the nation was less compared to the present scenario. After the said biological attack there has been a major change in the working of the whole system as it has become difficult for the humans to survive in the earth. In spite of making several efforts to combat the virus, it has not become fully possible to contain the virus. The virus has affected the lives of every individual. No state can sit idle under these difficult times. It is the responsibility of the State to fight against the threat imposed by the virus to mankind. The States have taken several steps to combat the pandemic situation. The corporate and other sectors have also joined hands with the State to help the people to fight against the pandemic. The concept of CSR has greatly come to the rescue in these times of difficulty. Many companies have devoted their CSR initiatives for Covid19 reliefs which have helped the States to withstand the present difficult situation in a most efficient manner. Even though various hindrances existed in the way of combating this pandemic situation, the nation has strived hard to overcome the situation with the help of CSR initiative and general public by passing various policy decisions at the right time.

Key Words: *Corporate Social Responsibility, Corona Virus, Pandemic, PM CARE Fund*

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1. INTRODUCTION

"COVID 19 Pandemic"- A word that created a panic and havoc in everyone's life throughout the globe. There was a complete change in the lifestyle of every individual. It brought various changes in the society including environmental changes. The country suffered a lot due to the pandemic, millions of people lost their lives, many lost their jobs, many businesses have shutdown which resulted in total imbalance in one's life. Situation has arisen such that people are not being allowed to move out of their houses because of which it has become very difficult for them to meet their daily necessities. It is a known fact that most of the people in our country are daily wage earners due to which the people are struggling to meet the basic necessity of their lives. The concept of CSR played an important role in lending a helping hand to the needy people due to the Covid19 outbreak. Several companies have devolved their profit amount in combating the problem arisen due to the Covid19 pandemic situation and is *inter-alia* providing aid to the government in such a critical situation. This article aims at providing a brief insight about how the concept of CSR *inter-alia* is an aid to combat the dangerous deadly Corona Virus problem in the country.

2. CONCEPT OF CORPORATE SOCIAL RESPONSIBILITY

Being humans, it is our responsibility and duty to take care of our society. It is the social responsibility of each of us to take care of the State. Even the Constitution of India clearly enumerates the duties of citizens and States towards each other under the concept of Fundamental Duties and Directive Principles of State Policy. No doubt in the beginning all the responsibilities were on the shoulder of the State. State was solely responsible for everything as all the departments were run by it. It was possible only for the state to take the responsibilities of the society and the people. But, as time passed, collective responsibility of the state and the citizens increased. The State felt it difficult to take the responsibility alone and the people were required to join hands with the State to contribute to the welfare of the state and the society.

The concept of CSR, an age-old concept was practiced in India from time immemorial without any mandatory law or statutory provisions. The corporate sectors which are considered as major stakeholders were involved in serving the society to the best way possible. There are several instances where the huge companies like TATA, Birla, Infosys,

etc were involved in various social activities like adoption of educational institutions, building toilets in villages, providing health facilities to the rural folk, empowerment of women, and so on.[1] In return the companies would also get name and fame which helped them to gain profit and expand and develop their business too. It is after the enactment of the Companies Act, 2013, which made the concept of social activity by the companies' mandatory in the name of CSR under Section 135 which led to the compulsory involvement of the corporate sectors in the welfare and development of the society. The law is clear in this regard which mandates every company who come under the purview of section 135 to spend a part of their profit for the benefit of the society.

There is a clear mention in the provision of the Companies Act, 2013 under section 135, which directs every eligible company to spend 2% of the company's average profit in the last 3 years compulsorily to social activities. The Act also lists out the activities to be carried out under CSR initiative in Schedule VII of the Act. In India, there are several companies which come under the purview of section 135 of the Companies Act, 2013 which devote their part of income compulsory to the social cause.[2] For a developing country like India with dense population, such companies are really a boon for the State as they lend helping hands in tackling the problems of the society. It is pertinent to note that all activities mentioned under Schedule VII of the Companies Act, 2013 concentrate on the social activities especially for the benefit of the vulnerable people who struggle for their daily basic necessities.

3. EFFECT OF COVID-19 TO INDIA

Being an independent country, India is linked to other countries either for trade, commerce or any other activities. The world has become a global village. After LPG, the movement of people between countries is quite often and it is also a necessity in modern system so as to develop the economy of a country. It is because of people travelling frequently between the countries, the epidemic disease can spread throughout the globe very easily. There were several rumours with regard to the deadly corona virus as to the origin of the virus

[1] Manuel T., and Herron T.L., "An ethical perspective of business CSR and the COVID-19 pandemic" 15 *Society and Business Review* 235-253 (2020).

[2] T.N.Pandey, "The concept of Corporate Social Responsibility under the Companies Act, 2013- Whether Well Conceived?" 43 *Chartered Secretary* 1055-1068 (2016).

which is still not clarified. But the impact of the deadly virus has changed the lifestyle of the people to a great extent.

India did not witness the deadly virus at the beginning when many other countries were suffering from the ill effect of the corona virus. The deadly disease entered India in the month of January 2020 in the State of Kerala through a student from Wuhan, China.[3] But once it entered India, it became difficult for the government to tackle the situation due to several reasons. It is a fact that the population of India is very high and the population density of the country when compared to land area is minimum. And as the virus is highly contagious, it was a challenge to the government to tackle the serious issue. The concept of maintaining a social distance was really a difficult task. Yet the government of India has really succeeded in handling the situation by implementing timely decisions and policies during the first wave of virus attack. The corona virus disease has brought a sea change in the life of every person. For the first time the whole country was locked down for more months together. Lockdown was considered as the only solution to tackle the problem of virus due to which the government announced lock down from time to time. It has worsened the life of many. India is a country where most of the people work on daily wages. The lockdown affected such people to a greater extent. There arose a situation where people were not in a position to meet their daily basic needs.

On the other hand, in spite of various measures initiated by the government to invent the vaccine and to control the virus it was not fully successful as many people were affected by it and several people lost their lives. The situation was such that people were not even allowed to perform the final rites of their family members. Even after the invention of vaccine, the distribution of the vaccine to the whole world was even more difficult especially to the country like India with dense population.

Furthermore, the national economy of the country was brought down suddenly. The government was not in a position to manage the situation as crores of rupees were spent by the government to handle the deadly disease. As the economy was highly affected, people started losing their jobs, cuts in their pay which made their life still worse. No doubt the NGO's, corporate sectors and other people joined hands with the government to manage the current situation, but they too were unable not to provide assistance to all the affected people.

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[3] M.A.Andrews and Binu Areekal, "First confirmed case of COVID 19 infection in India: A Case Report" 151 *Indian Journal of Medical Research* 490-492 (2020).

The Covid19 pandemic situation has affected the country to a greater extent. People were not allowed to move freely out nor were they allowed to gather at one place. They were forced to live like animals where the freedom of free movement was curtailed by the government for the larger interest of public health & safety.

The environment on one hand was pollution free due to non-usage of private vehicles, stoppage of most of the huge factories, plants & machineries which were the major cause of environment pollution. But, on the other hand due to the overuse of chemicals and plastics in the form of sanitizers, disinfectants, gloves, masks, etc the environment was filled with all these wastes which in turn polluted the environment badly.[4]

The major problem with the pandemic was arisen in the further days as the virus started getting new strain with new genes in the virus which made the situation even worse. No doubt with great efforts the government would contain the pandemic to a great extent. But soon the country got hit by the second wave which was even more dangerous than the previous one. Despite developing the vaccine, it could not reach to maximum people as once again the production was less compared to the demand. Once again, the situation was very bad to be tackled by the nation. Several new issues cropped up in the second wave like lack of medical oxygen, lack of hospital facilities and other important drug to save the lives of people. People started dying in mass due to the non-availability of the medical aid. In between several cruel people started minting money in the name of corona virus which became even more difficult for the State to tackle with the present situation in a country. The 2nd wave in India which was regarded as more serious than the first wave put the country into lockdown again which was again a real threat to the nation like India. The pandemic has worsened the life of individuals to a large extent.

4. ROLE OF CORPORATE SOCIAL RESPONSIBILITY IN COVID 19 PANDEMIC

The concept of CSR has played an important role in managing the Covid19 outbreak situation in the country. It is a true fact that the concept of CSR even though an age-old concept, it was made mandatory only after the inclusion of Section 135 along with Schedule VII of the New Companies Act, 2013. But even before 2013, CSR was followed

[4] Vasanthi Vara, "Coronavirus in India: How the COVID-19 could impact the fast-growing economy", *Pharmaceutical Technology*, April 30, 2020, *available at* https://www.pharmaceutical-technology.com/features/coronavirus-affected-countries-india-measures-impact-pharma-economy/ (last visited on Aug 5, 2020, 10.15 A.M).

by almost all the stakeholder's voluntary without any compulsion. Even the corona outbreak was not an exception as most of the companies came forward to help the country which was in great trouble due to the biological havoc.[5]

The aid provided by the companies was in different ways. Certain companies directly contributed money to the PM National relief fund at the beginning. Later keeping in mind, the emergent situation for tackling the pandemic situation in the country, a public charitable trust was set up in the name of 'Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund' (PM CARES Fund)' on 28 March 2020 with Prime Minister as the Chairman and Defence Minister, Home Minister and the Finance Minister as its members for the sole purpose of combating the virus. It was clarified that every donation made to the PM CARE Fund would come under the purview of CSR spending by the company and hence it encouraged the companies to contribute funds to the PM CARE which was used for the purpose of combating the pandemic situation in a country. The MCA also amended the Schedule VII of the Acton 23rdMarch 2020 by including the PM-CARES Fund as a permissible CSR activity along with the Prime Minister's National Relief Fund.

Tata Group has contributed Rs. 1500 crores, Reliance group of Companies has devoted Rs. 500 crores, Larsen and Toubro has contributed Rs. 150 crores whereas Infosys, Adani Group, Vedanta, JSW who contributed Rs. 100 crores[6] are in the major front line to contribute to the PM CARE fund. While several other companies joined hands with NGOs and served the public by providing kits containing basic essential articles. PepsiCo company in association with Akshaya Pathre foundation distributed about five million meals to the needy in times of pandemic. It also donated 25000 testing kits to the government and proved it cares for nation.[7] Infosys Company devoted its money to distribute basic kits to the needy and also spent the amount to establish smart classes in the rural areas in order to continue education in the pandemic situation. Companies like Maruthi, Hero, Bajaj, TATA, Birla expended their amount for the medical facilities like

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[5] Kee-Hong Bae, "Does CSR matter in times of crisis? Evidence from the COVID-19 Pandemic" 67 *Journal of Corporate Finance*, 101-124 (2021).

[6] Strategic Investment Research Unit (SIRU), "Indian companies contributing to PM-CARES Fund to fight COVID-19", *available at* https://www.investindia.gov.in/eam-india-blogs/indian-companies-contributing-pm-cares-fund-fight-covid-19. (Last visited on Nov. 10, 2020, 11.15 AM).

[7] Indra Nooyi, "Pepsi Co commits 25,000 COVID-19 testing kits, over 5 million meals to India*" The Economic Times*, Apr. 6, 2021.

providing medical oxygen, sanitizers, masks, PPE kits. Several companies like BSNL and other telecom companies as well as Google, Face book played a role in bringing awareness to the public with regard to prevention and protection against the deadly corona virus. During such an epidemic outbreak it was very much necessary to create awareness among the public in all ways possible. Various companies followed various tactics to spread awareness to the people and for that they have allocated huge amounts.[8] Even the companies tried to bring awareness to the people about the social distancing which is the most important thing in order to fight this pandemic by changing the logo of the company which will really have greater effect in the minds of the people. It is a known fact that people normally recognize the company from its logo rather than the name. Indeed, these logos have Intellectual property rights too. It has its own unique place. Several companies have changed their logo in order to bring awareness to the public with regard to Covid19 pandemic. MC Donalds Company has changed the logo from m split into 2 n so as to show the importance of social distancing. Similarly, Audi company has also changed its logo from 4 intersecting circles to 4 separate circles which once again show the importance of social distancing to prevent the spreading of the disease.[9] The corporate sectors have in one or the other way contributed for the suppression of the deadly disease. The CSR fund was an added advantage to the government in times of difficulty.

The government in order to protect the interest of the people and to get out of this pandemic situation, from time-to-time implemented policies with regard to CSR spending for Covid19 reasons. After the declaration was made about the novel corona virus outbreak in the world as a notified disaster and pandemic on 14th March 2020 it enabled every nation to be prepared and make arrangements to face the pandemic in the countries. Attempts were made to utilize funds for food supply, medical care, containment facility, testing labs, from various stakeholders to face the challenge imposed by the virus. The government also issued an order stating the funds spent by the corporate sector for the corona virus would come within the purview of CSR activity and the companies again need not spend on CSR activity as it would be difficult for the companies to be overburdened at the time of crisis. It created a win-win situation for the companies so as to

[8] Sidharth Choudhary, Vasundhara Singh, "The changing landscape of CSR in India during COVID-19", *Strategic Investment Research Unit,* Sep.3, 2020, *available at* https://www.investindia.gov.in/siru/changing-landscape-csr-india-during-covid-19 (Last visited on Nov.10, 2020, 12.35 PM).
[9] Editorial, "How brands are endorsing social distancing" *The Economic Times,* Apr. 1, 2020.

participate in the relief work to overcome the damage caused due to Covid19 and also to meet their statutory requirements.[10]

Further, on 26 August 2020, keeping in mind the emergent need of research and development of vaccine and medicine for corona virus, the Government amended the CSR norms of the company to include research and development activity. The government in its gazette notification stated that, "Any company engaged in research and development activity of new vaccine, drugs and medical devices in their normal course of business may undertake research and development activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22 and 2022-23 subject to the conditions".[11]

Relying on the above notification, the companies concentrated their CSR funds on top 3 sectors viz Preventive healthcare, food security and donations to government funds. Most of the companies concentrated and involved in more than one welfare domain, which made the companies to contribute to the nation in times of pandemic. Covid19 situation made companies to come out of their daily routine and mingle with the society directly. Most of the companies were involved in CSR activity simply by donating to prime minister or chief minister's national relief fund. But the pandemic situation has made the company to join hands with the State actively and to take care of the society during its urgent societal challenges. Some corporates have also creatively engaged their funds towards promotion of mental health at the time of crisis.[12] The Ministry of Corporate Affairs now allows companies to channel their mandatory Corporate Social Responsibility (CSR) spending towards any innovations carried on to fight against the deadly corona virus outbreak in the country which is mentioned under General Circular No. 10/2020, No. 05/01/2019-CSR, Government of India.

The government also initiated several policies specially to deal with the virus outbreak which ultimately increased the CSR spend by the companies.

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[10] Nishant Parekh J., "CSR in times of COVID-19" 3 Financial *Express* 1-5 (2020).

[11] Government of India, "Report of the Committee on Preventive measures to contain the spread of COVID19" (Ministry of Corporate Affairs, 2020).

[12] Government of India, "Report of the Committee on Spending for COVID-19 is eligible CSR activity" (Ministry of Corporate Affairs, 2019).

Firstly, it allowed the companies to spend their part of CSR fund directly to covid related activities. The companies didn't concentrate only to donate their part to the PM CARES Fund but also contributed to the State disaster management authority, health care and sanitation, announced certain packages to daily workers, etc.

Secondly, the government announced for 100 percent tax deduction to the companies for the amount spent for covid related activities. Once again due to this policy, the government's revenue in the form of tax was reduced. But it was a need of the hour because the Covid19 not only affected the general public but also the corporate sectors too. So, in order to balance the situation, the government brought the initiative so as to help the companies to manage their affairs and also encouraged the companies to devolve their CSR Fund to the most urgent cause of the nation.

Thirdly, the government made policy which allowed the companies to balance their CSR funding in the subsequent years which contributed over and above the minimum prescribed amount to the Covid19 reliefs if the company desired so. This led the companies to spend even more than their CSR limit which was very much necessary during the time of pandemic emergency.[13]

In the severe pandemic situation, corporate sectors in India have proved that it cares as much as the State. Crores of rupees have been donated by the corporate sectors to various government funds. According to one report, India has spent ₹7,537 crores out of the CSR contribution in two months on Covid-related issues which included ₹4,316 crore in the form of donations to the PM CARES Fund and the remaining ₹3,221 crore was spent on various other relief funds, masks and sanitizers, food and ration donation, protective gear kits, etc.[14] Even the company concentrated on the activities like vaccine drive, bulk testing for their employees and families, etc.

It is a known truth that corporate sectors themselves cannot involve in CSR activities independently because of several reasons. Even during the pandemic situation, they took the assistance of the various NGOs in order to serve the public in an efficient manner. It

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[13] Pushpa Sunder, "Covid has pushed CSR deeper into Corporate Consciousness" *The Hindu*, Sept. 9, 2020.

[14] Gaurav Noronha, "India Inc spent Rs 7,537 crore as CSR obligations 2 months directed to address the Covid-19 pandemic", *The Economic Times*, June 9, 2020.

was specially a necessity for concentrating on the rural sector during the time of pandemic which became possible with the assistance of the NGOs.

No doubt, CSR activities are meant for serving the public at large, but at the same time importance is to be given to the company's own employees. Hence all the companies have announced packages to its own employees which are a need of the hour. Keeping in mind the health and safety of its employees, most of the companies have taken precautionary measures by allowing their employees to work from home. Few have made staggering arrangement where the employees have to report on alternative days so to avoid congestion and gathering of people. Companies have also provided masks, sanitizers, and also vaccines to their employees as well as their family members and have taken all precautionary measures for curbing the Covid19 pandemic.

5. CRITICAL ANALYSIS

No doubt the corporate sectors have played an important role in curbing the virus to the maximum extent. But still there are certain hindrances. Firstly, most of the companies took this opportunity only to comply with the mandatory spending of the CSR fund because of which the amount spent was not completely utilized for the cause.

As the government announced 100 percent tax exemption for the CSR spending in times of Covid19, it increased the burden of the government and the government had to face a deficit amount as their income of the government in terms of tax was reduced drastically. As the government had to incur huge expenditure towards public health and safety during the pandemic, it was unable to meet the expenditure fully because of which the burden was shifted to the general public.

Most of the companies were involved in helping their own employees, but there were few companies, who even did not pay their own employees because of which many people suffered especially in times of pandemic.

The companies failed to contact the beneficiaries directly because of various reasons due to which most of the fund released by the companies were misused and did not reach the actual needy.

High risk is involved when huge amount of money is to be spent on a large number of people. Even the Covid19 situation is not an exception to it. Most of the funds were misused by the implementing agencies.

The NGO's appointed by the company normally concentrated on one particular area and one group of people because of which there was no proper release of funds to the various groups of people.

There was no proper agency to check and monitor the CSR spending by the companies because of which there was misuse of CSR funds by the people at various levels before it reached the ultimate beneficiary.

Few companies took this initiative because of compulsion only due to which there was no proper co-ordination of the activities under the CSR initiative.

As several company's themselves were not working in a full pledged manner, their profits also came down due to which the amount on CSR funding was also reduced.

6. CONCLUSION

COVID 19 disease declared as pandemic by the WHO, has brought the whole world to a standstill. The mother earth witnessed a huge disaster because of the loss of people's life. During the difficult times several institutions joined hands with the government for controlling the pandemic. The corporate sector took the premium role in controlling the disease by lending its helping hand to the Government. The CSR concept introduced under Section 135 of the Companies Act, 2013 played an important role during the pandemic. The corporate sectors in the name of CSR funding have pooled a huge amount for solving the problems of the people during the pandemic situation. In spite of several loopholes not being that serious, the companies have succeeded in their motive to curb the pandemic situation in the world. India even though a developing nation with a huge population has been successful in curbing the pandemic situation in the country with the help of the corporate sector and other institutions. The corporate sectors falling under the purview of CSR are not the only one which came forward to comply with the statutory requirement by spending a substantiate amount to the society. There are several instances where the people simply came forward to solve the problems of the present situation without expecting anything in return from the state. It is because of the kind gestures of the people of India, the outbreak situation was managed well during the first wave. It became a model to other countries across the globe. But this is not the conclusion as regards this pandemic is concerned. It has not stopped completely and the people as well as government are

working hard to hit the second and third wave which has hit our nation badly. Even after the invention of vaccine as well as the drug to combat the virus, still there are multiple challenges to be faced by our nation due to the dense population of the country. To vaccinate the people is also a challenging task. The best thing what the State can do is to be prepared to face the situation that may arise in future. There are some evil sources who do not care for the lives of people and try to mint money in the name of corona virus. People must realize the gravity of threat posed by the virus to mankind and at least in this case avoid such evil activities. It is a universal truth that the State alone cannot solve any such problem alone, but it is the people who must support the Nation by following the norms to avoid the pandemic situation in the country and join hands with the government to solve the cruel havoc in the world.

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Joseph Shine v. Union of India - Case Comment

*Shakshi Kothari

BENCH- Justice Deepak Mishra, Justice R.F Nariman, Justice D.Y Chandrachud, Justice A.M Khanwilkar and Justice Indu Malhotra.

CITATION- 2018 SC 1676.

DATE OF JUDGMENT- 27th September 2018.

ABSTRACT

India being a male-dominated society has always been overpowering with the rights and privileges of women. There exist a dichotomy in the current society, which on the one hand expressly promotes gender equality and on the other hand it impliedly supresses the women. Supreme Court under Chief Justice Dipak Misra realized that it is the need of the hour to take a step towards recognition of women's rights and promote gender equality. Women should be given equal rights and opportunities as men. So, the Apex Court recently passed certain historic judgments to recognize the inequality which women had been facing. One such judgment included Joseph Shine case dealing with decriminalization of adultery. This paper deals with comments on the case Joseph Shine V. Union of India.

Keywords- Dichotomy, Supreme Court, Gender equality, Joseph Shine

INTRODUCTION

Certain laws in India have become so archaic that they have lost their relevance over a period of time. The law on Adultery was one of such laws and the same had been defined under Section 497 of the Indian Penal Code, 1860.[1] It was based on the notion of patriarchy and male chauvinism. Under this law, in order to constitute the offence of adultery, the following must be established:

(1) Sexual intercourse between a married woman and a man who is not her husband.
(2) The man who had sexual with the married woman must know or had a reason to believe that she is the wife of another man.
(3) Such intercourse must take place with her consent i.e., it must not amount to rape.
(4) Sexual intercourse with the married woman must take place without the consent or connivance of her husband.

Prima facie, it appeared that it is a beneficial legislation passed to serve the interests of women. But on the closer examination, these provisions relied on the assumption that women are chattels of men. The given law clearly revealed that Adultery was for the benefit of the husband, for him to secure ownership over the sexuality of his wife. It objectified women and treated husband to be the master of his wife. It thus, relied on the stereotype about women and their subordinate role in marriage.

Therefore, the Supreme Court in the case of Joseph Shine V. Union of India[2] by declared 158 year old law on Adultery unconstitutional thereby recognizing the principles of equality and women's dignity. The Court also stated that the law was based on certain "societal presumptions" which had been in existence in the society from time immemorial.

BACKGROUND

In the given case Joseph Shine, a non-resident belonging to Kerala filed a Public Interest Litigation under Article 32 of the Constitution. He challenged the constitutionality of Section 497 of the Indian Penal Code, 1860 read with Section 198 of the Code of Criminal

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[1] "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offense of rape, is guilty of the offense of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such a case, the wife shall not be punishable as an abettor."
[2] 2018 SC 1676.

Procedure, 1973. He argued that it discriminated against men by only holding them liable for extra-marital relationships while treating women like objects.

The question of constitutional validity of Section 497 of the Indian Penal Code, 1860 arose before the Supreme Court multiple times. *First*, in the case of Yusuf Abdul Aziz V. State of Bombay,[3] where the Court held that Section 497 of the Indian Penal Code, 1860 was constitutionally valid as it was a special provision for women only and recognized under Clause 3 of Article 15 of the Constitution. *Second*, in the case of Sowmithri Vishnu V. Union of India,[4] the Supreme Court placed reliance on Yusuf Abdul Aziz case. The three grounds for challenges brought under this case includes:

1. Section 497 gives the right to the husband to bring an action upon the adulterer but does not give this right to the wife to prosecute the woman with whom her husband has committed adultery;
2. The section does not give the wife right to prosecute her husband who has committed adultery; and
3. It doesn't cover cases in which the husband has sexual relations with an unmarried woman.

The contention made was that Section 497 is a flagrant instance of "gender discrimination, legislative despotism and male chauvinism." However, the Court held Section 497 of IPC doesn't offend Articles 14 and 15 of the Constitution. *Third*, while placing reliance on the two earlier cases, the Supreme Court in the case of V. Revathi V. Union of India and Ors.[5] observed that this section didn't allow either the husband of the offending wife to prosecute her nor did it permit the wife of the offending husband for being disloyal to her. It was held that since neither of the spouses could bring a charge against each other therefore, this section doesn't discriminate on the ground of sex. So, section 497 of the Act was held to be constitutionally valid.

In the earlier three judgments Supreme Court agreed to the constitutional validity of the Adultery Law. This issue was again raised in the case of Joseph Shine i.e. "Whether Section 497 of the Indian Penal Code, 1860 is unconstitutional?" The 5-judge bench while deciding this issue over-ruled the earlier decisions and passed a concurring judgment by battling for

[3] AIR 1954 SC 321.
[4] (1985) Supp. SCC 137.
[5] (1988) 2 SCC 72.

gender equality. It struck down Section 497 of the Indian Penal Code, 1860 as the same being in violation of Article 14, 15 and 21 of the Constitution.

The judgment held that Section 497 is archaic and is constitutionally invalid as the same denies the women with her autonomy, dignity and privacy. This case recognized sexual autonomy as an integral part falling within the ambit of Article 21 of the Constitution. Also, the Court observed that in the institution of marriage women are unequal participants as they are incapable of consenting to a sexual act. Thus, women were recognized as sexual property of their spouse. In this way it violated Article 14. With respect to clause 3 of Article 15, the Court clearly stated that Adultery law violated the non-discrimination clause.

According to the Court, Section 497 was declared to be no longer a criminal offence as the same was not committed against the society instead is a personal issue. Considering this as a criminal offence would involve the interference of the State in the private realm of two individuals. Thus, according to Justice Misra, adultery still continues to be a civil wrong and also a ground for divorce thereby giving discretion to the husband and wife to decide the issue.

Apart from scrapping the above law, the Court realized that gender neutrality is needed in the society where even today women are treated as the property of their husbands. While deciding the issue the Court declared this law to be arbitrary in entirety. It doesn't in any manner preserved the sanctity of marriage. Instead this law showed the "proprietary rights" the husband had over his wife.

CRITICAL ANALYSIS

From its very inception the law on adultery was in controversy. As per my opinion, *firstly,* the law was not needed to be brought into existence as it interferes with the sexual autonomy of an individual which in turn affected the dignity of a woman. It was the discretion of an individual to determine his sexual acts and making it punishable criminally interfered with the right of privacy of an individual. Therefore, such a law is irrelevant especially in today's context where sexual privacy is a natural right, fundamental to liberty and a soul mate of dignity.[6] The application of Section 497 was a clear violation of these enunciated rights as Adultery law was based on the assumption that husband is the owner of wife's sexuality.

[6] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

Even Justice Nariman in the given judgment emphasised that "Section 497 is an archaic law, which has outlived its purpose"[7] and thus, need to be struck down.

Secondly, one of the most arbitrary part of Adultery law was the fact that wife's extra-marital sexual acts would not be a criminal offence if the same had been done with her husband's consent. Therefore, the consent of women is immaterial. This made women as the property of the husband clearly favouring the patriarchal notions and beliefs resulting in the oppression of women. Also, this law had no application in case of husband having sexual intercourse with unmarried woman. To substantiate this point I would quote Justice Nariman who in the given judgment stated that the nature of the offence under Section 497 IPC is based on a paternalistic notion of a "woman as chattel[8]" Also, Justice DY Chandrachud emphasised that the Adultery law was based on the notion "that a woman, upon entering marriage, is her husband's subject, such that her sexual autonomy and dignity are seeded to the autonomy of the husband.[9]"

In today's era, having a law like Adultery marks the backwardness of the society. Most of the countries of the world don't have any law on Adultery because in a way this law violates women's Fundamental Right to equality, autonomy and dignity. Quoting Justice Indu Malhotra who stated that, "the times when wives were invisible to the law and subordinate to their husbands had long passed.[10]" Also, speaking on gender equality, Justice Dipak Misra declared that the Court could no longer allow women to be treated as the property of men. He emphasised that the Court has evolved a progressive jurisprudence on constitutionally protected liberties and, recently, conferred several rights to women.[11]

However, this judgment completely ignored the rights and interests of men because the law on Adultery was not only committed against women but also against men. But the Court while deciding this case didn't discuss any discrimination against men by not holding women responsible in adulterous relationship. Thus, Court should have adopted gender-neutral approach. Also, the Court made an arbitrary classification between married and unmarried women and also aggrieved husband and aggrieved wife.

CONCLUSION

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[7] *S*upra note 2.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

To conclude, this historic judgment of striking away the Adultery law marks the progressiveness of the society. It not only ensures a move from a male dominated society but also provides equality and dignity to women. For a country like India which comprises of diverse population having different beliefs and ideologies adopting such a judgment would be difficult but a judicial pronouncement like this by the Supreme Court marks the beginning of "social change" and the society will slowly adopt the change according to the norms laid down. Therefore, the law of Adultery should not be treated as a criminal offence in the present time as this is a matter of private nature.

Women in today's world are entitled to the same rights as men. But in a society which had been patriarchal and male-dominated from time immemorial it is difficult to accept a "social change." A change which will not discriminate between men and women. A change which will give women the right to equality and dignity. A change which will support women empowerment. In order to achieve this change some bold steps are required not only from the public at large but also some authorities taking charge. Judiciary in the recent past has proved itself to be the guarantor and protector of Fundamental Rights of the People. The judicial pronouncement has been passed in order to protect gender inequality. The social stigma existing in our country where women are considered to be oppressed by men is to be abolished. The judicial wing has taken beyond implementation of laws.

The purpose of the verdict is to realize the status of women in the society. However, the orthodoxy which exists here is a challenge for the Judiciary to make people accept a change which is for the betterment of the society. But these steps marks the beginning of a new era. An era of equal rights and privileges to women. An era of women empowerment. As there is a famous saying by Kofi Annan, "There is no tool for development more effective than empowerment of women,"

SUGGESTIONS

India being at a very nascent stage in terms of women' rights need to be very cautious in dealing with such issues. *Firstly,* the Judiciary should be clearer in terms of laying down certain guidelines and rules while passing such historic judgment. It is expected from the Judiciary to know the consequences of its judgment and pass safety orders accordingly. *Secondly,* other authorities like Legislature or say the Government instead of using these verdicts as political stands should consider such issues with a wider perspective. *Thirdly,* the people living in the society instead of protesting or agitating against the same should

understand the purpose with which these verdicts have been passed. For a change to be brought in, the entire society is required to contribute in its own manner. Also, sometimes accepting the change is most important contribution. *Fourthly,* while recognising the rights of one gender the interests of the other gender should not be ignored. India instead of promoting gender equality in favour of one gender say, women should adopt a gender-neutral approach in order to support equality.

SHARDA UNIVERSITY - SCHOOL OF LAW

Sharda University School of Law (SUSOL) is a dynamic and progressive Law School situated in the clean and green environment of Greater Noida (National Capital Region). SUSOL is considered to be one of the most prestigious Law schools in the National Capital Region, offering BCI approved Five Year BA. LL.B. (Hons.), BBA. LL.B. (Hons.), LL.M. (Corporate Law, Criminal Law, International Law, Human Rights, Energy Law) and Ph.D. Programme.

VISION & MISSION

Vision

To emerge as a leading school of law in pursuit of academic excellence, innovation and nurturing entrepreneurship.

Mission

1. To prepare students as legal professionals through a transformative educational experience.
2. To encourage the global outlook of the students by providing enriched educational initiatives.
3. To promote research, innovations and entrepreneurship.
4. To inculcate ethical and moral values among the budding lawyers, judges and legal professionals and motivate them to serve society.

The vision is to emerge as one of the top Law Schools in India and one of the best in NCR. The mission of the School is to impart the best legal education to its students and help them to shape themselves as outstanding legal professionals and to inculcate moral values in their overall personalities.

Law serves as an instrument of change to establish an egalitarian society wherein the Preambular declarations of Justice, Liberty, Equality and Fraternity enshrined in the Constitution of India are guaranteed rights. As all aware that the Indian economy is the fastest-growing economy and is poised to become a 5 trillion dollar economy by 2025. This would necessarily entail the enactment of new legislation and setting up of courts and tribunals for speedy disposal of disputes *inter alia* to improve ease of doing the business ranking. This makes legal education a cutting-edge field with a plethora of opportunities for future legal professionals.

It is the sincere effort of the School of Law that these opportunities are made the most of, and it is in pursuance of this goal that the Faculty at School of Law, Sharda University ensures high-quality classroom teaching learning and also places focus on experiential learning, Free Legal Aid and Community Connect. At present we have 906 students. We have an excellent multi-cultural environment with best in class infrastructure.

CORE VALUES

1. Excellence: Commitment to innovation and continuous learning and to ensure we keep striving for the best outcomes in all facets of life.
2. Ethical Conduct: Integrity, fairness, honesty and transparency in all actions.
3. Global Outlook: Welcoming and encouraging diverse ideas, beliefs, and cultures.
4. Promote Leadership: Believing that leaders create leadership skills in others, thus igniting a virtuous cycle of growth.
5. Collaboration and Inclusiveness: Developing a symbiotic community of faculty, students, alumni, industry, government bodies and other Universities/Centers of learning.

SALIENT FEATURES

1. The School of Law has been established in the year 2012 as a constituent of Sharda University, a State Private University, established through an Act passed by the U.P. Legislature (14 of 2009) and permitted by the University Grants Commission to award degrees under section 22 of the UGC Act, 1956. The SOL has been recognized by the Bar Council of India.
2. Qualified and Experienced Faculty
3. Focus on experiential learning - Guest Lectures, Visits, Internship, Workshop, Seminars etc. Regular Guest Lectures by legal luminaries like Supreme Court Judges, High Court Judges, Leading Academicians, Public Prosecutors and Senior Advocates on current topics related to law to enhance the ability and skills of students and to connect with latest happenings of legal world. In the last academic sessions, faculty and students were privileged to interact with eminent legal luminaries namely, Hon’ble Mr. Sanjay KishanKaul, Judge, Supreme Court of India, Hon’ble Ms. Justice Indira Banerjee, Hon’ble Mr. Justice DipakMisra, Hon’ble Mr. Justice R.K. Agrawal, Hon’ble Mr. Justice A.K. Sikri, Hon’ble Mr. Justice Swata’nter Kumar, Hon’ble Mr. Justice R.C. Lahoti, Hon’ble Mr. Justice P.C. Pant, Hon’ble Mrs. Justice GyanSudhaMisra, Hon'ble

Mr. Justice Anil R Dave, Hon'ble Mr. Justice B.S. Chauhan, Hon'ble Prof. UpendraBaxi, Prof. B S Chimni, Prof. S.C. Raina, Prof. B.T. Kaul, Prof. Balraj Chauhan, Prof. Viney Kapoor, His Excellency ShriArif Mohomad Khan, Governor of Kerala, Hon'ble General (Dr.) V.K. Singh and Hon'ble Mr. Salman Khurshid notables among others.

4. School of Law adopts a multidisciplinary approach.
5. Cultural Diversity- Students from many countries.
6. World-Class Infrastructure.
7. Regular Interaction with top global law professionals and distinguished legal luminaries.
8. Focus on 3A's – Academic excellence accelerated thinking and All-inclusive development.
9. School of Law provides Moot Court Facility, Debates, Quizzes, Guest lectures, Seminars, Conferences, Case Study, Mentoring, Summer internship etc. for the students.
10. Community Connect, Free Legal Aid
11. Family Dispute Redressal Clinic, Mediation Centre at Police Station, Knowledge Park-1, Greater Noida.

2020-21 (Awards & Achievements)

1. School of Law has been ranked 4th Top Eminent Law School 2020 by the Competition Success Review (CSR)
2. School of Law has been ranked 28th in the India Today Law School Ranking 2020
3. School of Law has been awarded 'KNOWLEDGE STEEZ LEGAL AID AWARD 2019'for rendering excellent services in Legal Aid and Justice to the society in 2019. The award is presented on 19th January, 2020 at Malviya Smriti Bhawan, New Delhi at 4th National Conference on Human Rights and Gender Justice.
4. School of Law has been awarded as the 'BEST LAW SCHOOL IN NORTHERN INDIA AWARD 2019'.The award was given by the National Institute of Educational & Research (NIER), India on Saturday, 27th July, 2019.
5. District Legal Services Authority, Gautam Budh Nagar has commended School of Law for EXCELLENT COMMUNITY CONNECT PROGRAMMES 2019.
6. District Jail Superintendent Office has commended School of Law for organizing EXCELLENT FREE LEGAL CUM MEDICAL AID CAMP 2019 and providing books for the prison inmates.

ACADEMIC PROGRAMME OFFERED

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- *On-campus fully A/C Moot Court Hall to get practical experience*
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- *Focus on Experiential Learning and Practical Training through Moot Court Exercises, Debates, Legal Quiz & Legal Role Play Competitions, Organizing Workshops and Essay Writing Competitions.*
- *100% internship & placement assistance in leading Law Firms, Commission, Court, Corporate Houses, NGOs,*
- *School of Law is assisting Noida Police in its great initiative of "Family Dispute Redressal Clinic" to provide high quality, caring, client-centered specialist family dispute resolution services by experts.*
- *Periodical visits to the Parliament, Supreme Court, High Court, District Court, Police Stations, Juvenile Homes and Correctional Institutions and other empowerment programme for the students.*

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