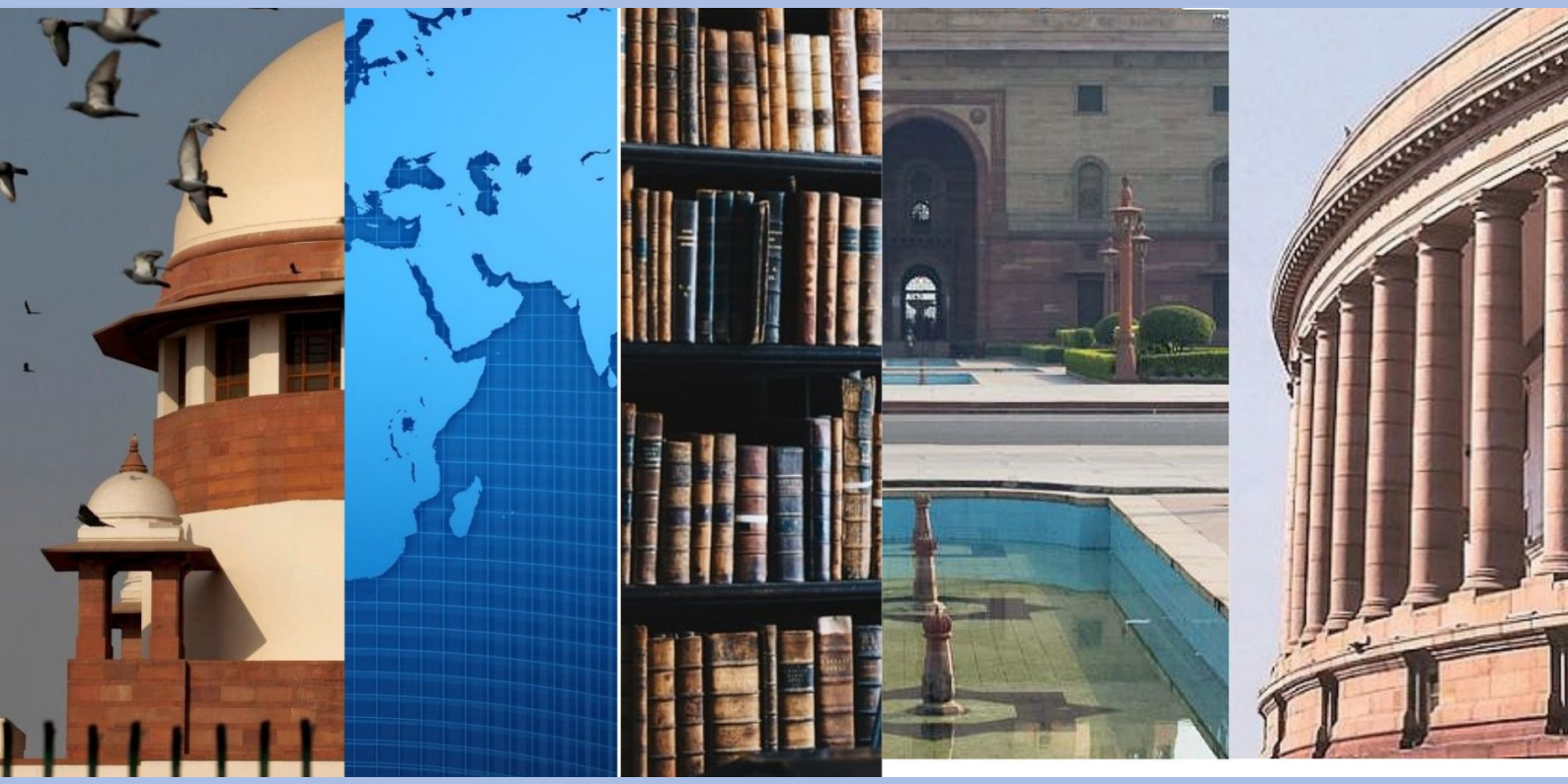
Journal of Global Research & Analysis

A Multi-Disciplinary Peer-Reviewed Research Journal
RNI-HARENG/2012/59126 ISSN: 2278-6775



EDITED BY

Dr. Dharminder Kumar

Volume 10 (2) December 2021

Journal of Global Research & Analysis

[A Bi-Annual (June & December)
Multi-Disciplinary Peer-Reviewed Research Journal]

editorjgra@geeta.edu.in **RNI-HARENG/2012/59126** **ISSN: 2278-6775**

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

PEER REVIEW PANEL

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Journal Website: https://www.geetalawcollege.in/academics/list-of-journals/

OWNED BY

K.R. Education Society, 547, Sector -11 (HUDA), Panipat, Haryana

Published by Nishant Bansal (On Behalf of) K.R. Education Society, Panipat**.**
Address of Publisher – H.No. 547, Sector -11 (HUDA), Panipat, Haryana, **Printed By –** Jitender Nandal**, Address of Printer** – Nandal Enterprises, Printing #39, 1st Floor, Kissan Bhawan, Assandh Road, Panipat, 132103 (Haryana). **Owned By** K.R. Education Society, 547, Sector 11 (HUDA), Panipat, Haryana, **Editor –** Dr. Dharminder Kumar, **Place of Publication** - K.R. Education Society, 547, Sector -11 (HUDA), Panipat, Haryana, India.

Annual Subscription-Rs. 1000/-
Single Copy- Rs. 500/-

Bank Draft drawn in favour of K.R. Society and Payable at Panipat may be sent to the following address: The Editor (Dr. Dharminder Kumar) Journal of Global Research & Analysis, Geeta Institute of Law, Karhans, Samalkha, Panipat- 132103 (Haryana).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

DISCLAIMER

JOURNAL OF GLOBAL RESEARCH AND ANALYSIS

Journal of Global Research & Analysis (JGRA) is "**A Bi-Annual Multi-Disciplinary Peer-Reviewed Research Journal**" (Print) in English for the enhancement of research published by Geeta Institute of Law (GIL) under the aegis of K. R. Education Society, Panipat.

The editors, publishers, and printers do not own any responsibility for the views expressed by the contributors and for the errors, if any, in the information contained in the Journal and the author shall be solely responsible for the same.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

TABLE OF CONTENTS

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

REGISTRATION OF MARRIAGES VIS-À-VIS CHILD MARRIAGES: AN ANALYSIS

DR. NEELAM TYAGI*

ABSTRACT

India is a country inhabited by people belonging to different communities. Child marriages are rampant across every community which remains the worst form of child rights violation, especially for a girl child. It has various detrimental effects as it hampers the physical and psychological development of the child and is the root cause of malice. Child marriages are the reason behind the illiteracy among children coming from rural backgrounds. Early pregnancies lead to poor health of the girl. Girls of such marriage often lack personal autonomy to make important life decisions. They have to face a violation of some of their crucial human rights, including the right to health, education, development and equality. Even after being aware of their effects, for the sake of religious vices and in the garb of customs, the practice of child marriage continues, especially in rural areas. Young girls have to drop from school, making them less empowered, submissive, restricting their growth prospects in the future. They have poor life skills, problem-solving abilities and coping skills. Studies confirm that these women suffer from various types of abuse and violence. They have only two options ie: to bear and stay or else be out of the matrimonial home. This situation is further aggravated by the non-supportive attitude of the natal families. Despite all this, seeking a legal remedy is difficult and even if she attempts to take up this challenge finding evidence to support their claim remains a task. The law remains inadequate and the tiring legal system adds to the plight of the deserted women. The paper highlights the persistent issue of child marriage, the reasons behind its continuation, problems faced by deserted women and the role of registration of marriage.

* Senior Assistant Professor of Law, Campus Law Centre, Faculty of Law, University of Delhi.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

1. INTRODUCTION

1.1. Frequency of Child Marriage in India

Recently the Union Cabinet has cleared the Prohibition of Child Marriage (Amendment) Bill, 2021 that aims to raise the minimum legal age of marriage of women from 18 to 21 years. The bill aims to empower women through socio-economic benefits. The practice of Child marriage has existed for a very long time.[1] Child marriage is a marriage in which a child below 18 (As per various global organizations like United Nations Children's Fund) is minor but married below the specified age. In such a marriage both or either of the party is a child[2] ie: one of the parties to the marriage is a child.[3] Such marriages are frequently practiced across the globe.[4] In India, the personal laws of each community prescribe their age for marriage. For Hindus, as per Section 5(iii) of the Hindu Marriage Act, 1955 it is 18 years for the bride and 21 for the groom. For Muslims, it is 15 years when a child is assumed to have attained puberty. The Indian Christian Marriage Act, 1872 governing Christians, the secular Special Marriage Act, 1954, and the Prohibition of Child Marriage Act, 2006, prescribes 18 and 21 years as the minimum age of marriage for women and men respectively.

Child marriages are rampant in India. Even the Law Commission of India in its 205th Report gives evident records regarding the incidence of child marriages.[5] According to the District-level household and facility survey in comparison to urban areas (29 percent), child marriages are more prevalent in rural areas (48 percent) and among certain castes and tribes in the North-West and the South-East of the country. Some states have high rates (50% and above) of child marriage.[6] As per UNICEF, India accounts for a third of the global total of child marriages as around 1.5 million girls under 18 years of age are married each year. As per International Center

[1] Bharti Dalbir, *Women and the Law* APH Publishing Corporation, New Delhi, 2008, p. 24.
[2] Article 1 of the Convention on the Right of the Child, "Child" means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.
[3] Section 2 (b) of the Prohibition of Child Marriage Act, 2006.
[4] Startling Statistics 'As many as 113 cases under the Prohibition of Child Marriage Act, 2006 were reported in the country in 2011, out of which the highest were in West Bengal (25), followed by Maharashtra (19), Andhra Pradesh (15), Gujarat (13) and Karnataka (12)), *The Hindu*, October 16, 2012, p. 6.
[5] *Proposal To Amend the Prohibition of Child Marriage Act 2006 and Other Allied Laws*, Law Commission of India, Report No. 205, February 2008, p. 20.
[6] Including Bihar where around 70% of women are married by the age of 18, Rajasthan, Jharkhand, Uttar Pradesh, West Bengal, Madhya Pradesh, Andhra Pradesh and Karnataka. Knot Ready: Lessons from India on Delaying Marriage for Girls, International Center for Research on Women (ICRW), 2008, p. 9.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

for Research on Women, India has the 14th highest rate of child marriage in the world. The National Family Health Survey (NFHS 2019-20) showed that one in four girls in India is married before 18. As per NFHS, 40% of the world's child marriages, out of 60 million around the globe, take place in India. Though there is a slight decrease in these statistics (from 47% to 27% between 2005-2006 and 2015-2016) it remains a matter of concern.[7]

1.2. Violation of Human Rights Due to Child Marriage

If we consider the estimates by *United Nations*, it projects that by 2021 there will be over fifteen million child brides.[8] Child marriage is a form of human rights violation as women face a range of violations of their human rights including, the right to equality, non-discrimination, health,[9] education, privacy, abortion and reproductive rights self-determination, prevention against violence and sexual abuse.[10] Several international instruments recognize varied human rights for the protection of children. They state the standards to ensure safe childhood and prohibition against child marriages. The Universal Declaration of Human Rights (1948) under Article 16.1 recognizes the right to marry and Article 16.2 recognizes free and full consent to marriage. The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1964) under its Articles 1, 2, and 3 provides the right to full and free consent to marriage, and not less than 15 years as the minimum age for marriage, with a mandate to register every marriage by a competent authority.

The Convention on the Elimination of All Forms of Discrimination Against Women (1979) under Article 16.1(b)on the elimination of discrimination against women in matters relating to marriage specifies the minimum age for marriage and makes registration of marriages compulsory under Article 16.2. The Convention on the Rights of the Child (1989) through its Article 3 gives primary consideration to the best interests of the child and abolishes practices

[7] Mukherji Anahita, 47% of young Indian women marry before 18', *The Times of India*, May10, 2011, p. 10.
[8] *Marrying too young: End Child Marriage*, United Nations Population Fund, 2012, p. 6.
[9] (Maternal mortality amongst adolescent girls is estimated to be two to five times higher than adult women according to one estimate it is three times higher amongst girls aged 15-19 years), Barua Alka (et.al.) 'Care and Support of Unmarried Adolescent Girls in Rajasthan', *Economic and Political Weekly*, Vol. XLII No 44, November 3-9, 2007, p. 54.
[10] *Proposal To Amend the Prohibition of Child Marriage Act 2006 and Other Allied Laws*, Law Commission of India, Report No. 205, February 2008, p. 8 (Statistics suggest a strong association between child marriage and education. The incidence of child marriage is 77% among girls with no education, 62 % among girls with primary education and 27% among girls with secondary education or higher.)

prejudicial to the health of children (Article 24.3). It provides for the Right of the child to education and equal opportunity (Article 28.1) and Protection from all forms of sexual exploitation and sexual abuse (Article 34). The Beijing Declaration and Platform for Action (1995) in its Mission Statement number 112 states that violence against women violates the enjoyment by women of human rights and fundamental freedoms. India is a signatory to these conventions and aims to make effective these human rights mandates.

The girls belonging to poverty-ridden families are at a greater risk of child marriage. There is a strong link between poverty and child marriage.[11] The girl child is regarded as a burden or '*ante property*' and early marriages are a way to thwart promiscuity. Factors like prevalent tradition, patriarchy, stress on virginity, fearing sexual violence, and family pride motivate these marriages. For poverty-ridden families, education is a costly affair and less education for girls means lesser dowries.[12] Due to early marriage, girls drop out of school and work in low-paid jobs that give them limited decision-making power. There is little awareness about the ill effects of child marriage and girls of such marriages are vulnerable to early pregnancies, unsafe abortions, stunted development, physical and psychological violence, isolation, and poor life choices.[13] They bear a child when they are a child themselves. They don't receive proper medical care during their pregnancies making them susceptible to childbirth-related complications and high Maternal Mortality Rate (MMR) and Infant Mortality Rate (IMR).[14]

Despite laws to curb child marriages, implementation remains poor because of a lack of will and action by the authorities.[15]

1.3. Desertion, Divorce and their adverse effect on Women

1.3.1. Desertion: An Adverse effect of Child Marriage

[11] *Plan Asia Regional Office, Asia Child Marriage Initiative: Summary of Research in Bangladesh, India and Nepal*, ICRW, January 2013, p. 28.
[12] *Plan Asia Regional Office, Asia Child Marriage Initiative: Summary of Research in Bangladesh, India and Nepal*, ICRW, January 2013, p. 27.
[13] *Association for Social Justice and Research* v. *Union of India*, W.P.(CrL) No. 535 of 2010 decided on 13.5.2010.
[14] The maternal mortality ratio in India is far below the United Nations Sustainable Development Goals (SDGs) target of 70 deaths per 1,00,000 live births. It was 130 in 2014-2016 and 113 in 2016-18.
[15] *Proposal To Amend the Prohibition of Child Marriage Act 2006 and Other Allied Laws*, Law Commission of India, Report No. 205, February 2008, p. 18.

Child marriage can be the main factor behind the abandonment, divorce, separation among parties and denial of property rights. [16] Studies have verified an interlink between child marriage, frequency of violence directed against girls, and high vulnerability to sexual violence in marriages below the age of 15. [17] As per statistics, the incidents of domestic violence remain at 67 % amongst women who are married by 18. [18] The child bride faces physical violence and mental abuse from their husband and his own family. Violent behaviour may be visible in the form of physical and psychological violence, [19] threatening behaviour, forced sex, and marital rape.

Tender age, loss of education and autonomy and poor-decision making exposes women to aggravated violence and abuse. The non-availability of options outside of marriage creates a sorry state of affairs for them. They are either trapped in a bad marriage or deserted or divorced without any personal knowledge. [20] Widowed women find it extremely difficult to establish their rightful claims. Women face huge implications in terms of economic depravity due to the termination of a marital bond. [21] It is one of the worrying situations for them and their children. Once deserted the unempowered women belong neither to the marital home nor the natal home. [22]

Parents show reluctance to support them and expect them to stay in their marital home. They view girls as a liability and fear social disgrace. Though the public disapproval of divorce and stigma has lessened, social assessment and attributing blame are common. [23] Child marriage makes girls spend appreciably more time being concerned for their children thus restricting their

[16] *Association for Social Justice and Research v. Union of India*, W.P. (CRL) 535 of *2010.*
[17] Somerset Carron, *Early Marriage: Whose Right to Choose?* Forum on Marriage and the Rights of Women and Children, London, 2000, p. 21.
[18] *Early Marriage: A Harmful Traditional Practice*, UNICEF, Florence, 2005, p. 22.
[19] The Annual Report of NCW, 2010-2011, p. 227. (Total 3272 complaints were registered at NCW).
[20] On this refer two sensational cases of the Colonial India : *Phulmonee case* of 1890 where an eleven year old Phulmonee died of marital rape by her husband which raised questions whether families or communities had the right to inflict pain or suffering on women using the plea of tradition (See: Sarkar Tanika, Hindu Wife, *Hindu Nation: Community, Religion and Cultural Nationalism*, Permanent Black, New Delhi, 2001, p. 226): The *Rukmabai Case* of 1884 in which a low caste, educated girl sought to repudiate an unconsummated marriage contracted at her infancy with an illiterate, sick husband (See: Charles H. Hemsath, *Indian Nationalism and Hindu Social Reform*, Princeton University Press, 1964, pp. 91-94).
[21] Gobind Kashyap Bal, *Reformative Law and Social Justice in Indian Society*, Regency Publications, New Delhi, 1995, p. 148.
[22] Kulkarni Seema, Bhat Sneha, "Issues and Concerns of Deserted Women in Maharashtra", *Economic & Political Weekly*, September 2010, Vol XIV No 38, p. 60.
[23] Sharma Bela Rani, *Women: Marriage, Family, Violence & Divorce*, Mangal Deep Publications, Jaipur, 1997, p. 148.

educational and occupational possibilities and earning potential. [24] Society expects women to adjust and put their best efforts to retain wedding partnerships by trivializing their persistent issues. [25]

2. EXISTING LEGAL FRAMEWORK FOR REGISTRATION OF MARRIAGE

A marriage certificate is valid proof of registration of marriage. It confirms that the essential conditions related to marriage are duly complied with. In India, we have diverse and dissimilar laws on this issue. Every personal law follows its own set of laws, but not all of them make the registration of marriage compulsory except the Christian and Parsi laws. Under Hindu laws, Section 8 of the Hindu Marriage Act, 1955 makes it mandatory for the State governments to make Rules regarding marriage registration.[26] In most jurisdictions, it remains optional till the State Government makes it mandatory to register every marriage. People will be reluctant to make any efforts in this regard. To date, the non-registration of marriage is only punishable with a fine of Rs. 25.

As per the Muslim laws, they do not prescribe any marriage rites and rituals. The marriage or *Nikah* ceremony requires the preparation of a document known as the *Nikahnama* (marriage certificate) that contains the details of the parties and which is a proper record of every marriage. This document issued to both the parties is a piece of evidence for all purposes and admissible as proof.[27] Though the formal legal efforts for legal registration are counter-attacked.[28]

The Indian Christian Marriage Act, 1872 states certain conditions for certification of marriage. [29] It provides for compulsory registration of marriages. Every Christian marriage solemnized in India between persons one or both of whom profess the Christian religion, shall be

[24] Mukherjee Roma, *Legal Status and Remedies for Women in India*, Deep & Deep Publications, New Delhi, 1997, p.149.
[25] Sharma Bela Rani, *Women: Marriage, Family, Violence & Divorce*, Mangal Deep Publications, Jaipur, 1997, p.152.
[26] Karnataka has amended the Prohibition of Child Marriage Act in 2017. It has declared every child marriage as void ab initio, declared them as a cognisable offence with a imprisonment for those who enable a child marriage.
[27] Mahmood Tahir, Mahmood Saif, *Muslim Law*, Universal Law Publishing Co. Pvt. Ltd, New Delhi, 202, p. 151.
[28] *Syed Amanullah Hussain* v. *Rajamma*, (1977)1 Andh WR 123, *Mohammed Amin* v. *Vakil Ahmed*, AIR 1952 SC 358, *Gokal Chand* v. *Parveen Kumari*, AIR 1952 SC 231, *Badri Prasad* v. *Deputy Director of Consolidation*, AIR 1978 SC 1557 (In 1981 the Jammu and Kashmir enacted the Muslim Marriage Registration Act that was later taken back).
[29] Part VI, Section 60, Indian Christian Marriage Act, 1872.

solemnized as per Part IV of the Act.[30] The Parsi marriages solemnized under the Parsi Marriage and Divorce Act, 1936 are certified by the officiating priest as per the Second Schedule.[31] A record register is maintained that is evidence of the statements contained therein.[32] Finally, the Jewish marriage is solemnised by Rabbis or Jewish priest who issues marriage certificate to the parties. Apart from these community-specific laws, the secular provisions of the Special Marriage Act 1954 under section 13 state that a marriage certificate will be deemed as conclusive evidence of the solemnisation of marriage.[33] In the case of the Foreign Marriage Act 1969, Section 17 provides for the registration of every marriage.

It is worth mentioning that under none of the personal laws, the non-registration of marriage will not affect the validity of the marriage. Only nominal fines are imposed for performing child marriage.[34] Such marriages are neither void nor voidable but valid marriages.[35] Further, the Child Marriage Restraint Act, 1929 restrains the performances of child marriages but in no way affect the validity of such a marriage despite it contravening the prescribed age mentioned in the Act.[36] The fines and punishments are petty and at times waived off with small fines.[37] Thus the validity of any marriage remains subject to its due performance as per the religious rites specific to the community.[38]

So, the norm for registration of marriage is not enforced and the registration is sought for limited personal purposes.[39] The majority of the states have not taken any step in this regard and a small

[30] Part IV of the Act (Sections 27-37): Provisions for registration of marriage to be solemnized by Ministers of Church who have received Episcopal ordination; Clergymen of the Church of Scotland; Ministers of Religion licensed under the Act; Marriage Registrars appointed under the Act, and persons licensed under the Act to grant certificates of marriage between "Indian Christians".
[31] Section 6 of the Parsi Marriage and Divorce Act, 1936.
[32] Section 8 of the Parsi Marriage and Divorce Act, 1936.
[33] Section 13 of the Special Marriage Act 1954.
[34] Section 5 and 11 of the Hindu Marriage Act, 1955, do not authorize the Court to declare a marriage void on the ground that either of the parties is underage. The exception to section 375 of the Indian Penal Code exempts a husband from the charge of rape if his wife is not under 15 years of age. These provisions are in direct contradiction to the Child Marriage Restraint Act of 1929, under which no child marriage is allowed. Registration of marriage can be essential to combating child marriage by requiring documentation of the age of the prospective spouses before solemnization.
[35] *G. Saravanan* v. *The Commissioner of Police, Trichy City and others* H.C.P. (MD) No.190 of 2011.
[36] *Manish Singh* v. *State Government of NCT,* AIR 2006 Del 37.
[37] *Mt. Jalsi Kumar & Others* v. *Emperor,* AIR1933 Patna 471; *Kondepudi Sriramamurthi* v. *State of Andhra Pradesh and another,* AIR 1960 Andhra Pradesh 302.
[38] *Khushalchand Janki Prasad* v. *Shankar Pandey Gaya Prasad,* AIR 1963 Madhya Pradesh 126.
[39] The following enactments by the State Governments have provided for compulsory marriage registration: (1) The Bombay Registration of Marriages Act, 1953. (2) The Karnataka Marriages Act, 1976 in force since 1983, (3) The

number of states have laws for compulsory registration of marriages, practically the law remains ineffective. To add to it, people are rarely aware of the advantages of registration of marriage and the issues that may arise in the future due to the non-registration of marriage.

3. IMPORTANCE OF COMPULSORY REGISTRATION OF MARRIAGE AND ISSUES SURROUNDING CHILD MARRIAGE

The topic of child marriage and its registration is a neglected social issue with limited attention from policymakers and legislators. The judiciary has persistently highlighted the associated problem and the hardship it causes to women. The recommendations given by various reports and studies to take concrete steps toward the compulsory registration of marriage have not materialized into tangible efforts. The National Consultation on Prevention of Child Marriage (May 2012) recommended curbing child marriage so that every child can realize its full potential and live a life of dignity and status.[40] It stated that the option of declaring a child marriage as void *ab initio* will not deter people.[41] Even the 12th Report by the Committee on empowerment of women,[42] suggested compulsory registration of every marriage irrespective of religion. The Law Commission of India[43] even suggested bringing a Parliamentary Legislation on Compulsory Registration of marriages that will apply to every citizen irrespective of their religion and personal law.

People usually take advantage of the vulnerable situation of women who due to lack of proof of marriage may face several issues. It will tackle the practice of desertion and abandonment, exploitation, trafficking, denying the existence of marriage as most of the states do not have any official record of the marriage solemnized within their jurisdiction. Compulsory registration of marriage can be viewed as a measure to protect women from becoming victims of situations. It will offer numerous advantages to battered and deserted women to claim their dues and legal

---

Himachal Pradesh Registration of Marriage Act, 1997 (4) Andhra Pradesh passed the Compulsory Registration of Marriage Act, 2002.

[40] Draft National Plan of Action to Prevent Child Marriages in India, Available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=100741, (Accessed on 10th May 2016).

[41] Report on the National Consultation on Prevention of Child Marriage held at New Delhi on 25th May 2012, pp.3-5, available at http://icds-wcd.nic.in/childwelfare/childwelfare.htm, (Accessed on 8th May 2016).

[42] *Plight of Indian Women Deserted by Indian Husbands*, 12th Report of the Committee on Empowerment of Women, 2006-2007, p. 12.

[43] *Laws on Registration of Marriage and Divorce- A proposal for consolidation and Reform*, Law Commission of India, 211th Report, Government of India, October 2008, p. 34.

entitlement in court. Lack of evidence should not be a legal barrier in proving the fact of the solemnization of marriage. In case of marital dispute and dowry harassment, along with the details of the list of gifts exchanged at the time of marriage, it will help women get back their *stridhann*. It will check the practice of child marriages, compliance with the existing laws regarding the uniform minimum age of marriage and sexual exploitation of children. It will further ensure free and informed consent of parties to marriage especially, minor girls who in the name of culture, religion, morality are forced into early marriage without any consent and even against their consent. Compulsory registration will help women victims of bigamous or polygamous relationships who face enormous hardship in establishing their marriage. The denial of property rights will be less and women will get hassle-free relief in times of distress. It will enable a widow to claim her share of the property and related benefits to which she is entitled. A battered woman staying separately when her marriage is still subsisting but facing frequent violence will be able to secure her maintenance rights. She will be able to live a dignified life and the registration of marriage will be cogent proof of her claim. Even the custody disputes will be smooth to resolve.

There are reports which confirm that Child marriage is also associated with the trafficking of girls who are either forced into prostitution or bonded labour.[44] The traffickers use fake marriages as a way to procure girls. It is difficult to prove these unofficial and unregistered marriages that allow traffickers to get away with their crimes without incurring any stringent punishments.[45] This sort of arrangement among traffickers and parents/guardians will be deterred by compulsory registration of marriage. It will also help the already overburdened judiciary as numerous matrimonial litigations will not stand in the existence of marriage registration certificates.[46] The compulsory registration of marriage will prove to be beneficial for distressed women. It will give them a right to reside in their marital home without fear by preventing their husband from disowning them due to lack of proof of marriage.

[44] Bhatt Aparna (et. Al), *Child Marriage and the Law in India*, Human Rights and Law Network, New Delhi, 2005, p.37; *A Report of Trafficking in Women and Children in India*, Volume I, NHRC - UNIFEM - ISS Project 2002-2003, p. 83.
[45] *Nihal Singh* v. *Ram Bai,* AIR 1987 MP 126.
[46] *Jitender Kumar Sharma* v. *State and Another*, 171(2010) DLT 543, I (2011) DMC 401, ILR (2010) Supp. (1) Delhi 600.

4. JUDICIAL PERSPECTIVE ON CHILD MARRIAGE AND NEED FOR REGISTRATION

Times are fast-changing, but for most women across the globe, things have not changed much. In India, the Child Marriage Restraint Act 1929 (Sharda Act), prohibits child marriages for girls below the minimum age of 18 years[47] but was not effective to achieve this aim.[48] Later, the Prohibition of Child Marriage Act 2006 aimed at overcoming the shortcomings of the Sharda Act. Together, these important laws seek to eliminate the practice of child marriage, which endangers the life and health of the girl child. On the flip side, none of these Acts invalidates child marriage but allows the child bride to end her marriage after attaining 15 years of age. Child marriages continue to be practiced in India and these laws do not holistically tackle the problem of child marriage. Lack of awareness regarding the detrimental issues encircling child marriages, the diversified personal laws of each community and their customary practices promotes child marriages. The discussions and open negotiations shrouding marriage preparations are not punishable.[49] The instances of reporting the episodes of prospective child marriage are ineffective[50] as society is reluctant. The reported cases of child marriage almost always never led to convictions. Child marriage continues and it is only when the child or his legal guardians file for legal proceedings that the court deals with them.[51] Both these acts don't cover the registration of every marriage.[52] The Prohibition of Child Marriage (Amendment) Bill, 2021 is also criticized as violative of Article 19 and Article 25 of the Indian Constitution. The basis of fixing the marriageable age is questioned against the age of right to vote which remains 18. The act is seen as a positive move towards the right to equality, women empowerment, gender justice and physical and psychological well-being of women but the social acceptance of the law will remain a challenge.

[47] The Act was amended in 1940 and raised the minimum age of marriage to 15 years and later in 1978, by a further amendment, to 18 years.
[48] *Lila Gupta* v. *Laxmi Narain*, AIR 1978 SC 1351.
[49] *Sheikh Haidar Sheikh Rahimmo Attar Musalman* v. *Syed Issa Syed Rahiman Musalman and others*, AIR 1938 Nagpur 235.
[50] *Crime in India, Compendium*, National Crime Bureau Records, Ministry of Home Affairs, Government of India, 2014 (169 incidences were reported in the country under the Child Marriage Restraint Act in 2012, 222 in 2013 and 280 cases reported in 2014).
[51] Section 3 of the Prohibition of Child Marriage Act, 2006.
[52] Gonsalves Colin, *Illegal Yet Valid*, Human Rights and Law Network, Indian Social Institute, 2007, pp. 1-2.

The Judiciary has frequently highlighted the harsh consequences of Child marriage and the significance of registration of marriage. In the case of *Association for Social Justice and Research* v. *Union of India & others*,[53] in the context of the Prohibition of Child Marriage Act, 2006 court pointed out that the acts aim at curbing child marriage as a child is not psychologically and physically suitable to get married. Then in the case of *T. Sivakumar* v. *The Inspector of Police*,[54] the Court held that even though child marriage is only violable under some possibilities, it is illegal and destructive.

Recommending compulsory registration of all marriages in India, in the case of *Seema* v. *Ashwani Kumar,*[55] *the* court opined it will be a rebuttable presumption of the solemnization of marriage. Even when the registration will not be valid marriage proof *per se*, it will be of evidentiary value in disputes concerning child custody, right of children, age of parties to the marriage, and will serve the larger societal interest. The Court directed that State Governments must proactively take action in this respect.

In *Lajja Devi* v. *State (NCT of Delhi) and Others*,[56] the court observed that if properly implemented, the compulsory registration of marriage will discourage parents from marrying off their minor children. The registration certificate will be documentary proof of their age and establish the illegality of such marriages. It will curb the minor marriages sanctioned by personal laws. In the case of *Jitender Kumar Sharma* v. *State and Another,*[57] commenting on child marriage as an unhealthy practice, the court suggested that the State must create awareness about their bad effects on the healthy development of children. It suggested the legislature examine the issues surrounding child marriage and formulate an all-inclusive and realistic solution.

Thus, the above decisions by the judiciary underscore the several types of ill effects of child marriage experienced by girls. These are numerous other delivered judgements that show the significant emphasis given by the Court on the damaging consequences of child marriage and the necessity for making suitable amendments in the prevailing laws. The Compulsory Registration

[53] W.P. (CrL) No. 535 of 2010 decided on 13.5.2010.
[54] AIR 2012 Mad 62.
[55] 2006 (2) SCC 578.
[56] 2013 Cri L J 3458.
[57] 2012 (3) JCC 148: 2012 (193) DLT 619.

of Marriage Act 2006[58] and an amendment to the Registration of Births and Deaths Act, 1969[59] aim to avert child marriages by recommending minimum age of marriage.

5. WAYS TO CURB CHILD MARRIAGE

Child marriage remains a grave form of abuse of girls who are married early. It violates their several internationally protected human rights and fundamental rights. To date, child marriages are recognized as valid marriage[60] and in the name of public policy lead to the exploitation of women.[61] Without registration of marriage, a mere enactment of the Child Marriage Act will not prove effective.[62] The root causes behind child marriage need to be addressed and above all, proper support systems for battered women must be developed. Access to legal support, appropriate health care facilities for women, psycho-social legal counselling support, and child protection services will help alleviate the issues arising out of child marriage. To motivate people, the Government must simplify the registration process. The mechanism must be affordable and accessible. People regularly interacting with rural communities must empower, encourage and publicize the ill effects of child marriage. Education should be accessible, economic empowerment and gender sensitivity through community programs will be additional solutions. The government should ensure suitable amendments along with stringent punishments to prohibit child marriage. The proposal to increase the minimum age for marriage for girls is a step in the right direction. Compulsory registration of every marriage and severe punishments against non-registration will scrape the evil practice of child marriage in a time-phased manner. Drivers for social change like education, legal provisions, and initiatives for creating awareness have still a lot to cover to eliminate child marriage. Moreover, it is a change that has to come from within.

[58] National Commission for Women Draft on the Compulsory Registration of Marriage Bill, 2005.
[59] 18th Law Commission of India recommended for compulsory registration of marriages by enacting a "Marriage and Divorce Registration Act" for this the government decided to amend the Registration of Births and Deaths Act, 1969.
[60] *Manish Singh v. State Government of NCT. And Others*, 2006(1) HLR 303.
[61] *Durga Bai* v. *Kedarmal Sharma,* 1980 (Vol. VI) HLR 166, *Shankerappa* v. *Sushilabai,* AIR 1984 Kar 112, *Smt. Lila Gupta* v. *Laxmi Narain and others,* 1978 SCC (3) 258.
[62] Negi BS, *Child Marriage in India,* Mittal Publications, New Delhi, 1993, p. 9.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

6. CONCLUSION

Child marriage is a social issue with deep roots in our society. It needs to be tackled from various angles as the legislative interventions alone will not be sufficient. The government must deal with the evil effects of this practice. Though the lack of political will and lack of initiative on this issue remains a problem. Different personal laws prescribe varied permissible ages at marriage that impede the implementation of this provision. Irrespective of religion, Central Government must make stringent provisions for compulsory registration of all marriages. Making appropriate laws towards child marriage will break the intergenerational cycle of poverty and will permit women to fully participate in society. These empowered and educated women will care well for their children and themselves and will lead healthier life.[63]

[63] *Ending Child Marriage: Progress and Prospects*, United Nations Children's Fund, New York, 2014, p. 8.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

THE PROSECUTION IN CRIMINAL JUSTICE SYSTEM: A COMPARATIVE APPROACH*

DR. MUDASIR BHAT & PROF. (DR.) MEHRAJ UD DIN MIR†**

ABSTRACT

In any country's criminal justice system, the prosecution system plays a critical role. Prosecutors are typically given discretionary power to decide whether or not to commence criminal proceedings, depending on the history, culture, and legal traditions of a specific legal system. Despite the crucial role of prosecutors in the criminal justice system, prosecutors are mentioned in international agreements far less frequently than judges and defence counsel. The prosecution systems of Common Law and Civil Law countries will be examined in depth in this study. It will also make an in-depth study of the contributions made by United Nations Guidelines on the Role of Prosecutor and Guidelines frames by the International Association of Prosecutors.

1. INTRODUCTION

The prosecution system is viewed as a vital component of the criminal justice process in any criminal justice system. The prosecutor's mission is traditionally to bring legal action against people accused of breaking the state's criminal laws and to ensure that people accused of crimes, as well as victims of those crimes, receive a fair trial. Depending on the history, culture, and legal traditions of a particular legal system, prosecutors are often given discretionary power to determine whether or not to initiate criminal proceedings. Plea bargains, immunity offers, the

* This research article is the third of the four research articles of Post-Doctoral research work sponsored by ICSSR, New Delhi. The first author is highly thankful to the Indian Council of Social Science Research (ICSSR) for the grant of fellowship and for time-to-time support and encouragement. The author is also thankful to the Department of Law, School of Legal Studies, the Central University of Kashmir for providing every facility as an affiliated institution. The authors will be grateful to the anonymous readers for citations and comments. The author can be mailed at *mudasirbhat@cukashmir.ac.in.*

** ICSSR, Post-Doctoral Fellow Department of Law, School of Legal Studies, Central University of Kashmir.

† Professor of Criminal Law, Dean, School of Legal Studies, and the Central University of Kashmir.

importance of witness evidence in trial strategy, and the content of sentencing recommendations are all examples of discretionary powers.[1]

Notwithstanding the decisive role of prosecutors in the criminal justice system, Howard Vamey observes "there is very less mention of prosecutors in the international instruments in comparison to Judges and Defence Counsels. Neither the Universal Declaration of Human Rights nor the Covenant on Civil and Political Rights expressly mentions anything about the role of prosecutors in the criminal justice system. There are only a few international documents that make lucid reference to the role of prosecutors in criminal proceedings. However, since the 1980s, two valuable international tools have been developed to fill up this gap to guide prosecutorial conduct. The first one is the United Nations Guidelines on the Role of Prosecutors (also known as Havana Guidelines), adopted by the 8th United Nations Congress[2] on the Prevention of Crime and the Treatment of Offenders, and the second is, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors created by the International Association of Prosecutors (IAP) in April, 1999. The United Nations Guidelines, the first international attempt to outline the role and functions of the prosecutors. These guidelines were formulated to assist the Member States in their tasks of securing and promoting the effectiveness, impartiality, and fairness of prosecutors in criminal proceedings. The IAP Standards expanded on the principles outlined by the United Nations Guidelines and sought to promote and enhance those standards and principles which are recognized internationally as necessary for the proper and independent prosecution of offences."

Prosecutors from a variety of legal traditions established and embraced the IAP Standards, which led to the development of complete standards.[3] For the purpose of this study, it becomes imperative to delve into these documents in detail.

[1] Howard Varney, Shenali De Silva, and Alexandra Raleigh, Guiding and Protecting Prosecutors: Comparative Overview of Policies Guiding Decisions to Prosecute, *International Center for Transitional Justice*, (October, 2019).
2 The 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, was held in Havana, from 27th August to 7th September 1990.
[3] *Supra* note 1.

2. UNITED NATIONS GUIDELINES ON THE ROLE OF PROSECUTORS

It was recognised in 1980 during the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, that international rules governing the function of prosecutors were needed. The United Nations Congress (1980) linked the correct selection and training of judges and prosecutors to the efficient implementation of Article 14 of the International Covenant on Civil and Political Rights (ICCPR):

> *"Member States should ensure that those responsible for the functioning of the criminal justice system at all levels should be properly qualified for their tasks and should perform them in a manner which is independent of personal or group interest".*

The Seventh UN Congress (1986)[4] emphasised the importance of prosecutors' independence and impartiality in initiating cases, as well as the necessity to avoid prejudice in the selection and appointment of prosecutors, and advised that the Member States pledge the prosecution service's objectivity.

The Seventh Congress also requested that rules be drafted for prosecutors' selection, training, and status, as well as their expected tasks and conduct, immunity, ways to improve their contribution to the efficient operation of the criminal justice system and their cooperation with police, the scope of their discretionary powers, and their participation in criminal proceedings.[5]

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders established the Guidelines on the Role of Prosecutors. The following is the rationale for these guidelines:

The Governments shall respect and take into account the Guidelines, which have been prepared to help the Member States in their roles of ensuring and promoting the effectiveness, impartiality, and fairness of prosecutors in criminal proceedings, within the framework of their national legislation and practise and prosecutors, as well as other individuals such as judges,

[4] The 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, was held in Milan, from 26 August to 6 September, 1986.
[5] United Nations Office on Drugs and Crime (UNODC) "The Status and Role of Prosecutors", (United Nations 2014).

lawyers, representatives of the executive and legislative branches, and the general public, should be made aware of this. The current Guidelines were written primarily with public prosecutors in mind, although they also apply to prosecutors who are appointed on ad hoc basis.[6] For the purpose of this study, "following guidelines with regard to the role of prosecutors in criminal proceedings need to be mentioned here:

1. The office of prosecutors shall be strictly separated from judicial functions.[7]
2. Prosecutors shall perform an active role in criminal proceedings, including the institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest. [8]
3. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently, and expeditiously, respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.[9]
4. In the performance of their duties, prosecutors shall[10]:
    (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
    (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
    (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
    (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

[6] *Ibid.*
[7] UN Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September, 1990 No. 10.
[8] *Id*. No.11.
[9] *Id.* No.12.
[10] *Id*. No.13.

5. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings when an impartial investigation shows the charge to be unfounded.[11]
6. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.[12]
7. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice."[13]

3. INTERNATIONAL ASSOCIATION OF PROSECUTORS AND ITS STANDARDS

The International Association of Prosecutors (IAP)[14] was founded in Vienna at the United Nations and formally inaugurated in Budapest in September 1996 at its inaugural General Meeting. The fast expansion of major transnational crime, including drug trafficking, money laundering, and fraud, was the driving force behind its founding. More international cooperation amongst prosecutors, as well as greater speed and efficiency in mutual aid, asset monitoring, and other international cooperative measures, were seen as necessary. It was also inspired by the United Nations, which saw the need for a vehicle to promote the ideas and standards contained in the Guidelines on the Role of Prosecutors once they were published[15]

The Guidelines were the first international attempt to define the job of the public prosecutor, but they are aimed at states and others interested in state action, and they do not go into depth on the

[11] *Id*. No.14.
[12] *Id*. No.15.
[13] *Id.* No.16.
[14] The International Association of Prosecutors (IAP) is the only worldwide organization of prosecutors. It was established in the year 1995 and now has more than 183 organizational members from over 177 different countries, representing every continent, as well as many individual members.
[15] *Supra* note 6.

prosecutor's relationship with the government or legislative. One of the most significant goals embraced by IAP in its constitution is to 'promote and strengthen those standards and principles which are commonly acknowledged internationally as necessary for the proper and impartial prosecution of offences,' and work on this resulted in the publication of the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors in 1999. (hereinafter referred to as "the IAP Standards"), in which, once again, the importance of prosecutors' work and their role in the administration of justice was acknowledged. The IAP Standards are a supplement to and expansion of the Guidelines, and they serve as an international benchmark for prosecutors and prosecution services. They promote international cooperation, highlighting the need for independence. Because the IAP Standards were established and endorsed by prosecutors from all over the world and from many legal traditions, they are unique in that they are not the result of an agreement between States or governments, but rather represent the opinions of prosecutors themselves on the standards that should apply to the profession of a prosecutor.[16]

The IAP Standards were acknowledged by the United Nations in 2008, through Commission on Crime Prevention and Criminal Justice resolution 17/2, as being complementary to the Guidelines on the Role of Prosecutors, and Member States were encouraged to encourage their prosecution services to take the IAP Standards, along with the Guidelines and the supplement to the IAP Standards, into consideration when reviewing or developing rules for prosecutorial conduct in their own countries.

Several United Nations crime treaties, "which aim to improve the effectiveness of investigations and prosecutions against severe crimes such as drug trafficking, organised crime, and corruption, have mentioned the role of the prosecution. These treaties urge States parties to guarantee that any discretionary legislative powers relevant to the prosecution of such crimes are used to "maximise the efficacy of law enforcement measures."

Finally, under Article 11[17] of the United Nations Convention against Corruption[18], "which recognizes the crucial role of the judiciary and the prosecution in combating corruption, States

[16] *Supra* note 6.
[17] Article 11 of the United Nations Convention Against Corruption provides that: (1) Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

parties may take measures to strengthen integrity and to prevent opportunities for corruption, which may include rules of conduct, to the same effect as rules established for the judiciary, to be applied within the prosecution service in those States Parties where the prosecution service does not form part of the judiciary but enjoys similar independence. The United Nations Convention against Corruption: Article 11 implementation guide and evaluative framework provide detailed information on the implementation of prosecutorial integrity".[19]

However, one of the most significant obstacles to establishing an internationally accepted set of norms for prosecutors has been the disparity in substantive law, evidence, and processes resulting from the many legal traditions and legal systems in use around the world. There are also a number of hybrid legal systems in use, with international tribunals and courts adopting their own procedures. That challenge still exists globally, although it is becoming less obvious as diverse legal traditions and systems merge and absorb each other's traits through time. As the Guidelines, the IAP Standards, and the other regional instruments illustrate, it is conceivable to articulate principles of general relevance to prosecutors in many legal traditions notwithstanding the differences in legal traditions.[20]

The current rules are written against this ever-changing backdrop with the goal of outlining some essential ideas and tenets of the prosecutor's job and position that should remain standard and unchangeable no matter where in the globe or which legal tradition these functions are followed.

4. COMMON LAW TRADITION

In any country, the prosecutor's office is one of the most powerful institutions. It is the epicenter of criminal justice administration. All criminal prosecutions travel through it and are handled by it, and the efficacy of the criminal justice system is largely dependent on how well it handles

---

the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.
(2) Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

[18] The United Nations Convention against Corruption is the only legally binding international anti-corruption multilateral treaty. The Convention has been negotiated by member states of the United Nations and has been adopted by the UN General Assembly in October 2003.

[19] *Supra* note 6.

[20] *Supra* note 6.

them. In order to understand the Common law traditions with regard to the prosecution services, it becomes imperative to go through the prosecution apparatus of various Common Law countries in detail.

4.1. England and Wales

The way criminal prosecutions are started and managed in England and Wales is very different from how they are done in many other common law jurisdictions. There are three distinct legal systems in the United Kingdom: England and Wales, Northern Ireland, and Scotland. The diverse prosecution systems are one of the many elements that distinguish various jurisdictions. The substantive law of England and Wales and of Northern Ireland bear marked similarities, but Scotland belongs to separate legal culture and cannot be classified as having a common law system. Each jurisdiction likewise has its own set of judges and judicial system. The Crown Court, a Superior Court, and the Magistrates' Courts are the courts with trial jurisdiction in criminal cases in England and Wales. The magistrates' courts, which are located throughout the jurisdiction, handle nearly 98 percent of all criminal cases that arise each year.[21]

The prosecution services in England and Wales have passed through various phases. Andrew Ashworth observes "For the first three-quarters of the twentieth century it was the police who controlled prosecutions for almost all serious and most non-serious offences. There were a few other agencies that prosecuted serious cases, notably H.M. Customs and Excise, but the police were generally in charge. Not only did the police decide whether to prosecute, and for what offence to prosecute, but police officers also presented most cases in the magistrates' courts. Arguments in favour of changing the system were heard at various times, but perhaps the most influential event was the publication in 1970 of a report by the British section of the International Commission of Jurists. This report drew upon arguments of principle that it was wrong for the police, who investigated crimes, to take decisions in relation to prosecution, which requires impartiality and independence. This report was constantly referred to in the 1970s, but it took a spectacular miscarriage of justice to provide the impetus for reform." "The report on the *Confait*

[21] Ian R. Scott, "Criminal Prosecutions in England and Wales", Vol. 3 No.1, *The Justice System Journal*, 38-39 (1977).

case,[22] published in 1977, made criticisms of several aspects of the criminal justice system, and it included proposals that changes in the prosecution system should be considered. The arguments for and against change were then considered by the Royal Commission on Criminal Procedure. The Royal Commission reported in 1981 in favour of the establishment of an independent public prosecutor system and accordingly the Crown Prosecution Service was created by the Prosecution of Offences Act 1985."[23]

Since the inception of Crown Prosecution Service in 1986, Andrew Ashworth's works provide "the organisation of the CPS has undergone major changes on at least two occasions, which may be taken as evidence of currents of dissatisfaction and discomfort. In the year 1993, the CPS has created an internal inspectorate, and in 2000 this inspectorate has become an independent body. During the 14 years of its existence, the CPS has been 'reorganised' frequently. Various combinations of the national, regional, and local organisation have been tried. In 1993 the CPS was re-organised into 13 regions, with strong central control from the London headquarters headed by the DPP. The Glidewell Report[24] concluded that the 1993 re- organisation 'was on balance a mistake' leading to over-centralisation and excessive bureaucracy. The Report agreed with the new government's preference for the creation of 42 separate CPS areas, co-extensive with the police areas, and added that more decisions should be taken locally than centrally. Devolution of most decisions to local areas was claimed to offer 'greater efficiency, better decisions, less delay, and more effective casework', whereas CPS headquarters in London should 'similar, tougher, and more directly in control of matters with which it is properly concerned. The 42 areas came into existence in April 1999. There are around 2,000 CPS lawyers and 4,000 other staff".[25]

In England and Wales, the Crown Prosecution Service (CPS) prosecutes criminal matters that have been investigated by the police and other investigative organisations in the country. The CPS is an independent agency that makes decisions without regard for the police or the

[22] The murder of Maxwell Confait (1972) was a case which raised questions about the police procedures with regard to the investigation and prosecution.
[23] Andrew Ashworth, "Developments in the Public Prosecutor's Office in England and Wales" Vol.8/3, *European Journal of Crime, Criminal Law and Criminal Justice*, 258 (2000).
[24] The Former Appeal Court judge Sir Iain Glidewell Report (Nov.1998) has concluded that the CPS has not achieved the improvements in effectiveness and efficiency of the prosecution process that were expected when it was set up in 1986.
[25] *Supra* note 6.

government. Prosecutors, on the other hand, must be fair and objective in order to attain this purpose. Lawyers must follow the Crown Prosecutor's Code while considering whether or not to prosecute a criminal case. This means that before charging someone with a crime, prosecutors must be convinced that there is enough evidence to establish a reasonable chance of conviction and that prosecuting is in the public interest.[26]

The following are the functions of CPS in England and Wales:

a) To decides which cases should be prosecuted;
b) To determines the appropriate charges in more serious or complex cases, and advises the police during the early stages of investigations;
c) To prepares cases and presents them at court; and
d) To provide information, assistance, and support to victims and prosecution witnesses.

4.2. The United States of America

In America, the beginnings of a public prosecution are a historical and social riddle. Private prosecution was clearly incompatible with the American ideal of a democratic process. Private prosecution was common in the English world at the time of the founding of the first American colonies in Jamestown and Plymouth, but it never caught on in the colonies. By 1704, one colony, Connecticut, had established a system of public prosecution, and the rest of the colonies quickly followed suit.[27]

In the United States, the prosecutor's most fundamental and customary obligation has had two parts, both heavily saturated with moral judgments. The prosecutor's first task was to ensure that individuals who engaged in both culpable and criminal activity received "justice." Second, the prosecutor was supposed to make a separate decision between the arrest and the prosecution. The goal was to ration both the limited time available in the courts and the limited space available in jails, as well as to ensure that not only punishment, which was subject to a check by the judge and jury, but also the burdens of the trial were imposed on defendants equitably and only when

[26] The Crown Prosecution Service of England and Wales, available at https://www.cps.gov.uk/about-cps, (Last modified on 12 July, 2019).
[27] Joan E. Jacoby, "*The American Prosecutor in Historical Context",* Lexington Books, D.C. Heath and Company, 3 (1980).

they were warranted. Prosecutors' offices in America, on the other hand, have seen substantial adjustments. First, the prosecutor's power in the United States appears to have grown since the 1960s, with little limits on his growing influence over criminal proceedings. Over the last three decades, the prosecutor has been elevated to a major role in a process of combating crime that has become stronger and stricter.[28]

The Prosecutors are currently the most powerful figures in the American criminal justice system. They respond to a variety of crime issues by efficiently processing criminal cases. They decide whether a case will go to trial or be pleaded out based on police reports. The image of the American Prosecutor is one of a diligent professional who represents the government in criminal proceedings for a variety of offences.[29]

The United States' federal system has organised prosecution at both the state and federal levels. The United States Attorneys, often known as Chief Federal Prosecutors, are the government's representatives in state district courts. There are around 93 United States Attorney offices spread around the country. The United States Attorneys are part of the government's executive branch. They are a division of the Justice Department. The Attorney General is the head of the Department of Justice, who is appointed by the President of the United States and serves at his discretion, with the advice and consent of the Senate. The US attorneys are appointed for a four-year term and act as the federal government's chief law enforcement agents in their districts, prosecuting criminal cases.[30] In the United States, the prosecutor's function is to represent the state as its counsel, presenting the case against an individual accused of committing any crime, initiating and directing subsequent criminal investigations, and advising and prescribing sentencing for offenders.

4.3. India

[28] The American National Research Council, "What's Changing in Prosecution?: Report of a Workshop" *The National Academies Press,* (2001) *available at: https://www.nap.edu/read/10114/chapter/2#2(Last modified on 17 July, 2019).*
[29] Johnd L.Worrall, "Prosecution in America: A Historical and Comparative Account", Chapter 1, *State University of New York Press, Albany*, 3 (2008).
[30] Gilliéron Gwladys, *Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France, and German,* Springer Nature, 65 (2014).

India is a confederation of states governed by a written constitution that took effect on November 26, 1949. There are 28 states and 8 union territories in India. India uses the Anglo-Saxon common law legal system as a result of its colonial past. Article 246 of the Indian Constitution establishes three lists, which are listed in the Constitution's 7th Schedule. List-I is the Union List, which enumerates the issues over which the Indian Parliament has sole legislative authority. List-II is the State List, which enumerates the issues over which a state's legislature has legislative authority. The Concurrent List enumerates issues on which both the Indian Parliament and state legislatures can enact laws; nevertheless, if there is any conflict or disagreement between the laws adopted by the Indian Parliament and the state legislatures, the law issued by the Union Parliament will take precedence. Importantly, the terms "Public Order" and "Police" are listed in the State List's Entries 1 and 2, respectively, implying that all topics relating to the organisation, structure, and control of the police force are under the jurisdiction of the states. The 'Criminal Legislation' and 'Criminal Procedure', on the other hand, are listed in List-3, the Concurrent List, which gives both the Indian Parliament and state legislatures the jurisdiction to enact substantive and procedural laws in criminal matters. States can also pass legislation on local and unique issues. The Indian Parliament has so created essential criminal legislation, including the Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act, as part of the constitutional structure. The Indian Parliament also passed the Indian Police Act of 1861. The states have also passed legislation on a variety of local and unique issues. In India, certain states have passed their own police legislation. The Indian Police Act, on the other hand, is the main statutory law that governs the composition and organisation of state police forces.[31]

The criminal justice delivery system in India has four basic components viz. Police, Courts, Prosecution, and Correctional administration. In the criminal justice system, the prosecution wing is the second most significant component. Every organised society has a well-developed prosecution system to prosecute those who break the society's established legal rules. However, the criminal justice system in common law countries such as India differs from that in civil law countries. However, under both systems, this office is the focal point. It is regarded as a power

[31] Madan Lal Sharma, "The Role and Function of Prosecutor in the Criminal Justice" 185, 107th International Training Course Participants Paper at *United Nations Asia and Far East Institute,* (1997).

centre since it holds significant authority. It is the repository for the public's authority to commence and withdraw criminal prosecutions.[32]

As per Section 24[33] and 25[34] of the Code of Criminal Procedure, 1973, "Prosecutor including Public Prosecutors, Additional Public Prosecutors, and Special Public Prosecutors are to conduct

[32] K. N. Chandrasekharan Pillai, "Public Prosecution in India" vol.50 *Journal of Indian Law Institute*, 629 (2008).

[33] Section 24 of the Code provides:

(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district: Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless

his name appears in the panel of names prepared by the District Magistrate under sub- section (4).

(6) Notwithstanding anything contained in sub- section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre: Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub- section (4).

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub- section (2) or sub- section (3) or sub- section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

(9) For the purposes of sub- section (7) and sub- section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.]

[34] Section 25 of the Code provides: (1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

(1A) 1 The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the Courts of Magistrates.]

(2) Save as otherwise provided in sub- section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case; Provided that a police officer shall not be so appointed-

(a) if he has taken any part in the investigation into the offence with respect to which the accused being prosecuted; or

(b) if he is below the rank of Inspector.

prosecutions and criminal proceedings in High Courts and Sessions Courts and Assistant Public Prosecutors are appointed for conducting prosecutions in the Magistrate's Courts."[35]

The role and functions of the prosecutor in the criminal justice system have been highlighted by the Hon'ble Supreme Court of India in *Shiv Nandan Paswan v. State of Bihar & Others*[36] as under:

a) "That the Prosecution of an offender is the duty of the executive which is carried out through the institution of the Prosecutor.
b) That the withdrawal from prosecution is an executive function of the Prosecutor.
c) That the discretion to withdraw from prosecution is that of the Prosecutor and that of none else and he cannot surrender this discretion to anyone.
d) That the Government may suggest to the Prosecutor to withdraw a case, but it cannot compel him and ultimately the discretion and judgment of the Public Prosecutor would prevail.
e) That the Prosecutor may withdraw from prosecution not only on the ground of paucity of evidence but also on other relevant grounds in order to further the broad ends of public justice, public order, and peace."

4.4. Civil Law Tradition

The civil law tradition, also known as civilian law tradition or inquisitorial system, is the legal system of former French, Dutch, German, Spanish, or Portuguese colonies or protectorates, which includes much of Central and South America. The civil law system is a legal system that has been codified. Its origins can be traced back to Roman law.[37] ts fundamental feature is that its essential ideas have been codified into a referable system that serves as the major source of law. In contrast, common law systems have an intellectual foundation derived from judge-made decisional law, and earlier court decisions have precedential authority.[38] A civil law, historically,

[35] Radheshyam Prasad, "Prosecutors as Gate Keepers of Criminal Justice Administration in India" vol. 8 *Dr Ram Manohar Lohiya National Law University Journal* 223 (2008).
[36] AIR 1983 SC 1994.
[37] World Bank Group, available at: https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law, (Last modified on 23 July, 2019).
[38] Available at: https://Civil_law_(legal_system), (Last modified on 23 July, 2019).

is a collection of legal ideas and systems derived from the Corpus Juris Civilis,[39] but greatly influenced by Napoleonic, Germanic, canonical, feudal, and local customs, as well as theoretical strains like natural law, codification, and legal positivism. Civil law, from a conceptual standpoint, develops abstractions, formulates broad principles, and separates substantive rules from procedural rules. It considers case law to be secondary and inferior to statutory law. The terms civil law and inquisitorial system are sometimes used interchangeably, yet they are not interchangeable. A statute and a codal article have significant distinctions. The legal codes of civil systems are the most noticeable traits, with short legal texts that often avoid factually specific instances.[40]

The inquisitorial system has been around for centuries and is related to civil law legal systems. It is distinguished by thorough pre-trial investigations and interrogations with the goal of avoiding the prosecution of an innocent individual. The inquisitorial procedure is a formal investigation into the truth, whereas the adversarial system relies on a competitive procedure between the prosecution and the defence to decide the facts. The judge who oversees the inquisitorial procedure has more power, whereas the judge in the adversarial system is more of an arbiter between prosecution and defence arguments.[41]

4.4.1. Germany

Germany is a federal republic comprised of 16 separate states. The majority of criminal and procedural laws (for example, the Criminal Code, the Code of Criminal Procedure, and the Prison Act) are applicable throughout Germany. Some laws, however, are unique to each state (e.g. Prison laws). The German legal system is based on civil law, as opposed to common law countries such as England and Wales, the United States, and Australia. The criminal justice system is "inquisitorial," meaning that judges play an active role in the investigations.[42] The public prosecutor's office is a relatively new organisation in German criminal proceedings. The applicable laws were based on a French criminal procedure model. Until the beginning of the

[39] *Corpus Juris Civilis*, is the modern name for a collection of fundamental works in jurisprudence, issued from 529 to 534 CE by order of Justinian I, Eastern Roman Emperor.
[40] Charles Arnold Baker, *The Companion to British History*, "*Civilian*" 308, (London: Routledge, 2001).
[41] The Doha Declaration: Promoting a culture of Lawfulness, Module 9, Prosecution Strategies, also available at: https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems. html, (Last modified on 23 July, 2019).
[42] Fair Trial International, Criminal Proceedings and Defence Rights In Germany, Booklet (2013).

nineteenth century, France maintained a secret and written inquisitorial procedure. Following Montesquieu's extolment of English legal institutions as models for court constitution and criminal process, these institutions were embraced, particularly the principle of ex officio prosecution, the parties' responsibility to supply proof, the principle of oral hearings, the principle of proceedings in public, and, above all, trial by jury.[43]

Public prosecution offices, according to current thinking, are hierarchically organised, independent agencies of criminal justice administration. The public prosecution office operates in tandem with the courts, which means that public prosecutors' territorial jurisdiction is governed by the territorial jurisdiction of the court where the public prosecution office is located.[44] According to Section 141 of the Constitution Courts Act of 1951, every court should have a public prosecutor's office. In most cases, these public prosecutors also serve as public prosecutors in the Local Courts. They report to a regional public prosecutor's office, which is located in each Higher Regional Court[45]. Regional public prosecution offices report to the individual ministers of justice of the Bundesländers (federal State).[46]

The Prosecutor-General in the Federal Court of Justice *(Generalbundesanwalt beim Bundesgerichtshof)* is Germany's highest-ranking prosecutor in the realm of national security. In all cases of major crimes against the state that jeopardise the Federal Republic of Germany's internal or foreign security, the Prosecutor General represents the prosecution. (i.e. politically motivated offences, particularly acts of terrorism, treason, or espionage). The Federal Prosecutor - General is also in charge of prosecuting crimes against International Law (*Völkerstrafgesetzbuch*) as well as appearing in appeal and complaint processes before the Federal Court of Justice's criminal division (*Bundesgerichtshof*). The public prosecutor's office of the Federal Court of Justice is led by the Federal Prosecutor-General. He or she is in charge of overseeing and directing the federal public prosecutors (Bundesanwälte), senior public prosecutors (Oberstaatsanwälte), and lesser public prosecutors (Bundesanwälte). The Federal Minister of Justice, in turn, oversees the activities of the Federal Prosecutor-General. The

[43] Eberhard Siegismund, "The Public Prosecution Office in Germany: Legal Status, Functions and Organization" 59-60, 120th International Senior Seminar Visiting Experts' Paper.
[44] The Courts Constitution Act, 1951, Section 143(1).
[45] *Id.* Section 142.
[46] *Id.* Section 147.

Minister has no supervisory authority over the Länder' public prosecutors and cannot offer them instructions.[47]

It might be useful to look at the many functions of the public prosecutor in criminal procedures to demonstrate the public prosecutor's status in Germany.

The three primary functions of the public prosecutor's office are as follows:

a) it is the authority in charge of the investigation procedures;
b) it is the authority in charge of the prosecution in the intermediate and main proceedings; and
c) it is the authority in charge of the execution of sentences in criminal cases, as well as the authority in charge of pardons in criminal cases.[48]

4.4.2 France

Prosecutors are a necessary aspect of the French criminal justice system, which is based on an inquisitorial or continental basis. In French, the Code of Criminal Procedure of 1958 is known as Code d' Instruction Criminelle. Crimes, delits, correctionells, and contraventions are all different types of offences. The term "*exercise de l'action publique"* refers to the public prosecutor's office. Prosecution in the public interest is referred to as an exercise. All acts of a process whose primary goal is to bring a case before the courts are classified as public prosecution. After bringing the case, the following stage is to pursue it through effective prosecution until the courts reach a final decision. In France, the prosecutor's office is known as the *Ministero Public or Parquet.* The body of the Prosecution is hierarchical. *Procureurs de la Republique* and *substututs du Procureur* are two terms for members of the prosecution body. Members of the judiciary make up this group. The Ministry of Justice's mission is to represent society's interests. The French Prosecutors are engaged not only during the trial but also during the pre-trial phase. Prosecutors in France are always given the status of judges, are seen as competent as judges, and are tasked with carrying out the tasks of the Ministry of Justice. Prosecutors in France are assisted by investigative magistrates, police officers, crime victims, and other public officials in

[47] Available at: https://e-justice.europa.eu/content_legal_professions-29-de-maximizeMS-en.do? member=1, (Last modified on 28 July, 2019).
[48] *Supra* note 45 at 60.

carrying out their duties. Assistance to the Prosecutors is required under the Criminal Procedure Code. In France, the inquisitorial or continental model of justice is used, which compels the prosecutor to prove his or her case in court.[49]

During the pre-trial stage, French prosecutors have a lot of discretion. Prosecutors determine the appropriate course of action based on the facts and circumstances of the case. If the case is complicated and ambiguous, the prosecutor can direct the investigating officers to look into it right away or inform the investigating magistrates about it. Prosecutors and investigating magistrates in France both have an interest in the probe. Prosecutors and investigating magistrates have the authority to provide police officers instructions about the inquiry. Prosecutors play a critical role in the pre-trial inquiry process. In practise, rather than conducting actual investigations, the Prosecutor directs the police to do the investigation part on the field. They do, however, have complete authority to examine witnesses, and the Prosecutor can perform searches and seizures in the case if there are any suspicious circumstances. As a result, prosecutors relinquish the authority of the police during the pre-trial phase. Prosecutors have this degree of influence over investigations as well as the structuring of charges. Any court involvement is not allowed under this controlling power.[50]

5. CONCLUDING REMARKS

The office of the prosecution worldwide has been tagged as the power center. However, it has not been much researched in comparison to the research done on Judges and Defence Counsels. The United Nations has taken a pivotal step in framing the guidelines on the role of prosecutors in criminal proceedings. Inspired by the United Nations Guidelines with regard to the role and services of Prosecutions the International Association of Prosecutors (IAP) which established in the year 1995. The IAP also framed guidelines, known as Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors. Because the IAP Standards were established and endorsed by prosecutors from all over the world and from many legal traditions, they are unique in that they are not the result of an agreement between States or

[49] Unpublished Research Study Available at: https://webcache.googleusercontent.com/search?q=cache:cFSdFizcbfMJ:https://shodhganga.inflibnet.ac.in/bitstream/10603/144597/12/chapter%2520v.pdf+&cd=3&hl=en&ct=clnk&gl=in, (Last modified on 29 July, 2019).
[50] *Ibid.*

governments, but rather represent the opinions of prosecutors themselves on the standards that should apply to the profession of a prosecutor.[51]

The form and organisation of the prosecutor's office in the Common Law and Civil Law countries examined in this chapter vary from one another. They are reflections of their individual criminal justice systems' political and historical evolution. As a result, each model must be assessed in its own context. Each model has advantages and disadvantages. Thus, no prosecution model can claim to be better than any other model operating in any part of the world.

[51] *Supra* note 6.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

PROMOTING ACCOUNTABILITY AND TRANSPARENCY IN THE CUSTOMARY COURTS IN NIGERIA: SOME NEW APPROACHES

DR. ABIODUN ODUSOTE*

ABSTRACT

The Nigerian justice system currently faces significant administration and efficiency problems. It is well-established that the justice system is slow, not accountable, not so transparent and unfriendly to its users and stakeholders. The use of legal terminologies and technicalities are rife and bogged down the wheel of justice. This study aims to determine how the implementation of the customary Law of Lagos State can facilitate quick and efficient administration of justice at the customary courts. Specifically, it investigates whether the implementation of the new customary law of Lagos state and the application and enforcement of the judicial code of conduct can impact the administration of justice, particularly at the customary court level. To test the hypothesis that these legal instruments can positively impact the legal system the research adopts the doctrinal and comparative legal research methodologies. The results showed that the implementation of the new customary laws of Lagos state and the application of the judicial code of conduct at the customary court have the potential to improve the dispensation of justice at this level. Further, the judges must do substantial justice and avoid technical justice to achieve the desired end. These results suggest that in addition, new approaches to the dispensation of justice is required.

1. INTRODUCTION

It is a widely held view that in Nigeria, an overwhelming majority of cases are decided at the lower courts[1]. The Customary Court system is a significant part of the lower Courts. However,

* Senior Lecturer, University of Lagos, Akoka, Yaba, Lagos, Nigeria.

[1] Honourable Justice Joseph Otabor Olubor, President, Customary Court of Appeal, Benin City, Edo State, "Customary Laws, Practice And Procedure In The Area/Customary Court, And The Customary Court Of Appeal" Available at: http://www.nigerianlawguru.com/articles/customary ; British Council, "How to improve the quality of services in lower courts: Introduce a courts inspection system" https://www.britishcouncil.org.ng/sites/default/files/e413_j4a_c2_lower_court_inspection_final_v4_web_0.pdf Accessed on the 1st of July, 2021.

there has been growing concern by some critics and stakeholders about the efficiency, transparency and accountability of the Customary Court system. In particular, there has been waning confidence in the efficiency of the justice delivery of the Customary Court and its effectiveness in Nigeria. It has been alleged that compliance of judicial officers and staff with judicial officers' codes of conduct is rarely monitored coupled with the fact that Court officials do not provide good service. Such concerns make it imperative to interrogate the customary Court justice system to promote accountability and transparency in the implementation of the Customary Court law. This research adopts the doctrinal and comparative legal research methodologies to achieve its objectives. In this discourse, an attempt is made to interrogate the peculiar nature of customary laws. It is clear to a discerning mind that because of the simplicity of the customary law and its primary characteristics of being flexible, largely unwritten, changes over some time and a mirror of accepted usage or culture of the people that observe it, it can easily be manipulated and abused. Customary law is elastic and adaptable to time and socio-economic changes. It enjoys validity from the assent and recognition by the people of the community. It follows therefore that its practice and enforcement through the Customary Court system may be problematic and subject to abuse because customary law is unwritten, may sometimes be vague and exist substantially in the mind of those subject to it and the custodians of the tradition and culture. It is also difficult to apply because of diversity and differences amongst those that are subject to it or those that are the custodians.[2] Amidst plurality of customary laws in urban cities and multiplicity of customs and traditions, it might be difficult to get credible and reliable expert opinions and capable judges to adjudicate in the Customary Courts. It is in this context, that this paper examines and evaluates the nature of customary law, prerequisite and qualification for the appointment of judges at the Customary Court in Lagos State. Next, the paper extensively discusses how adherence to the judicial officer code of conduct in Nigeria and the Bangalore principles of judicial conduct can greatly improve the justice delivery and administration of the Customary Court system. It also argues that the application of the principles of fair hearing and the promotion of substantial justice is essential for the delivery of an efficient customary justice system. In conclusion, the paper makes further recommendations that have the potential of promoting transparency and accountability in the implementation of the Customary Court law.

[2] *Lewis* v. *Bankole* (1908) INLR 81 at 100, Osborne, CJ.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

2. CONCEPTUAL DEFINITIONS

2.1. Accountability in the Customary Court

In this paper, Customary Court accountability includes accountability through adjudicating by observing due process, adherence to the principles of judicial independence, applying the Customary Court law and rules of court diligently, observing the provisions of the Constitution of the Federal Republic of Nigeria 1999 as amended, in particular, adherence to the principles of fair hearing and protecting human rights, applying substantial justice, monitoring the powers of court officials and providing prompt remedies to a litigant.

2.2. Transparency in the Customary Court

Transparency is synonymous with righteousness. Its component includes honesty and judicial integrity. A judge should always imbibe and exhibit these virtues, not only in the discharge of official duties but at all times. He must be seen to always discharge his duties without bias and in a manner befitting the judicial office. A judge and the Court must be free from dishonesty, deceit, sloppiness, fraud, and partisanship. He must be good and morally upright in behaviour and character. Transparency is absolute. In the judiciary, transparency is second to none. It is a must-have.

2.3. Implementation of Customary Law

It is the Customary Court that has the jurisdiction to interpret and uphold the customary law that is applicable within its jurisdiction. The Customary Court plays an integral role in implementing customary laws, in doing this, the President and members of the Customary Court must be strong and committed to interpreting and applying customary laws to bring reliefs to litigants who had approached the court for redress.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

2.4. Nature of Customary Law

Obaseki, J.S.C. in *Oyewumi* v. *Ogunsesan*[3] defined customary law as "the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it". For Elias, Customary law is 'the body of rules, which are recognized as obligatory by its members''.[4] C.E. Chukwurah suggests that there are, "three distinctive characteristics of Customary Law: Customary law is essentially a body of unwritten rules applicable to a community, the rules are intended to regulate the relationship and transaction of the community and the community must accept and recognize the rules as binding, that is to say, as having a force of law[5]". For example, Akin Ibidapo-Obe, a foremost Pan-Africanist and Professor of Public Law opined that "the traditional law of the Yorùbá of Nigeria is mainly found in the Yorùbá oral literature which includes proverbs, *oriki* (praise-poems), festivals and re-enactments ceremonies, carvings, pottery, artefacts, foods, music, myths, folklore, history, àlọ (long and short stories) and *ewi*."[6] Further, in the case of *Zaidan K.* v *Mohssen F. H.*,[7] the Supreme Court defined Customary Law as: "… any system of law not being a common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria between the parties subject to its sway".[8] Essentially, customary law consists of customs and traditions that are generally accepted conferring obligatory rules of conduct, practices and beliefs among the people that are so vital and imperative to the socio-economic system that they are treated as laws[9].

[3] [1990] 3 N.W.L.R. (Pt. 137) 182 at 207.
[4] Elias, The Nature of Africa Customary Law (1954) p. 55.
[5] Hon. Justice C. E. Chukwurah, "An Overview of the Jurisdiction of Area/Customary Courts "Conference of Area/Sharia/Customary Court Judges/Directors and Inspectors of Area/Sharia/Customary Courts, P.1
[6] Akin Ibidapo-Obe, "The Sacred and the Profane: Yoruba Environmental Jurisprudence" *Nigerian Journal of African Law*, (2020) 2 NJAL p. 7; Akin Ibidapo-Obe, "Discourse of the Yoruba Philosophy of Law" *Nigerian Journal of African Law*, (2019) 2 NJAL p. 23.
[7] (1973) II SC 1.
[8] *Ibid*. at p. 21.
[9] *Sunday Anunobi* v. *Chief Elias Nwankwo* (2017) LPELR-43774(CA).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

3. ESTABLISHMENT OF CUSTOMARY COURTS

According to Obaseki J.S.C. in *Loba* v. *Akereja*[10] Customary Courts are the creatures of statutes or laws promulgated by the various States Legislatures. Section 6(4) of the CFRN as amended provides that the National Assembly and the States Houses of Assembly are empowered to establish courts other than those established by the Constitution, such courts must however have subordinate jurisdiction to that of a High Court. The House of Assembly of Lagos State enacted the Lagos State Customary Court Law 20ll and amended same in 2018. S. 1 (1) gives the Lagos State Judicial Service Commission the power to establish Customary Courts in Lagos State. The LSJSC is to act on the recommendation of the Attorney General and subject to the approval of the Governor in establishing the Customary Courts in Lagos State.

A judiciary with proven integrity is the bedrock of constitutional democracy[11] and the enjoyment of rule of law and civility. The judiciary provides strong support and protection for democratic principles that stand as a bulwark against tyranny and a foundation for the enforcement of rights and freedoms[12]. The Customary Court system is a significant but often underrated part of the Nigerian judiciary. The main purpose of setting up the Customary Court is to do substantial justice without the technicalities and the harshness of the common law. The simplicity, non-technical and timeous dispensation of justice by Customary Courts adhere the Customary Court system to the locals. Decisions of the court are expected to be made per the indigenous custom of the people and common sense, not per the Common law and its technicalities. In *Oguanuhu & Ors* v. *Chiegboka*[13], the Supreme Court held that strict rules of pleadings and application of provisions of the Evidence Act are not expected to be observed in the Customary Courts. The decisions of such court must be based on common sense and reasonableness of their findings. However, in recent times the simplicity and user-friendly nature of the Customary Court system is being displaced and eroded by stakeholders. Nwabueze rightly observes that customary law utilized the tools of flexibility, traditional legal education, the absence of writing and the polycentric nature of its disputes to withstand the societal dynamism engendered by the Western

[10] 1988 (LPELR-2583 (SC) p. 19 paras A – B.
[11] Dist. Prof. Taiwo Osipitan, SAN FCArb, "The Search for a Fiscally Autonomous Judiciary in Nigeria" being a paper delivered virtually on the occasion of 2nd Founder's Lecture of the Nigerian Institute of Advance Legal Studies on the 6th of July, 2021.
[12] *Ibid.*
[13] (2013) Vol 221 LRCN (Pt. 2) 117.

colonial invasion of Nigeria. Ironically, these characteristics, which served customary law well during colonial rule, are now threatened by some reformist activities of post-independent Nigeria and some of its scholars.[14] Counsel now file and exchange pleadings and apply the rules of evidence. The English system has gradually crept into the administration of the Customary Court system with its technical nature thereby now resulting in Customary Court proceedings suffering from incessant adjournments and preliminary objections. The proceedings of the Customary Court ought to be simple and user-friendly. For example, in a land matter, a party relying on traditional history need not give particulars and a Customary Court may *suo motu* invite a witness to testify as was the case in *Onwuama* v *Ezeokoli*[15] where the Court held *inter alia*:

> *In considering proceedings of Native, Customary or Area Courts, an appellate Court should act liberally and this is done by reading the record to understand what the proceedings were all about so as to determine whether there is evidence of substantial justice and the absence of any miscarriage of justice. This is because such Courts are not required to strictly comply with the Rules of practice and procedure or evidence, and the rationale for creating them is for the need to make the administration of justice available to the common man in a simple, cheap and uncomplicated form. In the instant case, since the proceedings were that of a Customary Court, the Respondent was not bound to plead particulars in support of traditional history as it would have done if the case was commenced at the High Court. Furthermore, the fact that the Trial Court called a witness on its own to resolve the conflicting evidence adduced by the parties did not vitiate the proceedings.*

The need to promote the Customary Court system is captured in the following passage by Hon. Justice (Dr) G.W. Kanyeihamba of the Supreme Court of Uganda:

> *The non-recognition of some of the finer points of African Customary law was based partly on ignorance and partly on the incidents of imperialism and colonialism. However, the main reason for denying African Customary law its sanctity and value was colonialism. The policy of colonial rule was based on the theory of the superiority of the imperial race and its culture and laws over the subjugated peoples and their own culture and laws… If the latter*

[14] N. NWABUEZE, "The Dynamics and Genius of Nigeria's Indigenous Legal Order'' Indigenous Law Journal/Volume 1/Spring 2002 p.155.
[15] (2002) 5 NWLR (Pt.760)353.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

were to be allowed to believe in their own culture and values and deem them to be equal with those of their masters, they could challenge the right of imperialism to govern them[16]

4. IN PURSUIT OF ACCOUNTABILITY AND TRANSPARENCY

4.1. First Perspectives from the Bible and the Qur'an

Moses's father-in-law said to him in Exodus 18:21-22: "You should also look for able men among all the people, men who fear God, are trustworthy, and hate dishonest gain; set such men over them as officers…Let them sit as judges for the people at all times…; Psalm 82:3 Give justice to the weak and the fatherless; maintain the right of the afflicted and the destitute"; Isaiah 1:17, "Learn to do good; seek justice, correct oppression; bring justice to the fatherless, and plead the widow's cause,"; and Micah 6:8 "he has told you, O man, what is good; and what does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?".

In the holy Qur'an, according to an eminent Islamic scholar, all human beings are God's servants and are equal before God. Hence, judges should not discriminate against the poor, everyone should be treated equally by the Judge. In the Adab al-Qadi[17] (The Judge's Etiquette) by Abu Bakr Ahmad ibn al-Shaybani alKhassaf, an eminent jurist provide a manual to enable judges to administer justice by the teachings of Prophet Muhammad. The attributes of a judge should include; knowledge and patience; ensure easy access to court by all; any falsehood in a case should render the case a nullity; he should be familiar with the culture and custom of the people he has been appointed to judge; he should be trustworthy, and when he sparingly attends social gatherings, he should refrain from discussing the matters before him.

In giving effect to the provisions of the Customary Court law and rules and the pursuit of justice at the Customary Court, the adjudicators of the court must possess sterling character and allow the qualities and judicial codes set out below to guide their conducts at all times:

4.1.1. Imperative for exemplary Standard of Conduct

[16] G.W. Kanyeihamba 'Criminal Law Administration – Historical and Institutional Constraints' presented at the Commonwealth Magistrates and Judges Conference held at Edinburgh, Scotland. PP 12-13.
[17] Muhammad Ibrahim H.I. Surty, "The Ethical Code and Organised Procedure of Early Islamic Law Courts, with Reference to al-Khassaf's Adab al-Qadi", in Muhammad Abdel Haleem, Adel Omar Sherif and Kate Daniels (eds), Criminal Justice in Islam (London and New York, I.B. Tauris & Co Ltd., 2003), pp. 149-166 at pp.151-153.

The importance of a good standard of conduct appropriate to judicial office has been amplified by a judge in the terms set out below:

> *No one doubts that judges are expected to behave according to certain standards both in and out of court. Are these mere expectations of voluntary decency to be exercised on a personal level, or are they expectations that a certain standard of conduct needs to be observed by a particular professional group in the interests of itself and the community? As this is a fundamental question, it is necessary to make some elementary observations. We form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not someday depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be standards of conduct, both in and out of court, which is designed to maintain confidence in those expectations*[18].

A judge and particularly a customary court judge is required to maintain a form of life and conduct which is more disciplined, cautious and restricted than that of other people. A customary court judge is not a celebrity in the community and must not be seen to be hobnobbing with politicians and the privileged in society. To preserve the integrity of the justice system, the rule of law and the sanctity of the judiciary, a judge being someone in authority must live a peaceful and quiet life marked by godliness, honesty and dignity[19]. Trust in the justice system is anchored not only on the competence and diligence of the judges but also on their integrity and character. A Customary Court judge must not only be a good judge but must also be a morally upright person and a good man. It is acknowledged that it would be unreasonable to expect a judge to completely retreat from society and public life in isolation from family and friends but in socializing, a judge must exercise great caution. This is because it is important for the integrity of the justice system that the judiciary should be perceived as independent. The test for independence should include the perception of being independent. A judge must always act in a

[18] J.B. Thomas, Judicial Ethics in Australia (Sydney, Law Book Company, 1988), p.7.
[19] 1 Timothy 2:2, Holy Bible.

manner that reflects the highest ethical and professional standards of conduct and performance that promotes transparency, accountability, integrity and respect for the independence of the Judiciary.

4.1.2. The Nigerian Revised Judicial Code of Conduct[20]

S.318 CFRN defines a judicial officer as follows:

> *"Judicial office" means the office of Chief Justice of Nigeria or a Justice of the Supreme Court, the President or Justice of the Court of Appeal, the office of the Chief Judge or a Judge of the Federal High Court, the office of the Chief Judge or Judge of the High Court of the Federal Capital Territory, Abuja, the office of the Chief Judge of a State and Judge of the High Court of a State, a Grand Kadi or Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja, a President or Judge of the Customary Court of Appeal; of the Federal Capital Territory, Abuja, a Grand Kadi or Kadi of the Sharia Court of Appeal of a State; and a reference to a "judicial officer" is a reference to the holder of any such office*

Though it appears under S.318 of the CFRN, copiously cited above, the customary judge is not a judicial officer under the 1999 Constitution[21] but for administration and dispensation of justice, the Customary Court judges are judicial officers.[22] Nevertheless, in the context of the judicial code of conduct, the term judicial officer includes Magistrate, Area/Sharia or Customary Judge or any person holding a similar office in any inferior court. The explanatory notes to the revised code of conduct for Judicial Officers of the Federal Republic of Nigeria throw more light on this issue. It states that:

> *In this Code, the term "Judicial Officer" shall mean a holder of the office of Chief Justice of Nigeria, a Justice of the Supreme Court, the President or Justice of the Court of Appeal, the Chief Judge or Judge of the Federal High Court, the President or Judge of National*

[20] National Judicial Council, Code of Conduct: Revised Code of Conduct for Judicial Officers of the Federal Republic of Nigeria. Available at: https://njc.gov.ng/code-of-conduct Accessed on the 6th of July, 2012.
[21] This includes the mode of appointment, security of tenure, remuneration etc.
[22] Tom Anyafulude, *Principles of Practice and Procedure of Customary Courts in Nigeria Through the Case* (2018: Spakk & Spakkle) p.4 See also Hon. Justice P. O. Nnadi, "Promoting Integrity and Transparency in the Administration of Justice" Paper Presented by Hon. Justice P. O. Nnadi, Chief Judge, Imo State at the Refresher Course for Judges and Kadis on Modern Judicial Practice and Procedure held at the National Judicial Institute, Abuja, From 20th – 24th March, 2017. P. 17.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Industrial Court of Nigeria, the Chief Judge or Judge of High Court of a State and the Federal Capital Territory, Abuja, the Grand Kadi or Kadi of a Sharia Court of Appeal of a State and the Federal Capital Territory, Abuja, the President or Judge of a Customary Court of Appeal of a State and of the Federal Capital Territory, Abuja and every holder of similar office in any office and tribunal where the duties involve adjudication of any dispute or disagreement between person and person (natural or legal) or person and Government at Federal, State and Local Government levels including the agents and privies of any such person.

The National Judicial Council is established under Section 153(1) of the Constitution with power relating to appointments and exercise of disciplinary control over judicial officers specified in paragraph 21 of Part 1 of the Third Schedule of the Constitution. It also has the power to deal with all matters relating to policy and administration. Following the above, the NJC has put in place the Revised Code of Conduct to regulate the general conduct of Judicial Officers of the Federal Republic of Nigeria.

The Revised Code of Conduct is set out below:

The Revised Code of Conduct for Judicial Officers of the Federal Republic of Nigeria[23]

A Judge should avoid impropriety and the appearance of impropriety in all of the Judge's activities both in his professional and private life,[24]; A Judge shall in his or her personal relations with individual members of the legal profession, who practice regularly in the Judge's Court, avoid situations which might reasonably give rise to the suspicion of or appearance of favoritism or partiality[25]; A Judicial Officer should be true and faithful to the Constitution and the Law, uphold the course of justice by abiding with provisions of Constitution and the Law and should acquire and maintain professional competence[26]; A judge owes it a duty to abstain from comments about a pending or impending proceeding in any Court in this country[27]; but in exercising such rights, a Judge shall always conduct himself in such manner as to preserve the

[23] Violation of any of the Rules contained in this Code amounts to a judicial misconduct and or, misbehavior and it attracts disciplinary action.
[24] Rule 1.
[25] Rule 2.
[26] Rule 3.
[27] Rule 4.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

dignity of the judicial office and the impartiality and independence of the judiciary[28]; A judge has a duty to abstain from involvement in public controversies[29]; A judge should not adjudicate over a matter in relation to the Judge's personal and fiduciary financial interest, including the interests of members of the Judge's family[30]; A Judge shall not allow the Judge's family, social or other political relationships improperly to influence the Judge's judicial conduct and judgment as a Judge[31]; A Judge may engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.[32]; A judge is prohibited from acceptance of a gift, bequest, loan, favour, benefit, advantage, bribe etc [33] ; A Judicial Officer should diligently discharge his administrative duties, maintain professional competence in judicial administration and facilitate the performance of the administrative duties of other Judicial Officers and court officials[34]; A Judicial Officer should disqualify himself in a proceeding in which his impartiality may genuinely and reasonably be questioned[35]; A Judicial Officer should regulate his Extra-Judicial Activities to minimize the risk of conflict with his judicial duties, A Judicial Officer shall not take or accept any Chieftaincy title while in office[36]; A Judicial Officer should regulate his travels within and outside Nigeria so as not to affect his judicial duties or cause a delay in the administration of justice or detrimentally affect his performance or the overall performance of the judiciary.[37]; Judicial Officer while in service shall not publish any book or cause another person, group of persons, publishing house, whosoever, acting on his behalf to publish any book until he ceases to be a Judicial Officer where such publication may infringe in any manner the Code of Conduct for Judicial Officers.[38] In addition, the Bangalore Principles of Judicial Conduct[39] also emphasizes that a judge must imbibe the following attributes: independence, impartiality, integrity, propriety, equality, competence and diligence.

[28] Rule 5.
[29] Rule 6.
[30] Rule 7.
[31] Rule 8.
[32] Rule 9.
[33] Rule 10.
[34] Rule 11.
[35] Rule 12.
[36] Rule 13.
[37] Rule 14.
[38] Rule 15.
[39] The Bangalore Principles of Judicial Conduct have been acknowledged and accepted by the different jurisdictions and by international agencies interested in the integrity of the judicial process: Value 1: Independence; Value 2: Impartiality; Value 3: Integrity; Value 4: Propriety; Value 5: Equality; Value 6: Competence and diligence

A Customary Court judge, in particular, must ensure that he serves all the people, regardless of ethnic groups, places of origin, sex, religious beliefs or political opinions. That is why the judge must avoid stereotyping, embrace and understand diversity in society as well as differences in people. Hsun Tzu, a distinguished Chinese elder and beloved magistrate counselled:

> *Fair-mindedness is the balance in which to weigh proposals; upright harmoniousness is the line by which to measure them. Where laws exist, to carry them out; where they do not exist, to act in the spirit of precedent and analogy – that is the best way to hear proposals. To show favouritism and partisan feeling and be without any constant principles – this is the worst you can do. It is possible to have good laws and still have disorder in the state*[40].

And the Bible admonishes the judges to "hear the disputes between your people and judge fairly, whether the case is between two Israelites or between an Israelite and a foreigner residing among you"[41]. In the Qur'an, justice abhors discrimination on the prohibited grounds of ethnicity, rank, language, colour, nationality, sex, status or religion. All humans are created by God and are servants of God, and as such should be treated equally in courts of law.[42]

4.1.3. The Capacity of the Customary Courts and Judges

The capacity of the Customary Court to perform its role transparently and efficiently is central to the promotion of accountability and efficiency. Capacity can be enhanced in the proper engagement of the right personnel to man the Courts. Section 2(2) of the Lagos State Customary Court (Amendment) Law 2018 provides that:

> *A Customary Court is properly constituted with a minimum of three (3) members and a maximum of (5) members one of whom shall be the President.*
>
> *Provided that one of the members presiding is knowledgeable in Native Law, Custom and Tradition.*

[40] Basic Writings of Mo Tzu, Hsun Tzu and Han Fei Tzu, Burton Watson (trans.) (Columbia University Press, 1967), p. 35, cited in Weeramantry, An Invitation to the Law, p. 253.
[41] Deuteronomy 1:16, New International Version.
[42] Muhammad Ibrahim H.I. Surty, "The Ethical Code and Organised Procedure of Early Islamic Law Courts, with Reference to al-Khassaf's Adab al-Qadi", in Muhammad Abdel Haleem, Adel Omar Sherif and Kate Daniels (eds), Criminal Justice in Islam (London and New York, I.B. Tauris & Co Ltd., 2003), pp. 149-166.

A member of the Customary Court is required to hold a degree from any recognized University or Polytechnic.

Section 5 (A) states the qualification to hold the office as a member of the Customary Court as follows:

(a) a holder of a degree in any recognized University or Polytechnic

(b) at least (50) years of age

(c) of proven integrity and good standing in society.

In addition, Section 5 states that to hold office as a President of the Customary Court, the candidate must be a Legal Practitioner or a Law graduate, must be at least fifty (50) years of age and have proven integrity and good standing in society.

It is generally acknowledged that anyone that meets the above qualifications will be competent and skilled. However, it should be remembered that the fact that a Customary Court is presided by a lawyer does not make it lose its peculiarities as a customary law court. Regards must be heard to the facts that the litigants are locals and the nature of customary law courts is plain and simple. Composition of a customary law court by lawyers should enrich rather than impede the application of customary law, no regard should be made to the application of technicalities and strict rules of pleadings and Evidence Act in the customary law court despite its composition made up of lawyers.[43] The principle governing the customary court law proceedings is the attainment of substantial justice based on "reasonable practice, tradition and custom of the local people."[44]

Still on the qualification as president and members of the Lagos State Customary Court, beyond academic and age qualifications, a judge must be able to manage his court efficiently. A judge must manage and also decide cases. Cases must be promptly decided, copies of ruling and judgment delivered must be made available to litigants and their counsel within a reasonable period. And records of the court should be kept safe[45], the judge must take all reasonable and

[43] *Ezike Theophilus* v *Gabriel Ezeh* (2017) 1 ESCCALR 85 at 87.
[44] *Ibid*, 85.
[45] Order 12 Rules (3) 1 and 4.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

necessary steps to prevent court records from disappearing. Court records are sacred and should be treated as such. The court will outlive the judges. Court records should be kept in a manner that will make them easy to be retrieved at a later date. In sum, a judge must maintain professional competence and also effectively supervise the administrative and support staff[46]. In promoting accountability and transparency it is significantly also important that the judge and the customary court system interrogate the many incidents of court officials requesting unofficial payments. It is pervasive in our climes for court officials to demand unofficial payments for services they have been employed to perform, ranging from the court bailiffs demanding money for service, registrars making unofficial financial demand for the issuing of certified true copies of court processes and the gateman making an unofficial demand for payment before cars can be parked in the court premises!

4.1.4. Substantial Justice

Customary courts are by nature created to do substantial justice under largely unwritten custom and tradition of the people with the only exception that such custom and tradition must not be repugnant to natural law equity and good conscience. Hence, S.25 (1) of the Lagos State Customary Court Law 2011 provides that a "Customary Court shall observe and enforce every customary Law which is applicable and is not repugnant to natural justice, equity, and good conscience or incompatible either directly or by implication with any law for the time being in force, and nothing in this Law shall deprive any person of the benefit of Customary Law". Kayode Eso J.S.C. in *State* v. *Gwonto*[47] also postulated that: "the Court is more interested in substance than in mere form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice." As a Customary Court, the court is obliged to apply substantial justice because most often the parties to a dispute are no strangers to each other. They share a common bond and culture and are well known to each other. Substantial justice is justice administered according to the substance and not necessarily the form of the law. Nwabueze puts it succinctly as follows:

[46] See "Principles of Conduct for Court Personnel", Report of the Fourth Meeting of the Judicial Integrity Group, 27-28 October 2005, Vienna, Austria, Annex A, at http://www.unodc.org/pdf/corruption/publication_jig4.pd.
[47] (1983) 1 S.C.N.L.R. 142 at P.160.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

> *Another feature of customary law is that parties to a dispute subject to customary law are usually no strangers to each other. There is usually a tie, social, marital or tribal, binding them. For instance, land disputes are usually between people related by blood. This is in contradistinction to modern land adjudication, which may be between parties who are strangers to each other and may even be of different nationalities. Apparently, for this reason, disputes in an African setting are considered to disrupt the societal or family equilibrium. The main aim of the adjudicators will be to restore that equilibrium and this might only be achieved by not deciding strictly on the rights of the parties. Legal rights are not emphasized as much as reconciliation. Thus, an African justice system is mainly reconciliatory.*[48]

This bias for substantial justice is reflected in Section 29 of the Customary Courts Law, 2011 which provides that, "in any proceedings before it, the customary court shall proceed without undue formality and shall ensure that the proceedings are not protracted". This position appears to be a codification of the Court of Appeal judgment in *Okeke* v *President & Members Customary Court*[49] where the court held that, "customary courts have their practice and procedure as embodied in the Customary Courts Law and Rules of the States in the country where they are applicable. By the nature and customary laws, they relate to the traditional unwritten law of the people handed down from generation to generation. Where members of the courts are familiar with the custom of a community they can apply it without first requiring evidence[50]. In another instance, the court held that failure to comply with the Rules of Court by the Customary Court may not vitiate the judgment of the Customary Court. In *Nwigwe Unonu* v. *Onweonu Ohabia*,[51] the plaintiff filed an action in the customary court for a refund of 67 pounds being the dowry paid based on the unsworn evidence of the plaintiff. He was awarded the refund of the 67 pounds paid for the dowry. At the county court, the unsworn testimony of the Plaintiff was rejected based on Order 25 (1) of the Customary Courts' Rules, 1957 and the dowry was reduced to 18 pounds. On appeal to the High Court, it was held that the Customary Court is mandated to observe the statutory provisions of Order 25 (1) of the Customary Courts' Rules, 1957 but in this instance, none observance had not vitiated the judgment, only the weight of

[48] P.163; V.C. Uchendu, The Igbo of Southeast Nigeria (New York: Holt, Rinehart and Winston, 1965) at 14.
[49] (2001)11 NWLR (Pt. 725) 507.
[50] *Ehigie* v *Ehigie* (1961) All NLR 842.
[51] 1964 ENLR 94.

evidence was affected. Hence, the plaintiff was entitled to the judgment of 18 pounds despite his unsworn evidence and that of his witnesses. In this case, the courts applied substantial justice.[52]

Furthermore, transparency and accountability require that in proceedings before the Customary Court, all customary laws, principles and rules pursuant to S. 47 of the Lagos State Customary Law 2011 should be applied in the promotion of substantial justice. English laws and common law may not apply to the Customary Court law proceedings except where express provisions are made for English law or common law to apply. Hence, technical issues such as particularization of claims, locus standi, legal personality, abuse of court processes may not apply except where non-application may lead to a substantial miscarriage of justice.[53]

Substantial justice further requires the Customary Court to properly evaluate the evidence presented by the parties, make specific findings and give reasons for its judgment. Issues not raised by parties should not be pronounced upon[54]. This is a mandatory provision.[55] The court must hear the complete evidence before delivering judgment.[56]

A Judge should strive to comply with the provisions of S. 294(1) of the CFRN, 1999 as amended by delivering Judgments and Rulings within 90 days after adoption of written submissions of counsel. Even under the ancient Roman Law, the Twelve Tables (450 B.C.) contains the injunction "the setting of the sun shall be the extreme limit of time within which a judge must render his decision"[57]. Finally, in applying sanctions under the customary law system, scholars have argued and correctly so that "sanction under customary law, does not have the same nature as the sanctions of a modern state, with its full machinery for the administration of justice. Customary sanction takes the form of ostracism, compensation, propitiation, restoration or apology. "[58]

[52] See also Alice Odewara v. The State (unreported) Judgment of High Court (West) delivered on the 22nd January, 1969) Charge No. HOS/10CA/68.
[53] See *Tetter Okuma* v. *Tsutsu* 10 WACA 89.
[54] *Adeniji* v. *Adeniji* (1997) ALL NLR 301.
[55] See *Nnando* v. *Diokpa* (1959) WNLR 309.
[56] *Essien* v. *George* (1962) ALL NLR 1064.
[57] The Civil Law, S.P. Scott (trans.) (Cincinnati, Central Trust Co., 1932), Vol. 1, pp. 57-59, cited in Weeramantry, An Invitation to the Law, pp. 265-266.
[58] N Nwabueze, p. 158.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

4.1.5. Application of the Principles of Fair hearing

All courts at all times must observe the principles of fair hearing, it is absolute and there is no derogation about this right. The provisions of Section 36 (1) CFRN as amended applies to the proceedings of the Customary Court. These constitutional provisions relate to a fair hearing. These provisions embraced the twin pillars of natural justice;[59] the two components of fair hearing under natural justice are the rule against bias (*nemo iudex in causa sua*, or better still, "no man is allowed to be a judge in his cause"), and the right to a fair hearing (*audi alteram partem*, or "the other side must be heard")[60]. The most basic requirements of fair hearing require that adequate notice of the nature and purpose of the proceedings must be given to all the parties; parties must be afforded an adequate opportunity to prepare their respective cases; present facts, arguments and supporting evidence either in writing, orally or by both means; be represented by counsel of their choice during all stages of the proceedings; consult an interpreter at all stages of the proceedings if required; have their rights or obligations affected only by a decision based solely on evidence known to and presented by the parties to public proceedings, and have a decision by the court rendered without undue delay. Parties must be given the right to appeal the decisions of the court.[61] In the context of the customary law court, in *Falodun* v. *Ogunse*[62] the court held that "although Customary Courts are not bound by technical rules of procedure, the provisions of Section 36 of the constitution relating to a fair hearing is a very far-reaching provision. The requirements of fair hearing are so ubiquitous that even proceedings in Customary Courts must observe them"[63]

4.1.6. New Approaches Required

Some of the complaints that have been allegedly made against the Customary Court system in Nigeria include judges and staff having immoral affairs with litigants or litigant's spouses, court staff soliciting unofficial payments to provide services they have been employed to perform which should be free; judges and staff being rude to court users; failure to notify users about hearing dates; poor record-keeping and retrieval of court records; failure to record court

[59] Oputa, C. A. *The Law and the Twin Pillars of Justice*. Owerri: Printed by the Government Printer, 1981.
[60] *Alakija* v *Medical and Dental Disciplinary Committee* (1959) 4 F.S.C 385.
[61] See Draft UN Body of Principles on the Right to a Fair Trial and a Remedy, UN document E/CN.4/Sub.2/1994/24 of 3 June 1994.
[62] (2010) All FWLR (Pt. 504) 1404 at 1427 27.
[63] *Kwali* v *Dobi* (2010) All FWLR (Pt. 506) 1883.

proceedings accurately[64] etc. Most litigants that approach the Customary Court may not have the means to seek further remedy and seek remedies from higher courts. Hence, it is suggested that a court inspection system be put in place by the Lagos State Judicial Commission to constantly go around the Customary Court system for inspections. The inspecting body should be independent of the court system and should have the power to review court records, interview members of staff and litigants, observe proceedings and the court setting and infrastructures[65]. This Inspection System has been reportedly implemented in Enugu Customary Court system[66] and it has hugely increased the efficiency of the system and user's satisfaction. Judges and staff should also be constantly trained to be able to perform their duties effectively.

4.1.7. Application of Information Communication Technology

It is a notorious and worrying fact that the state of infrastructure in most Nigerian Courts is in a state of disrepair. Sometimes the courts would be so filled up that lawyers would not have any seat to sit to present their cases. Many Courts are not accessible to the physically challenged. Some lack basic working tools such as computers, constant supply of electricity, durable tables and chairs. One of the steps to be taken in promoting accountability and transparency at the Customary Court is the provision of relevant ICT tools, including an e-library, relevant soft wares, computers and printers. It is good to know that the calibre of judges and staff at the Lagos State Customary Court are familiar with word processing skills. Equipping the Customary Courts with information technology tools will enable the courts to be able to produce a judgment much faster with computers. And because of the ability to manipulate different documents through copy, cut and or paste, or working from templates, it is far easier to produce a document with the information the court wants to be included in it. In addition, on the same computer, it is possible to store the document, and retrieve it very fast, call up other documents, without having to move from one office to the other. Overall, judgment can be produced much faster and such judgements can go into a court system database and can be easily retrieved in the future. The provision of computers and competent staff to operate them at the customary courts will largely increase the speed and efficiency of the justice system. Storage and retrieval of court processes

[64] British Council, "How to improve the quality of services in lower courts: Introduce a courts inspection system" https://www.britishcouncil.org.ng/sites/default/files/e413_j4a_c2_lower_court_inspection_final_v4_web_0.pdf Accessed on the 1st of July, 2021.
[65] *Ibid*.
[66] *Ibid*.

will become more secure and transparent. It will become easier to access certified true copies of court records and processes. There is no doubt that the application of technology in the Customary Courts will reduce inefficiency, inaccuracy, lack of transparency and promote accountability and integrity.

4.1.8. Training

The importance of training and retraining cannot be over-emphasized; the judges and staff members of the Customary Court should be constantly trained so that their skills and competencies can be updated. Research findings have revealed that training presents a prime opportunity to expand the knowledge base of workers, it makes workers more confident in the performance of their duties, and training also increases efficiency and productivity. Training can take diverse forms; roundtable, workshops, seminars, conferences and attendance of short courses. It makes the judges and staff members feel they are appreciated and valued.

5. CONCLUSION

This paper has endeavoured to show that the Customary Court system is an integral part of the justice system and that the Customary Court has been charged with the interpretation and implementation of customary laws which are largely unwritten. In doing so, the judges of the Customary Courts are faced with the unenviable task of interpreting customary laws that are intrinsically difficult to interpret and implement. However, in making the challenges faced by the President and members of the court less cumbersome, only individuals with requisite capabilities and qualifications should be appointed to adjudicate at the customary law courts. In addition, those appointed should imbibe the judicial officers' code of conduct and the Bangalore Principles of Judicial Conduct. The Customary Court adjudicators are also required to be of noble character in and out of court, they should diligently apply the principles of fair hearing and ensure substantial justice rather than technical justice. It has also been shown above that there is potential for efficacy inherent in the appointment of an independent inspection body that will act as a watchdog to the Customary Courts. The paper also makes a case for the application of information communication technology which has become an indispensable tool for the modern judicial system. In sum, it is in the religious observance of all the issues raised and discussed

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

above that accountability and transparency can be ensured in the implementation of customary law.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

JUDICIAL APPROACH TOWARDS DEFECTIVE INVESTIGATION OF CRIMES BY POLICE: A STUDY

DR. AMIT BHASKAR*

ABSTRACT

The defective investigation by investigative authorities to provide a shield to the accused is a serious concern in any criminal justice administration and the same hold true for India also. It is generally perceived that poor investigation by police or any investigative authority could thwart the case of the prosecution ultimately leading to the acquittal of the accused. However, the Supreme Court of India, by taking a different approach, has held in some of its judgments that the criminal conviction of the accused cannot be made solely dependent on the whims and fancies of the investigative authorities. Otherwise, every criminal case will rest at the mercy of the investigative authorities. The Supreme Court of India has laid down the principle that if independent evidence is sufficient to convict the accused then notwithstanding the defect in the investigation, the accused will be convicted and the rule of law will be upheld. This paper attempts to do a case analysis of three prominent judgments of the Supreme Court on the point and the legal principles laid down.

1. INTRODUCTION

The defective investigation of crimes by the police could be a serious concern in any criminal justice administration. The same holds true for India also. The cases and incidents of defective investigation raise serious questions on the credibility of the police as an investigative authority and also on the entire criminal justice administration.[1] It also has an adverse impact on the conviction rate because if the investigation is defective, the charge sheet filed before the court will also, in probability, be defective.[2] India is already facing the grave issue of a poor conviction rate for serious offences as per the data released by the National Crime Record Bureau (NCRB)

* Associate Professor in Law, Alliance School of Law, Alliance University, Bengaluru.
[1] Laura C. H. Hoyano, "Policing Flawed Police Investigations: Unravelling the Blanket" The Modern Law Review Vol. 62, No. 6. pp. 912-936.
[2] Wiley, "Police Investigations: Practice and Malpractice" Journal of Law and Society, vol. 21, no. 1, Cardiff University, 1994, pp. 72–84.

from time to time.[3] Further, the cases of defective investigation, if it results in acquittal or discharge of the offenders, also boost the morale of the anti-social elements and may further aggravate the law and order problem in the society. As a consequence, society as a whole has a very big stake in fair investigation done by the police and other investigative authorities. [4]Considering the sensitivity of the matter, the Administrative Reform Commissions in India have focussed on bringing police reforms at organizational and operational levels.[5] Further, the fair investigation has become an invaluable aspect of Article 21 of the Constitution as held by the Supreme Court in a number of judicial rulings. Not only does the accused have a right to a fair investigation but society in general and the victim in particular also has a right to demand a fair investigation.[6] Fair investigation occupies pivotal importance in every mature criminal justice system.[7] In this paper, I am not deliberating upon the causes of defective investigation which could be multifarious such as undue political interference, corruption, lack of competent police personnel, and others. This paper only attempts to find out the approach of the judiciary towards defective investigation because a case of a defective investigation, as pointed out, has the potential to sabotage the entire case of the prosecution. Should in such circumstances the judicial administration of criminal justice be at the mercy of the investigative authorities? If such could be the scenario, will it not lead to the collapse of the entire criminal justice administration? Hence, this paper attempt to understand the judicial approach towards the defective investigation. This inquiry is important because it is generally perceived that the defective investigation will inevitably led to acquittal of the offender in all situations. However, the principles laid down by the Supreme Court in some of the cases is that the defective investigation by itself cannot be a sole ground for acquittal of the accused. Sometimes, the Court may ignore the defective investigation and rely on the other evidences available on record to convict the offender. Hence,

[3] NCRB statistical data on Crimes in India for the year 2020. Available at https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf. The Report is titled "Crime in India 2020 Statistics Volume 1" (Date of Access 28/12/2021).

[4] R. Deb "Police investigation: A Review" Journal of the Indian Law Institute, APRIL-DECEMBER 1997, Vol. 39, No. 2/4, pp. 260-271

[5] Second Administrative Reforms Commissions Reports on Public Order. Available at https://darpg.gov.in/arc-reports (Date of Access 28/12/2021).

[6] Robert E., and Sarah J. McLean, "Reflections on Police Reform. Mirage of Police Reform: Procedural Justice and Police Legitimacy*"* 1st ed., University of California Press, 2017, pp. 178–96.

[7] Article, "Fair Investigation: Backbone of Criminal Justice System" Available at https://haryanapolice.gov.in/policejournal/pdf/fair_investigation.pdf (Date of Access 28/12/2021).

the principles laid down in such cases are important to understand in the light of the several judicial rulings.

2. CASES OF DEFECTIVE INVESTIGATIONS BEFORE SUPREME COURT

The legal principles laid down by the Supreme Court in cases of a defective investigation by police could be understood from the several judgments of the Supreme Court. This research paper is doctrinal in nature and aims to look into and analyzes some of the prominent judgments of the Supreme Court on the point of defective investigation. Some of the prominent judgments on the subject are *Ram Bihari Yadav v. State of Bihar* (1998 SC), *Karnel Singh v. State of MP* (1995 SC) and *Paras Yadav v. State of Bihar* (1999 SC). Some recent judicial rulings have also come up on the point. The author will discuss these cases in the light of the factual matrix of the cases and the principles laid down therein so that the reader will have a holistic understanding of the issue which revolves around the central theme of defective investigation.

2.1. Ram Bihari Yadav v. State of Bihar and Ors[8]

Ram Bihari Yadav case was a case of deliberate defective investigation because the accused himself was a police officer at the relevant point of time. As the factual matrix of the case goes, the appellant was working as a police officer in the present State of Jharkhand (earlier part of Bihar) at the material point of time. He was the officer in charge of a police station. The appellant had developed carnal intercourse relations with his servant that led to estranged relations between him and his wife. On an unfortunate day, there was a serious altercation between him and his wife over the issue. In a heat of passion, he committed the murder of his wife by burning her alive after sprinting kerosene oil on her body. After committing the dastardly act, he went on to call his neighbours saying that his wife accidentally met with fire in the kitchen. One of the prosecution witnesses PW-6 (a Sub Inspector) went to the spot and helped the victim to be taken to the hospital after breaking the main gate of the house which was deliberately locked by the appellant. The victim was admitted to the hospital. The judicial magistrate recorded the dying declaration of the victim. As both the hands of the victim were badly burnt, he took an impression of her left toe on the declaration and certified accordingly. He

[8] AIR 1998 SC 1850.

stated in the trial that he put certain questions to the victim with a view to testing her memory. He stated that she was conscious while making her statement. Both the Trial Court and the High Court convicted the appellant on the basis of the dying declaration of the victim. On appeal, the Supreme Court noted how two important prosecution witnesses PW-2 and PW-6 turned hostile. PW-2 was the servant with whom the appellant was alleged to have carnal intercourse relation. PW-6 was the sub-inspector who went to the house of the appellant and took the victim to the hospital. The counsel for the appellant raised the theory of two contradictory dying declarations and contended before the Supreme Court that there was not one but two dying declarations made by the victim wherein the victim had made contradictory statements. Hence, the Court should not have based conviction on the sole dying declaration brought to its notice. However, the Supreme Court doubted the theory of two contradictory dying declarations which the Court felt was propounded to shield the appellant. The Court noted that the Station House Officer (SHO) who made the alleged entry of the first dying declaration in case dairy has not come into the witness box. The investigating officer, who is said to have signed that entry, also did not prove the same. Thus, exhibit 2 was the only dying declaration that remains and was rightly relied upon for convicting the appellant. Hence, the Apex Court affirmed the conviction of the appellant for the murder of his wife and sentenced him to life imprisonment.

However, in the course of the judgment, the Court made a very important observation regarding the defective investigation and its effect on the conviction of the accused. It is worthwhile to quote the relevant Para. The Court said in Para 13 of the Judgment:

> "*Before parting with this case we consider it appropriate to observe that though the prosecution has to prove the case against the accused in the manner stated by it and that any act or omission on the part of the prosecution giving rise to any reasonable doubt would go in favour of the accused, yet in a case like the present one where the record shows that investigating officers created a mess by bringing on record Exhibit 5/4 and GD Entry 517 and have exhibited remiss and/or deliberately omitted to do what they ought to have done to bail out the appellant who was a member of the police force or for any extraneous reason, the interest of justice demands that such acts or omissions of the officers of the prosecution should not be taken in favour of the accused, for that would amount to giving premium for the wrongs of the prosecution designedly committed to favour the appellant. In*

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

such cases, the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice."

The importance of these observations in the *Ram Bihari Yadav* case could be gauged from the fact that in all subsequent cases of defective investigation, the abovementioned paragraph is quoted as an authority laying down the proposition that where the defective investigation is done intentionally with design to shield the accused, the court shall not remain a mute spectator and will meaningfully intervene to ensure that justice is done. The justice to the victim shall not be at the mercy of the investigative authorities. Otherwise, the people will lose confidence in criminal justice ultimately leading to the collapse of the entire criminal justice administration system.

2.2. Karnel Singh v. State of M. P.[9]

Another case in which the Supreme Court came down heavily on the defective investigation was the case of *Karnel Singh*. The *Karnel Singh* was a case of prosecution of the appellant for the offence of rape under Section 376 of IPC. As the fact of the case goes, the prosecutrix was a poor labourer who was employed in a factory at the material point of time. On an unfortunate day, the appellant came there with one of his friends and committed rape upon her. Before committing the rape, the appellant deliberately asked one person called Charan who was present in the factory premise to fetch tea and then taking advantage of the situation committed rape upon the prosecutrix. After the incident, the prosecutrix was sent to the hospital for medical examination where the lady doctor examined her and prepared the report. In the medical report, it was mentioned that the victim was habituated to sexual intercourse. Further, the doctor mentioned in the report that she did not find any marks of injury or struggle on the person of the prosecutrix thus implying that it was not a case of rape. However, the victim's petticoat which was attached earlier in point of time and shown to her bore semen stains. In her cross-examination, the doctor stated that she did not see any sign of forcible intercourse on the prosecutrix and was, therefore, not in a position to say whether or not the prosecutrix was subjected to rape. The garment of the

[9] (1995) 5 SCC 518.

prosecutrix was examined by the Chemical Analyzer, which upon examination, confirmed the presence of semen stains on the cloth of the prosecutrix. The prosecutrix in her evidence had stated that immediately after the unfortunate incident she ran from the place of occurrence where she met one co-labourer and narrated to her the incident before going in search of her husband. Thus, at the earliest point of time, she narrated the incident to the aforesaid person-a co-labourer. The Supreme Court noted the poor and defective investigation on the ground that the aforesaid co-labourer was not cited as evidence nor examined in the court as a witness which could have been a very crucial piece of evidence. Further, the Supreme Court also noted that another important piece of evidence of a person called Charan who was there in the factory premise at that time and to whom the accused had deliberately asked to fetch tea was not produced as a witness. The Supreme Court noted that both these material witnesses (Charan and the co-labourer) were not produced which could have corroborated the story of the prosecutrix which highlights the serious and glaring defect in the investigation. Both the witnesses ought to have been examined by the prosecution in the trial. Further, pointing towards the defective investigation, the Supreme Court noted the recovery of the under-garment of the accused on which the medical expert noted semen-like stains and advised its examination by the Chemical Analyzer. However, much to the dismay of the Supreme Court, the seizure of underwear was held to be not proved. It could have been very clinching evidence against the appellant. The Court expressed utter shock and surprise that the Investigating Officer has not uttered a word about the seizure of the article which could have been an important piece of evidence implicating the appellant. Therefore, this important piece of evidence on which the prosecution sought to rely was of no avail to it. On the overall facts of the case, the Court concluded that the present case was a case of defective investigation by police. The appellant, pointing towards the defective investigation, contended that the investigation leaves much to be desired as the two independent witnesses who could have corroborated the prosecutrix have, for reasons best known to the prosecution, not been called to the witness box. The story regarding the recovery of the underwear of the appellant with semen stains is a concoction and the prosecution could not prove its recovery, the defence argued. At last, the defence contended that the prosecution fails to prove the case beyond reasonable doubt, and hence the appeal must be allowed and the appellant must be acquitted.

While responding to the defence argument of defective investigation and hence pleading for acquittal, the Supreme Court made some very important observations in Para 5 and 6 of the Judgment. The Court said:

> "*Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective*".

On facts, the Court said:

> "*Any investigating officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would have drawn up a proper seizure-memo in regard to the 'Underwear'. That is the reason why we have said that the investigation was slip shod and defective."*

Further in Para 6, the Supreme Court noted:

> "*We must admit that the defective investigation gave us some anxious moments and we were at first blush inclined to think that the accused was prejudiced. But on closer scrutiny we have reason to think that the loopholes in the investigation were left to help the accused at the cost of the poor prosecutrix, a labourer. To acquit solely on that ground would be adding insult to injury."*

The Supreme Court then said that it had carefully examined the evidence of the prosecutrix, the medical evidence of her examination, and the evidence of the investigating officer and held that there is no risk involved in accepting the version of the prosecutrix. The Court noted that the evidence of the prosecutrix shows that she had joined the two accused persons hardly three days before the incident as a laborer under a contractor. She was, therefore, not very familiar with the environment. She was the only female worker just out of her teens. Besides, the two accused persons and the prosecutrix, as mentioned earlier, there was one more person by the name of Charan who was deliberately sent away to fetch tea. Taking advantage of the prosecutrix being

alone in their company, the appellant committed rape upon her. After he had satisfied his lust, he called his companion but before the latter could commit upon her, she ran away and narrated the incident to Multanabai (the co-labourers) and then went in search of her husband, a rickshaw puller. After narrating the incident to him, both of them went to the police station and lodged the complaint. The Supreme Court said that the entire event goes on to show that there is a truth in the prosecution story and, therefore, it is safe to place conviction on the appellant by relying on the testimony of the prosecutrix notwithstanding the defective investigation by the police which was done purposely to help the appellant.

Regarding the delay in lodging of FIR and no mark of injury present on the body of the prosecutrix, the Supreme Court, after taking into account the totalities of circumstances, said that a victim of the crime had absolutely no reason whatsoever to falsely implicate the appellant nor did her husband have any reason to do so or tutor his wife to involve the appellant. No such suggestion was made to the prosecution witnesses in cross-examination nor is there any evidence on record on that behalf. The prosecutrix was a poor labourer who was toiling to earn her livelihood to augment the family income. The presence of semen stains on the petticoat and in the vagina lend assurance to the story narrated by the prosecutrix. The submission that there was a delay in lodging the complaint was rejected on the ground that immediately after the incident, she had to go in search of her husband who was a rickshaw puller, narrate to him the incident, go down to the police station and then lodge the complaint. She had explained the absence of injuries by stating that she was laid on minute sand so there were no marks of injury. The only argument given by the defence of false implication in order to grab money was found to be unreliable. Therefore, taking an overall view of the matter, the Court said that it is safe to place reliance on the testimony of the prosecutrix. Both the courts below relied on her evidence and we see no reason to take a different view, the Supreme Court said. Hence, the Supreme Court affirmed the conviction of the appellant for the offence under Section 376 of the IPC notwithstanding the defective investigation by the police. The *Karnel Singh* case is a reflection of the point that any defective investigation done to deliberately shield the offender will not render the court helpless in delivering justice to the victim.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

2.3. Paras Yadav and Ors. v. The State of Bihar[10]

Another case where the defective investigation has no bearing on the conviction of the offender is the *Paras Yadav* case. In the *Paras Yadav* case, the victim was murdered by the appellant Paras Yadav and others while he was returning home in the evening. The reason for the murder was the prior enmity between them due to the land dispute. The victim was stabbed in the abdomen by a dragger as post mortem would reveal. The police recorded the statement of the victim on the spot. Later, the victim was shifted to the hospital where he died. Thereafter, the offence against the appellant was altered from Section 307 (Attempt to Murder) to 302 (Murder) IPC. The appellant was convicted on the basis of a dying declaration made by the victim as there was no eyewitness to the incident. It is only after the offence was committed few bystanders gathered at the scene of the crime. The victim made a statement to the Police Sub-Inspector (SI) who went to the spot after the incident. The Session Court and the High Court convicted the appellant on the basis of the dying declaration made to the SI by the victim and also on the basis of the statements of the people who reached the spot after the incident. Both the courts treated the statement made to the Sub-Inspector as a dying declaration under Section 32 of the Indian Evidence Act. On appeal before the Supreme Court, it was contended by the appellant that dying declaration was not recorded as per the mandate of the law and so no reliance could be placed. Hence, the conviction was illegal. It was contended that the Investigating Officer has not bothered to record the dying declaration of the deceased as per the mandate of the law nor the dying declaration was recorded by the doctor. It was further contended that the doctor was not examined to establish that the deceased was conscious and in a fit condition to make the statement, a condition which is a prerequisite for successful reliance on dying declaration as per the legal principles laid down by the Supreme Court in a host of cases. The Supreme Court said that it is true that there was negligence on the part of the Investigating Officer in not getting the dying declarations recorded by the medical practitioner. On occasions, such negligence or omission may give rise to reasonable doubt which would obviously go in favour of the accused. But in the present case, the evidence of prosecution witnesses (the eyewitnesses on the spot) clearly establishes beyond reasonable doubt that the deceased was conscious. All the witnesses deposed that the deceased was in a fit state of mind to make the statement. He expired just after

[10] 1999 2 SCC 126.

24 hours of recording the statement. The Court said that there was no justifiable reason to disbelieve the evidence of a number of witnesses who rushed to the scene of the crime. Their evidence does not suffer from any infirmity which would render the dying declaration doubtful or unworthy of being relied upon.

While discussing the impact of the defective investigation on criminal prosecution, the Supreme Court said that the lapse on the part of the Investigating Officer should not be taken in favour of the accused. The rationale is that such lapse is committed designedly or because of negligence to scuttle the case of the prosecution and benefit the accused. Hence, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. In the present case, the evidence does not suffer from any infirmity which would render the dying declaration doubtful or unworthy. The Court further said that the medical evidence also corroborates the prosecution version. Hence, the Supreme Court affirmed the conviction of the appellant for the offence of murder notwithstanding the defect in recording the dying declaration as per the law.

3. REITERATING THE PRINCIPLE IN SUBSEQUENT CASES

In *Amar Singh v. Balwinder Singh*[11], which was a case of murder and attempt to murder by the use of firearms, the High Court had acquitted the accused persons. One of the grounds of acquittal was the defect in an investigation by the Investigative Officer in not sending the firearms and empties to the forensic laboratory for forensic examination. However, the Supreme Court took the view that it would have been better for the police to send it to the forensic laboratory. However, not sending it would not be fatal to the case of the prosecution in the light of the fact that the guilt of the accused was proved by the presence of eyewitnesses to the scene of the crime who were also injured parties. The Court said that even if the firearms and empties were sent to the forensic laboratory, it would have been in the nature of an expert opinion of the ballistic expert and the same is not conclusive. The Court said that when the case of the prosecution is fully established by the direct testimony of the eyewitnesses to the crime which is also corroborated by the medical evidence available on record, the defect of not sending the firearms to the forensic laboratory would not have much impact on the case. As a consequence,

[11] AIR 2003 SC 1164.

the Supreme Court convicted the accused persons setting aside their acquittal. The same principle was reiterated in a 2002 case of *Allarakha K. Mansuri v. State of Gujarat*[12] wherein the Supreme Court held that defective investigation by itself cannot be a ground for acquittal of the accused.

Amar Singh's case was further followed in *Ram Bali v. State of Uttar Pradesh*[13] case where the appellant sought to challenge his conviction before the Supreme Court on the ground of defect in the investigation in not sending the gun to a forensic laboratory for forensic examination. Repealing the contention and following the principles laid down in earlier cases, the Supreme Court held that in cases of defective investigation, the Court should be circumspect in evaluating the evidence available but it would not be correct in acquitting the accused on the ground of defective investigation as it would amount to playing into the hands of the investigative officer and that too when the guilt of the accused is proved by other evidence available on record. *Ram Bali* was a case of murder by firearms due to prior enmity between the appellant and the deceased.

The principle got re-affirmed in a 2010 judgment of the Supreme Court in *C. Muniappan and Ors. v. State of Tamil Nadu*[14], where there were some allegations of irregularity in preparing the inquest report by the Investigative Officer (IO) and the appellant sought to challenge his conviction on the ground of those irregularities. Negating the contention of the appellant, the Supreme Court said that the occurrence of the incident (burning alive of school-going girls in a Bus) was so ugly and awful that IO came under great anxiety and tension while preparing the inquest report and hence the irregularities have crept in. The Apex Court noted that at times the investigations are done under such charged atmosphere that IO and his team may come under great stress and anxiety and such defects in the investigation may inadvertently occur. However, that may not be a ground to acquit the accused. On the facts of the case, the Court noted that the occurrence of an event of burning alive the three school-going girls in bus was so ugly and awful that investigation was conducted under great stress by the IO. The seizure memos were also prepared in such a state of affairs. Therefore, when the investigation had been conducted in such a charged atmosphere, some irregularities were bound to occur. Realizing the gravity of the

[12] (2002) 3 SCC 57.
[13] AIR 2004 SC 2329.
[14] (2010) 3 SCC (Cri) 1402.

matter, the State of Tamil Nadu had transferred the case to CBCID (Criminal Investigation Department). Therefore, the earlier investigation done by three IOs in the case and the consequent irregularities had little or no relevance in the fresh investigation done by CBCID. The evidence collected by the IOs was, therefore, not relied upon by the CBCID.

On the question of defective investigation, The Apex Court in *C. Muniappan's* case laid down the following principle in Para 44 of the case. The Court said:

> "*There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the I.O. and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation*."

In a recent case of 2021 titled *Saroj Bhola v. State of NCT of Delhi*[15], the Delhi High Court, while dealing with the defective investigation done by the police in the dowry death case, held that it is a well-settled principle of law that where there has been negligence on the part of the investigating agencies or omissions either negligently or with a design to favour the accused, then it becomes the obligation of the Court to ensure that proper investigation is carried out and the justice is done. The High Court reiterated the principle that:

[15] 2021 SCC Online Del 1497, decided on 05-04-2021.

"*Courts must not close its eyes to the fact that it is the victim who knocks the doors of the Court and seeks justice must not left high and dry with the feeling that the accused have escaped due to the perfunctory/faulty/defective investigation*."[16]

The instant case was a case of dowry death wherein the FIR was filed by the police by an inordinate delay of ten months. There was no explanation as to why FIR was registered after ten months of the incident. Further, the High Court noted the glaring defect in the various stages of investigation as it was conducted in a very shoddy manner. The High Court observed that the entire investigation was oriented/directed in a manner to file a closure report in favour of the accused. Reiterating the principle that in such circumstances the Court will not remain a mute spectator, the judgment of the lower court acquitting the accused persons were set aside and the police were directed to conduct a fresh investigation with a different investigating officer (IO).

4. CONCLUDING REMARKS

As seen in this paper, in cases of defective investigation of crimes by the police or any investigative authorities, which could either be inadvertent or may be deliberately designed to shield the accused, it is the bounden responsibility of the court, as guardian of the rights of the people and as an upholder of the justice, to analyze and independently appreciate other evidence available on record to decide the culpability or innocence of the accused and not to leave the administration of justice at the whims and fancies of the investigative authorities. Otherwise, the delivery of justice will be at the mercy of the investigative authorities. In a plethora of judicial rulings discussed in this paper, the Supreme Court has laid down the principle that defective investigation will not of itself be a ground for acquittal of the accused. The Court has categorically held that if defective and poor investigations are done deliberately to defeat or thwart the case of the prosecution, the court will not remain a silent spectator to the injustice being meted out to the victims of crimes. The investigative agencies, by conducting a defective and biased investigation, cannot hold the entire criminal justice administration to ransom and defeat the rule of law which is the foundation of our Constitution. In the appropriate cases, the court will intervene and fulfill its constitutional obligations of ensuring justice to the victims of crimes by punishing the offenders. The court will do this by ignoring the defective aspect of the

[16] Available at https://www.scconline.com/blog/post/tag/defective-investigation/ (Date of Access 29/12/2021).

investigation and relying on other evidence available on record to determine the question of guilty or otherwise of the accused. The court, as the fountain of justice, will intervene to uphold the justice element.

Journal of Global Research & Analysis
(A Multi-Disciplinary Peer-Reviewed Research Journal)
Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

CHILD MARRIAGE LAWS IN INDIA: A CHASM BETWEEN INADEQUATE LAWS AND ERADICATION OF CHILD MARRIAGE

DR. NARENDRA KUMAR BISHNOI*

ABSTRACT

Marriage is a social institution that unionizes two individuals. However, at times, two children are forcefully led down this path by their parents or relatives. At an age, when children should be acquiring knowledge, making friends, and weaving dreams for their future, they are pushed down the path of wedding bells and non-consented togetherness. In India, a couple of legislations have been enacted to deter citizens from participating in this social evil. As to their effectiveness in realizing the objective, there is not much to say. Recently, Government has proposed to increase the marriageable age of men too from 18 to 21. Although it is a welcome change, it will be too early to say if this Bill will result in the eradication of child marriage from the country.

1. INTRODUCTION

In 2019, UNICEF Report highlighted that child marriages have been on the decline in India since the 2000s.[1] However, it is still home to more than 223 million child brides. Overall, the country accounts for around a third of all child marriages worldwide. Even the National Crime Records Bureau data paints a rather grim picture. It calls attention to the fact that over 785 cases were reported under the Prohibition of Child Marriage Act in 2020, against 523 cases in 2019.[2]

These figures confirm the pervasiveness of the social ill of child marriage in India while pointing out only a few of the dangers associated with it. The causes of child marriages may well be connected to a tangled web of religious traditions, social customs, economic considerations, and deeply entrenched prejudices. It is a socially destructive practice that needs to be eliminated from the Indian culture before it closes its claws on innocent boys and girls any further. Some of the primary reasons for child marriage can be poverty, insecurity of parents to miss out on the

* Assistant Professor, Faculty of Law, University of Delhi.
[1] Shireen J Jejeebhoy, "Ending Child Marriage In India, Drivers and Strategies" 13 (UNICEF, 2019).
[2] Government of India, "Crime in India 2020- Statistics Volume I" 6 & 326 (Ministry of Home Affairs, 2021).

opportunity of getting their young daughters wedded when the time is ripe, lack of education and awareness, improper implementation of the existing laws towards curbing the incidences. Apart from being a social evil, it also accounts for a gruesome form of child abuse. Many females succumb to death following teenage pregnancies, give stillbirths, or become plagued by life-threatening health issues in the prime of their life. The most distressing part that often gets overlooked is that child marriage deprives young boys and girls of a fair opportunity to attain education and aspire for a better life.

2. MAPPING THE EXISTENCE OF CHILD MARRIAGE IN INDIA

The tradition of child marriage can be traced back to medieval period in the country. Conquest, uncertainty, and a variety of other political and social forces often compelled families to arrange the marriage of their children while they were still in the bassinet. As a consequence of this uncertainty and tradition, marrying off the children before they attained maturity became acceptable and regarded as a social norm.

For the first time in history, someone spoke out against this tradition in the nineteenth century. Rukhmabai went on to become the first woman to practice medicine in India. She, too, had to go through the ordeal of being a child bride. Under the impact of social demands, she was betrothed by her family at the age of 11 to a guy named Dadaji Bhikaji aged 19. Due to prevailing norms, she did not immediately move and live with her spouse after their marriage. Her education, on the other hand, was rigorously pursued under the continual supervision and encouragement of her stepfather, Dr. Sakharam Arjun.

She was a lot more mature and understanding with the passage of time. She continued staying away from her husband which was unacceptable in society at that time. In 1885, her husband filed a petition against her for restitution of conjugal rights after the completion of 12 years of their wedding. Justice Robert presided over the case. Rukhmabai's position was that she was too young to consent to the marriage at the time. There were no court precedents to help the judge decide the case because it was the first of its type. Given Rukhmabai's standpoint in this case, that she was a kid at the time of the wedding, the court first ruled in her favour, noting that she

could not be coerced. However, the case[3] was brought to trial yet again in 1886. It was around this phase that society began to voice its opinion. The verdict was criticized by several Hindus as being in violation of Hindu ceremonies and norms. Others, though, were in favour of the move. In 1887, Rukhmabai was forced to reside with her spouse or face six months in prison. She told the court that she was certain she would not go live with her husband under any circumstances and that she was willing to go to jail if necessary. Rukhmabai subsequently wrote to Queen Victoria after several hearings. The Queen backed Rukhmabai's position and overturned the court's decision. The lawsuit was finally resolved without the court's intervention in 1888, when Rukhmabai's spouse, agreed to dissolve their marriage for a sum of two thousand rupees.

Another case that brought calamitousness of child marriage to the fore was Phulmonee's death. She was just an 11-year-old female child bride wedded to a 35-year-old man. Phulmonee, the sufferer in this case, died as a result of copulation with her husband. Her vaginal rupture caused a haemorrhage leading to her death. This happened because of her husband had forced her for sexual intercourse. The Calcutta High Court did not accuse her spouse of rape since Phulmonee was well over the legal age of consent.[4]

These incidents, along with a number of written works by some of the time's reformers, sparked the introduction of the Age of Consent Act in 1891. A draft memorandum was also delivered to the government by lady doctors, requesting that necessary legislation be enacted to curb child marriage. A total of 1500 women signed a petition to the Queen, asking for similar measures. A committee was set up to look into the matter, and soon after the recommendations were made, the Government implemented the Age of Consent Bill, which rose the age of consent for sexual intercourse from 10 to 12 years for both unmarried and married girls. This was a significant development at the time. The Joshi Committee examined the issue of child marriage in India more thoroughly in 1925, and the Child Marriage Restraint Act of 1929 (hereinafter CMRA) was enacted after a lot of pressure from reformers who wanted a specific law on the subject.

The CMRA failed to fulfill the goal for which it was enacted, and child marriages remained unchecked and unrestrained. The practice was socially sanctioned at the time to ensure its continuation. Some 70-80 years lapsed with hardly any change in the legislation having a

[3] *Dadaji Bhikaji* v. *Rukhmabai*, ILR 10 Bom 301.
[4] *Queen-Empress* v. *Hurree Mohun Mythee*, (1891) ILR 18 Cal 49.

minuscule effect on the status of these marriages. On the other hand, the country's population continued to grow, making it difficult to enforce the law with unregistered births of children across the length and breadth of India. The passing of the Prohibition of Child Marriage Act, 2006 (hereinafter PCMA) was a significant step forward since it brought about the sought-after changes. Child marriages are now voidable at the minor child's request. This meant that girls who had been married as minors might now petition the court to have their marriages annulled. However, child marriages continue to receive recognition and support from society. Despite the enactment of the law in 2006, this social menace persists in India.

3. THE PCMA: KEY PROVISIONS & CRITICAL ANALYSIS

3.1. Key Provisions

The PCMA was attuned to the needs of the existing times. Some of the salient features of the Act are discussed as follows:

- Contracting party/parties in a marriage who had not attained majority when they got married can have their marriage be declared voidable as per their discretion. The CMRA ruled that these marriages were completely lawful and that there was no provision for annulment. The PCMA did not take a leap of faith by declaring such marriage null and void. However, it did provide the contracting parties with the option to have their marriage be nullified if they had been married as a minor.
- CMRA did not have any specific provision in place that could ensure the maintenance and custody of those children that are born from the marriage between a minor and an adult or two minors. However, this lacuna has been addressed under PCMA.
- If a marriage that took place under the aforementioned circumstances gets annulled, the man or the parents of the boy, who is below the age of 18 years during the annulment period, must provide maintenance to the minor until she remarries.
- Under the Act, District Courts have the authority to alter, add to, or cancel any order that concerns the maintenance or domicile issue where the petitioner is a female. Not only that but this authority of District Courts also extends to the matters concerning maintenance and custody of the children that are born to the party/parties of child marriages.

- PCMA has explicitly stated that the children born out of marriages happening under the aforementioned circumstances shall be considered legitimate. Hence, the annulment of the marriage of the child's parents shall not affect his/her legitimacy.
- If a male who has attained majority becomes a contracting party to a marriage where the bride is a minor, he shall be imprisoned for up to 2 years or made liable to pay fine for up to Rs. 1 Lakh, or both.
- In several instances, child marriages have been pronounced null and void. According to Section 12[5], these situations include when a youngster is seized or seduced out of the custody of his or her legitimate guardian, or when a minor is sold with the purpose of making him a contracting party to a marriage and others.
- Under the Act, judges have the authority to impose injunctions in the instances where marriage taking place between two contracting parties fulfills the criteria of child marriage. However, like the CMRA, the courts must provide the defendant with a reasonable opportunity of being heard before issuing an injunction against him. The Act consists of a supplementary provision for an interim injunction that the court can impose in extreme situations or cases of emergency.
- PCMA has declared the offences to be cognizable. Not only that but these offences have also been categorized as non-bailable.
- The penalty has been increased to a maximum sentence of two years in prison and a fine of Rs. one lakh, or both.
- State Governments have the responsibility to oversee the appointment of Child Marriage Prohibition Officers (hereinafter CMPO) and to take measures for the effective implementation of the Act.

3.2. Critical Analysis of the PCMA

The PMCA is a stark departure from CMRA, 1929. However, it is ridden with several loopholes and drawbacks that need to be addressed for its effective implementation. Some of these shortcomings are discussed as follows:

[5] The Prohibition of Child Marriage Act, 2006.

- *The Act declares child marriage to be voidable instead of void*-Given the fact that child marriage is legal under personal law, religious institutions must adhere to the strict guidelines set forth in the PCMA, which allows child marriages to be annulled at the child's desire. Child marriages are only voidable if a motion for annulment is made in district court, and they are only voidable if the minor is taken away without guardian's consent, in conditions of force, fraud, or trafficking, or in defiance of an injunction. The notion that the Act does not inherently declare child marriages null and void, but rather renders them voidable voluntarily, is troubling.
- *The Act holds the child responsible to establish the onus of proof in order to challenge the validity of the marriage*-According to the Act, only the child bride/groom can file a motion to annul their marriage. If the petitioner is not an adult under the PCMA (female below the age of 18, man below the age of 21), the petition can only be presented by a guardian or a close friend/acquaintance with the assistance of the PCMO (who must be 18 or beyond).

  Making justice accessible to the children in an afore-mentioned manner may seem ideal on paper, however, it could be impractical in reality. It is because many families oppose or threaten their children to discourage them from filing the petition and at times, husband or in-laws, resort to violence or retaliation if the child decides to report them for child marriage. Even if these circumstances do not transpire, children may very well fear the consequences that would ensue upon filing the petition in the Court. In several cases, guardians and parents themselves orchestrate child marriages and expecting them to help out the child with the petition is sheer foolhardiness. This issue needs to be looked into and resolved at the earliest.
- *The Act holds the parent/caregiver as a criminal without looking into the circumstances that resulted in child marriage*- The fact that the Act criminalises individuals who perform child marriages, mainly parents or carers, without examining the myriad reasons for child marriage, which could include economic disparity, limited educational prospects, concern for their daughters' safety, and so on, is contentious. Several non-governmental organisations (hereinafter NGOs), on the other hand, have suggested that government workers who fail to report such marriages within their jurisdiction should

face disciplinary action. This should be taken into account more severely than criminalising families who are susceptible to societal pressure and expectation.

- *This Act creates a lot of conflicts owing to its inconsistencies with personal laws*-Where several of the personal laws allow for child marriages, PCMA strives to ban it altogether. In a country like India, where different communities rely on their personal laws for the matters such as marriage, maintenance, and others, banning child marriages without consideration for instances where personal laws are given precedence, is bound to result in a flurry of lawsuits.
- *The Act does not mandate registration of child marriages*-Registration of child marriages has not been made compulsory under the PCMA. Due to this, innumerable child marriages go unreported and undocumented. Absence of such a hard and fast rule allows perpetrator/culprits of child marriages to escape unscathed. Even the Apex Court pronounced that compulsory registration of child marriage across all the states in India would a positive step towards the objective of eradicating child marriage.[6]

4. THE PROHIBITION OF CHILD MARRIAGE (AMENDMENT) BILL, 2021: AN OVERVIEW

The Prohibition of Child Marriage (Amendment) Bill (hereinafter Bill) was introduced in the Lok Sabha on the 20th of December in the year 2021. The principal goal of this law is to raise the legal marriage age for females in India from 18 to 21 years old, which is currently at 18. The basis for this modification is the implementation of the Constitutional mandate of gender equality, which is important given that the legal marriage age for males in India is twenty-one years.

The following significant revisions have been made to the PCMA since its inception:

- According to Section 2 of the CMAB, a child is defined as any male or female who has not attained the age of 21 years, notwithstanding any legislation or customary practice that is in conflict with this amendment.

[6] *Smt. Seema* v. *Ashwani Kumar,* AIR 2006 SC 1158.

- Changing the order of the words Section 3(3) of the PCMA, which deals with a child filing a petition for the annulment of child marriage, replaces the previous two-year period with a five-year period. Following the passage of this amendment, a kid may file such a petition only if he or she has not reached the age of majority for five years.
- The addition of Section 14A to the Act indicates that these proposed modifications will take precedence over any existing laws or practices that may be in conflict with the amendments in the event that they are implemented.
- Other personal and marriage laws, such as the Hindu Marriage Act 1955, the Hindu Minority and Guardianship Act 1956, and the Foreign Marriage Act 1969, as well as the Indian Christian Marriage Act 1872, the Parsi Marriage and Divorce Act 1936, the Muslim Personal Law (Shariat) Application Act 1937, and the Special Marriage Act 1954, will be amended in accordance with the new provisions.

4.1. Legislative Intent Behind the Law

Smriti Iran, the Incumbent Union Minister for Women and Child Development, proposed this Bill, asserting that it will be applicable to all castes and religions in the country. In and of itself, this Bill maintains the values of the fundamental right to equality[7] by ensuring that the marriage age for both male and female citizens remain at 21 years old. After marriage, women will have more time to pursue educational and vocational opportunities because they will have more free time to pursue education or engage in work-related activities, which are typical benefits that are denied to a huge number of women before marriage. In such cases, men become the sole breadwinners of the family, and their wives are compelled to rely on their husbands' earnings for financial support.

As noted in the Policy Brief published by the Centre for Law and Research, the stipulations of the current law place an encumbrance on the child's ability to annul the child marriage within a specified time period. Furthermore, when a kid seeks an annulment, he or she typically encounters a number of roadblocks, including a lack of parental support, cultural pressure, the danger of violence, and financial restraints. Children are frequently deterred from contacting NGOs or Child Marriage Prohibition Authorities due to a lack of information about their rights.

[7] The Constitution of India, art. 14.

It also has a negative impact on the schooling and professional development of these young women. Child marriages also result in the sexual abuse of children and the birth of children too soon, posing major health hazards to both the mother and the child. According to the National Family Health Survey (hereinafter NFHS) conducted in 2016, the under-five mortality rate among mothers who gave birth before the age of 20 years was 59.2 percent. In the year 2021 alone, government officials have intervened in more than 5584 cases of child marriage. Respected former judges M.B. Lokur and Deepak Gupta have observed that child weddings in India are unlawful but not void, which they believe is unusual.

4.2. Recent Judicial Developments Concerning Child Marriage

On 26th April 2017, the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 was approved, rendering child marriages null and void in law. This was the culmination of state-level initiatives, which included a particular proposal of the Justice Shivaraj Patil Committee (2011), which was established to assess the state of child marriage in Karnataka.

Child marriage is recognised as lawful under the PCMA but is "voidable" at the minor contracting party's request.[8] Recognizing child marriage as 'voidable' entails all of the repercussions of a legitimate marriage, including conjugal access, and perpetuates the practice's impunity. The reality is that few women exercise their right to petition the court for a judgment of nullity to annul their marriage once it has been consummated. Additionally, courts have been hesitant to declare child marriage void unless the facts of the case definitely fall within the parameters specified in Section 12 of the Act[9]. This aversion to discussing "voidability" pervades the entire legislative and policy discourse on child marriage.

This legislation was lauded by the 2017 Supreme Court judgment, *Independent Thought* v. *Union of India*[10], which was also relied on by the Centre to modify the PCMA to increase the marriage age of women from 18 to 21. However, it made key observations about the statute not declaring child marriages 'void' but 'voidable'. Both justices wrote separate but concurring opinions in which they stated that the PCMA "requires significant review" to ensure its "effective implementation" as a disincentive to "avoid or minimise child marriages. "When it read down

[8] *Supra* note 5, s. 3.
[9] *Supra* note 5, s.12.
[10] (2017) 10 SCC 800.

Exception 2 of Section 375 (rape) of the Indian Penal Code, the court conveyed its thoughts on the PCMA's flaws. A man cannot be prosecuted for rape if he has sexual relations with a girl between the ages of 15 and 18 if she is his wife. According to the 2017 rape law verdict[11], it is now legal to have non-consensual sexual relations with a wife who is under the age of 18. On the PCMA, the court observed: "Ironically, despite the fact that child marriages are solely voidable, Parliament has criminalised child marriage and imposed penalties for contracting a child marriage."

The Punjab and Haryana High Court's division bench has held that a marriage contracted with a juvenile girl is legally valid if the child does not declare it void upon reaching the age of 18. The Court determined that such a marriage is voidable, not void. It would become lawful if the 'kid' did not take efforts to declare the marriage null and void upon reaching the majority, the High Court declared. *Yogesh Kumar* v. *Priya*[12] was a case involving a couple who married in February 2009 and petitioned the High Court to set aside a family court verdict in Ludhiana. By mutual accord, the couple had petitioned the Ludhiana court for a divorce. The Punjab and Haryana High Court relied on a 2012 Delhi High Court decision[13] in which a girl married a boy with whom she had eloped. The Delhi High Court had previously declared that a marriage committed with a bride under the age of 18 or a bridegroom under the age of 21 was not void, but voidable, and would become valid if no efforts were made to declare the marriage void. Accordingly, the Punjab and Haryana High Court decided that the couple's petition for divorce by mutual consent should have been granted on the basis that their marriage was legal in all material respects. The Bench then granted divorce to the parties.

The Ludhiana court had dismissed their divorce petition on the grounds that their marriage was invalid because the wife was under the age of 18 at the time of the marriage in 2009. The High Court Bench of Justices Ritu Bahri and Arun Monga concluded that the Ludhiana Court erred in dismissing the petition because the wife had turned 18 in 2010 and the couple continued to live together till August 2017.

5. DRAWBACKS IN THE 2021 BILL

[11] *Ibid.*
[12] FAO-855-2021.
[13] *Lajja Devi* v. *State*, 2012 (4) R.C.R. (Civil) 821.

There are some negative aspects of this Bill that cannot be ignored or overlooked. Due to the fact that this Bill possesses overriding characteristics, it will fully negate the provisions of the different personal and marriage laws that pertain to the legal age of marriage. The Hindu Marriage Act, 1955, for example, specifies that the marriageable age for girls is 18 years and for males, it is 21 years under Section 5(iii). The Bill would negate this specific clause and dictate that both males and females must be at least 21 years old before they can marry. When taking a deeper look at the overall picture, it can be seen that this Bill is another step forward for the Bharatiya Janta Party (hereinafter BJP) on the road to achieving the Uniform Civil Code (hereinafter UCC)[14]

While the notion of UCC is laudable, as uniformity in legal standards can lead to faster trials and greater clarity in the law, its adoption in India may counter a few hurdles due to the country's immense diversity as well as its long history of traditions. Ram Madhav, a member of the Rashtriya Swayamsevak Sangh national executive, told the Print that the UCC is beneficial to the country and that there are a variety of opinions on whether it is necessary.[15] Contrary to this, according to the Law Commission's 2018 study[16] on the viability of UCC and reform of family law, which was proposed by the BJP in 2016, discriminatory personal laws may be repealed or altered, but UCC in India is neither essential nor desirable at this point in time. However, it is pertinent to note that law is dynamic in nature. Even if the need for UCC does not feel desirable or necessary at the given point in time, its value will be acknowledged only when it is adopted as people will realize that its benefits outweigh any legal ramifications it may have.

It cannot be denied that such reforms in personal laws could have major legal ramifications and cause widespread unrest as a result of a conflict between the legitimacy of the pre-existing personal laws and the validity of the newly formed uniform law that has been established.

The subject of Muslim Personal Law is the most crucial one to consider. It is extremely difficult to achieve harmony between the new amendment and the terms of this law when it comes to the

[14] Dr. Renu Singh, "Amendment to Child Marriage Act could usher in social change", *The Times of India*, December 27, 2021, *available at <https://timesofindia.indiatimes.com/blogs/voices/amendment-to-child-marriage-act-could-usher-in-social-change/>*(last visited on December 29, 2021).
[15] Madhuparna Das, "Why raising marriage age of women is another step towards BJP's pet goal of uniform civil code", *The Print*, December 24, 2021, *available at* https://theprint.in/india/governance/why-raising-marriage-age-of-women-is-another-step-towards-bjps-pet-goal-of-uniform-civil-code/786878/ (last visited on December 29, 2021).
[16] Law Commission of India, "Consultation Paper on Reform of Family Law" (August 31, 2018).

marriage age because Muslim law specifies that a girl can be married once she reaches puberty, which makes establishing harmony impossible. This age is typically considered to be 15 years old. Since Islamic personal law is a codification of Islamic law, the extent to which legislative and judicial authorities have authority over divine or religious rules is a legitimate subject to consider. However, while the Supreme Court has ruled that all personal laws must adhere to the principles and rules of the Constitution, other High Courts have expressed differing views on the subject.

That there were no revisions to the legislation regarding child marriage is the most noteworthy aspect of this legislation. The Bill does not contain any provisions that would render child marriages void under the law. Child marriage is voidable at the request of the underage party to the marriage within two years after gaining adulthood, according to current legal standards, as stated in Section 3(1).[17]

5.1. Factual Analysis of The Bill

A cursory examination of Bill's statement of objects and reasons demonstrates unequivocally that this Bill is a convenient way for the Government to avoid situations where girls are deprived of their rights to pursue higher education, become financially independent and other by allowing them a chance to marry on their own accord. The immediate Bill's objectives and justifications are as follows:

> *"The Constitution protects gender equality as a component of fundamental rights and also prohibits discrimination on the basis of sexual orientation. Existing regulations fall short of ensuring gender equality in marriageable age between men and women, as required by the Constitution. Women frequently face disadvantages in higher education, vocational training, acquisition of psychological maturity and skillsets, and so forth. Entering the labour force and becoming self-sufficient prior to girls marrying is crucial."*

The lingering issue with the Bill is that at the present moment it fails to elaborate how raising the marriage age would address the pervasive problem of gender discrimination in our culture. For instance, when it comes to higher education, the primary, if not the only, reason parents do not

[17] *Supra* note 5, s. 3.

provide it to their daughters is poverty.[18] The other cause is illiteracy, which is closely followed by fear of insecurity. Implementing sufficient safety measures is critical in a country where a girl is raped every 15 minutes.[19] Similarly, only education can address the issue of gender bias. Until the current biases and taboos associated with our society's patriarchal structure are addressed by education and awareness campaigns, families will continue to deny women the possibility of "joining the labour force and contributing to the workforce."

It may be felt that the constitutional imperative violated by this Bill is the freedom of adult women to marry off of their own accord. The Supreme Court declared in *Ashok Kumar Todi* v. *Kiswhwar Jahan*[20] that where a boy and a girl marry on their own volition and are of legal age, and the marriage is officially registered with the notified body, police officers have no participation in their conjugal affairs, and law enforcement officials have no right to meddle with their marital lives; in fact, they are obligated to prevent others from interfering.

People do not realize that women marry before turning 21 because they are deprived of the opportunities to pursue a career upon graduating from school due to narrow mindedness of their parents or lack of financial means. Sometimes, parents themselves are responsible for instilling the importance of marriage in their minds since they are 7-8 years old. These disadvantages exacerbate women's reliance on men. There are also compelling reasons to reduce maternal and infant mortality rates, as well as to improve nutrition levels and the sex ratio at birth, as these measures would promote opportunities for responsible parenthood for both father and mother, equipping them to provide better care for their children. It is also critical to reduce the prevalence of teenage pregnancies, which are detrimental to women's overall health and result in an increased number of miscarriages and stillbirths.

Along with rising the marriageable age, the government should also prioritise education for women and knowledge of gender equality among males. Poverty and illiteracy continue to be the primary drivers of underage marriages, female foeticide, dowry deaths, and other issues of

[18] Naveli Sharma, *The Prohibition Of Child Marriage Amendment Bill, 2021: A Critical Analysis*, Legal Service India, *available at* <https://www.legalserviceindia.com/legal/article-7496-the-prohibition-of-child-marriage-amendment-bill-2021-a-critical-analysis.html> (last visited on December 29, 2021).
[19] Madeeha Mujawar, "National Crime Records: One woman raped every 15 minutes in India", *CNBC TV18*, October 23, 2019, *available at* <https://www.cnbctv18.com/economy/national-crime-recordsone-woman-raped-every-15-minutes-in-india-4579141.htm> (last visited on December 29, 2021).
[20] 2011 (3) SCC 758.

gender inequality. What the women of this country require is for the government to adopt welfare schemes and policies such as Kishori Shakti Yojana and Sabala that focus on teenage girls' nutrition, health and development, skill development, and vocational opportunities.

Discrimination against women also obstructs the achievement of sustainable development goals and violates the principles enshrined in the Convention on the Elimination of All Forms of Discrimination against Women, to which India is a party. It is critical to address gender inequality and discrimination and to put in place necessary measures to ensure the health, welfare, and empowerment of our women and girls, as well as to ensure that they have the same status and opportunities as men.

It is widely accepted that the age of marriageability for both men and women is 18. Even the Convention on the Elimination of All Forms of Discrimination against Women establishes 18-year-old as the marriageable age. However, circumstances are different in India. The discrimination against women that this Bill seeks to remedy will be solved to a large extent by raising the marriage age.

Thus, establishing a minimum legal age for marriage may not deter child marriages completely. However, it can be reduced significantly. Moreover, its positive impact can be doubled by expanding women's access to free and obligatory education and employment prospects.

5.2. Steps to Respect Women's Agency

There are numerous examples of families exploiting laws to simply cancel weddings between different castes or religions. The laws exploited in this manner include requesting nullification under the PCMA, falsely alleging kidnapping and rape under the Protection of Children from Sexual Offences Act 2012, and the Indian Penal Code 1860. The current Bill will also be vulnerable to similar patterns of abuse by parents and family members who are dissatisfied with their daughter's relationship or choice of partner.

However, the Bill appears to be a genuine attempt to solve significant concerns such as gender discrimination, underage marriages, female foeticide, maternal mortality, and women's safety. To resolve these challenges on a large scale, the government must take proactive measures to

develop women-centered welfare programs, offer easy access to education, and raise social awareness about the evils of patriarchy, which are deeply ingrained in our society.

6. CONCLUSION

When it comes to women's empowerment, the desired progressive purpose of this Bill is reflected in the primary rationale for the creation of the same. Although this modification to raise the marriageable age to 21 years may seem extremely beneficial in theory only, because it allows for better educational opportunities for women as well as improved nutrition levels, it will have a major influence on society in practice.

Women who are most likely to gain from higher education and professional prospects are those who come from well-off families that encourage them to pursue their goals. Women from rural areas or low castes, on the other hand, would be less likely to be able to take advantage of this benefit because of a lack of awareness about their rights and a lack of legal or family support.

Awareness-raising activities, particularly in rural areas, are required if a significant change is to be achieved. As a result, apart from focusing on legislation to promote true women empowerment, the emphasis should also be placed on stricter enforcement of laws because structural changes within the society are urgently required.

Additionally, the problem with the previous law was not so much in the content, as in its implementation. On the face of it, it seems like the proposed Bill seeks to improve on its predecessor in this regard. As discussed above, data indicates that the law has not been completely successful in eradicating the social evil of child marriage. Considering all, the Bill may not be the effective solution to the eradication of India’s child marriage problem if it lacks in the arena of proper implementation. Hence, effective implementation of this Bill once it becomes the law should be Government’s primary objective for it to bring about real and significant changes.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

FUNDAMENTAL RIGHTS & DYNAMICS OF STATE

DR. SEEMA SINGH*

ABSTRACT

The entire freedom struggle of colonial India was primarily for the Fundamental Rights which are guaranteed by the nature. In post-independent India, the constituent assembly gave prime importance to these rights which were put in part III in the form of Fundamental Rights. These Rights are guaranteed against the State, but in the era of globalization and neo-liberalization being the part of the global world and World Trade Organization India has changed its economic policies in 1991 and moved towards privatization, disinvestment, and public-private partnership. This diluted the concept of State as it is defined under article 12 and further explained by the judiciary. In this paper the author is trying to explore the possible solution to this problem of inevitable privatization where most of the public functions are going to be performed by the private players and the state is shrinking its responsibility only as a regulator. This paper is an attempt to ignite the mind of the judiciary and lawmakers regarding the protection of fundamental rights against a private entity. In this paper, the author has also discussed the effect of technological globalization and suggested some ideas to protect the fundamental rights of users against big tech giants.

1. INTRODUCTION

In the Indian constitution, fundamental rights are guaranteed against the State. These rights are basically natural rights and not the gift of the State. These natural rights have been acknowledged by different laws and conventions across the globe. Though they are natural rights, in most civilizations, they have not been respected by the authorities in power being king, dictator, or duly elected government. As Atkin says "Power corrupts and absolute power corrupts absolutely", so it is very much required to protect these fundamental rights against the power of the State. For this purpose, different mechanisms have been evolved in almost all the civilized nations in the form of constitutional, statutory, or judicial remedies.

* Assistant Professor, Campus Law Centre, University of Delhi.

In the constitutional scheme of most of the democratic countries, State plays the role of protector and provider both. But the faculty of the State does not deny the probability of being a violator of the same rights. So, in the entire discussion of ‘‘Rights & State”, the definition of State becomes very significant. In the entire history of human civilization, the idea of State has been discussed, though the definition kept changing in changing times and circumstances. ‘State’ as a term can be perceived differently in political science and law but their overlapping and bonding cannot be overlooked. For all time ‘State’ is a comparatively settled territory where residents have formed an association with the purpose of establishing peace, law, and order. In political science, State is a political organization of society. In different societies, the definition of State was evolved according to their own societal dynamics. That’s why we can see some distinctions between the ‘Idea of State’ of Bharat and West.

2. THE IDEA OF STATE

2.1. Theories of Origin of State & Western Philosophy

The idea of State in the western world can be traced back to the theories of **Plato and Aristotle**. The political theories of both philosophers are closely tied to their ethical theories. According to this theory, small States in Greece originated from natural divisions like mountains, rivers, sea or on the basis of ethnic or cult division. The city-states were self-sufficient and were perceived by Aristotle as the means of developing morality among the individuals in the community[1].

The modern concept of State emerged in the 16th Century in the theories of Machiavelli and Bodin[2]. Term ‘State’ in the modern system was firstly used by Machiaveli, in his book “The Prince”, which was published in 1523[3]. Machiavelli’s concept of state was centered around the importance of the durability of government[4]. It arrogated moral considerations and focused completely on the strength of the ruler. However, Bodin believes that power alone is not

[1] Ancient Ethical Theory, *available at*: https://plato.stanford.edu/entries/ethics-ancient/ Ancient Ethical Theory, First published Tue Aug 3, 2004; substantive revision Fri Feb 5, 2021 (last visited on June 05, 2021).
[2] *Available at*: https://www.britannica.com/topic/state-sovereign-political-entity (last visited on June 05, 2021).
[3] *Available at*: https://digital.library.unt.edu/ark:/67531/metadc663699/m2/1/high_res_d/1002773351-Hunt.pdf (last visited on June 05, 2021).
[4] POWER AND STATENICCOLO MACHIAVELLI (1469-1527), *available at*: https://archive.mu.ac.in/myweb_test/TYBA%20study%20material/Politicals%20Sci.%20-%20V.pdf POWER AND STATENICCOLO MACHIAVELLI (1469-1527) (last visited on June 05, 2021).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

sufficient to create a sovereign, but rules must be complied with morality to be long lasting, and need to be continuous[5].

Later on, "social contract" was picked up in a good pace to establish the definition of State. According to Locke, 'the state' in itself is a social contract between individuals whereby they agree not to infringe on each other's "natural rights" to life, liberty, and property, in exchange for which each man secures his own "sphere of liberty[6]."

Rousseau's theory was a deviation from his predecessor whose theory revolved around the monarchy. Rousseau recognized the State as the environment for the moral development of humanity. He proposed that the state owed its authority to the general will of the people. According to him, the nation is sovereign, and the law is the will of the people[7].

In the development of the concept of State next was Hegel, who believed that the state was the highest form of social existence. According to him- "Legitimacy of the state comes from upholding common morals rather than the particular interest of the individuals in a society"[8]. He believed in the power of national aspiration. He says that "Every man is subordinate to the state and if a state claims one's life, he must surrender it"[9]. This differed from his predecessor Immanuel Kant, who proposed the establishment of a league of nations to end conflict and to establish a "perpetual peace[10]."

In the 19th century, Jeremy Bentham proposed a new idea of State. He considered the State as "An artificial means of producing a unity of interest and a device for maintaining stability"[11]. As

[5] DEMOCRACY: ITS PRINCIPLES AND ACHIEVEMENT, *available at*: http://archive.ipu.org/pdf/publications/democracy_pr_e.pdf DEMOCRACY: ITS PRINCIPLES AND ACHIEVEMENT ((last visited on June 05, 2021).
[6] *Available at*: https://www.britannica.com/topic/state-sovereign-political-entity (last visited on June 05, 2021).
[7] *Available at*: https://plato.stanford.edu/entries/rousseau/ Jean Jacques Rousseau, First published Mon Sep 27, 2010; substantive revision Fri May 26, 2017 (last visited on June 05, 2021).
[8] *Available at*: https://iep.utm.edu/hegelsoc/ Hegel: Social and Political Thought (last visited on June 05, 2021.
[9] WHAT IS A STATE?, *available at:* https://www.ilms.academy/blog/what-is-the-defination-of-a-state-legally What is the definition of a State? (last visited on Feb.16,2019).
[10] 5 Things to Know About the League of Nations, *available at:* https://time.com/5507628/league-of-nations-history-legacy (last visited on June 15, 2021).
[11] *Available at*: https://www.britannica.com/topic/state-sovereign-political-entity/Hegel (last visited on June 15, 2021).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

per him, the role of the state was to ensure more happiness and lack of pain in the individuals. This theory is known as the utilitarian theory[12].

In later times Karl Marx gave a very restrictive meaning of State. According to him- a state is nothing but an "apparatus of oppression", which is operated by the stronger class to ensure economic supremacy over the weaker class. He saw the state as the product of the class struggle between "haves" and "haves not[13]".

Later on, Hans Kelsen came up with the theory which defined the State as simply a centralized legal order, with no more sovereign than the individual, in that it cannot be defined only by its own existence and experience. It must be seen in the context of its interaction with the rest of the world[14].

In modern times, though the concept of the welfare state is universally accepted, the definition of State is gradually changing. The state has a broad and restricted definition. Government is just a part of the State but State in itself is much broader in its definition. States enjoy perpetuity but Governments keep changing. The meaning of 'State' comprised of a defined or "sovereign" territory with a population and also includes legislature, executive, bureaucracy, courts, and other institutions to ensure rule of law. State also has the authority to levy taxes and keep military and police forces to defend its citizens and territories. The state has control over all resources and it keeps distributing and re-distributing the same. As per legal dictionary, in broad terms, a State can be defined as **"Groups of people which have acquired international recognition as an independent country and which have a population, and a defined and distinct territory[15]."**

2.2. Theories of Origin of State in Ancient India

The three theories of the origin of the state in ancient India are as follows: 1. Social Contract Theory 2. Divine Origin Theory 3. Organic Theory.

[12] *Available at*: https://iep.utm.edu/util-a-r/ Act and Rule Utilitarianism (last visited on June 15, 2021).
[13] *Available at*: https://www.ilms.academy/blog/what-is-the-defination-of-a-state-legally (last visited on June 15, 2021).
[14] Kelsen Lives Alexander Somek, European Journal of International Law, Volume 18, Issue 3, June 2007, Pages 409–451, https://doi.org/10.1093/ejil/chm028 Published: 01 June 2007 *available at:* https://academic.oup.com/ejil/article/18/3/409/363595 (last visited on June 17, 2021).
[15] *Available at*: https://www.britannica.com/topic/state-sovereign-political-entity (last visited on June 17, 2021).

The core issues of Bhartiya political science are the study of the origin, nature aim, and functions of the State. In ancient India, the main duty of the State was to ensure peace, prosperity, order, and happiness. It was a social organization with centralized political power. Origin of State was the beginning of the dawn of civilization. There is a lack of unanimity among scholars about the origin of the State in ancient India. A good number of scholars believe that there was a golden age in ancient Bharat where people were duty centric and used to enjoy a life of happiness, peace, and self-discipline.

Ancient Vedic text Aitreya Brahmana provides the earliest record of the origin of State and Kingship. According to this text State gradually evolved after the establishment of kingship[16].

The following is a brief explanation of each theory:

1. Social Contract Theory[17]:

The social contract theory is one of the most celebrated and common theories about the origin of the State. According to this theory, State is a result of a contract between the king and his subjects. In this contract, the king is expected to save the state and the subjects from external aggression and internal disturbance and also to ensure order and security within the state. Though in earlies Vedic period there was no belief in Social Contract Theory, instead king used to be elected to wage a successful war against the demons.

2. Divine Origin Theory[18]:

According to 'Divine Origin Theory', the king was subordinate to law, which was made by society on ethical norms. The governance was community-driven and the king was not the center of all powers. King was the father of his subjects and was supposed to act in a non-discriminatory manner, with utmost affection and kindness.

According to Manusamhita origin of the State is divine. According to one excerpt from Manusamhita- 'the Lord created the king for the protection of his whole creation … even an

[16] Theories of Origin of State in Ancient India, *available at:* https://www.yourarticlelibrary.com/political-science/3-theories-of-origin-of-state-in-ancient-india/40149/ 3 (last visited on June 17, 2021).
[17] *Available at*: https://www.iilsindia.com/blogs/social-contract-theory-origin-state/ (last visited on June 17, 2021).
[18] *Available at*: https://www.politicalscienceview.com/divine-theory-of-origin-of-state/ (last visited on June 21, 2021).

infant king must not be despised (from an idea) that he is only a mortal, because he is a great deity in human form'[19].

It was also stated in Manusamhita that "When the world was not without a king and dispersed in fear in all directions, the Lord created a king for the protection of all. And because he's formed of fragments of all those gods, the king surpasses all other beings in splendor[20]".

'Ramayana', the great epic of India, also laid down that king was of the divine origin. This theory believes that men approached the creator- Brahma to provide them a king with divine qualities. Then all Gods spared a portion of their power in a human being who became the king. Thus, this theory believes in divinity and the special abilities of the king[21].

Like Ramayana, Mahabharata, another great epic, also believes in the superior talent and caliber of the king on the earth. Similarly, Puranas also describe the divine origin of the king and the state. The Agni Purana states that the kings were embodiments or forms of Lord Vishnu (the God who sustains the earth)[22]. It is also interesting to note that some kings had titles like Chakravarthi— universal emperor, while some of the Mauryan emperors conferred titles like Devanam Priya, beloved of Gods, upon them[23].

3. Organic Theory:

This theory holds the view that state is like an organism and that each organ has a specific function to perform. The theory believes that the healthy functioning of the whole organism depends upon the healthy conditions of each part of the body or organism and its efficient functioning[24].

[19] *Available at*: https://www.hinduwebsite.com/sacredscripts/hinduism/dharma/manusmriti_2.asp(last visited on June 21, 2021).
[20] *Available at*: https://www.yourarticlelibrary.com/political-science/3-theories-of-origin-of-state-in-ancient-india/40149(last visited on June 21, 2021).
[21] Ibid.
[22] *Available at*: https://www.newworldencyclopedia.org/entry/Vishnu(last visited on June 21, 2021).
[23] Theme Two- Kings, Farmers and Towns, *available at:* https://ncert.nic.in/textbook/pdf/lehs102.pdf/ (last visited on June 21, 2021).
[24] *Available at*: http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000829IC/P001771/M027444/ET/1519189771P10M03-TheoriesofState-ET.pdf (last visited on June 21, 2021).

The seven parts of the body of state are -1. the king or the sovereign, 2. the minister 3. the territory and population 4. the fortified city or the capital 5. the treasury 6. the army 7. the friends and the allies. Among all the seven elements or parts, it is the king who is most important[25].

According to Matsya Purana, the king was the root and the subjects were the trees, while, Sukra Neetisaara, compares the state with that of the human body. According to Sukracharya- "The king is the head, the ministers the eyes, the treasurer the mouth, the army the heart, the fort the hands, and the territory the feet". Mahabharata also supports this theory and believes that every element or limbs are important for the proper functioning of the state[26].

According to modern International Law, the definition of the state is- "An independent legal entity occupying a defined territory, the members are which are united together for the purpose of resisting external force and preserving internal order"[27].

Thus, on the basis of the abovementioned discussions, it is clear that from ancient to modern times welfare of people and the protection of territories against external aggression or internal disturbance was the prime responsibility of the State.

3. STATE AND INDIAN CONSTITUTION

As an independent, democratic country term "India" in itself confines a deep sense of constructive meaning and responsibility. According to the definition of political science, India that is Bharat shall be a Union of States[28] and for the purpose of part III and IV, the definition of State is prescribed under Article 12 of the Indian Constitution. Part III of the Indian Constitution deals with fundamental rights and part IV deals with the Directive Principle of State Policy. The position of Article 12 in the Constitution of India is quite unique. Part III deals with fundamental rights but instead of defining rights, it defines State first. The unique position of the definition of State is self-explanatory in two ways. First, it proves that these rights are available against the

[25] THE SAPTANGA THEORY: ELEMENTS OF STATE, *available at:* https://www.iilsindia.com/study-material/516108_1606765387.pdf/ (last visited on June 21, 2021).
[26] *Available at*: http://www.casirj.com/article_pdf?id=8440.pdf/ INTERNATIONAL RESEARCH JOURNAL OF COMMERCE, ARTS AND SCIENCE / Shri Param Hans Education & Research Foundation Trust ISSN 2319 – 9202(last visited on June 21, 2021).
[27] *Available at*: https://thelawbrigade.com/tax-laws/economic-justice/Economic Justice/By Journal Of Legal Studies And Research Last Updated Mar 14, 2019/By Shree Krishna Singh(last visited on June 21, 2021).
[28] Article 1 of the Indian Constitution.

state and second it is the responsibility of the state to protect these rights. Just because of this article we can claim our fundamental and constitutional rights against State or its instrumentality, before the Supreme Court of India or the High Court of any State. The statement of the Article, as enshrined in the Constitution, goes as follows:

"Definition in this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

Thus, under Article 12, the definition of State is illustrative and includes Central government and Parliament and State Government and State Legislature. The meaning of both can be easily understood. The difficulty arises in defining the meaning of local and other authorities. In both categories term 'authority' is common. According to Webster's Dictionary; "Authority" means- "A person or body exercising power to command. When read under Article 12, the word authority means the power to make laws (or orders, regulations, bye-laws, notification etc.) that have the force of law. It also includes the power to enforce those laws."

"Local Authority" is defined under section 3(31) of the General Clauses Act, 1897. According to this definition-

"Local Authority shall mean a municipal committee, district board, body of commissioner or other authority legally entitled to or entrusted by the Government within the control or management of a municipal or local fund."

In the case of **Mohammad Yasin v. Town Area Committee**[29]**,** the Supreme Court further clarified the meaning of 'local authority.' Local authorities also have the power to raise funds for

[29] AIR 1952 SC 115. According to Supreme Court Local authority has the following characteristics-1. Have a separate legal existence as a corporate body. 2. Not be a mere government agency but must be legally an independent entity. 3. Function in a defined area. 4. Be wholly or partly, directly or indirectly, elected by the inhabitants of the area. 5. Enjoy a certain degree of autonomy (complete or partial).6. Be entrusted by statute with such governmental functions and duties as are usually entrusted to locally (like health, education, water, town planning, markets, transportation, etc.)".

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

the furtherance of its activities and fulfillment of its objectives by levying taxes, rates, charges, or fees[30].

3.1. Other Authorities?

As we have seen earlier the term 'Local Authority' is defined under the General Clauses Act, 1897, but the term "Other Authorities" are not defined anywhere. Some courts applied the principle of "ejusdem generis" and no distinction was made between State maintained and State-aided or private institutions[31]. Later it was held that the expression includes constitutional and statutory authorities[32] and a distinction was made between authorities constituted by an Act and those constituted under an Act of the Legislature.[33] An earlier restrictive interpretation was given to the term, 'other authority' which received more clear and broader interpretation in the case of **R.D Shetty v. International Airport Authority of India.**[34] In this case, Justice P.N Bhagwati propounded 5 Point test to determine whether a particular body is an agency or instrumentality of the state or not and it goes as follows –

1. "Financial resources of the State, where State is the chief funding source i.e. the entire share capital is held by the government.
2. Deep and pervasive control of the State.
3. The functional character is Governmental in its essence, meaning thereby that its functions have public importance or are of a governmental character.
4. A department of Government transferred to a corporation.
5. Enjoys "monopoly status" which State conferred or is protected by it".

This was also elucidated by the Supreme Court that the Five Point Test is only illustrative and not conclusive in its nature and should be further expanded with great care and caution.

[30] *Available at*: https://blog.ipleaders.in/state-article-12-constitution-india/(last visited on July 01, 2021).
[31] *University of Madras v. Shanta Bai* (A.I.R.1954 Mad.67).
[32] *Ujjambai v. State of U.P*. (1963)1 S.C.C. 778.
[33] *Sabhajit Tewary v. Union of India* (A.I.R.1975 S.C.1329).
[34] AIR 1979 SC 1628.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Relying on these tests Supreme Court in many judgments declared companies registered under the Companies Act, 1956[35] or societies registered under the Societies Registration Act,1860[36], as the instrumentality of State and thus "other authority" under Article 12.

3.2. Liberalization of Economy and State

In post-independent India, the approach of the constitution was in the favor of the welfare-socialist state and it can be easily understood from the Preamble and Directive Principles of State Policy. Perhaps constituent assemble never thought about the free economic model. The role of a welfare state was not limited to health, education, or housing but it strives for securing social, economic, and political justice as enshrined in the Preamble of the Indian Constitution and similarly placed under Article 38 (1) of the Indian Constitution which says- "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may social order in which justice, social, economic and political, shall inform all the institutions of the national life."

Effectively, the idea of justice is inter-spread among different provisions of the Indian Constitution, especially in DPSPs. The purpose of these provisions is to minimize inequality in all respect by State efforts. Though these directives are not enforceable by the court but the principles are fundamental for governance and can't be ignored by any government in the welfare State[37].

Since the adoption of the New Economic Policy (NEP)in the year 1991, after being a member of the World Trade Organization India started opening up its market by removing and relaxing Tariff and Non-Tariff Barriers and thus started moving towards privatization and disinvestment. As we are aware that for the successful implementation of FRs and DPSPs state control and regulation are important, but under the NEP state started losing its grip over the economy. Slowly private sectors started growing and disinvestment, PPP Model, private finance initiatives and contractual activities started rising. Government/s started selling their stakes in many PSUs

[35] AIR 1981 SC 212.
[36] *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* (2002)5SCC111 & *State of U.P. v. Radhey Shyam Rai* 2009(3) SCALE 754.
[37] KLE Law Journal 90 PRIVATIZATION AND PUBLIC WELFARE: CONSTITUTIONAL IMPERATIVES DR. P. Puneeth, *available at*: http://docs.manupatra.in/newsline/articles/Upload/82667634-4CA1-4467-9A0C-01A3BF3661B9.pdf (last visited on June 21, 2021).

and other government companies. After considerable disinvestment, such companies lost control of the government and thus lost the status of government instrumentalities and State. In this second phase of liberalization which is also known as neo-liberalization redistribution capacity of the State is limiting. So, this is a unique paradox of modern liberalization where institutions are talking about institutional democracy but not implementing the same in economic affairs.

Although in this new world order, where every country is competing with the rest of the world in terms of GDP growth this NEP is a necessary evil and cannot be considered unconstitutional per se, but in touching the pre-condition of free economy India is bound to move for more privatization and foreign direct investment which is resulting into compromise with DPSPs and narrowing down the scope of term State.

Realizing the present-day problem Justice V. R. Krisna Iyer, expressed his concerns over such affair of State and said[38]:

"We have a new democracy run from afar be strong capitalist proprietors influencing the political process and humoring the glitterati and wining parties Right, Left and Centre through a monoculture of globalization, liberalization, marketization, and privatization plus anti-socialism … Herein lies the contradiction between the Constitution and the elections held under the Constitution."

In this context, Prof. Upendra Baxi also observed at several places that, DPSPs are imperative and cannot be compromised without changing the text of Articles 38, 39 or 43A[39].

In reality, these raised concerns of all these legal luminaries are not baseless. It is a reality that increasing privatization is creating new kinds of challenges. In this new liberalization, the scheme State is distancing itself from different commercial activities and focusing primarily on governance. For most of the commercial activities, State is just a regulator. But in reality, this neo-liberalization is adversely affecting the interest of the citizens. An employee in private employment cannot claim any fundamental right against his employer and thus is bound to be

[38] V.R.Krishna Iyer, *Rhetoric Versus Reality: Essays on Human Rights, Justice, Democratic Values* 51 (2004).
[39] KLE Law Journal 90 PRIVATIZATION AND PUBLIC WELFARE: CONSTITUTIONAL IMPERATIVES DR. P. Puneeth, http://docs.manupatra.in/newsline/articles/Upload/82667634-4CA1-4467-9A0C-01A3BF3661B9.pdf(last visited on June 21, 2021).

exploited without appropriate remedy. This shows the dilution of the concept of State and defeats the purpose of part three up to a greater extent.

3.3. Protections against State in the Constitutional Scheme

As we know that under the constitutional scheme the most important part of the Indian constitution is the 'Right to Constitutional Remedies' which is prescribed under Article 32. This right comes with certain restrictions and pre-conditions and the two most important among them are- the violator should be State and the right which has been violated should be the fundamental right. As the rights are available against the State it is always in the interest of the petitioner to prove that the violator is State. So here it becomes pertinent to discuss what those benefits are which can be claimed against the State. The first benefit is the protection of Articles 14[40] and 16[41]. Both prohibit employer to exercise their powers arbitrarily and protects the constitutional right of an employee of equal opportunity guaranteed in the constitution. These rights cannot be claimed against the private employer. Another benefit that an employee receives against the state employer is such state instrumentalities come under the discipline of administrative law. Such authorities or employers also come under the writ jurisdiction of the Supreme court and High court and they cannot ask the petitioner to exhaust his alternative remedy first. So, in this way access to remedy becomes much quicker and easier and the probability of protection of fundamental rights rises manifold.

4. NEW APPROACH OF JUDICIARY, LAW COMMISSION, AND FEW LANDMARK CASES

Privatization has made a private employer or service provider much more powerful in terms of bargaining and in a way given them a license to play with the fundamental rights of their employees. Such violations primarily include the right to retrenchment, the right to deny equality or equal opportunity to employees. In many such cases of disinvestment, the affected parties moved to the Supreme court for the protection of their fundamental right to life which was under threat due to forced retirement or retrenchment but rejected by the Supreme Court many times in

[40] Article 14 - Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
[41] Article 16 - Equality of opportunity in matters of public employment.

the name of the prerogative of government over economic policy issues, such in the case of BALCO[42].

So, in these changing circumstances, where the fundamental rights of the citizens are under threat due to privatization, the role of the Supreme court, who is the protector of fundamental rights becomes extremely crucial. Globalization and privatization in this present-day world cannot be restricted by any means but as the savior of the constitution honorable Supreme court is bound to evolve some new approaches to protect the fundamental rights of the citizens. In this regard citing certain judgments is imperative.

4.1. Cricket Control Board of India (BCCI) Case

First, an important case related to BCCI was Zee Telefilms Ltd. v. Union of India[43]. BCCI is one of the riches Cricket boards in the world. BCCI is a registered society under Tamil Nadu Societies Registration Act. It is a non-profit making organization. BCCI is creating Team India which participates in different International Cricket tournaments. Win and Loss of this team are considered as win and loss of India. Once BCCI invited bidding to sell telecasting rights for five years. Zee Telefilm was the highest bidder so a contract was given to Zee and Zee also transferred the initial token amount to the bank account of BCCI. But subsequently, without mentioning proper reason BCCI cancelled this contract and then Zee telefilm filed a writ petition before the SC to issue a writ of mandamus to BCCI.

In this case, BCCI opposed the petition on the ground that BCCI is not a state, so the writ petition is not maintainable. In the support of its arguments, BCCI put the key ground of being an independent non-profit making registered society, which is not receiving any funds from the government and working independently without any control of the government. The monopoly of BCCI over cricket is not State conferred nor it is created by BCCI. BCCI organizes international cricket tournaments as part of the International Cricket Council.

After listening to arguments from both the parties and applying the cumulative effect theory evolved by SC in International Airport Authority Case, SC held that BCCI is not a State. While deciding this matter SC also showed its concern that if BCCI is declared as State 64 other sports

[42] AIR 2002 S.C.350.
[43] (2005) 4 SCC 649.

federations will also have to be declared as State. Thus, the judiciary will be over flooded from such cases. Hence SC directed the petitioner to approach HC under Article 226 to seek appropriate remedy.

After a few years, another case brought BCCI into the limelight and that was the case of match-fixing. In the case of BCCI v Cricket Association of Bihar[44], honorable SC showed its special interest in the cleaning of BCCI and constituted a committee under the chairmanship of Justice Lodha. This committee was constituted to investigate the allegation of corruption in BCCI and to suggest possible reforms in Cricket governance in India. The committee was also asked to submit its report to Honorable Supreme Court.

In this case, the honorable Supreme Court opined that as the BCCI is taking tax exemptions to form the government over its income and also receiving land to build a stadium to promote Cricket, BCCI may be declared as State but refrained itself from declaring the same. In this case, the Supreme Court ruled that BCCI was not amenable to writ in infringement of fundamental rights under Article 32, but the jurisdiction of Article 226 could be successfully applied. Through this judgment, SC clearly indicated that the limitless and massive powers, which are held by BCCI in the field of cricket and the function which is performed by them is primarily a public function.

The Law Commission of India, which works as an advisory body to the Ministry of Law & Justice, in its 275th report also suggested the Government treat BCCI as an agency of the state under Article 12 of the Indian Constitution. Commission further added that – 'BCCI controls the policy formulation and implementation related to cricket, affecting the country at large, which commission believes to be a state function[45].

Moreover, in October 2018, the Central Information Commission, the top appellate body in RTI matters, went through the law, orders of the Supreme Court and the recommendations of Law Commission of India report, submissions of the Central Public Information Officer in the Ministry of Youth Affairs and Sports and concluded that- "the status, nature and functional characteristics of the BCCI requires fulfillment of the conditions of Section 2(h) of the RTI Act

[44] (2015) 3 SCC 251.
[45] *Available at*: https://www.scconline.com/blog/post/2018/05/02/law-commissions-275th-report-on-legal-framework-bcci-vis-a-vis-right-to-information-act-2005/ (last visited on June 21, 2021).

2005[46]. Section 2(h) of the Act defines criteria under which a body can be declared as public authority under the RTI Act[47]. As per this Section- "Public authority includes anybody or institution controlled or substantially financed, either directly or indirectly by the Government". CIC order says- "Though there is no direct financial assistance to BCCI by the Central Government, it has been granting concessions in Income tax, customs, etc. to BCCI. Even land is provided at highly discounted rates or nominal value by the Centre and State for the construction of cricket stadiums. These concessions amount to thousands of crores of rupees. This qualifies as indirect funding by the Government. Given all these reasons, one may infer that the BCCI carries out public functions and also receives governmental exemptions"[48].

4.2. Jatya Pal Singh v. Union of India[49]

In this case, the engineers and technical staff were originally working in the Department of Overseas Communications, which was the department of the Government of India. Later it was converted into Videsh Sanchar Nigam Ltd. (VSNL) and the government divested a portion of its shareholding in VSNL and it became a Tata Communications Ltd. a Tata group company. Earlier there was a condition that the employees would not be retrenched, but subsequently, 20 managers were terminated. These terminated employees moved to the Delhi and Bombay high courts against this action, but both the high courts rejected their petitions as the company was no longer a state enterprise. Their appeals were dismissed by the Supreme Court also which stated that they could seek redress through ordinary forums like the industrial courts.

In this case, the Supreme Court ruled that- "Tata Communications, the successor of VSNL, was providing commercial service for profit considerations and it is not performing public functions". Therefore, employees who were terminated cannot move high courts through writ petitions, the court said while upholding the judgments of the Bombay and Delhi high courts. So, this is the case where the ill effect of disinvestment can be easily seen. Here due to retrenchment, several employees lost their jobs and thus their Right to Life faced a severe setback. SC as a protector of fundamental rights needs to evolve some mechanism to protect the same.

[46] Definition of Public Authority under RTI Act, 2005.
[47] Smt. Geeta Rani v. CPIO, M/o Youth Affairs & Sports, CIC/ MOYAS/A/2018/123236. https://indiankanoon.org/doc/144876151/ (last visited on June 21, 2021)
[48] *Available at*: https://cic.gov.in/sites/default/files/Tanya%20Singh.pdf (last visited on July 11, 2021).
[49] (2013) 6SCC 452.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

4.3. Social Media / Internet Service Providers Cases

Presently so many cases are pending against private entities who are basically performing public functions. In every such case, the issue is related to the maintainability of the petition. More recent ones are the cases against social media platforms like Facebook, Twitter, and WhatsApp. Though they all are social media platforms they are gathering a huge amount of personal data of the users which is directly related to their right to privacy. Facebook and Twitter are also controlling the right to freedom of speech and expression of the users by flagging their messages or blocking their accounts. They do not have any clear policy but they are constantly violating the law of the land in India. But, in all these cases which have been filed against these social media platforms, they are raising the issue of maintainability of the writ petition as they claim that is a private entity they do not come under the purview of writ jurisdiction of SC and H.Cs.

Now the most relevant question is such social networking sites, which are collecting valuable personal data of millions of Indians can shed off their responsibility on the ground that they are not state? And if so then what about the fundamental right to privacy which was declared by SC in the case of Justice K. S. Puttaswamy v. Union of India[50]. In the recent case of Karamanya Singh Sareen v. Union of India & Another[51] Delhi High Court has given an unprecedented decision where the petition filed against Facebook was rejected on the want of jurisdiction, but at the same time, partial relief was granted to the petitioner. Currently, matter is pending before the SC. The case first came up in the Delhi High Court over privacy concerns with a WhatsApp data sharing with Facebook, which had acquired the messaging app. The HC questioned the effectiveness of the consent given by WhatsApp users while signing up for the services. Although the court highlighted the lack of a data privacy policy and commented on the need for a comprehensive law on the subject, it finally took a 'take-it-or-leave-it' approach on the matter. However, the court directed WhatsApp not to share any data collected before September 25, 2016, the date the data sharing policy came into force.

This case shows another challenge for the judiciary in the era of technological globalization, where SC declared the Right to Privacy as a fundamental right but still there is no corresponding legislation dealing with the right to privacy. In absentia of law, these giant tech companies are

[50] (2017) 10 SCC 1.
[51] W.P.(C) 7663/2016 & C.M.No.31553/2016 (directions).

openly flaunting norms in the name of private entities. Besides this in this era of technology-driven society Internet Service Providers (ISPs) or social networking sites and OTT platforms are creating a new challenge before Articles 19 (1)(a), 19(1)(g), and the restrictions of Article 19(2). Now, in this era of 'Internet Economy', where citizens can utilize the service offered by an ISP, and exercise their fundamental right to freedom of trade, such ISPs are always in the position to restrict someone's trade right and thus can effectively regulate a citizen's fundamental right to practice any trade or profession. Seeing the gravity of the matter it is imperative to review the decision of the Delhi High Court.

Therefore, the phrase 'other authorities' should be liberally interpreted to include private Internet Service Providers and social networking sites within its ambit. This is necessary in order to prevent Internet Service Providers and social media sites from violating the fundamental rights of the citizens.

4.4. Dr. Janet Jeyapaul v. SRM University [52]

The appellant, Dr. Janet Jeyapaul, was a Senior Lecturer in the Department of Biotechnology at SRM University (respondent), which is a deemed university. A series of memos and counter-replies were in motion as the respondents alleged that the appellant had failed to take classes for two batches. Later on, the respondent constituted an Enquiry Committee that communicated that the action was based on several complaints made against her by her students. However, the appellant was not given a reference to any of those documents or complaints. She was subsequently received notice of removal.

To challenge this notice she filed a writ petition before Madras High Court under Article 226 before a Single Judge, where the high court quashed the termination notice and directed the employer to reinstate her. Then University filed a letter patent appeal before a Division Bench. The division bench reversed the order citing the reason that the respondent was not a State under Article 12, and thus could not be subject to writ jurisdiction under Article 226.

The present case before the Supreme Court was a Special Leave Petition against the decision of the Division bench that viewed the University to not be a State for the purpose of Article 12. Honorable court appointed Mr. Harish Salve, as amicus curie to assist the court. As the matter

[52] AIR 2016 SC 73.

involved a legal question Mr. Salve opined through his submission, that the first test to decide maintainability under Article 226 is the object of the institution and the activities it performs in furtherance of that object. Not only the statutory body or instrumentality of State but anybody performing public function should be the key factor to decide maintainability under Article 226.

It was highlighted that the phrase "any person or authority" under Article 226 was broad enough to encompass any person or a body performing a public function or a duty. The emphasis would thus lay on the nature of duty performed by that authority and not its form per se. Here the university is imparting education which is a public function and is Deemed University under sec. 3 of the UGC Act. Thus, when a private body exercises its public function, then the aggrieved party has remedy not only under ordinary law but also under Article 226.

The judgment also added that the term "authority" under Article 226 would have to be construed liberally as compared to the term under Article 12 as it entailed both fundamental and non-fundamental rights. This judgment is very instrumental in protecting the rights of those who are working in so-called private sectors but such sectors are imparting public functions.

4.5. Mr. Subhash Chandra Agarwal v. CPIO Supreme Court of India[53]

An RTI activist Shri. Subhash Chandra Agrawal, filed an RTI to the Chief Justice of India office to get a copy of the declaration of the High Court and Supreme Court judges in which they have made a declaration of their assets to the Chief Justice of India. The CPIO office of Chief Justice of India denied granting information on this ground that CJI's Office does not come under the purview of the Right to Information Act.

Against the order of CPIO, Subhash Chandra Agrawal filed an appeal before the office of the Chief Information Commissioner. CIC held that the office of CJI is a public authority, and thus comes under the purview of the Right to Information Act. Against the order of CIC, the CPIO office of CJI filed an appeal before the Delhi High Court. Delhi High Court upheld the order of CIC and reiterated that the office of CJI is a public office, so comes under the purview of the Right to Information Act. Now against this order of Delhi High Court, CPIO Office of SC filed an appeal before the Supreme Court of India.

[53] CIVIL APPEAL NO. 10044 OF 2010.

In this case, ultimately the Supreme Court has decided that the office of CJI is a public office and it comes under the purview of the Right to Information Act. Judgment was put on by justice Gogoi, as the Chief Justice of India who ultimately clarified that the office of CJI is covered under the Right to Information Act, 2005. In this case, Supreme Court has also clarified that- "Information not presently available to the public authority but which can be accessed by the same authority from a private body under any other law for the time being in force is also a public information." Thus, all such private organizations whose information can be accessed by some public authority would be covered under the Right to Information Act,2005.

Thus, such public authorities which come under the purview of RTI would be subject to writ jurisdiction of High Court/s under Article 226.

4.6. Venkatachaliah Committee Recommendation & Expansion of the term 'State'

The earlier NDA Government, then Prime Minister Shri. Atal Bihari Vajpayee Ji had appointed a commission in February 2000 under the chairmanship of Manepalli Narayana Rao Venkatachalaiah, to review the working of the Constitution. This commission is known as – "The National Commission to Review the Working of the Constitution (NCRWC)". This commission had to suggest possible amendments to the Constitution of India in this era of privatization and liberalization. In its 2000 pages report which was submitted on 31st March 2002, this commission proposed some changes in Articles 12 and stated that,

"In Article 12 of the Constitution, the following Explanation should be added:

Explanation – In this article, the expression 'other authorities' shall include any person in relation to such of its functions which are of a public nature".

This recommendation, though not complete in itself or fully analytical of the situation, was at least an attempt to further widen the import of the term "State" as envisaged in Article 12 of the Indian Constitution.

5. CONCLUSION

Now on the basis of the above discussions, it is clear that in the era of the Global world almost all the countries are facing almost the same kind of challenges to keep their economy and

development aligned with the rest of the developed world. To speed up the process of development and remove the hurdles of red-tapism public sectors are sieging in their size across the globe. Obviously, globalization has risen the standard of living and provided more opportunities but simultaneously rising power of capitalists and industrialists created more conflicts across the globe.

In any democratic set up it is the responsibility of the state to protect the weaker and redistribute prosperity and justice. But the erosion of the State can be easily seen in the form of a cut in public sector jobs and diversion of resources to private sectors.

This is disturbing the balance of power and making states less powerful and less responsible. A weak State can never keep the terms of a social contract. This is diluting the dream of fundamental rights of citizens. So, in such circumstances, a way out from this crisis is urgently required.

On the basis of the abovementioned judgments, it is very clear that judiciary has more ways to protect the rights of the citizens and they should try to establish more clarity over it. Thus, even though the definition of 'other authority' cannot be expanded the term "Public Authority" should be definitely redefined to include all those within its purview who are performing public functions, irrespective of their private nature. If it happens then many such private organizations may come under the purview of the Right to Information Act and thus under the purview of Article 226. This approach which has been recently adopted by the judiciary is also in conformity with the recommendations of the National Commission to Review the Working of the Constitution (NCRWC) under the Chairmanship of Justice Venkatachaliah.

Thus, if the Central Legislature is not in a mood to listen to the popular opinions, rather, it is gradually diminishing the space for the same, it is high time for the Supreme Court to come up with its solemn duty of protecting the Constitution by every means. Expanding the definition of State in the name of the public function is a welcoming step but more actions are expected from the judiciary to protect the fundamental rights of the citizens in this era of technological globalization.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

RIGHTS OF FOREST-DWELLING TRIBAL POPULATION AND CHALLENGES FACED BY THEM: A CRITICAL STUDY

DR. SONIA ANEJA*

ABSTRACT

For a long period of time, India's formal legal process did not recognize the conventional customary claim of indigenous people over forest land. Subsistence, religious, and cultural factors are the underlying reasons for the argument. The statements made by the indigenous people remained informal, which were not recognized in India by the formal state legal system. Until the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act was enacted in 2006, discriminating legal centralism prevailed in forest governance and policy. The Forest Rights Act, 2006 brought a paradigm change in the entire legal approach to indigenous people and recognized the rights of indigenous people. This article seeks to explain the importance of the legislation of the acceptance of pluralistic legal principles.

1. INTRODUCTION

1.1. Forests and Forest Dwellers

Post-and-present status of forests vis-à-vis forest dwellers: Nearly 370 million indigenous people live in about 90 countries worldwide. They are among the most oppressed groups in the world. Politically and socially, they are often segregated within the nations where they live by the geographical position of their families, their distinct backgrounds, cultures, languages, and customs. They are a large part of the world's poorest strata, and in many countries around the world, the poverty disparity between indigenous and non-indigenous groups is growing.[1] This impacts the quality of life of indigenous peoples and their right to health. According to the United Nations Indigenous People Report,[2] the working concept is as follows: indigenous cultures, peoples, and nations are those that, having a historical continuity with pre-invasion and

* Assistant Professor, Department of Law, University of Jammu.
[1] *N.D. Jayal & Anr. v. Union of India & Ors,* (2004) 9 SCC 362, 410.
[2] Www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/SOWIP_Health.pdf.

pre-colonial societies that have formed on their territories, consider themselves different from other sectors of societies prevailing over, or portions of, those territories. They are currently developing non-dominant sectors of society. They are determined to maintain, establish and transfer their ancestral territories and ethnic identity to future generations on the basis of their continued life as peoples, in accordance with their cultural patterns, social structures and legal framework.

1.2. Indian Position

Before Independence, the forests and the tribal people lived in harmony and shared an intimate relationship since their very existence. Forests have been the source of social and economic development of the inhabitants. They have served as a rich repository of biological diversity by continually supplying various products and ecosystem services. They have for times immemorial; formed the basis of livelihood for million so forest communities. Tribal individuals and their families have a historical association with their lands and are typically descendants of those lands' original settlers.[3] They have developed a conventional, holistic knowledge of their lands, natural resources, and environment over many centuries. Two main means of production, i.e., the forest and land, which are defined as twin pillars of the tribal economy, emphasize and build the entire tribal life process.[4]

It is said that the forest economy is the tribal economy and vice versa. Apart from this, animism. worship of flora and fauna has been an integrated part of the forest culture and is known to be the earliest form of religion. Therefore, a symbiotic and complementary relationship is witnessed between the tribal communities and the forest.[5] Since ancient times, they have been leading a simple life with minimal needs. The tribes in India have been diverse and varied. Even though distinct traditions and culture are prevalent among different tribes, the tribes can be attributed to the following basic common tenets[6]: Their immense association with the land they live on or the habitat they form part of. The strong tradition of 'community ownership and individual use'. The tribal people who dwell in the forests have always embraced forest treasure as a community

[3] Richard K. Wolf & Frank Heinemann, Guest Editor's Introduction, 73, Asian Ethnology, Special Issue: The Bison and The Horn: Indigeneity, Performance, And the State in South Asia & Beyond 1-18 (Nanzan University, 2014).
[4] *Available at:* http://shodhganga.inflibnet.ac.in/bitstream/10603/99445/4/th-1856-%20chapter%201.pdf.
[5] Jagannath Ambagudia, Tribal Rights, Dispossession and the State in Orissa, 33 EPW 60 (2010).
[6] Dr. Bhalchandra Mungekar, Third Report of the Standing Committee on Inter-Sectoral Issues Relating to Tribal Development on Standards of Administration and Governance in the Scheduled Areas, MOTA, GOI.

property resource. They had been enjoying the freedom to hunt and use the forest produce for their sustenance. But there has been no evidence of the destruction of forests by the poor people for fulfilling their basic requirements. Indian history is full of proofs regarding the sacrifices of local people in forest protection like the Chipko movement[7] and many other such examples where the local communities come forward with their interventions to protect wildlife.

2. POST-INDEPENDENCE SITUATION

The Scheduled Tribes are generally referred to as Adivasis in mainland India, which means indigenous peoples. 461 ethnic groups are known as Scheduled Tribes in India, and these are considered to be indigenous peoples of India. They constitute 8.2 percent of the total population with an approximate population of 84.3 million. However, there are several more ethnic groups that would apply for the status of ST but are not officially recognized. Estimates are as large as 635 of the total number of tribal groups. In the seven states of northeast India, and the so-called "central tribal belt" extending from Rajasthan to West Bengal, the largest concentrations of indigenous people are found.[8] The Jharkhand Movement, which was a tribal movement that achieved success in the year 2000, began in 1949. Like Nagaland, Meghalaya, Arunachal Pradesh and Mizoram, the Tribal States were established in the north-east. Tribal mobilization shows the new formation of Chhattisgarh, Telangana and the ongoing Bodo movement in Assam.

2.1. Post-Independence: Policies and Measures towards their Protection

2.1.1. National Initiatives

To curb this tendency and with the due realization of the importance of conservation, maintenance, and sustainability of forest culture and resources, various policies were framed giving the deserved weightage to the forest dwellers and tribal communities' involvement[9]. At the same time, it was also appreciated that unless these communities were made equal partners in

[7] *Available at:* edugreen.teri.res.in/explore/forestry/chipko.htm (Jan. 13, 2021, 6:00 PM).
[8] Diana Vinding and Cæcilie Mikkelsen, The Indigenous World2016, The International Work Group for Indigenous Affairs (IWGIA), 2016.
[9] *Available at:* National Human Rights Commission India (nhrc.nic.in).

the Sustainable Forest Management (SFM)[10], the goals could not be possibly achieved. Further, Constitutional provisions were framed to meet the objectives of sustaining the tribal culture and protecting their relationship with the forests. Constitutional Safeguards Various Constitutional provisions may deserve mention here: First and foremost, is the basic Fundamental Right of right to life under Article 21 of the Constitution, which has been widely interpreted to encompass all the facets of living a dignified life.[11] Article 39 of the Constitution, specifically directs the state to distribute ownership and control of the community's material resources for society's common good. Land reforms, thus, are contemplated under the Directive Principles. Article 48A, one of the Directive Principles, casts a duty on the state to take care of the environment and forest ecosystem. Article 38, of the Constitution, puts an obligation on the State to promote a social order wherein justice social, economic, and political are met to one and all. Furthermore, the Constitution provides that the State has special responsibility for the protection and advancement of tribal people, in particular with regard to the administration of planned areas and peace and good governance, in accordance with the fifth and sixth schedules of the Constitution.[12] post-independence, under the aegis of the Constituent Assembly, two sub-committees namely Thakkar Sub-Committee and Bardoloi sub-Committee were formed. This was the continuation of the de-regularization regime started in 1874, following the principle of 'particularization in tribal governance rather than generalization. The Thakkar Committee dealt with the Central Tribal Areas relating to excluded and partially excluded areas. This culminated in the Vth Schedule extending the governmental as well as social protection to tribal interests. Whereas, the Bardoloi Committee came up with a self-management module that took shape in the form of the VI Schedule. Various governmental efforts were witnessed by setting up committees and the publication of reports.[13] The Apex Court in *Samantha v. Arunachal Pradesh* ruled[14] all relevant clauses in the Schedule and the Regulations should be harmoniously and widely read to elongate the Constitutional objectives and dignity of the person to the Scheduled Tribes and ensure distributive justice as an integral scheme thereof. The Court noticed that agriculture is the only

[10] Sustainable Forest Management is not new to India and nowadays it is gaining immense significance for augmenting the forest conservation drive. India is working towards it and is a signatory to the "Objective 2000" of the ITTO.
[11] Olga Tellis & Ors. vs. Bombay Municipal Corporation & Ors., AIR 1986 SC 180.
[12] *Available at:* www.tribal.nic.in (Jan15, 2021, 12:00 PM).
[13] Report of the Scheduled Areas and Scheduled Tribes Commission, Government of India, GOI, 16, (2002-2004), http://www.tribal.nic.in/writereaddata/AnnualReport/BhuriaReportFinal.pdf.
[14] MANU/SC/1325/1997: (1997) 8 SCC 191.

source of livelihood for the Scheduled Tribes apart from collecting and selling minor forest produce to supplement their income. The land is their most important natural and valuable asset and imperishable endowment. The tribal derive their sustenance, social status, economic and social equality, permanent place of abode, work, and living. Consequently, tribes have great emotional attachments to their lands."

By Articles 341 and 342, of the Constitution, Presidential orders, namely, Constitution (Scheduled Tribes) Order, 1950 (for Part A and the Part B States) and Constitution (Scheduled Tribes) Part C States Order, 1951, were passed. Due to the emergence or formation of new States, these were modified and amended as per requirements. But the basis of its selection was objected to by various groups labelling it unscientific and devoid of uniformity. This was because these provisions do not outline any definite principles or eligibility criteria. Due to this dissatisfaction regarding the inclusion/exclusion of the tribes from the lists, ***Lokur Committee*** was set up under the Department of Social Security in 1965. This Committee addressed the drawback of lack of uniformity while scientifically examining the background of the tribes by assessing their social, educational, and economic conditions. The guidance was taken from the preambular objectives and the overall framework given under the Constitution.[15] Before we proceed, let us discuss the provisions that helped mark the contours of the considerations that needed to be accounted for. Article 46, of the Constitution, casts a duty on the state to specifically cater to the unique needs of the Scheduled Tribes protecting them from exploitation and making social justice accessible to them. Further, Article 15(4), of the Constitution, explicitly empowers the state to make special provisions for the Scheduled Tribes. Article 335, of the Constitution, provides for reservation in favour of the Scheduled Tribes in services and posts of the Government. The Constitution also provides for a Special officer who keeps a tap on the working of the safeguards meant for the tribal and setting up a Commission that has to report on the state of welfare of the tribes and points out the shortcomings in the welfare administration. Apart from this, one of the significant provisions is Article 275(1), of the Constitution, which ensures the financial flow for tribal development. It casts a duty on the Union to pay to the States as grant-in-aid, the necessary capital and recurring sums for achieving their set targets under

[15] Department of Social Security, The Report of The Advisory Committee on The Revision of Theists of Scheduled Castes and Scheduled Tribes, GOI, 1965. This Committee was chaired by Mr. B. N. Lokur. Appendix VII of the report gives a state-wise list of tribes that have been declared as scheduled. For details see http://hlc.tribal.nic.in/WriteReadData/userfiles/file/Lokur%20Committee%20Report.pdf.

various schemes for the tribal' welfare. A reading of these provisions provided the guidelines and considerations to be kept in mind while specifying any tribe as a Scheduled Tribe. Extreme social, economic, and educational backwardness was the priority criteria. Since 1931, the Government notified a formal set of lists on a varying basis like the primitiveness, backwardness, territorial seclusion, and social alienation. It has been challenging to define the term tribe, as no formal set of criteria has been possible due to India's transitional status.

2.1.2. Policy Measures

The first Forest Policy Resolution of independent India was passed in 1952. In fact, in the year 1942, Gandhiji had pointed out the 'welfare of the tribes' as one of the major issues in the 14-point reconstruction scheme. Rather, the first effort in independent India was put forth by Pandit Jawahar Lal. When he enunciated the five principles of tribal advancement, Nehru, namely, the Panchsheel, provided an ideological foundation.[16] It can also be termed as the first informal policy about the affairs of the tribal. Coming back to the 1952 policy, it was no better than the British's policy enunciated in 1894.TheDhebarCommissionsaid: Thus, through a deliberate process, the tribal who formerly considered himself as the lord of the forests became a subject and was placed under the Forest Department. Tribal Villages were no longer an essential part of the forests but merely suffered. The tribal's legal rights were no longer recognized as rights. They became "rights and privileges" in 1894, and they became "rights and concessions " in 1952. The policy stressed on sustained availability of forest products. Forests were seen as a significant source of increasing revenue. Simultaneously, studies and reports were at work, suggesting changes, and then came the concept of Tribal Sub-Plan emerged. This was introduced in the Fifth Plan Period, aiming at an integrated multi-sectoral approach towards identified beneficiaries. As a result of the gained momentum, in 1988 a National Forest Policy was framed, which marked a departure from the earlier policies. Apart from the tenets present in the previous guidelines, ecological conservation and the relationship between the forests and the tribal people were now the mainstream priorities Specifically concerning tribal rights, particular focus was turned to 'inclusive forest ecology Development by removing constraints such as middlemen and contractors, recognizing the needs of forest dwellers

[16] Dhebar Commission said about the 1894 Forest Policy: “This conception of regulating the rights and restricting the privileges affected the tribal people very deeply and was the root cause of the delicate relations between them and the Forest Department which continue to the present time.” Dhebar Commission was the first Scheduled Areas and Scheduled Tribes Commission set up under Article 339(1) of the Constitution.

sustenance fulfilled by the MFP, and making institutional arrangements for marketing the produce.[17] Further, in 1999, the birth of JFMmarked a significant step towards the fulfilment of the goals under the 1988 Forest Policy. It was to mobilizes mass movement for ecology conservation, especially with the involvement of women. This came up as a management strategy wherein the Government through the State Forest Department had to collaborate with the village community to protect and manage forest land. This envisaged a culture of appropriate utilization of the rural community's indigenous knowledge to be out to use for their benefit.[18] As per the 2015-16, Annual Report of the MoTA[19], under a PRAGATI initiative, the Act has been under review. Implementation of the Act has been taken up on campaign mode, wherein: - The Centre has pointed out to the State Governments that enactment of the Act is not up to mark and the progress under the Act is slow. - The Centre has issued specific guidelines based on which the State governments must draw up an action plan and set time-bound targets.

The Centre has asked the States that have been faring well concerning implementing the Act to address certain specific issues. The States and Centre's joint review meetings address various issues like implementation issues in worst affected LWE districts; high rejection rates; wrongly rejected claims; pending claims or delays, etc. are being held. Timelines for the completion of the pending activities within the next three months have been set. To support other pieces of evidence for claims and the re-examination of rejected claims, all states were advised to support geo-referenced images and technology. The use of technology for better implementation and a speedier claim verification process is being promoted. – The States have been asked to enlist the potential claimants and assess the possible area where the rights could be conferred and finally determine the same. A National Resource Centre at TRI Campus, Odisha, has been set up by the Government to conduct training programmers to train master trainers to better implement the States Act. – Translation of the text of the Act and the Rules in local vernacular is being taken up by various States so that the locals and beneficiaries of the Act can better understand and help themselves gain the legislation's benefits. – The Centre has recommended extensive training programmers, on a priority basis, for officials, Ward members, Gram Sabha members, Panchayat Secretaries, Forest Field Officials, Tribal Welfare and Land Administrative Departments and

[17] Ibid. at 267.
[18] Ibid at 284-287
[19] Ministry of Tribal Affairs, Annual Report 2015-2016, 51 – 55, (Jan. 16, 2021, 11:00 AM), http://tribal.nic.in/WriteReadData/CMS/Documents/201606060452201526687EnglishAR.pdf.

members of the Sub-Divisional Level Committee (SDLC) and District Level Committee (DLC), etc.

2.1.3. Legislative Initiatives

Today, the country's STs population is 10.45 crore as per Census 2011 constituting 8.6% of the country's total population, and this has been increasing since 1961.[20] In India, nearly 200,000 villages rely on forests and forest products for their livelihood. The supply of forest products and consequently, forest-dependent communities' livelihoods, change in biodiversity and associated products come from forests.[21]"India's tribes have been officially defined, since at least the 1960s, as having five key features: primitive traits, distinctive culture, geographical isolation. Increasing pressure for the supply of goods and services results in the country's forests' over-utilization. Despite, relatively stabilized forest cover and marginal improvement since the 1990s, the resource's quality remains a concern.[22] On 21 December 2015, Parliament passed the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Bill, which is a step towards protecting the interests of the tribal people. This law provides for stringent action against those involved in crimes against SCs and STs. Similarly, a land acquisition ordinance, which would have considerably weakened the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, has been sought to be dropped by the government.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (after this referred to as the Act) is significant legislation and a step forward in protecting the forest dwellers' interests and rehabilitation. Though its existence and coming into force has not been an easy task. There were various problems faced before the passing of the Act[23]:

The forest department and the timber mafia because of the fear of losing their control over the forest produce, tried hard to block the Act's passing. Corporates also served as significant impediments in the path of the passing of the Act as the eviction of tribal in the name illegal

[20] Report to the People on Environment and Forests, 21 (2009-2010), (Jan 28, 2021, 11:30 AM), http://moef.nic.in/downloads/public-information/Report%20to%20the%20People.pdf.
[21] Supra Note 19.
[22] State of the Environment Report, at 14, (Aug. 28, 2013, 10:00 AM), http://moef.nic.in/downloads/publicingformation/Report%20to%20the%20People.pdf.
[23] Manju Arora Relan, The Forest Right Act, 2006: Victory and Betrayal, 52 JILI 486 (2010), Page 287.

occupants and the process of land acquisition would stand void. The eviction drives in the name of removal of so-called encroachers had become a norm. The forests declared to be the government forests under the Indian Forest Act,1980 had been seldom surveyed as to know who resided there or who had rights in them and thereby wrongfully branding the poor forest dwellers as 'encroachers' and 'illegal migrants', thereby depriving vast masses of a critical source of livelihood. There have been numerous incidents of the use of coercive means of evicting the poor and powerless dwellers.

3. OBJECTIVES OF THE ACT

This Act came as a significant facilitator by duly recognizing Forest dwellers are vital to the very life and survival of the forest ecosystem to achieve the following objectives and recognizing the following concerns:

- To duly recognize and acknowledge such forest dwellers' identity who have been residing for generations in the forests and due to some practical hurdles, their rights could not be recorded.
- To put forth a system in place wherein forest rights could be duly recorded and hence serve as the evidence required for such recognition.
- To devise a complementarity mechanism by conserving biodiversity and maintaining ecological balance onto forest rights holders for sustainable use. Thereby, giving way to the symbiotic relationship of conservation of forests on hand and ensuring the forests' food security and livelihood needs of dwellers on the other.
- To undo the historical injustice which had led to extreme resentment and denial of the duly deserved rights of Scheduled Tribes and other traditional forest dwellers due to:

Non-recognition of their forest rights to ancestral land habitat during the colonial period in the consolidation of state forests as well as in independent India; And Forced relocation as a consequence of State development interventions and the need to address their long-standing insecurity of tendril and access rights attributive to state interventions. "Scheduled Tribes and Other Traditional Land Dwellers (Forest Rights Recognition) Act, 2006 is expected to perform the following essential functions:

- Granting legal recognition and partial correction of injustice to the interests of traditional forest-dwelling populations.
- Giving tribal communities and the public statutory space and voice in the conservation afforested wildlife in their vicinity.

4. CHALLENGES FACED

The language of the original Scheduled Tribes (Recognition of Forest Rights) Bill, 2005, as tabled in Parliament on 13 December 2005, recognized the symbiotic tribal relationships with the forest. The original bill specified in its preambular paragraph: "A Bill to recognize and vest the forest rights and occupation in the forest land of forest-dwelling Scheduled Tribes who have been residing in such forest for generations but whose rights could not be recorded…."However, the final Act came up added 'other traditional forest dwellers', thereby diluting the forest-dwelling Scheduled Tribes' interests with the "Other Traditional Forest Dwellers". It has been perceived that the forest-dwelling Scheduled Tribes who were the only rightful claimants initially have no longer remained the focus and the objective with which this law was enacted has been defeated.[24] The other view is that though the cut-off date for determination of forest land occupation is the 13th day of December 2005, the criteria for such determination under the said Act are different for the "forest-dwelling Scheduled Tribes" as compared with "other traditional forest dwellers". Concerning the "forest-dwelling Scheduled Tribes" occupation of the land on the 13th day of December 2005 is sufficient and depends on the forest lands for bona fide livelihood needs. The 'other traditional forest dwellers' should have the land and rely on the said forest or forest land for three generations for bona fide livelihood. Therefore, the harmonious construction of the said two conditions would lead to the conclusion that insofar as the "other traditional forest dwellers "are concerned. They would be entitled to the benefit of the Act only if they establish that for 75 years before 13th December 2005 they are in occupation of the forest or forest land and Bonafide depending on the same for their livelihood.

Further, this Act reflects the ambiguity of beneficiaries as it is unable to draw a clear-cut distinction between the needs and nature of the tribal and other forest dwellers. While tribal and

[24] India's Forest Rights Act Of 2006: Illusion or Solution? Indigenous Issues – The Occasional Briefing Papers of AITPN (Jan. 20, 2014, 9:30 PM), www.aitpn.org.

forest dwellers are synonymous and one cannot be separated from the other, the same is not the case with the "other traditional forest dwellers, i.e., non-tribal. Tribal have emotional, psychological, and cultural attachments with the forest, and they have always lived in the forest. The other traditional forest dwellers have made the forest the last source for earning bread when all other alternatives have been extinguished. However, by legitimizing their occupation of the forest lands under the guise of "Other Traditional Forest Dwellers", the Act negated the spirit of the various safeguards available to the members of the Scheduled Tribes under the Constitution and other relevant laws of the country. As a consequence, fear of conflict of interests between the two is inevitable, and the aim of the betterment of the tribal may not be fulfilled.

Thirdly, the problems of Naxalism and Maoist violence have erupted out of the tribal' injustice. Their indigenous right to forest produce, livelihood source, and safeguard their culture has been in perpetual danger. There have been increased atrocities on the scheduled tribes and rampant exploitation of forest resources in the name of development. To remedy this, the said Act came into force. But due to delays in settlement processes and many such loopholes, more study and research by the brought Government needs to occur.

Many STs and other TFDs do not recognize their rights. Because of their separate culture and restricted interaction with mainstream society, they often face many difficulties in gaining adequate access to justice. They also do not have the financial means to take any legal action against construction projects carried out in their place of residence or the forest in which they are living. Due to their awareness and conventional traditions, they have a vital role in environmental management and development. To effectively achieve sustainable development, the state must acknowledge and duly foster its identity, culture, and interest.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

SEXUAL HARASSMENT AT WORKPLACE IN INDIA: AN OVERVIEW

DR. JAI MALA NAROTRA[*] & DR. GEETIKA SOOD[**]

Long bygone are the days when men used to be the sole breadwinners of a family. Globalization has brought a radical change in the status of women worldwide. However, with the larger influx of women in the mainstream workforce of India, sexual harassment at the workplace has assumed greater dimensions.

It is India's first legislation that specifically addresses the issue of sexual harassment at the workplace. This was Act; The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was enacted by the Ministry of Women and Child Development, India in 2013. The Government also subsequently notified the rules under the POSH Act titled the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 ("POSH Rules").[1]

According to this Act women of any age at the workplace may be employed or not employed face any sexual harassment by the employer or in a domestic relationship Women of any age employed in a dwelling house or place are considered as aggrieved woman.[2]

This Act defined "sexual harassment" as any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely: — (i) physical contact and advances; or (ii) a demand or request for sexual favours; or (iii) making sexually coloured remarks; or (iv) showing pornography; or (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature[3].

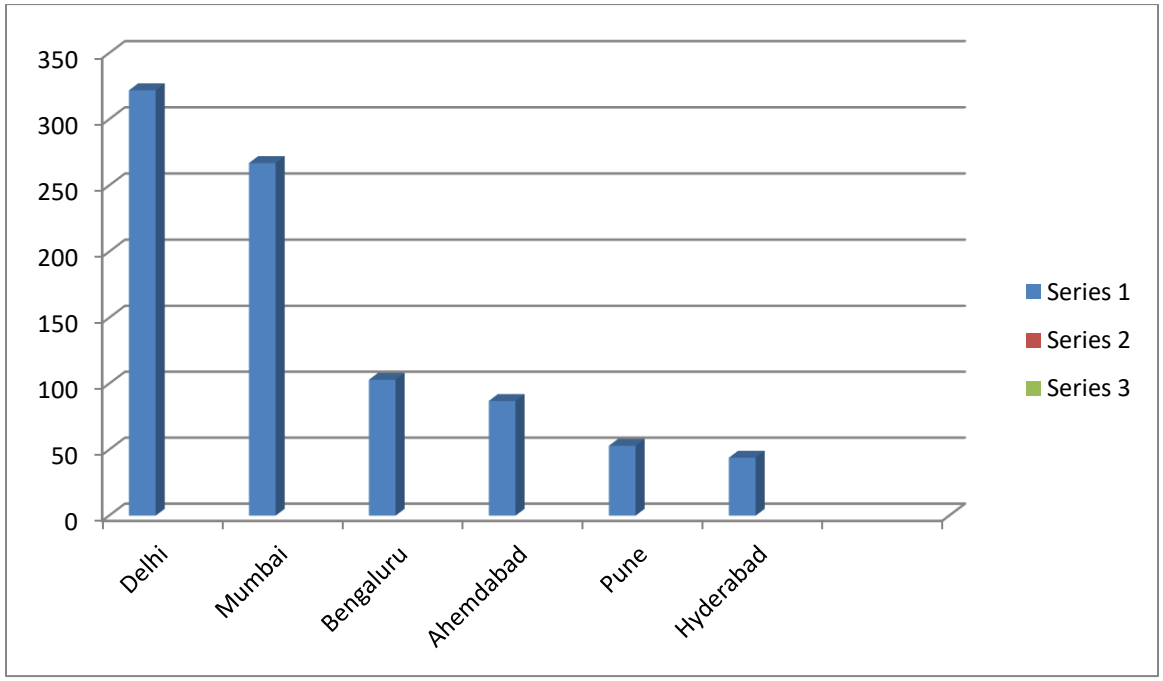
The incident of sexual harassment can be Quid Pro Quo, or it may happen with the opposite sex, or sometimes the incidents of sexual harassment may happen between the same genders.[4] Data

[*] Associate Professor, University Institute of Legal Studies, Panjab University.
[**] Assistant Professor, Department of Laws, Himachal Pradesh University.
[1] Prevention of Sexual Harassment at the Workplace (POSH) available at https://www.nishithdesai.com › user_upload › pdfs (last visited on December 17, 2021).
[2] The Sexual Harassment of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013, s. 2 (a).
[3] *Id;* section 2 (n).
[4] Guide on Prevention of Sexual Harassment in the Workplace available at thttps://www.ilo.org › publication › wcms_157626 (last visited on December 17, 2021).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

published by Statista Research Department on September 23, 2021 (Chart I) shows the incidents of women's harassment in major cities such as Delhi, Mumbai, Bengaluru, Ahmedabad, Pune, Hyderabad.

Chart 1



National Commission of Women has also published the data of sexual harassment at workplace from January 2020 to Dec 2020 on 17-2-2022 at 13:13:20. According to their data reports, 376 women face sexual harassment at the workplace.[5]

UN Convention on Elimination of all Kind of Discrimination Against Women, which is ratified by India defines violence against women include sexual harassment, which is prohibited at work, in educational institutions, and elsewhere.[6] This Convention also directs States Parties to take appropriate measures to eliminate discrimination against women in all fields, specifically including equality under law, in governance and politics, the workplace, education, healthcare, and in other areas of public and social life[7].

[5] NCW available *at* NCW report://ncwapps.nic.in (last visited on December 17, 2021).
[6] The Convention on Elimination of Discrimination Against Women 1979, article 2(b).
[7] *Id*; articles 7-15.

ILO Convention 111 sexual harassment is a form of sex discrimination covered by the Discrimination (Employment and Occupation). The ILO's Indigenous and Tribal Peoples Convention No. 169, also specifically prohibits sexual harassment in the workplace.

The International Covenant on Economic, Social, and Cultural Rights contains several provisions particularly important for women. It also recognizes her right to fair conditions of work and reflects that the women shall not be subjected to sexual harassment at the place of work which may vitiate the working environment.[8]

Beijing Platform for Action [9]recognizes sexual harassment as a form of violence against women and as a form of discrimination and calls on multiple actors including government, employers, unions, and civil society to ensure that governments enact certain legislation to protect women from sexual harassment.

Recently there was an international social movement known as the "#mee too" movement. It is against sexual abuse and sexual harassment where people publicize allegations of sex crimes.

The Indian Constitution has various provisions which act as safeguards Against Sexual Harassment at Workplace. The Constitution of India ensures and guarantees every individual the right "to practice any profession, or to carry on any occupation, trade or business"[10]. Sexual harassment of women at the workplace is also a violation of the right to life and personal liberty[11] Since the 'Right to Work' depends on the availability of a safe working environment and the right to life with dignity, the hazards posed by sexual harassment need to be removed for these rights to have a meaning.

In this legislation section 2 deals with definitions of aggrieved women, employer, and employee, etc. legislation also provide an internal complaint Committee [12] and Local complaints committee[13] at the workplace. After receiving the complaint from the aggrieved women internal Committee or Local Committee conduct an inquiry. After inquiry, they provide the report to the

[8] The International Covenant on Economic, Social and Cultural Rights 1966, article 7.
[9] The Beijing Platform for Action.
[10] The Constitution of India, article 19(1)(g).
[11] *Id*; article 21.
[12] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, section 4.
[13] *Id*; section 5.

employer.[14] This Act also has provisions if it is reported by the committees that allegations against the respondent are false, malicious ten employers can take actions according to service rules applicable on her or in absence of any service rule any procedure prescribed by the department.[15]

Before 1997, women experiencing sexual harassment at the workplace had to lodge a complaint under sections 354[16] and 509[17] of the Indian penal Code. These sections left the interpretation of the police officer who recorded the statement of women. [18] Despite the fact that work establishment has service rules which contain the rules of misconduct but sexual harassment was not considered as misconduct. Supreme Court stepped in to fill the lacuna and defined precisely what constitutes sexual harassment at the workplace as well as the duties of employers. The Supreme Court also gave directions for developing a mechanism for the prevention and redress of such complaints. In the landmark case, *Vishakha v State of Rajasthan*[19] Supreme Court has laid down guidelines and norms relating to sexual harassment i.e Duty of the employer or other responsible persons in workplaces and other institutions, defined the definition of sexual harassment, etc. Etc. *Apparel Export Promotion Council v A. K. Chopra,* [20] the National Commission for women conducted a survey that revealed that nearly 50% of women filled the complaint against sexual harassment. National commission for women formulated Code of Conduct for Workplace according to guidelines laid down in the Vishakha case. The Commission also circulated the code to all state commissions for Women, NGOs, and the Apex bodies of the corporate sector and to the media.[21]

U.S Verma Principal Delhi Public School Society v National Commission for Women,[22] court reiterated that "the aim of the Vishakha was to ensure a fair, secure and comfortable work environment and completely eliminate possibilities where the protector could abuse his trust."

---

[14] *Id*; section 13.
[15] *Id*; section 14.
[16] Indian Penal Code 1860, section 354: Assault or criminal force to woman with intent to outrage her modesty.
[17] Indian Penal Code,1860, section 509: words, gesture or act intended to insult the modesty of woman.
[18] Reena Choudhry, *Sexual Harassment, Threat to Working Women*, 88-89 (Deep and Deep Publication Pvt Ltd, New Delhi 2011).
[19] *AIR* 1997 SC 3011.
[20] (1999)1 *SCC*759.
[21] Surinder Mediratta, *Crimes Against Women and the Law* 75 (Delhi Law House, Delhi, 1st ed., 2010).
[22] 2009 *DLT* 557.

Nagaraju v Syndicate Bank,[23] the Court observed that sexual harassment may include verbal innuendo and affectionate gesture which are inappropriate in nature.

D.S Grewal v Vimmi Joshi,[24] the Supreme Court held that writing unwelcome and unsolicited love letters to a woman would amount to sexual harassment.

Medha Kotawal Lele v Union of India[25] held that guidelines in the Vishaka case should not remain symbolic and issued certain other directions relating to sexual harassment. State and UT should amend their respective civil service conduct rule within two months. Report of complaint committee shall be deemed to be an inquiry report and disciplinary action should be taken by employer treated sexual harassment as misconduct. Adequate numbers of complaint committees should be constituted and functional at the taluka level, District level, and state level. State functionaries, private, public sectors, undertaking, establishment, and institutions, statutory bodies should follow these guidelines. In pursuance of this direction, the Central Government (Department of Personnel and Training) has amended Central Civil Services (Classification, Control, and Appeal) Rules, 1965, R. 14, sub-r. (2) To incorporate the necessary provision.

In another case of Ruchika Singh Chabbra v m/s Air France India and Anr, Delhi High Court directed ICC should be constituted in strict compliance with requirements under the law. Recently Israeli coach Avram grant faces a FIFA case over sexual harassment on March 5, 2021 Mumbai BMC officials held for sexual harassment of colleagues.[26]

Women faced sexual harassment from childhood. Various factors are responsible for this although the judiciary has played an important role to define it. Legislative protections are also provided by the government. In spite of them, incidents occur. There is a need to change the mindset of society through awareness and education.

[23] 2014 *ALD* 758.
[24] Civil Appeal 7355 of 2008(17-12-2008) SC.
[25] (2013) 1 *SCC* 297.
[26] Sexual harassment cases news-the Indian Express *available at* http:/indiaexpress.com (last visited on December 28, 2021).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

SEPARABILITY ANXIETY: STATUS OF THE ARBITRATION CLAUSE IN MUTUALLY TERMINATED CONTRACTS

AHAN GADKARI*

ABSTRACT

The separability of an arbitration agreement from the underlying contract is a well-established principle recognized by courts and arbitral tribunals worldwide in commercial arbitration. However, the issue gets more complicated when the parties mutually cancel the underlying contract. As a result, jurisdictions have taken a unique approach to this kind of separability throughout the world, either via legislative requirements or judicial rulings. Unfortunately, the issue remains somewhat ambiguous in India due to contradictory Bombay High Court judgements and the absence of any official pronouncement by the Supreme Court of India. Therefore, this Article will perform a comparative examination of several national systems and international norms and arbitral organizations to recommend a course of action for India.

1. INTRODUCTION

Arbitration agreements are handled independently of the contract in which they are included. Section 16(1)(b) of the Indian Arbitration and Conciliation Act, 1996 (*hereinafter* referred to as "Indian Act") provides explicitly that the invalidity of a contract shall not affect the legality of an arbitration agreement, even if the contract is *void ab initio*. This section is modelled after the Model Law of the United Nations Commission on International Trade Law (*hereinafter* referred to as "UNCITRAL"). This accepted position of law was also reflected in the Supreme Court of India's judgement in *A. Ayyasamy vs. A. Paramasivam*, in which the Apex Court accorded proper attention to the concept of severability in contracts, including a separate arbitration provision.[1] However, such judgements are limited to situations in which the contract is either

* Student, O. P. Jindal Global University, India.
[1] MANU/SC/1179/2016, at 21, 27, 36.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

void ab initio or has been terminated, for example, owing to fraud, inability to fulfill, or non-performance of the contract.

Pertinently, the issue of whether an arbitration clause is terminated or not as a result of mutual bilateral contract termination persists and is *res integra*. The goal of the severability concept in a contract that contains an arbitration agreement is to guarantee that disputes between contracting parties are resolved effectively via arbitration. Therefore, it is desired that an efficient adjudicatory procedure exists even when the contract becomes unenforceable due to circumstances beyond the contracting parties' control. However, while the arbitral procedure is predicated on the parties' mutual permission to bring the dispute to arbitration, an odd situation develops when the contract containing the arbitral Agreement is amicably cancelled. This creates a dichotomy: on the one hand, the parties' explicit decision to terminate the arbitration agreement to settle conflicts between them contradicts a pre-determined dispute resolution process on the other.

Given the above, it is necessary to evaluate the judicial dicta on this subject. In the instances of *Ashok Thapar vs. Tarang Exports* (*hereinafter* referred to as "Ashok Thapar") and *Mulheim Pipecoatings GmbH vs. Welspun Fintrade Ltd. & Anor* (*hereinafter* referred to as "Mulheim"), the High Court of Bombay tried to define such bilateral terminations.[2] However, in the absence of legislative action or a decisive judgement by the Supreme Court of India clarifying the legal position on the same and contradicting jurisprudence of the Bombay High Court, this subject remains obscure. Therefore, the purpose of this article is to analyze the Bombay High Court's views on the issue of the existence of an arbitration agreement in cases of bilateral contract termination, to analyze the position in foreign jurisdictions, and to suggest legislative reforms regarding the issue of the existence of an arbitration agreement in cases of bilateral contract termination.

2. INDIAN JURISPRUDENCE

2.1. Ashok Thapar v. Tarang Exports

2.1.1. Background Information

[2] MANU/MH/2103/2018, at 6-11; MANU/MH/1285/2013, at 27-30.

The plaintiff and respondent entered into a Leave and License Agreement, which authorized the respondent (Tarang Exports) to occupy the property. Following that, both parties mutually terminated the Agreement. Disputes developed about the return of the security deposit and other funds. The plaintiff filed a lawsuit in City Civil Court seeking reimbursement of the security deposit and other claims arising from the Leave and License Agreement. Following that, the defendant contended that the Civil Court lacked the necessary authority to hear the case due to the arbitration provision included in the Leave and License Agreement. The Civil Court rejected the defendant's motion and determined that the Court has jurisdiction over the subject. The defendant filed an appeal with the Bombay High Court.

2.1.2. Determination

According to the Bombay High Court, the disputed question was 'whether an Arbitration Clause survives bilateral termination of the Agreement' and that the issue as mentioned earlier was *res integra* in character. Additionally, the Bombay High Court, relying on Supreme Court decisions in the cases of *SMS Tea Estate Pvt. Ltd. vs. Chandmari Tea Co. Pvt. Ltd*., *Branch Manager, Magma Leasing & Finance Ltd. v. Potluri Madhavilata*, and *Ford Credit Kota Mahindra Ltd. v. M. Swaminathan*, held that the doctrine of separability applies even in cases of mutual termination of the contract with an arbitration clause.[3] However, the Bombay High Court's opinion did not examine the theory of severability's applicability in the context of unilateral agreement termination or in the situation of an impossible agreement.

2.2. Welspun Fintrade Ltd. & Anor v. Mulheim Pipecoatings GmbH

2.2.1. Background Information

The appellant and respondent had engaged in a Share Purchase Agreement (*hereinafter* referred to as "SPA") that included an arbitration provision that applied to any issues arising from the Agreement. The Agreement provided for the respondent to transfer shares to the appellant. For a period of two years, the appellant firm was not permitted to transfer the shares to a third party. If they seek to transfer the property after two years, the priority should be provided to the responder at the same price. A later Memorandum of Understanding between the two did not include any

[3] MANU/SC/0836/2011; MANU/SC/1672/2009; MANU/SC/0836/2011.

reference to arbitration to resolve disputes but included clauses contradicting the SPA. Disputes developed about the notice's legitimacy and the transfer of the shares. The case was heard by the Bombay High Court.

2.2.2. Determination

While opining that the arbitral proceedings in this dispute must continue, the Court offered several noteworthy remarks. Justice Chandrachud differentiated two situations: the first occurs when the execution of the contract, is terminated; the second occurs when the contract's existence is terminated. The arbitral Agreement will survive in the former case but will not survive in the latter.

As a consequence of *Ashok Thapar* and *Mulheim*, a state of confusion has developed, as the same Court has construed severability upon mutual termination of an agreement in two diametrically opposed ways: one in which the arbitration agreement is valid, and one in which it is not. This inconsistent interpretation by the same Court requires further clarification.

3. DECIPHERING THE *ASHOK THAPAR* JUDGMENT

The Bombay High Court's contentious decision in Ashok Thapar has complicated the issue of severability. Regrettably, although this judgement reads the law unconventionally, it does not clearly explain why it reached this determination. On the other hand, numerous reasons might be advanced in favour of the *Ashok Thapar* ruling.

To begin, arbitration agreements have autonomy. Indian law is sometimes modelled after English legislation. The Indian Act demonstrates this concerning the British Arbitration Act, 1996 (hereinafter referred to as the "English Act"). Notably, a similar topic about the validity of an arbitration agreement in the event of mutual bilateral contract termination was addressed in the seminal English case of *England Harbour Assurance*.[4] In this case, re-insurers launched a lawsuit alleging that reinsurance plans were invalid, for which the plaintiff should not be held accountable. Defendants contested the illegality and requested a stay and referral to arbitration.

[4] *Harbour Assurance Co. (UK) Ltd. vs. Kansa General Int'l Insurance Co. Ltd*. [1993] 1 Lloyds Rep. 81 (QB); Andrea Bonomi et al., *Yearbook of Private International Law* (Munich Sellier European Law Publishers Birmingham, Al, Usa Ebsco Industries, Inc, 2010).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

While the contract's objectives may fail, resulting in contract termination, the Court concluded that the arbitration provision might not be automatically terminated for the purpose of the Agreement. Recently, in 2007, the English Court of Appeal and House of Lords ruled in *Fiona Trusts & Holding Corp. v. Privalov*, a case involving allegations of fraudulent conveyance.[5] The enticement of a party's agent recognized that such a claim against the sanctity of the underlying contract does not affect the contract's arbitration provision. The Court, based on various credible scholarly writings, determined that:

> *'It is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular … It is only if the arbitration agreement is itself directly impeached for some specific reason that the tribunal will be prevented from deciding the disputes that relate to the main contract.'*[6]

As a result, the arbitration agreement is viewed as a separate contract that is ancillary to the primary deal.[7] This is sometimes referred to as the autonomy principle, which states that the arbitration agreement is unaffected by the outcome of the principal contract, which might be nullity, settlement, termination, or even non-existence.[8] As a result, the arbitrator/judiciary is capable of determining the existence of an arbitration agreement. This view is supported by the Indian Act Section 11(6A), which empowers courts to assess the existence of an arbitration agreement.[9] The notion of autonomy is also recognized in the rules of numerous international arbitration centres and organizations, such as the London Court of International Arbitration (*hereinafter* referred to as "LCIA") Rules, which regard an arbitration agreement as a separate

[5] [2007] 1 All E.R. (Comm.) 891 (English Ct. App.).
[6] Ibid.; The Court of Appeal relied in particular on Professor Jonathan Harris and Lord Collins of Mapesbury (eds.), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell Ltd, London, 2014), which approved the analysis in *Prima Paint* and subsequent U.S. decisions.
[7] *Hayman vs. Darwins Ltd.* [1942] A.C. 356 (HL).
[8] A. M. Steingruber, "The Doctrine of Separability in International Investment Arbitration: Some Reflections" *Transnational Dispute Management* (2020); Ronán Feehily, "Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine," 34 *Arbitration International* 355–83 (2018); Carl Svernlov, "The Evolution of the Doctrine of Separability in England: Now Virtually Complete?," 9 *Journal of International Arbitration* (1992); Marc Bungenberg et al., *European Yearbook of International Economic Law 2018* (Cham Springer International Publishing, 2019) at 185-301.
[9] Arbitration and Conciliation Act 1996, s. 11(6A).

agreement.[10] Similarly, the International Chamber of Commerce (*hereinafter* referred to as "ICC") Rules and the UNCITRAL Rules demonstrate the arbitration agreement's independence from the primary Agreement.[11] Thus, arbitration agreement autonomy has evolved into a fundamental concept of arbitration upon which arbitrators the world over depend to resolve conflicts.[12] Secondly, arbitration agreements are not bound by the laws applicable to the transaction, including the arbitration agreement. A contract is controlled by the country's laws in which it is entered into, but the rules selected by the parties govern an arbitration agreement.

Consequently, circumstances may arise in which the primary contract is regulated by a different set of laws than the arbitration agreement. Thus, the laws governing the primary contract are inapplicable to the arbitration agreement. The arbitration agreement would stand apart from the primary contract in such instances. The arbitration agreement would not be subject to the same scrutiny as other transactions under national law. The converse is also true. National law provisions that make an agreement void would be excluded from the arbitration agreement. Thus, the arbitration agreement's legality or invalidity would be distinct from the validity or invalidity of the primary contract. Though not expressly expressed, the position above might likewise serve as a foundation for reaching comparable findings to the Court's in *Ashok Thapar*.

Redfern and Hunter bolster the preceding reasoning.[13] According to them, there are two distinct contracts.[14] The principal contract is the one that incorporates commercial responsibilities and transactions between the contract's parties. This is the contract that controls all of the parties' transactions. The arbitration clause is the second contract. This contract resolves any disagreements between the parties over the original contract. The second contract stays dormant and becomes active only when the parties disagree over the first contract. As a consequence of

[10] LCIA Arbitration Rules, Art. 23(1).
[11] ICC Arbitration Rules, Art. 6(4); LCIA Arbitration Rules, Art. 21(2).
[12] Charles Chatterjee, "The Reality of The Party Autonomy Rule In International Arbitration," 20 *Journal of International Arbitration* (2003); Saloni Khanderia and Sagi Peari, "Party autonomy in the choice of law under Indian and Australian private international law: some reciprocal lessons," 46 *Commonwealth Law Bulletin* 1–30 (2020).

[13] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, Oxford, United Kingdom ; New York, Ny, 2015), at 14-16.

[14] *Ibid.*

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

the arbitration agreement's autonomy, two separate contracts arise, which, although depending on one another to some degree, remain autonomous as well.

4. *BOGHARA POLYFAB* AND *KISHORILAL GUPTA*: OBITER'S SEPARABILITY PRINCIPLE

For the purpose of understanding the separability principle, the author believes that the cases of *Union of India (UOI) v. Kishorilal Gupta & Bros.* (*hereinafter* referred to as "Kishorilal Gupta") and *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd*. (*hereinafter* referred to as "Boghara Polyfab") are critical, as the Supreme Court made observations regarding the applicability of the separability principle to bilateral termination of contracts in the cases mentioned above.[15] However, since the remarks are *obiter dicta* and not *ratio decidendi,* they are inadmissible under judicial dictum, as elaborated by the Apex Court of India.[16]

In *Kishorilal Gupta,* the Supreme Court was considering a Special Leave Petition. It primarily addressed the legal issue of whether an arbitration provision in a contract survives when a new contract replaces it.[17] In that instance, many issues occurred under three contracts involving the delivery of raw materials and the payment of damages for contract violation. The Supreme Court of India stated that:

> *'the logical outcome of the earlier discussion would be that the arbitration clause perished with the original contract. Whether the said clause was a substantive term or a collateral one, it was none the less an integral part of the contract, which had no existence de hors the contract … Though the phraseology was of the widest amplitude, it is inconceivable that the parties intended its survival even after the contract was mutually rescinded and substituted by a new agreement.'*[18]

However, after a thorough examination of pertinent legal opinions and concepts pertaining to the doctrine of separability, the Supreme Court articulated the following required factors for judicial determination of separability:

[15] MANU/SC/0180/1959, at 3,33; MANU/SC/4056/2008.
[16] State of Haryana vs. Ranbir, MANU/SC/1877/2006, at 10.
[17] *Supra* note 15.
[18] Ibid., at 8.

'(1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract;(3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach, etc. In those cases, it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. Therefore, as the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.'[19]

The Supreme Court finally determined that the new contract entered into between the parties replaced the parties' older contracts, and so the arbitration provision included in the earlier contracts expired immediately. Even though the Court's *ratio decidendi* in the case mentioned above was limited to the validity of an arbitration agreement in a contract that was superseded by a new contract, the Court clearly stated in *obiter dicta* that the existence of an arbitration clause is entirely dependent on the existence of the contract, which can be interpreted as implying that an arbitration clause does not survive bilateral contract termination.

In *Boghara Polyfab*, the Supreme Court, in resolving an insurance claim, articulated the moot legal question as to whether an insured might submit a dispute to arbitration after providing the insurer with a complete and final discharge voucher.[20] The case concerned the discharge voucher issued by the National Insurance Co. Ltd. (appellant in this case) in favour of Boghara Polyfab, in which the appellant contended that Boghara Polyfab had accepted the payment offered in the

[19] *Ibid*., at 10.
[20] *Supra* Note 15.

full and final settlement, and thus any subsequent disputes were not arbitrable due to the contract's discharge. Boghara Polyfab responded that the discharge voucher was acquired by deception and coercion. A study of the Apex Court's ruling demonstrates unambiguously that the case's *ratio decidendi* is regarding the scope of the Chief Justice's/his designate's powers under Section 11 of the Indian Act. Nevertheless, the Supreme Court of India has declared the following in its *obiter dicta* about the effects of bilateral contract termination:

> *'We may next examine some related and incidental issues. Firstly, we may refer to the consequences of discharge of a contract. When a contract has been fully performed, the contract is discharged by performance, and the contract comes to an end. In regard to such a discharged contract, nothing remains – neither any right to seek performance nor any obligation to perform. In short, there cannot be any dispute. Consequently, there cannot obviously be reference to arbitration of any dispute arising from a discharged contract. It is thus clear that the arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances, when the contract is discharged on account of performance, or accord and satisfaction, or mutual agreement, and the same is reduced to writing (and signed by both parties or by the party seeking arbitration): (a) Where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/receipt. Nothing survives in regard to such discharged contract. (b) Where the parties to the contract, by mutual Agreement, accept performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations. (c) Where the parties to a contract, by mutual Agreement, absolve each other from performance of their respective obligations (either on account of frustration or otherwise) and consequently cancel the Agreement and confirm that there is no outstanding claims or disputes.'*[21]

5. COMPARATIVE APPROACH TO SEVERABILITY: DISCUSSING INTERNATIONAL JURISPRUDENCE

[21] *Ibid*., at 19.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

5.1. Austria

Austria's 2006 Arbitration Law Reform Act is based on the UNCITRAL Model Law and adheres to its principles. However, Article 16 of the UNCITRAL Model Law, which establishes the separability doctrine, was left out of the national law during the approval process.[22] A review of the legislative history surrounding the enactment of the Austrian Arbitration Law reveals that the statute's drafters took an extreme yet interesting view of the doctrine of separability, believing it to be misleading, oversimplifying, and alien to the general principles of Austrian law.[23] As a result, Austria is one of the few nations that lack a provision in their domestic law governing the separability of an arbitration agreement from the underlying contract. Without an explicit provision and a lack of logic on the part of the Commission that created the Austrian Arbitration Act, the Austrian Court has played a critical role in explaining the law surrounding separability.

The Austrian Supreme Court issued a historic judgement in 2015 in which it rejected the notion of separability, stating that the arbitration agreement is solely incidental to the primary Agreement.[24] As a result, an arbitration agreement is treated the same as any other item in the underlying contract and has no unique status in the contract. It is not true that the arbitration agreement is conditional on the existence or outcome of the primary contract. As recognized, the Austrian Supreme Court's reasoning revolves around the parties' purpose concerning the arbitration agreement. The Supreme Court of Austria stated in a judgment dated 5 February 2008 that, although an arbitration agreement may be viewed as any other contract provision, its survival depends on the parties' purpose regarding the arbitration agreement.[25] Thus, the arbitration agreement would survive if the parties intended for it to exist, and it will not survive if the parties did not intend for it to survive.

Thus, Austrian law represents a unique position in international arbitration, where the outcome of the underlying contract is not determinative of the outcome of the arbitration agreement but instead is determined by the parties' purpose. As a result, it will when the parties intended for the arbitration agreement to survive the contract's termination.

[22] Dietmar Czernich, "The Theory of Separability in Austrian Arbitration Law: is it on stable pillars?," 34 *Arbitration International* 463–8 (2018).
[23] *Ibid.*
[24] Supreme Court, 23 June 2015, 18 Cg1/15v, RdW 2016 (Austria).
[25] Supreme Court, 5 Feb. 2008, 10 Ob 120/07f (Austria).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

5.2. Switzerland

Switzerland's legislation on the handling of arbitration agreements after the termination of the contract containing the Agreement follows Austria's lead. Austria and Switzerland both think that terminating the contract, including the arbitration agreement, would not impact the arbitration agreement unless an explicit purpose to do so can be shown. The Swiss Code of Private International Law, 1987 establishes the arbitration agreement's independence from the underlying contract.[26] According to Article 178, the 'validity of an arbitration agreement may not be contested on the ground that the principal contract is invalid or that the arbitration agreement concerns a dispute not yet existing.'[27] The Article expressly states that the courts will not consider any challenge to the arbitration agreement based on its legality or invalidity. While the clause makes no direct reference to the status of an arbitration agreement during mutual contract termination, it lays the groundwork for future application of the idea of separability to mutual contract termination. This is demonstrated by First Civil Law Court Judgment 4A 438/2013 of 27 February 2014, in which the Court stated that 'the severability of the arbitration clause is a cornerstone of arbitration, and if a contract provides that the parties' rights and obligations terminate upon termination, this will not apply to the arbitration clause unless expressly stated in the contract.' The Association Suisse de l'Arbitrage made a similar comment, stating that the arbitration provision is independent of the underlying contract and, in particular, would survive the contract's termination.[28] Thus, Switzerland believes in the arbitration provision's independence from the contract, including the clause.

5.3. China

The Arbitration Law of China, 1994, governs arbitral procedures in China. The legislation is by far the clearest of any domestic law on the subject of the separability of arbitration agreements across the globe. According to Article 19 of the Act, 'an arbitration agreement shall exist independently. The amendment, rescission, termination, or invalidity of a contract shall not affect the validity of the arbitration agreement. The arbitration tribunal shall have the power to

[26] Swiss Federal Code on Private International Law, 1987; See T. Bersheda, "Is arbitration-friendly Switzerland also trust-arbitration-friendly?," 18 *Trusts & Trustees* 348–57 (2012).
[27] *Ibid.*, Art. 178.
[28] Association Suisse de l'Arbitrage, *Arbitration Clauses in Switzerland*, 2016.

affirm the validity of a contract.'[29] Even in China, an arbitration agreement may exist apart from the underlying contract and shall be legal even if the underlying contract, including the arbitration agreement, is amicably cancelled.

5.4. International and Institutional Regulations

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*hereinafter* referred to as "NYC"), which is the basic treaty governing arbitral awards, makes no explicit reference to the notion of arbitration agreement autonomy or its separability from the underlying contract. However, Article V of the NYC establishes reasons for refusing to enforce judgments.[30] These reasons include the illegality of the arbitration agreement under the applicable legislation, the parties' inability to arbitrate the dispute, and others. This expresses the notion that the national legal system has the authority to judge whether an arbitration agreement is enforceable or not. Support for arbitration agreements' autonomy is also seen in the UNCITRAL Arbitration Rules, the LCIA Rules, and the ICC Rules of Arbitration.[31]

6. CONCLUSION

In light of the detailed discussion above, the authors believe it would be preferable if the Indian Legislature amended the law and expressly incorporated a provision similar to Article 19 of China's 1994 Arbitration Law, explicitly recognizing the Supreme Court's *obiter dicta* as enunciated in the preceding paragraphs. One must, however, be sceptical that the Indian Legislature would follow the aforementioned proposed measures since it seldom alters the Indian Act for merely legal conceptual reasons. Thus, it would be prudent for the time being for parties and practitioners to integrate the notion of separability clearly into their arbitration agreement. Any clear intention of the parties regarding the arbitration agreement's survival as a distinct agreement regardless of the existence of the primary contract would very certainly be recognized by the Indian courts.

[29] Arbitration Law of China, 1994, Art. 19.
[30] Chiara Giorgetti, *Litigating International Investment Disputes* (The Netherlands Brill | Nijhoff, 2014).
[31] 2010 UNCITRAL Arbitration Rules, Arts 16(1) and 21(2); LCIA Arbitration Rules, Art. 23(2); ICC Arbitration Rules, Art. 6(9).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

UPHOLDING THE DIGNITY AND PROTECTION OF THE RIGHTS OF THE DEAD AMIDST COVID 19 PANDEMIC

SHAMBHAVI GOSWAMI*

ABSTRACT

When it comes to the rights of people, Indian laws make no exceptions for the dead, thus encompassing the dignity of the dead in Art.21 Right to life and liberty. Judicial courts have reiterated in different judgments that the right to dignity is not solely to be provided to the living human beings but also the dead. During the initial phase of the pandemic, the lives of the people have been affected largely, primarily in handling the dead bodies in their burial or cremation. For this purpose, organizations such as WHO and NHRC have issued guidelines relating to how the dead bodies need to be disposed of in a dignified manner. Today, against the background of COVID-19, the role of the stakeholders such as the government, hospital administration, etc. form a core element in safeguarding the rights of the deceased and upholding their dignity and this has become essential due to instances of human rights violations that have occurred in handling the pandemic situation.

1. INTRODUCTION

In the past year, the world has been gripped by the horrors of the COVID-19 pandemic. With a dearth of hospital beds, medicines, and oxygen in countries like India, the official daily death toll averaged up to 3000 in the country.[1] As of 11th August 2021, cumulative deaths in India stood at 429179 (MoHFW). But experts and eyewitnesses say that there is a 'massive' discrepancy in the death toll as compared to the reports.

There has been an ancient practice prevalent in India to burn dead bodies. This was commonly noticed among the Hindus, Buddhists, and Jains quite before the onset of the Common Era, and later accepted by Sikhs too, while the Muslims and Christians foremostly practiced burying of

* BB.A.LL.B. student, University School of Law & Legal Studies, GGS Indraprastha University, New Delhi.
[1] MISHA KETCHELL, *"Indians are forced to change rituals for their dead as COVID-19 rages through cities and villages"*, THE CONVERSATION, Indians are forced to change rituals for their dead as COVID-19 rages through cities and villages (last visited Aug. 13, 2021).

the dead. Even though these rituals related to cremation varied among different communities, they all shared a belief that it should take place immediately after death and usually within twenty-four hours, in an open place and on a funeral pyre created out of wood.[2] The primary reason is to release the soul from the dead body that serves no purpose and does not be preserved. Historically, some communities also followed the practice of floating the dead bodies in the river that die from infectious diseases[3].

As the second wave of COVID-19 hit India, the cases went sky-rocketing to up and above 25 million cases, with more than 275,000 deaths.[4] Many people could not make it to the hospital and died at home. On one hand, many people could not find enough space to cremate the dead bodies at crematoriums, while on the other, many impoverished families who did not have the money for cremation resorted to wrapping the dead bodies with cloth and dumping them into the rivers, leading to hundreds of corpses hovering in the river Ganges. Similarly, dozens of stiffly decomposed bodies were found tossed on the riverbank in Gahmar village of Ghazipur, Uttar Pradesh, with dogs, insects, and crows eating off the bodies.[5]

The data on the death toll and those found in the crematoriums shows extreme disparity. The following data[6] suggests how the data varied from that of the crematory and cemetery sites. The official number of deaths due to COVID-19 between 11th to 16th April stood at 145 in Lucknow, the capital of Uttar Pradesh, which is also the most populous state of India. Notwithstanding, according to some eyewitnesses and people working there as workers, just two of the main places reserved for cremations reported more than 430 or about thrice as many in that period, following the COVID-19 protocols or guidelines. This does not take into consideration the funerals and/or burials at other cremation sites within the city. Data gathered from various sites and logs in Surat show that in April 2021, the locations of burial or cremation reported more than 6,520 bodies, up by a count of 1,980 bodies in the same month of the previous year. However,

[2] DAVID ARNOLD, *BURNING ISSUES: CREMATION AND INCINERATION IN MODERN INDIA* 4 (2007).
[3] GEETA PANDEY, "*Covid-19: India's holiest river is swollen with bodies",* BBC, Covid-19: India's holiest river is swollen with bodies, (last visited Aug. 13, 2021).
[4] *Id*.
[5] *Id* at 1.
[6] Upmanyu Trivedi & Sudhi Ranjan Sen, "*Even Record Death Toll May Hide Extent of India's Covid Crisis",* BLOOMBERG, Even Record Death Toll May Hide Extent of India's Covid Crisis (last visited on Aug 14).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

the city's official data show only 585 deaths were taken into account by the city as well as the district in April 2021.

Communities started facing several problems following the undercount of deaths and unreported cremations taking place all around the country. With rising deaths, there was hardly any space left for the people to cremate their dear ones. Many were not allowed to avail themselves of the electric furnace kept aside for COVID-19 deaths due to the unavailability of virus-positive reports. None of the relatives of the deceased person could attend the cremation either due to unavailability of space or because they tested positive themselves. Crematorium workers also complained of how the local authorities did not furnish sufficient protective gear.[7] Additionally, the market could also see a shortage of workers to extract firewood from trees for the crematoria.

India's majority of the population comprises Hindus, but also sizeable communities of Muslim and Christian population. It is vital to remark that much statistical data reports foremostly on Hindu deaths, while Muslim and Christian numbers might show an undercount or be underreported even without considering those burials.[8] Overall, it emerges that India seems to lack an authentic estimate of the number of deaths caused by the coronavirus pandemic.

A study[9] has reported estimates for excess mortality after drawing data from three separate sources since the pandemic's commencement. The report highlights three estimates for the undercounts beginning with the extrapolation of civil registration at the state level from seven states that suggested up and above 3.4 million deaths. A toll of about 4 million was hinted at by putting the age-specific infection fatality rates (IFR) estimates on the Indian seroprevalence data. And lastly, the Consumer Pyramid Household Survey's analysis provides an estimate of deaths over 4.9 million. The conclusion that followed is that between 3.4 and 4.7 million more people died in this pandemic period than would have been predicted, which is up to 10 times higher than the official death toll of 414,482 given by the Indian government.

[7] MANAVI KAUR, "*Too many dead bodies" are weighing heavy on India's Covid-19 crematoriums"*, QUARTZ INDIA (last visited on Aug 14, 2021), "Too many dead bodies" are weighing heavy on India's Covid-19 crematoriums.
[8] *Id.*
[9] ABHISHEK ANAND ET AL., *THREE NEW ESTIMATES OF IND ALL-CAUSE CAUSE EXCESS MORTALITY DURING THE COVID-19 PANDEMIC* 1 (2021).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

2. GUIDELINES ISSUED BY WHO FOR THE CREMATION OF DEAD BODIES

According to the World Health Organization (WHO), as of August 2021, there have been more than 200 million confirmed cases of COVID-19 globally, and more than 4 million COVID-19 related deaths[10]. The United States of America and India have been the worst hit by the COVID-19 pandemic, with more than 30 million cases reported in each state.[11]

Infection prevention in different settings, including the mortuary management of COVID-19 dead bodies, has become a key issue since the COVID-19 health crisis started. Indeed, bodies of people who have died from COVID-19 might present a potential risk of transmission, such in the case of direct contact with human remains or bodily fluids where the virus is present, or with contaminated fomites, i.e., objects or passive vectors that may carry and spread the virus. There is consequently the need for proper dead bodies management and guidance for individuals handling them, to stave off the infection from spreading.

As the epidemiological understanding about the symptoms and consequences of COVID-19 increased in March 2020, many national governments adopted guidelines on dead body management, as for example the Ministry of Health and Family Welfare of the Government of India in mid-March 2020[12]. Similarly, to other documents published at the onset of the COVID-19 crisis, the Indian Government guidelines express limited knowledge, undeniably attributable to the knowledge gap of the new disease at that moment. Nonetheless, they identify some key issues areas that must be considered in dead bodies management, e.g. the training of staff identified to handle the dead bodies in various settings[13], the removal of the bodies from isolation rooms[14], how to carry out proper environmental cleaning and disinfection of surfaces[15], the

[10] World Health Organization, *Health Emergency Dashboard* (COVID-19), WHO Coronavirus (COVID-19) Dashboard (last visited Aug. 12, 2021).
[11] *Id.*
[12] Government of India, Ministry of Health & Family Welfare, *Covid-19: Guidelines On Dead Body Management,* (March 15, 2020), COVID-19: GUIDELINES ON DEAD BODY MANAGEMENT.
[13] *Id* at 3.
[14] *Id.*
[15] *Id* at 4.

handling of the bodies in the mortuary[16], at the crematorium or in the burial ground, the transportation[17], finally also covering some key recommendations on autopsies[18].

The WHO issued on 24 March 2020[19] interim guidance on *Infection Prevention and Control for the Safe Management of a Dead Body in the Context of COVID-19*, which was further updated on 4 September 2020[20] with new content. This document is complementary to a previous document of the Inter-Agency Standing Committee (IASC) entitled *COVID-19 Interim Guidance for the Management of the Dead in Humanitarian Settings*[21], published in July 2020, jointly drafted by the WHO, the International Committee of the Red Cross (ICRC), and International Federation of Red Cross and Red Crescent Societies (IFRC). Being these two documents the most recent ones, they will constitute the basis of the following analysis, to provide a detailed overview on the disposal of COVID-19 dead bodies.

Highlighted in both the WHO and IASC interim guidelines, two elements are critical in the mortuary management of COVID-19 bodies.

Firstly, the safety and the well-being of the staff responsible for handling the bodies must be safeguarded, and all the necessary personal protective equipment (PPE), hand hygiene supplies, cleaning and disinfection supplies, and waste management must be ensured[22]. In Annex I to the WHO interim Guidance, for hand hygiene WHO enlists "alcohol-based hand rub, running water, soap, disposable towel for hand drying"[23], while depending on the level of interaction with the dead body, the personal protective equipment shall include "gloves (single-use, heavy-duty gloves), boots, waterproof plastic apron, isolation gown, anti-fog goggles, face shield, medical

[16] *Id* at 6.
[17] *Id*.
[18] *Id* at 5.
[19] World Health Organization (WHO), *Infection Prevention and Control for the Safe Management of a Dead Body in the Context of COVID-19: Interim Guidance*, (March 24, 2020), Infection prevention and control for the safe management of a dead body in the context of COVID-19: interim guidance, 24 March 2020.
[20] World Health Organization (WHO), *Infection Prevention and Control for the Safe Management of a Dead Body in the Context Of Covid-19: Interim Guidance*, (September 4, 2020), Infection prevention and control for the safe management of a dead body in the context of COVID-19: interim guidance.
[21] Inter-Agency Standing Committee (IASC), *Covid-19 Interim Guidance for the Management of the Dead in Humanitarian Settings*, (July 23, 2020), COVID-19 Inter-Agency Guidance for the Management of the Dead in Humanitarian Settings | IASC.
[22] WHO, *supra* note 20, at 1.
[23] *Id*.

mask, N95 or similar level respirator in the event of aerosol-generating procedures"[24]. Appropriate waste management and environmental cleaning must be secured via disposal bags for biohazardous waste, soap, water, or detergent. WHO has reported that the presence and persistence of human coronaviruses can amount up to 9 days on inanimate surfaces such as metal, glass, or plastic, and "the SARS-CoV-2 virus has been detected up to 72 hours in experimental conditions on surfaces such as plastic and stainless steel"[25]. Thus, it is crucial environmental surfaces shall be cleaned with disinfectant for surfaces containing a minimum concentration of 0.1% sodium hypochlorite or 70% ethanol[26].

The second critical aspect in the management of the dead is that all measures must respect the dignity of the dead, their cultural and religious traditions at all times, including avoiding hasty disposal of their bodies and "stigmatization as a result of the COVID-19 statues"[27]. Timely identification, documentation, and traceability of the dead shall be guaranteed, "including the process for relatives to obtain all related documents, such as death certificates, death registration, and burial permits"[28]. Furthermore, the interests and rights of families and communities should be honored and safeguarded throughout, assuring that the families are treated with utmost respect to mourn their deceased loved ones as per their cultural and religious needs, while also ensuring their safety and that of the community.[29]

What explicitly emerges is the implication of properly balancing the safety of body handlers, the rights of the dead, the rights of the family, and the further need to investigate the cause of death, against the risks of exposure to COVID-19 infection.

Delving deeper into WHO September 2020 guidance[30], detailed step-by-step guidelines are provided for different facets of the mortuary management of COVID-19 bodies.

[24] *Id*.
[25] *Id* at 2.
[26] *Id* at 3.
[27] IASC, *supra* note 21, at 4.
[28] *Id* at 3.
[29] *Id* at 4.
[30] WHO, *supra* note 20.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

For what concerns the preparation and packing of the body for transfer, key elements worth mentioning are the removal of all catheters and other indwelling devices, ensuring that any leakage of body fluids from orifices are contained, keeping the movement of the body to a minimum[31]. Compared to the March 2020 guidance, additional clarification of body bag requirements was specified, in particular, it is clearly stated not to use body bags unless either there is excessive fluid leakage, for post-autopsy procedures, to facilitate the transport and storage of dead bodies outside the mortuary area, or for the management of large numbers of dead bodies. The body bags must be solid, leakproof, and non-biodegradable. In the case of a thin body bag and potential leak, WHO recommends double bagging the body.[32] Further requirements are delineated for autopsies, specifically for the risk of aerosol-generating procedures or splashing of fluids. It is recommended to conduct autopsies in a sufficiently ventilated room, also restricting the number of staff involved in the procedure. Adequate PPE must be accessible, complemented by the usage of particulate respirators (such as N95 or FFP2).[33] While there is a common assumption that COVID-19 dead bodies shall be cremated as a means to prevent the spread of the virus, there is no scientific evidence supporting this. Cremation shall be performed only as a matter of cultural choice and available resources[34]. As all existing guidelines recommend, embalming should not be allowed unless carried out by experienced staff[35]. In the case of families wishing to view the body, they are allowed but they must be instructed not to touch or kiss the body[36]. For funeral rites involving bringing the body home, the usage of gloves for any physical contact with the body and particulate respirators are recommended, further complemented with frequent hand hygiene for all those attending, whose number must nonetheless be limited[37].

In the Inter-Agency Standing Committee guidance document, some further special recommendations for temporary holding areas, namely places where bodies with COVID-19 can be safely stored before disposal, are further outlined. Additional measures might be critical, such as the disinfection of body bags upon their arrival or double bagging the bodies. The body bags

[31] *Id* at 2.
[32] *Id*.
[33] *Id.*
[34] WHO, *supra* note 20, at 1.
[35] *Id* at 2.
[36] *Id*.
[37] *Id* at 3.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

shall be properly labeled with unique identifies, and all movements of bodies should be recorded.[38] The environment temperature shall be maintained around 2-4°C.[39] Lastly, the IASC guidance provides a brief recommendation for the repatriation of human remains, which in the instances of COVID-19 cases could represent an additional challenge[40]. The IASC recommends cremation as the least complex option, as cremated remains contained in a funeral urn can be transported in checked baggage, in some cases even without in-advance agreements. The guidance further points out that some aircraft operators might accept only embalmed human remains, but as already highlighted, embalming should be avoided as an excessive movement of the dead body must be avoided. In case of divergent requirements, the IASC recommends seeking further bilateral discussions[41].

3. INTERNATIONAL CONTEXT & HUMAN RIGHTS VIOLATION

The 2020 Inter-Agency Standing Committee interim guidance does not represent the sole document that IASC released on the subject at hand. Earlier in 2006, following the tsunamis, earthquakes, and hurricanes that had hit Asia and the Americas in 2004-2005, IASC published the "Operational Guidelines on Human Rights and Natural Disasters"[42], targeting governmental and non-governmental organizations, with an eye on what these actors should do "to implement a rights-based approach to humanitarian action in the context of natural disasters"[43]. In emergencies, the population affected by such disasters is confronted with multiple problems, ranging from unequal access to assistance to being discriminated against in relief provision, gender-based violence, child exploitation, and above all being forced to relocate. According to IASC, the population affected is more at risk of human rights violations, when the displacement situation lasts longer. In section D, entitled "Protection of Other Civil and Political Rights", the respect of the dignity and privacy of the dead, and their living family members are stressed, in particular concerning the collection and identification of the human remains of those deceased, the prevention of despoliation and mutilation and their burials, which shall consider local

[38] IASC, *supra* note 21, at 6.
[39] *Id* at 7.
[40] *Id* at 9.
[41] *Id.*
[42] Inter-Agency Standing Committee (IASC), *Operational Guidelines on Human Rights and Natural Disasters - Protecting Persons Affected by Natural Disasters,* (June 6, 2006), IASC Operational Guidelines on Human Rights and Natural Disasters - Protecting Persons Affected by Natural Disasters, 2006.
[43] *Id* at 9.

religious and cultural practices.[44] Further measures shall ensure the remains of the deceased are returned to the next of kin, and "if remains cannot be returned, . . . they must be disposed of respectfully and in a manner which will help their future recovery and identification"[45].

It is important to remark that, while WHO and IASC guidelines have become key international frameworks during emergencies such as natural disasters or the COVID-19 crisis, they do not represent the only instruments addressing the dignity of the dead, especially in the international law landscape. Rather, core components of legislation on the issue are to be found in the law of war, international humanitarian law, and the protection of war victims.

Already in the 1929 International Committee of the Red Cross (ICRC) *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armies in the Field*[46], article 4 paragraph 5, clearly defined that dead people shall be honorably interred.

In the Fourth Geneva Convention 1949 *Protection of Civilian Persons in Time of War,* article 16[47] focuses on the general safety of the wounded, the sick, the infirms as well as pregnant women, who shall be under particular protection and respect. This obligation is general and absolute, and it admits no derogation.[48] The special focus on these societies categories does not in any way exclude or free "the belligerents from their obligation to give the civilian population as a whole the respect and protection to which they are entitled"[49]. Paragraph II reads as follows: "As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other fiersolzs exposed to grave danger, and to protect them against pillage and ill-treatment"[50].

Article 130 paragraph 1 of the same convention highlights how detaining authorities, in the case of people who died while interned, shall assure that they are honorable buried in individual graves unless unavoidable circumstances requiring collective graves, and "if possible, according

[44] *Id* at 31.
[45] *Id*.
[46] International Committee of the Red Cross (ICRC), *Geneva Convention forAmeliorationation of the Condition of the Wounded and the Sick in Armies in the Field*, (July 27, 1929), Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929.
[47] *Id* at 175.
[48]International Committee of the Red Cross (ICRC), *Commentary on the Fourth Geneva Convention,* (1958), The Geneva Convention of 12 August 1949.
[49] *Supra* note 46, at 175.
[50] *Id*.

to the rites of the region to which they belonged and that their graves are respected, properly maintained, and marked in such as way that they can always be recognized"[51]. Cremation is to be performed only on the ground of hygiene or religious factors, or in line with the expressed will of the individual. The ashes must be preserved for safekeeping by the authorities and shall be returned as soon as possible to the next of kin on their request"[52]. The lists of deceased internees, all information needed for their identification, and their graves' exact locations shall be forwarded from the detaining power or nation to the power or nation to whom the deceased internees were liable. Article 8 of the 1977 Protocol II Additional to the Geneva Conventions[53] reaffirms that all possible measures shall be taken to search and collect the wounded, the sick, and the shipwrecked, to guarantee them appropriate care and to decently dispose of them[54].

One key question might arise. The Geneva Conventions represent one branch of International Humanitarian Law usually defined as the "law of Geneva"[55], aimed at both military personnel no longer taking part in the conflict and people not actively having a part in the conflict, such as civilians. But does the law of Geneva also apply during peacetime?

Common to all the Geneva Conventions is Article 2, which states that "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict [..]". The 2016 ICRC Commentary[56] clarifies that notwithstanding the full applicability of the Conventions actualizes in situations of armed conflict, "State Parties have obligations already in peacetime".

In particular,

> *"States must adopt and implement legislation to institute penal sanctions for grave breaches and take measures to suppress other violations of the Conventions; they must adopt and*

[51] *Id* at 214.
[52] *Id.*
[53] International Committee of the Red Cross (ICRC), P*rotocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), (June 8, 1977), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Vi is of Non-International Armed Conflicts (Protocol II).
[54] *Id.*
[55] International Committee of the Red Cross, *International Humanitarian Law: Answers to questions*, (2015), International Humanitarian Law: Answers to your Questions.
[56] International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention,* (2016), Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

implement legislation to prevent misuse and abuse of the emblems, and they must train their armed forces to know and be able to comply with the Conventions and spread knowledge of them as widely as possible among the civilian population.[57]*"*

In addition, key provisions on e.g., missing and dead persons or reunion of dispersed families, that is to say, provisions which regulate and remedy "phenomena which originate in or result from an armed conflict or occupation, but whose effects extend beyond the end of those situations"[58] must be applicable "beyond the end of the armed conflict or occupation"[59], thus ensuring that the dignity of the dead is respected.

In August 1990, also the Organization of Islamic Cooperation (OIC) adopted a core piece of legislation in the Islamic world, namely the *Cairo Declaration on Human Rights in Islam*[60]. This declaration represents an important contribution to human rights law by Islamic Shari'ah and fundamental rights and freedoms in Islam.

About the subject in question, article 3(a) reads:

"In the event of the use of force and case of armed conflict, it is not possible to kill non-belligerents such as old men, women, and children. The wounded and the sick shall have the right to medical treatment; and prisoners of war shall have the right to be fed, sheltered, and clothed. It is prohibited to mutilate dead bodies. It is a duty to exchange prisoners of war and to arrange visits or reunions of the families separated by the circumstances of war.[61]*"*

It is evident that regardless of religion, the respect of the dignity of the dead is regarded as being a crucial fundamental right.

[57] *Id.*
[58] Anna Petrig, *The war dead and their gravesites*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 341–369 (2009), at 364.
[59] *Id.*
[60] Organization of the Islamic Conference (OIC), *Cairo Declaration on Human Rights in Islam*, (August 5, 1990), Cairo Declaration on Human Rights in Islam.
[61] *Id.*

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

4. INDIAN SCENARIO & RECENT JUDGEMENTS

Presently in India, the delinquency of the healthcare sector throughout both the public and private spheres across the nation shed light on two important things - the lack of legal awareness even after 3 decades of an established rule of law and; the utter failure of the pertinent authorities in applying the rule at the grassroots level, or any level for that matter. Since the discovery of the very first case of the Coronavirus in January 2020,[62] up until the end of the 2nd wave in May 2021, India grew from having relatively few cases when compared to Europe, the US, and Brazil to become the 2nd largest contributor to the total cases worldwide.[63] The situation in India during the second wave saw both governments and private health systems fail miserably in upholding the right to life as well as the inherent right to die with dignity[64].

The right to life under article 21 of the Constitution of India is accompanied by a duty of care vis-a-vis the legal obligation that not only the State but also all doctors owe to individuals needing care in preserving and protecting their life. In *Parmanand Katara v. Union of India*,[65] it was held that this legal and professional obligation of doctors and other medical professionals is "total, absolute and paramount" and no law of the state is allowed to infringe upon this fundamental right of individuals. According to *Jacob Mathew vs. State of Punjab,* negligence is defined as the breach of duty caused by the omission or commission of an act that a reasonable and prudent person would have done or not done in a similar situation. It is a failure to exercise a duty of care that a person owes to another person resulting in injury or damages.[66] When it involves medical professionals, the duty to care is higher, the failure of which causes civil or criminal liability. For instance, when a doctor performs a surgical operation, a high degree of care and attention is required. In such a case, the doctor makes even a slight error like delaying

[62] Andrews MA, Areekal B, Rajesh K, *First confirmed case of COVID-19 infection in India: A case report*, Indian J. Med. Res. 151, 490–2 (2020).
[63] Satabdi Dutta, Neloy Kumar Chakroborty, et al., *COVID-19 pandemic in India: Chronological comparison of the regional heterogeneity in the pandemic progression and gaps in mitigation strategies*, Research Square, COVID-19 pandemic in India: Chronological comparison of the regional heterogeneity in the pandemic progression and gaps in mitigation strategies | Research Square (last visited Aug. 11, 2021).
[64] Common Cause (A Regd. Society) v. Union of India, AIR 2018 SC 1665 [hereinafter "Common Cause"]; Devina Srivastava, *The Right to Die with Dignity: The Indian Supreme Court allows Passive Euthanasia and Living Wills*, Oxford Human Rights Hub, The Right to Die with Dignity: The Indian Supreme Court Allows Passive Euthanasia and Living Wills | OHRH (oxUKc.uk) (last visited Aug. 12, 2021).
[65] Parmanand Katara v. Union of India, (1989) 4 SCC 286, Supreme Court of India, Parmanand Katara v. Union of India.
[66] Jacob Mathew vs. State of Punjab, Appeal (crl.) 144-145 of 2004.

the procedure for a few minutes could result in a lot of damage to the patient. And because *Parmanand Katara* established a legal standard for medical professionals, any deviation from the set standard would not only amount to the violation of the right to life specified in the case but also the offense of *negligence*. During the second wave, alongside the rise of black fungus infections across India, gross cases of medical negligence were witnessed. Shortage of beds and medical staff saw up to 3 individuals sharing a single bed. Tens of patients losing their lives due to shortage of oxygen, and most importantly- patients being denied even the most basic of care after being admitted, as they are left on their own.

This failure was concomitant with a subsequent rising death toll leading to an overburdening of cremation grounds[67] and the inability of the government to account for horrible violations of this fundamental right to life even as hundreds of dead bodies washed up on the banks of the Ganges [68] The obligation of the State in guaranteeing the right to life of all individuals is absolute and not subject to any legal justifications which may be extended to other legal jurisprudence such as contracts. Any defense of unforeseen circumstance, the act of god, and so on cannot lie against the fundamental right to life

The brief facts in *Parmanand Katara* went as such. The petitioner, a human rights activist filed an application under Article 32 of the Constitution of India pleading to direct the Union of India to provide instantaneous medical assistance to every injured citizen who is brought to a hospital for treatment to preserve the life of the injured, only then any procedure required by the criminal law should be allowed to operate so to prevent any death caused due to negligence. In the event of a breach, appropriate actions for negligence along with compensation should be awarded. He attached to the writ petition a report named "Law helps the injured to die". In this report, it was asserted that a motorist was injured by a fast car. A bystander on the road picked up the profusely injured man and carried him to the closest hospital. The doctors, however, refused any medical assistance to the patient and the Samaritan was told to take the patient to a different hospital located around 20 kilometers away which dealt in *medico-legal* cases. The Samaritan

[67] Irish Nanisetti, *Bodies Keep Coming to Cremation Grounds*, THE HINDU, Bodies keep coming to cremation grounds - The Hindu (last visited Aug. 12, 2021).
[68] PTI, *Plea in Supreme Court seeks direction for removal of bodies found floating in river Ganga*, THE HINDU, Plea in Supreme Court seeks direction for removal of bodies found floating in river Ganga - The Hindu (last visited Aug. 12, 2021).

tried to reach the other hospital in time but before he could arrive, the victim succumbed to his injuries.[69]

The disrespectful treatment of the dead, in blatant contravention of the law established in *Common Cause (A Regd. Society) v. Union of India,*[70] in addition to the condition of living in crowded hospitals, the deficit in the availability of beds inter alia, during the second wave of the COVID-19 pandemic in India displayed grim socio-legal prospects despite relevant authority on the subject matter existing much before the pandemic itself. During the short respite that the nation has between waves, efforts must be made to vaccinate extensively.

However, vaccination alone will not be sufficient in battling subsequent waves. United efforts must be taken by all stakeholders- the executive, legislation, judiciary as well as the press. Legal awareness must exist regarding the silent but crucial constituents of the Right to life and related institutions must be strengthened to guarantee their ability in upholding this right. Right without remedy is inconsequential but on the question of rights such as the Right to life, it is far more important to safeguard it than have it violated and receive judicial relief.

Bodies of the COVID-19 patients piling up in hospitals and mortuaries, non-availability of adequate cremation and burial grounds, bodies being cremated in car parks and dumped alongside riverbeds, scenes of mass burials and bodies floating on the Ganga River, all painting a picture of India's horrendous and pathetic mismanagement of the COVID-19 crisis that even the dead couldn't get their due of dignity. Instances like a body being tossed in a ditch for burial and a COVID-19 positive patient being tied to a hospital bed shook the nation. It took courts to reiterate how important it is to ensure the dignity of the dead. In a judgment on 27th July, 2020 Karnataka High Court directed that the state government must guarantee that a dead person receives his right to dignity.

This was not the only time; Courts have reiterated the right to dignity after the death of the person. Oftentimes, Courts have affirmed that Article 21, Right to life and liberty encompasses the right to death with dignity.

[69] Parmanand katara *supra* note 65.
[70] Common Cause *supra* note 64.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

The landmark case of *Parmanand Katara v. Union of India* recognized a dead person's right to life, fair treatment, and dignity. It provided the right to receive proper health care to an individual whether a criminal or not.[71]

Ashray Adhikar Abhiyan v. Union of India questioned the right of a homeless deceased person for a decent cremation as per the rites and customs of the person's religion. It encompassed that the right to dignity of the dead must be safeguarded and maintained. Furthermore, it also established the state's duty to provide a proper burial or cremation to the deceased person.[72]

In *P. Rathinam v. Union of India,* the domain of article 21 was broadened to include the dignity of a person. It was further extended to a dead person. It added an individual's right to life constitutes living a meaningful life.[73]

A special division bench comprising Chief Justice Abhay Shreeniwas Oka and Justice Aravind Kumar of the Karnataka High Court issued an order while hearing PIL petitions on issues related to mismanagement in the handling of bodies after the death of the COVID-19 positive patients in the state on July 27, 2020.

The court instructed the state to re-examine the guidelines and protocol about how the corpses of the COVID-19 positive person should be disposed of that upholds the rights and dignity of the dead and their family members. The court instructed the state and the civic body to come up with guidelines and directions ensuring the dignity of the deceased persons. Furthermore, the Karnataka state government has to assure that the body of a deceased person receives proper last ceremonies/rites as per their religious and traditional background. The court pointed out certain anomalies in the guidelines relating to the inability of women belonging to a certain community or religious background to go to the crematorium or burial ground to see their loved ones for the last time. Also, the bench commented that there was no mention of keeping the corpses of COVID-19 positive patients for specific periods in the guidelines. The bench called attention to the fact that the exact reason for natural death could not be mentioned due to the pandemic, even if the report comes out to be COVID-19 negative post-death of the patient. It further added that

[71] *Supra* note 65.
[72] Ashray Adhikar Abhiyan v. Union of India, 2002 (W. P. (C) 143 of 2001).
[73] In P. Rathinam v. Union of India, 1994 (SCC (3) 394).

not mentioning the exact cause of the death gets in the way of securing the dignity of a dead person. The bench ordered the state government to take notice of how private hospitals are ensuring to admit patients and not denying their services to needy patients.

Immediately after this judgment, the Karnataka State Government released the guidelines on July 29, 2020, for the management of dead bodies during COVID-19. Several directions regarding insurance and salaries for cleaning staff in the state were also recommended by the division bench.

The order of the court included:

- The State government to issue adequate guidelines emphasizing ensuring the dignity of the dead.
- Assure that the centralized ambulance system is in place shortly.
- State to establish machinery to monitor the activities of private hospitals to ensure patients are not refused admission to the hospitals.
- Re-examination of BBMP guidelines regarding the mentioning of COVID-19 status on the death certificate, even if the reason for death is a natural one. There is no such requirement to do so.
- The beneficiaries of the Garib Kalyan Package Insurance Scheme must be notified about the scheme for them to receive the benefits.
- The state needs to clarify who are beneficiaries (pourakarmikas and cleaning personnel present in government institutions including hospitals) under the insurance scheme.
- Further, the state is to elucidate whether the relatives of the deceased beneficiaries under the insurance scheme can get the benefit at this phase.
- State to guarantee wage payment of all sanitation workers (pourakarmikas) to be paid on time, particularly in non-BBMP areas. Benefits should further be extended up to compulsory testing and provision of PPEs, temperature testing equipment, etc, which are provided to workers within BBMP areas.[74]

[74] Rintu Mariam Biju, *[COVID-19] Karnataka HC asks State to frame guidelines to ensure dignity of the dead, wages for sanitation workers*, Bar and Bench - Indian Legal News, (August 11, 2021), Bar and Bench.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

5. RECOMMENDATIONS BY THE NATIONAL HUMAN RIGHTS COMMISSION OF INDIA

When COVID-19 hit, no one was ready to face the worst medical emergencies of the world. Governments across States dealt with the catastrophe with their limited resources. Lakhs of people lost their lives, some suffered and recovered. In the devastating times of such crises, it became a challenge to treat the dead with dignity when hundreds and thousands of people were dying daily. On May 14, 2021, the National Human Rights Commission of India (NHRC) issued an *Advisory to the Centre and States for Upholding the Dignity and Protecting the Rights of the Dead*[75], which has become a key issue during the COVID-19 crisis. As of May 2021, no specific law on the protection of the rights of the dead existed in India, although the courts have been playing a key role in ensuring that these rights are granted, e.g. in the 1989 landmark case of *Parmanand Katara v. Union of India,* which extended to dead persons the Right to Life and Right to Dignity enshrined in article 21 of the India Constitution. NHRC reaffirms that in both natural or unnatural deaths, "it is the duty of the State to protect the rights of the deceased person and prevent the dead body from being a victim of a crime"[76], further foreseeing that States are obliged to consult all the stakeholders that might be involved in the process.

In section II of the Advisory[77], the NHRC presents the basic principles for upholding dignity and protecting the rights of the dead. The most fundamental principle for upholding dignity and protecting the rights of the dead is *Ensuring the fair treatment of the body.* When bodies are to be disposed of on an extremely large scale, the bodies might likely be handled in a discriminatory way. A proper system of management that assures that the body of a deceased person does not come across any discrimination in treatment irrespective of religion, caste, region, gender, etc., and proper training of the individuals who are involved in the administration is advantageous. Likewise, safeguarding any kind of physical violation is necessary. The bodies of the deceased are susceptible to be physically violated when there is a certainty that the relatives and friends of the deceased person will not have a chance to touch or look after the body. It becomes only

[75] National Human Rights Commission of India, *Advisory to the Centre and States for Upholding the Dignity and Protecting the Rights of the Dead,* (May 14, 2021), NHRC issues Advisory to the Centre and States to ensure dignity and the rights of the dead (14.05.2021).
[76] *Id.*
[77] *Id.*

apparent that the bodies might be manipulated for the illegal removal of organs. Any such exploitation means curtailing the basic right of the deceased person to be treated with dignity. A proper monitoring system to notice any such violation is required. Even in instances of donations, the opinion of the deceased person should be of primary significance, no matter the standpoint of the legal heir. Similarly, unclaimed bodies should be placed in safe conditions, and the use of their bodies for any purpose whether academic or research, should not be done without acquiring a proper license. The bodies, to be treated in a dignified manner, require decent cremation or burial. The last rites of the dead bodies need to be done as per their customs and religious background. Family members possess a right to have a last look at the bodies of their dear ones. In cases of unclaimed bodies, the state should assure the proper disposal of the body following the standard procedure. A person whose death has occurred due to a crime deserves to be treated with compassion and respect. They are entitled to get justice as they are a victim to a crime and the state must ensure they receive justice. Taking measures to make the existing system more efficient. Avoiding any unnecessary delay in post-mortem or autopsy procedures, proper handling of the dead bodies, and treating the bodies in a dignified manner are some of the ways to safeguard the dignity of the dead victim. Close members of the deceased should be provided with a strengthened system to make it easier for them to file their cases and seek redressal. When a person dies, leaving a will, it must be honored and obeyed. It must go in favor of the person the will has been written for. The deceased has a right to not be defamed by any words, written or spoken, by visual representation, made to harm the reputation of the person. No derogatory remarks shall be made to malign the reputation of the dead persons. It is believed to harm the deceased person the same way it would harm if he were alive. A deceased person has a right to privacy and dignity relating to the dissemination of any personal information after death. The onus falls on the media houses including social media sites to avoid any exhibition of the dead bodies' explicit pictures or videos to the common public in a way that compromises the privacy and dignity of the deceased.[78]

As previously mentioned, In India, the law does not embody any particular legislation for safeguarding the dignity of the dead. Nonetheless, the judiciary has asserted that the States shall

[78] *Id.*

engage with all the stakeholders involved towards upholding the dignity and protecting the rights of the dead. In Section III[79], the NHRC assigns roles and responsibilities to the key stakeholders i.e., the citizens, hospital administration, medical practitioners, government, etc.

Every citizen is entrusted with a responsibility to report the respected legal or administrative authority or the emergency ambulance services, whenever there is an instance of any death. Further, Citizens should not be using the bodies of the deceased persons for personal gains or to manipulate the authorities to fulfill their demands. About the duties of hospital administration, it is the duty of the doctor conducting the autopsy to collect, examine, preserve and seal the clothing of the deceased in special body bags for proper transportation and send it for further examination to the forensics. Also, the unclaimed bodies must be stored in a deep freezer to stave off any decomposing. In the case of any pending bills, the bodies should not be withheld by the Hospital Administration. The family members should be allowed to take the dead body. In cases of unclaimed bodies, the civic authority to dispose of the dead bodies in a dignified manner. Proper licenses should be acquired by the Hospitals before using any unclaimed bodies for academic, research, and training purposes. The medical practitioners should be following the guidelines of the Indian Council of Medical Research (ICMR) while dealing with dead bodies of claimed and unclaimed persons. Moreover, when a person dies, the doctor must make an official announcement of the death. Forensic Departments play a key role as a stakeholder. The stage at which forensic departments deal with the bodies is very crucial. Effective steps must be taken to prevent any mismanagement. When the autopsy procedures are to be conducted, only qualified professionals must perform them.

Video graphing of the post-mortem examination must be done according to the guidelines issued by the NHRC. Any mark or incision on the body of the deceased must be hidden by clothes before delivering it to the family members. There must be proper confidentiality while obtaining the genetic data through DNA profiling. The data and biological samples collected should be stored properly, following the proper law. Mortuaries should be kept in a hygienic condition so that the dead bodies are given a clean environment maintaining the dignity of the dead. The data about the deceased person should be kept confidential and secure so that any information that might harm the dignity of the deceased person is safeguarded, especially in cases of sexually

[79] *Id.*

transmitted diseases that are stigmatized. The bodies must be handled in a dignified manner at all times and for this purpose, the staff dealing with the bodies should be provided with adequate training.

The state must maintain and protect the dignity of the dead as has been iterated by courts. From providing proper services regarding the disposal of bodies to digital confirmation of the deaths is all the duty of the government. A district-wise digital dataset of death cases should be maintained on web portals by the state government. The data must also be protected. There must be proper updating of the death of the person in all documents such as Aadhar, Bank accounts, etc., to prevent the misuse of such documents by impersonation. A 24×7 helpline should be run to provide immediate help to the families and friends of the deceased in cases of assault, mishandling, or misconduct of any kind. The state should ensure the proper availability of necessary equipment for post-mortem procedures. Also, there should be state-prepared SOPs to register the particular customs and rituals of the deceased person to assure the dignity of the dead. The dead bodies of the deceased must be properly cremated or buried according to the customs and religious background of the deceased by the civic bodies, in cases of unclaimed bodies or where the body has been disowned by the legal heirs. The last rites must be performed in a dignified manner. The state government should ensure the availability of cremation and burial grounds and encouragement should be provided to environmentally friendly practices such as electric cremation. The Police administration as a stakeholder must ensure that no unnecessary delay occurs while calling the forensic team to the scene of the crime and transferring the body for the post-mortem procedures within the stipulated time. In cases where the death of the person occurred due to sensitive reasons such as suicides, accidents, murders, death due to sexual offenses, etc. the police authorities need to handle the dead body with utmost dignified manner. It should be properly covered and sent for immediate autopsy procedure. For proper identification and transfer of the dead body to the family members, the police personnel should collect and store unique body codes, technical photographs from the dead bodies under the police record in a dignified manner.

The deceased person has a right to privacy and dignity. It is the duty of the media agencies and social media outlets to ensure that no explicit photographs or videos of the dead bodies are being exhibited in the public. Any kind of remark that is degrading or derogatory to the deceased

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

which might interfere with the dignity of the person should be deterred from being published. As an important stakeholder, the CSOs/NGOs must show the enthusiasm to share the responsibility of performing the last rites of the dead bodies in a dignified manner.

The stakeholders are the bedrock elements of the society to secure that the deceased person receives his share of rights. Today in the COVID-19 times, various violations have been registered such as gross negligence on part of the Hospital Staff, mishandling of the dead bodies of COVID-19 affected persons by the state, dead bodies being thrown in ditches without giving a proper cremation or burial, family members of the deceased being scrapped with the chances to bid their last goodbyes to the loved ones, and many more other incidents. These instances are proof of how major and crucial a role stakeholders play in safeguarding the rights of the deceased and even the slightest error in discharging their functions leads to gross mismanagement.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

PATENT LINKAGE: A NECESSITY OR HINDRANCE IN THE INDIAN DRUG INDUSTRY

SHIVANGI PANDEY* & BALAJI K JYOTHI**

ABSTRACT

Generic manufacturers have a huge market in India and continue to provide to India's economy as well which is why concepts like data exclusivity, patent linkage for pharmaceuticals is not recognized in India. The absence of such protection had proved vital even before the evolution of TRIPS when India was following the "process patents" regime. But the adoption of TRIPS leads India to provide minimum standards of protection under the IPR regime. Though India still doesn't have specific legislation with respect to the trade secret as pronounced under TRIPS relaxations granted for developing and underdeveloped nations, the evolving generic pharmaceutical industry now poses a threat to the developed nation's pharmaceutical sector. India is a lot of pressure from the developed nations to provide this protection to the innovators who specifically belong to the developed nations and the amendment made by China to its patent regime has again created the arena of such policy changes to be adopted by India. This paper would analyze the eventual implications of such changes.

1. INTRODUCTION

After Covid-19 it is known that pharmaceutical industries worldwide have witnessed a boom. Where on one side pharmaceutical corporations are expanding, there is another development to this story. The need for safe, efficacious, and affordable medicines has been observed and the nations are struggling hard to achieve this for their citizens. There have been demands to provide it as a matter of their rights. But the fact is that under the impact of such usage there is another element that goes unobserved and that is the role played by patents. A lot of times it is observed that the drugs that are of utmost necessity for the citizens are under the patent rights of multi-national corporations which obviously worsens the situation. The high prices which are laid on

* LL.M. Student, Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur.
** B.Tech. LL.B. Student, University of Petroleum and Energy Studies, Dehradun.

such branded drugs often make such life-saving drugs not accessible to the citizens and this is where the generic drugs come into existence.

Generic drugs are a mere copy of such drugs that have the same characteristic as the original drug but they are provided a lot of relaxation with respect to the submissions, with respect to the approval process which is why they are comparatively cheaper than the original. The only submission that they are supposed to provide is the bioequivalence data i.e. the same effect as the original drug and they are good to go. Naturally, the costs of conducting the different phases of clinical trials are reduced here making the drugs thereby cheaper. The regulations governing the approval of generic drugs are somewhat the same throughout the world, with very few differences in developing countries, as in this part of the world it is not mandatory to undergo bioequivalence (BE) studies for getting approval for generics, and the gold standard considered for regulation in this field is the United States[1]. Ranbaxy, Sun Pharma is one of the famous generic manufacturers worldwide. Along with it, such generic manufacturers are free from the burden of brand and which is why they do not impose such high prices. Low-cost medicines, apart from their attribute as a commercial commodity, have far-reaching implications on public health and international human rights and they need to be promoted[2].

1.1. Economic role of Generic drugs in India

Now it must be remembered that India is the largest provider of generic drugs globally. Indian pharmaceutical sector supplies over 50% of global demand for various vaccines, 40% of generic demand in the US, and 25% of all medicine in the UK[3]. India has unambiguously subscribed to the pro-public health argument, and it has articulated its position several times at home and in international forums[4].

The Indian pharmaceutical sector contributes about 2 percent to India's GDP and around 8 percent to the country's total merchandise exports. The sector has exhibited resilience to many economic shocks, and this can be substantiated by India's more than 18 percent growth in

[1] A Dey, CN Patra, ME Bhanoji Rao, S Swain, *Pharma-regulations for generic drug products in India and US: Case studies and future prospective*, Pharmaceut Reg Affairs, 2014.
[2] Gudipati Rajendra Kumar, "An analysis of generic medicines in India", The Hans India, May 10,2017.
[3] IBEF, Indian Pharmaceutical Industry, *available at:* https://www.ibef.org/industry/pharmaceutical-india.aspx (Visited on November 30, 2021).
[4] *Supra* at 2.

exports of pharmaceuticals during 2020-21, a pandemic hit year when global output and trade contracted[5].

According to total sales audit data from the world's largest pharmaceutical market research firm IMS Health, the Indian Pharma Market (IPM) grew 59 percent year over year in April, 2021 Vs 16 percent year over year in March, 2021 due to the low base effect in April, 2020 and a sharp surge in Covid-19-related sales[6]. Right now in 2021, India ranks third worldwide for pharmaceutical production by volume and fourteenth by value[7]. The average growth rate of India's biotechnology industry comprising biopharmaceuticals, bio-services, bio-agriculture, bio-industry, and bioinformatics is expected to be 30 percent and to reach US$ 100 billion by 2025[8].

All of this data reflects one significant aspect that India can clearly not avoid its pharmaceutical industry and the policies that are drafted with regards to this industry have to be made only after analyzing all the economic effects. India has made significant contributions to the arena of branded drugs but its contribution to the generic market is quite significant and cannot be avoided. This affects both the domestic and the international industry. Where in India people are already in need of having cheaper substitutes for branded drugs, even the international arena demands the presence of such drugs and that is where the exports affect the economy. The Medical Council of India, in an amendment to the code of conduct for doctors in October 2016, has recommended that every physician should prescribe drugs with generic names legible and he or she shall ensure that there is a rational prescription which promotes the use of generic drugs[9].

However, the picture is not just limited to the generic drugs and their benefits to the overall Indian healthcare system and economy. There is another system that plays a role here and that is the Patent Linkage system bestowing rights on the innovators in the pharmaceutical industry.

---

[5] RBI, Drivers of Indian Pharmaceutical Exports, RBI Bulletin, *available at:* https://m.rbi.org.in/Scripts/BS_ViewBulletin.aspx?Id=20379, (Visited on November 30, 2021).
[6] Editorial, "Covid second wave pushes India's pharma industry growth to 59% in April", Business Standard, May 15, 2021.
[7] *Supra* at 3.
[8] Dr. Sujith Varma K, "Covid-19 impact on Indian pharmaceutical industry", Pharmabiz.Com, February 10, 2021.
[9] Gudipati Rajendra Kumar, "An analysis of generic medicines in India", The Hans India, May 10, 2017.

2. POSITION IN DEVELOPED COUNTRIES

With the development of the industry of generic drugs worldwide, the innovator drugs who lead way to the introduction of such medicines are bound to feel that their rights have been violated. The basic motive of providing a patent as a right was to incentivize the innovator and to increase the research and development. The pharmaceutical industry is also not an exception to such a rule. But such generic manufacturers are bound to affect their profits, which is why a lot of countries have adopted the process of Patent linkage system as followed in the U.S.A under the Hatch-Waxman Act. The process basically prescribes the manner of linking the patents granted to such medicines to the eventual production of the generic drugs wherein if the drug has been patented the generic manufacturers cannot apply for production of the generic drugs until the patent lasts. They even have a separate document dedicated specifically to patents in the pharmaceutical department and that is the Orange Book. This book contains details of all the chemical drugs that have been provided with patents in the U.S.A and anyone can look it up in order to confirm if some pharmaceutical product has a patent or not. However, this book limits its extent to chemical drugs, biological drugs are not included in such document. There is a separate statute for the introduction of bio-similar in the nation known as BPCIA (Biologics Price Competition & Innovation Act) where the patents for such products are directly collected from the information provided by the parties as there is no Orange Book. This has been proven quite beneficial as well as controversial for the U.S pharmaceuticals regime.

It must be remembered that even after all these restrictions on the generic market it cannot be concluded that the scope of generic manufacturers has decreased. Rather all these steps have improved the rate of development of such medicines. It has decreased the issue of tiresome patent litigation, also the submission requirements for the approval of such medicines have also decreased from the earlier norm leading to the fall in prices of such medicines as well. To assure these benefits to generic manufacturers they even introduced a new concept called ANDA (Abbreviated New Drug Application), under the Food, Drug & Cosmetic Act i.e. FD&C Act, which decreased the submission requirement to mere bioequivalence data and thus the expenses of clinical trials were decreased leading to falling in prices. This is known as the abbreviated pathway for generic drugs.

These results lead the Obama regime to introduce a similar pathway like ANDA for biological products as well as clearly the biological products were overpriced as there was a limited scope of competition. These biopharmaceuticals were "big-molecule," very expensive drugs that are manufactured in animal or plant cell tissue. Examples include etanercept (Enbrel, Amgen/Pfizer), infliximab (Remicade, Centocor), adalimumab (Humira, Abbott), bevacizumab (Avastin, Genentech), and rituximab (Rituxan, Genentech)[10]. However, he had even asked for reducing the period of data exclusivity from 12 to seven years which was clearly rejected.

The rights in this department are just not limited to the rights of patents. A lot of time it has been observed that after the filing of an application or patent, the regulatory authorities take a lot of time to validate the product. In such cases, the innovator is bound to lose crucial time of his patent rights since the extent of patent rights starts from the date of filing of the application. In such instances, the regulatory authorities like the FDA under the FD&C Act, provide for the process of a pharmaceutical patent extension where the innovator manufacturer has the right to market exclusivity to a maximum of 5 years. The total time period in such cases should not extend beyond 14 years so that the innovator's rights are well protected and are not just a statutory promise. It is essential that there is a proper structure of realization of rights that the statutes promise in a nation and U.S.A clearly balances the conflicting rights of generic and reference manufacturers, which is why the U.S.A has developed a regime that continues to support innovation. The same is the position in European Union as well where they adopted the mechanism of giving data exclusivity on the basis of 8+2+1 where the drugs are provided initial data exclusivity up to 8years. Though the concept of a patent linkage system is absent the protection in this case in itself is huge.

2.1. Developing Nations

However, in India, such kind of process is rejected and the patent regime for drugs is not observed. India completely rejects the idea of providing patents for life-saving medicines. This raises a major question, if patents are allowed in all departments, then why is the pharmaceutical industry exempted from this protection? Does India not want to incentivize its drug manufacturers? The answers to such questions reflect a completely new form of welfare policy

[10] Stephen Barlas, "President Obama Reopens Debate on Patented Biologics", *NCBI*, April 2011.

construed by the lawmakers and the idea is to not restrict the pharmaceutical industry to certain multinational corporations and risk the lives of citizens. The fact is that, unlike the U.S, the majority of India's population pays their medical expenses from their own pockets and not by health insurance. In such cases, if the prices of life-saving drugs are again subjected to the multinational corporations who have the sole intention of exploiting profits out of the medical needs of India's population would be catastrophic.

One such example of this policy can be reflected when in 2013 Honorable Supreme Court rejected Novartis' patent application for its life-saving drug i.e. Glivec which was a drug prone to fight cancer. The reason why Novartis was so hell-bent on getting a patent in India was because of the reason that generic manufacturer had already introduced this drug in India, and they were securing profits from the Indian market. Indian generic producers were manufacturing and selling Glivec at less than 10% of the patented version's price, compelling Novartis to put pressure on the Indian government to take a stance on intellectual property protection[11]. But it was eventually rejected and there were two basic reasons given for such rejection. One was that the modified version of the drug did not exemplify a significant change in therapeutic effectiveness over its previous form[12]. This decision was under the light of Section 3(d) of the Indian Patent Act, which expresses those minor changes to existing molecules will not be deemed as sufficient for further patent protection, which was critical to this case[13]. The second aspect was that providing a patent to this drug would mean putting an end to the production of all the generic drugs in India. The pricing of cancer treatment is arguably the most important factor in determining India's position in the case: a monthly dose of the patented version of Glivec (around USD$2,600 per patient) is over three times an average Indian's annual income[14]. This was a reflection of how the IP rights in India serve the interests of its domestic population and are attaining the ideal of social justice.

Generic manufacturers have already a huge market in India and continue to provide to India's economy as well, but often the question is that such negligence of the innovator's rights would

[11] Lee L, "Trials and TRIPS-ulations: Indian patent law and Novartis AG v. Union of India", *Berkeley Technol Law J.,* 281-290 (2008).
[12] E Hannon, "How an Indian patent case could shape the future of generic drugs". *Time Magazine*, August 21, 2012.
[13] J Albutt, "Novartis loses battle for patent protection for Glivec cancer drug in India", *Mondaq,* May 23, 2013.
[14] Ravinder Gabble & Jillian Clare Kohler, "To patent or not to patent? The case of Novartis' cancer drug Glivec in India", *Globalization & Health,* 10, 3, (2014).

eventually affect innovation, the sole reason behind the introduction of IP rights. The issue is just not limited to this aspect, another issue is patent infringement because though these drugs are not patented in India, they are provided in the case of a lot of drugs outside India. The practice that is followed in India is that when a generic manufacturer applies for approval for marketing in India, the regulatory authorities pay no heed if the reference product of such medicine was patented or not, and after 4 years of introduction of such new drug in India, with no regards to its patent, the generic manufacturer can get the approval to market their drug in India. In such cases obviously, the innovator corporation may file for patent infringement, and even if the innovator corporation loses the expenses and extent of patent litigation are huge. A lot of times it has been observed that the authorities often refuse the patent grant of life-saving drugs, but even then, a lot of times generic manufacturers do get skeptical about such regime. That is why they try to work on drugs that are not patented or those which are already in the public domain and try to develop and market them which obviously restricts the growth of the market.

These instances reflect an anti-competitive strategy as well where apparently India is so focused on allowing the copying of data that it avoids the rights of the innovator manufacturers. This is where the Indian patent regime stumbles. It has to maintain its pro-health regime and the generic industry that contributes heavily to the Indian economy. It faces growing competitive pressures from China, which is now taking market share from India in the volume generics market which it dominates[15]. At the same time, China is working to harness pharmaceutical innovation, undertaking significant pro-innovation reforms to its intellectual property and regulatory frameworks[16] where India is clearly lacking behind as it is clearly mentioned that India fails to provide this protection to the pharmaceutical industry which has led to one major result and that is infuriating the innovation regime in India. Considering the factor that innovated drugs which have a slight improvement can get patents in foreign nations and not in India is bound to affect its innovation sector leading to the result where pharmaceutical companies are more interested in copying rather than creating. Indian generic pharmaceutical companies have a strong appetite for investing in innovation, yet their patenting behavior shows them unwilling or unable to

[15] Shen Weiduo, "Chinese pharma firms enter a golden era, set to surpass Indian counterparts", *Global Times*, July 7, 2018.
[16] Sharon Thiruchelvam, "How China became a leader in intellectual property", *Raconteur*, April 20, 2018.

undertake it in India[17]. Also, investors in India prefer predictable, imitative business models and me-too products, where they have the visibility of assured returns[18].

India needs innovation in the pharmaceutical industry and it is neglecting the positive outcomes of such a regime. In India, this would lead to a reduction in disease burden (development of drugs for India-specific concerns like tuberculosis and leprosy does not get global attention), creation of new high-skilled jobs, and probably around $10 billion of additional exports from 2030[19].

This also affects its international relations as where foreign companies cannot get their drugs patented in India, Indian manufacturers can go ahead with their innovated products and get them patented in countries like the U.S.A and enjoy the benefits of rights bestowed upon them.

3. EXTENT OF TRANSITION REQUIRED?

It is time that India realizes that it is not the sole generic manufacturer in terms of the global industry. China and India are both major API Active pharmaceutical ingredients) suppliers and generic-heavy countries. Because of the similarity, Indian drug-makers have long had a hard time finding an inroad into the Chinese market. But as U.S. pricing pressure lingers on, and as China welcomes competition to further bring down its own drug costs, a door has opened[20]. As a consequence, it can be deduced that China is a very important competition to India's position as a leading generic manufacturer. China being the second most important manufacturer with its pro-investment facilities continues to attract investors from all around the world as everyone recognizes that China is a crucial market development arena. This can be observed when major Indian pharmaceutical manufacturers are raging to be a part of the Chinese market. One such crucial example was the joint venture of the leading manufacturer Cipla. A combined total investment of $30 million was made for the joint venture. Cipla EU, a wholly-owned subsidiary of Cipla, will hold an 80% stake and Acebright will hold a 20% stake. Even though Cipla will

[17] "Copy or Compete? How India's patent law harms its own drug industry's ability to innovate", Geneva Network, December 3, 2018.
[18] Kiran Mazumdar Shaw, "The challenges and opportunities of innovating in India", *ORF*, October 30, 2020.
[19]Nilesh Gupta, "Pharma industry must turn more innovative", *Business Line*, September 7, 2021.
[20] Angus Liu, Top "Indian drugmakers expand in China as policy changes trigger opportunity", *Fierce Pharma*, July 17, 2019.

start off with respiratory products in China, the pharmaceutical company aims to expand to other segments in the future, according to Umang Vohra, MD & Global CEO of Cipla[21].

Even Dr. Reddy's has identified 70 products from its US portfolio that meet requirements and can obtain approval from Chinese authorities in the coming years. The company is building a new plant, upgrading teams, and building a pipeline for China[22]. This reflects how China is slowly reforming its policies to be more corporate-friendly and attract more investments from such influential players. But their policies are not just limited to investments. China is also slowly emerging to be one of the global leaders in providing IP rights as well and even such policy is helping China's strategies in the pharmaceuticals industry.

The business policy of China to allow only those foreign industries to participate in the Chinese market which has a policy of certain beneficial returns to the domestic entities by making it mandatory for such foreign companies to make alliances with the domestic players is another way of China's tactic to ensure the well-being of its economy. Such alliances are prone to being one of the many ways of transfer of knowledge which will have a drastic impact on the growth of the economy as well as the skills of the people. The large-scale effects were not observed initially. But now as China continues to be the global leader in cases of forged products, this transfer of knowledge becomes crucial in such ventures as it was one of the many factors that lead to such growth of forged product markets. This practice has slowly evolved in the case of pharmaceuticals as well. But slowly these policies are changing, and China is avoiding the copying mechanism even in the case of pharmaceuticals. They know that it is a crucial step for the global expansion of their domestic business entities. As Chinese companies focus on global expansion abroad and high-tech innovation at home, they have increasingly called on the government for more robust IP protection. In fact, many of the issues raised by foreign companies operating in China have already begun to be addressed by legal reforms and stronger enforcement mechanisms[23].

[21] Mukesh Adhikary, "Cipla re-enters Chinese market in joint venture with Jiangsu Acebright", *Business Today.in,* July 16, 2019.
[22] Teena Thacker, "Indian drug makers scouting for partners in China", *Live Mint,* July 29, 2019.
[23]Sharon Thiruchelvam, "How China became a leader in intellectual property", *Ranconteur,* April 20, 2018.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

China knows that an essential part of achieving its aim of "science and intelligent technology leadership" is putting in place high-quality legal protection for intellectual property[24]. As of 1 June 2021, China has amended its drug patent policies, introducing a patent term extension for drugs and the patent term compensation system to protect against untimely and unfair generic competition. According to market analysts, the reforms make the Chinese pharmaceutical market more conducive for innovative research companies, both regional and international[25]. Along with this, they have introduced the concept of patent linkage in order to strengthen their innovation.

Despite being a generic market historically, China has made significant reforms to drive innovative research within the country. Notwithstanding the negative perception owing to the COVID-19 pandemic, China continued to implement major drug regulatory reforms and clinical trial guidelines which ensure faster turnaround of regulatory approvals. Against this backdrop, lucid patent guidelines become more relevant than ever. Domestic pharmaceutical companies who have forayed into the innovation of late are the most likely benefactors although this will also benefit international innovator companies as well[26].

India has a close nexus to China in terms of competition that it can clearly not avoid. The continued evasion of IP rights in pharmaceuticals cannot be supported and India needs to upgrade its policies. A reasonable transplantation policy is necessary where the policies are in consonance with the domestic market as well as the international regime. Globalization has ensured that no entity in the current time can have its independent existence; everyone is dependent on another for their own needs. In such a case, the policies have to be framed in such a manner that helps international entities with respect to competition in India. Also, other nations that are slowly advancing in this sector need to be analyzed closely in order to understand the change of competitive strategies. Innovation needs to be incorporated in the pharmaceutical sector and pro-health regime needs to be balanced accordingly.

[24] Alice De Jonge, "Why China is a leader in intellectual property (and what the US has to do with it)", *The Conversation*, March 26, 2018.
[25] Hannah Balfour, "Chinese patent reforms to bolster pharma innovation", *EPR*, June 17, 2021.
[26] *Supra* at 25.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

4. CONCLUSION

Where nations like U.S.A and China are evolving their strategies with respect to innovation in pharmaceutical sectors day by day by restricting generic and allowing innovation, India has no market exclusivity, no concept of patent extension, patent linkage. Even in the case of the U.S.A when the then President Obama tried to decrease the market exclusivity Stephanie Fisher, a spokeswoman for Biotechnology Industry Organization (BIO), the brand-name company association, countered that: "Lowering the period of data exclusivity may result in some short-term savings, but it would discourage investment in the next generation of therapies and cures—which would end up costing the government money in the future[27]."

The eventual outcome from all of this data is only one thing that though developing nations are struggling to find ground as to patent linkage concept it is necessary that innovation as a concept is promoted in such nations. The developed nations have huge investments, in the arena of research and development and that is why they are providing such huge leverage and benefits to such pharmaceuticals because it will lead to innovation that is bound to affect the economy. Developing nations will also have to provide such investments so that they can at least be a part of this process.

4.1. Recommendations

India needs to upgrade its policies and it needs to be done in such a manner that will serve the interests of both the innovator manufacturers as well as generic manufacturers. India and its pro-health policies need to be analyzed in the context of international behavior and even the domestic firms who have the capacity of making such innovations need to be supported which are pro-innovation. India cannot continue with its mechanism of copying and implementing as eventually, the pharmaceutical companies will derive technology that will prevent the generic industries from deducing their data. Terminator gene technology is one of the many examples which can be brought out in this context. In the era of globalization India cannot have a policy that is an isolated mechanism and though it is adopting strategies like "Make in India", the same practice needs to be adopted in the context of pharmaceuticals.

[27] Stephen Barlas, President "Obama Reopens Debate On Patented Biologics", *NCBI,* April 2011.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

India also needs to form its policies in such a manner that will lead to the international entities considering India as a hub of research and development. However, policy in this arena needs to be drafted while considering the exploitative nature of these international players and the poor awareness of their exploitative practices when it comes to clinical trials in India. Even the policies regarding compensation have to be drafted accordingly.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

THE MIRAGE OF 'SOCIAL JUSTICE': A DECONSTRUCTION OF THE SHIFTING IDENTITIES OF THE 'WELFARE STATE' IN INDIA

DIVYANSHU SAXENA*

ABSTRACT

The research paper aims at examining the scope and nature of the socialist fiction of the 'welfare state' in India by enumerating the ideological drawbacks of the contemporary social welfare legislations passed in the interests of the labour classes by ruling governments. The research paper proposes the hypothesis of the 'Mirage of Social Justice' by deducing the central role played by the socio-legal institutions and the market to uplift the standards of living for the labour classes. The research methodology consists of ideological and normative points of inquiry into the conditions of social justice within a socialist society i.e. India, despite the presence of class and caste hierarchies in the foundations of social relations. Moreover, the research paper has employed deconstructive and discursive tools to elaborate upon several examples of social injustices being continually inflicted upon 'labour classes' across different states in India. The several contentions of the research paper have been enumerated as follows, a.) Tracing the meaning of 'labour classes as legal subjects' by placing them within the dichotomy of public and private laws in the legal sphere, b.) Critiquing the lack of proper recognition of the socio-political limitations of the legal sphere and market by Pashukanis while conceptualizing the economic forms of 'labour classes', c.) Analysing the significant concerns of Pashukanis over the transformation of the identities of the 'welfare state' in a socialist society i.e. India into an impersonal mechanism of public authority that works towards exacerbating the pre-existing social inequalities due to the sub-ordination by the dominant classes.

1. THEORETICAL DISCUSSION

1.1. Tracing the Meaning of 'Labour Classes' as *Legal Subjects* and *Economic Subjects*

* Student, NALSAR University of Law, Hyderabad.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

In his work *'The General Theory of Law and Marxism',* Pashukanis has attempted to theorize that 'every sort of juridic relationship is a relationship between subjects'[1] which must be fundamental in understanding the functioning of social welfare mechanisms within a 'rule of the law society. We must understand that the commodification of the 'labour classes' in the capitalist society is a direct result of the *alienation* of the natural rights of the workers against the economic imperatives of the modern market. A *socialist* society like India faces deeper structural and institutional challenges while implementing the original intent of the social welfare legislations like the Social Security Code, 2020, etc. It must be contended that the pre-existing inequalities in the distribution of economic resources lead to the creation of inevitable *'possessory barriers'* and *'proprietary entitlements'* in the legal sphere leading to the possibilities of sub-ordination of the weaker classes by the dominant classes.

In his work, *'Ideology and Ideological State Apparatuses,* Louis Althusser [2]has proposed that the *specificity* of the social form acquired through the 'labour' of the marginalized classes leads to the evolution of the state apparatuses of control in such a manner that they undermine the *economic* and *constitutional* freedoms of the 'labour classes'. The organization of the social institutions leads to the possibility of over-differentiation of the legal disputes amongst the unequal individuals along with the constant contesting between them over the accumulation of possessory and proprietary rights in the society. The inherent legal and economic conditions that pre-exist the *natural rights* of the 'labour classes' allow their systemic sub-ordination by the welfare state within the subtle fiction of *'Socialism'.*

1.2. Tracing the Nature of Social Relations between the 'Socialist Welfare State' and 'Labour Classes'

The research paper highlights that the inter-subjectivity of class relations in a 'rule of law society is subdued by the capitalistic imperatives of the market-based policies devised at the whims and fancies of the ruling parties at the state and central government levels in the *socialist* society. In his work, *Pashukanis' Selected Writings on Marxism and Law*[3], he emphasized upon the fact that

[1] Evgeny Pashukanis, The General Theory of Law and Marxism, p. no. 321-22 (Transaction Publishers, New Brunswick, USA, 2nd Edition, 2002).
[2] Louis Althusser, *'Ideology and Ideological State Apparatuses,* (La Pensee, 1st Edition, 1970).
[3] Evgeny Pashukanis, Selected Writings on Marxism and Law, p. no. 111-13 (P. Beirne & R. Sharlet, London, 1980).

there is a continuous contest over rights between the legal subjects would lead to a necessary manipulation of the social institutions and control mechanisms to transform the natural essence of the legal rights of the labour classes into *abstract* and *alienable* statutory rights solely based upon the provisions of the legislation.

For example, recently on 12th December 2020, a violent clash between the workers and the factory officials broke out at the Wistron Infocomm Manufacturing Ltd. facility in the Kolar district of Karnataka. The matter involved the immediate suspension of an employee by the manager along with the ongoing struggle of the workers against grave violations by the employers of their rights under several legislations like Contract Labour (Regulation & Abolition) Act, 1970; Minimum Wages Act, 1948; Equal Wages Act, 1976 and Industrial Employment (Standing Order) Act, 1946. The allegations include the rapid increase in the number of workers from 5000 to 10,500 in a short period and the undue increase in the number of working hours from 8 to 12 hours. The major issue in this example is the lack of sufficient notice about the changes to the workers as well as the complete ignorance of the management authorities while deciding upon the fate of thousands of workers without any proper consultation with the representatives of the 'labour class'.

2. CONCEPTUAL DISCUSSION

2.1. Tracing the Distinction between the Proprietary and Possessory Forms of Legal Rights in A 'Rule of Law' Society

The research paper has attempted to draw a careful distinction between the organizational forms adopted by the practices of law in a 'rule of the law society. In his work, *Pashukanis Special Writings on Marxism and Law*[4], he clearly stated that the 'labour' of the working classes transforms into a *specific social form* that directs the evolution of the market and social practices but, the *socialist* society attempts to abstract the real legal character of the labour entitlements through the dilution of the proprietary rights of the labour classes. The original aim of the social welfare legislation is adversely affected by the nature of social relations sustaining within the pre-existing inequalities of the social system. The research paper contends that the proper

[4] Evgeny Pashukanis, Selected Writings on Marxism and Law, p. no. 91-92 (First published, P. Beirne & R. Sharlet, London, 1980).

recognition of the *possessory rights* of the workers would necessarily transcend into systemic socialization of the mutual economic exchanges as well as the beneficial privatization of the individual production capacities in the market.

For example, in the year 2012 the auto-mobile manufacturing company *i.e. Maruti Suzuki Ltd.* faced widespread violent conflicts from the workers when an employee was unjustly suspended by the shop-floor supervisor of the plant. More than 100 officials of the management and 9 policemen were injured in these violent clashes that occurred in the Manesar factory plant. The adverse consequences of the organized strikes and protests of the laborers led to a steep decline of 29% in the net profits of the company along with a significant decrease of 11% in the quantum of vehicles being averagely sold by Maruti Suzuki Ltd. This example portrays the adverse impacts of the presence of class conflicts within industrial and social relations which inevitably lead to the economic and political oppression of the 'labour classes' by the dominant classes. Moreover, we must understand that the concealment of the *masks of oppression* is a systemic function of the 'welfare state' to direct the 'movement of capital' in favour of the interests of the dominant classes.

2.2. Tracing the Transformation of the *'Identities'* of the Welfare State in India

In his work, *Critique of Hegel's Philosophy of Right: Collected Works, Vol. 3,* Marx[5] cautioned us about the deliberate construction of the positive concept of state in a 'rule of law' society leads to the constant reinforcement of the pre-existing inequalities as well as the consolidation of the pre-existing capital-commodity relations in the market. The research paper argues that the state acquires the role of a rational representative of the dominant classes within the fiction of a 'welfare state identity' in a *socialist* society. The 'targeted legislations' ignore the inter-subjective values of the 'law' that protects the fundamental rights and entitlements of the 'labour' due to the commodification of their identities in the market. The legal institutions must strictly co-relate the nature of *public and private* law in a 'rule of law society because it is necessary to understand that there is an inter-dependence of the two concepts upon each other. The legality of the state imparts social and economic form to the commodity interactions between the individuals in the market.

[5] Marx, Karl, Critique of Hegel's Philosophy of Right, Collected Works, Vol. 3, (2nd Edition Cambridge University Press, Cambridge, 1970.

For example, recently in September 2021, after the removal of pandemic restrictions in the market by the government of Gujarat, the diamond industry of Surat has been constantly facing an acute shortage of skilled migrant labourers that were forced to return to their hometown during the lockdown last year. It has been reported that more than 1,25,000 workers have abandoned the state causing huge losses to the manufacturers but, it must be understood that the deeper reason for their non-willingness to return to work with the same employers stem out of deeper issues like non-payment of wages during a pandemic, demands of higher wages as there have been a 4 times increase in the demand of their labour in the international market, managerial differences between recognition of skilled and unskilled labourers, etc. This example is a clear indication of the attempts of the *socialist state* to ignore the epistemological struggles of the migrant labourers during the pandemic by subjecting them blatantly to the uncertainties of the market without the proper recognition of their constitutional guarantees and natural rights within the legal sphere.

3. CRITICAL ANALYSIS

The research paper examines that the 'law' is essential for the adequate circulation of capital in the market and thus, we must carefully contemplate the abstractions of commodity relations in the 'rule of law' society as a positive differentiation of the *possessory and proprietary* rights of the labour classes into institutionally enforceable legal rights. In his work, *The General Theory of Law and Marxism*[6], Pashukanis has clearly stated that the coercive legal instruments of the state function towards the evolution of class structures in a 'rule of the law society. He emphasized the fundamental concepts of proprietary regulations and commodity exchanges that determine the *essential* character of 'law' along with the *specific* functions of the legal institutions in the legal sphere. Therefore, the research paper contends that the material inequality pre-existing the capital-commodity relations causes the *systemic ignorance* of the formal equality of the individuals within the scope of their social and economic relations.

For example, on November 26, 2020, a nationwide strike was launched at the instance of 10 central trade unions across India in which more than 25 crore workers participated to demonstrate against the anti-workers and anti-farmer legislation being brought into force by the

[6] Evgeny Pashukanis, The General Theory of Law and Marxism, p. no. 321-22 (Transaction Publishers, New Brunswick, USA, 2nd Edition, 2002).

government authorities. The example reveals massive distrust against the state amongst the workers in the unorganized sector that are demanding proper recognition of their legal rights at the cost of their essential daily wages and job security. We must understand that the solidarity against the coercive legislation of the state is a clear indication of the epistemological consistencies that have evolved within the members of the oppressed 'labour classes' across the nation due to the curtailment of their constitutional guarantees and fundamental rights by the state institutions. The lack of proper consultation and adequate planning reveals the lack of legislative intent to beneficially accommodate the legal rights of the workers into the larger legislative and executive scheme of increasing production capacity in the international market.

In his work, *The State and Revolution, Collected Works, Vol. 25,* Lenin has criticized the constant circulation of labour as a legal subject in the market due to the alienation of his *possessory and proprietary* entitlements by the virtue of the state-enacted and targeted legislation. The ideal *socialist state* must attempt to unveil the masks of oppression that persist within the class structures of the society by carefully understanding the true nature of the social revolution amongst the workers without institutionalizing their social identities. The research paper contends that the role played by the 'welfare state' regards the efficient containment of the labour unrest in a 'rule of law' society which is the exploitative nature of the capitalist relations. Furthermore, the primary legislative aim of the state is to regulate the 'movement of capital' through policies and schemes which is in direct contest with the constant struggles of the labour classes and thus, it leads to a situation where the state attempts to alienate their *possessory and proprietary* entitlements in the market. The research paper contends that the logic of capital must be legitimized by the legal practices of the state in a 'rule of law' society leaving large spaces for the socio-political appropriation of the pre-existing material inequalities as well as the deliberate creation of the *'Mirage of Social Justice'* by the *socialist* state.

In his work, *Pashukanis' Selected Writings on Law and Marxism*[7], he systematically attempted to amalgamate the original conceptions of *private and public law* to structurally explain the causes of wage exploitation of workers in the Soviet Union. However, he fails to recognize the extent of the legal character being acquired by the legislations of the state amongst widespread

[7] Evgeny Pashukanis, Selected Writings on Marxism and Law, p. no. 91-92 (First published, P. Beirne & R. Sharlet, London, 1980).

protests being levelled against the legitimacy and legality of the state institutions. The research paper contends that we must locate the causes of labour exploitation outside the purview of the market and social exchanges to emancipate the real character of the *welfare state* in a rule of the law society, rather than prioritizing the coercive forms of legal instruments and oligarchic policy regulations that reinforce the material inequalities between the individuals that already exist within institutionally specified layers of class-based and caste-based hierarchies.

4. CONCLUSIVE REMARKS

The research paper has laid down *ideological* and *normative* conceptualizations of 'labour' as distinct legal subjects in a 'rule of the law society. Furthermore, the paper contends that the exploitation of workers by the private agents is facilitated by the state institutions to promote the sustenance of particular capitalistic structures within the *'Mirage of Social Justice'* in India. In his work, *Critique of Hegel's philosophy of Right*[8], Marx has elaborated upon the fact that social processes of material reproduction are central to the development of the social structures that promote the formal equality between the legal subjects in a 'rule of the law society. The research paper challenges the pre-determination of the position of the state because it leads to the consolidation of pre-existing capital-commodity relations in the market which transforms the identities of the legal institutions into *oppressive institutions of state control.* Pashukanis has argued that the economic character of commodity exchanges is regulated by the well-differentiated legislative principles but, the alienation of the *possessory and proprietary* values from the legal entitlements of the labour classes within the legal sphere is a direct result of the commodification of the labour identities by the state institutions. Therefore, we must understand that the legislative inevitability of representational bias and class coercion causes the constant shifting of the identities of the 'welfare state' in a *socialist* regime towards the attainment of the values of *legitimacy* and *legality.* The positive construction of the concept of *'state'* is a classical example of the creation of pre-dominantly hierarchical social institutions that assume unfettered power and control over the 'movement of capital' as well as institutionally alienate the *natural rights* of the legal subjects. Conclusively, the research paper contends that a *deconstructive* inquiry into the origin and purpose of the state would reveal several instances of socio-political

[8] Marx, Karl, Critique of Hegel's Philosophy of Right, Collected Works, Vol. 3, , (2nd Edition Cambridge University Press, Cambridge, 1970.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

manipulation of the constitutional principles that solely legitimize the social functions of the state in a 'rule of the law society. It must be understood that the formality and legality of the *unjust laws* are functional pre-conditions to the effective sustenance of *capitalist* regimes and hence, the slippery-slope fiction of *socialist* welfare state provides adequate opportunities to the dominant classes in a parliamentary-democratic polity to misappropriate the beneficial character of the labour welfare legislation against the interests of the 'labour class'.

Journal of Global Research & Analysis
(A Multi-Disciplinary Peer-Reviewed Research Journal)
Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

THE CONTRADICTION BETWEEN THE LAWS AS TO SUICIDE ATTEMPT: A CRITICAL ANALYSIS

MUBARAK KHAN*

ABSTRACT

It cannot be denied that natural law has played a crucial role in shaping the law. It is obvious that in many situations man has surrendered himself before the natural law and whenever required he has used the law of nature for his own cause. It is fact that 'life' is a priceless gift of nature that is protected and guaranteed by almost all the democratic countries in a form of 'right to life'. It is argued that the right to life is a natural right that cannot be abridged or abrogated by the state without following due process of law even though it is not recognized as such. Now in what way it is justified to end this natural right by oneself, in other words why should be a man allowed to commit suicide? this question to be resolved needs a pragmatic jurisprudential approach. It is about 160 years ago under section 309 of the Indian Penal Code (IPC), 1860 an attempt to commit suicide is made punishable in India in due consideration of various factors. The same was challenged before the various High Courts and before the Supreme Court many times. Several attempts have been made starting from 1970, to decriminalize suicide attempts. Eventually, it was included in a few sections of the recently passed Mental Health Care Act (MHCA), 2017, section 115(1) of which not totally but partially decriminalizes the offence of suicide attempt. Now the question arises, is an attempt to commit suicide punishable? Two laws have opposing views, i.e., the conflict between IPC section 309 which criminalizes attempted suicide, and section 115(1) of the MHCA which bars punishment. This paper intends to meticulously analyse and resolve the controversy between these two laws. The paper also seeks to address the questions of, whether in view of the provisions of MHCA, Section 309 IPC becomes redundant? If not, is it necessary to amend the same?

* Assistant Professor, Al-Ameen College of Law, Bangalore.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

1. INTRODUCTION

Each suicide is a personal tragedy that prematurely takes the life of an individual and has a continuing ripple effect, dramatically affecting the lives of families, friends, and communities. There are various causes of suicide like professional/career problems, sense of isolation, abuse, violence, family problems, mental disorders, addiction to alcohol, financial loss, chronic pain, etc.[1] Evidently, suicide is an unnatural act of killing oneself, which is a serious social problem to be tackled. Several types of research are being made throughout the globe to find out the causes and outcomes of suicide. Suicide is a deliberate act of self-harm taken with the expectation that it will be fatal. A suicide attempt is a non-fatal act of self-harm, often with the aim of mobilizing help. Suicidal behaviour has gained recognition worldwide as a significant public health problem. In many countries, rich and poor, suicide rates are increasing. In developed countries, suicide is among the top ten leading causes of death, and one of the top three causes of death among people aged 15-35 years. It is estimated that one suicide occurs approximately every minute, and one suicide attempt approximately every three seconds. As a result, more people die from suicide than from armed conflict.[2] There may be several causes, mental as well as physical for an individual for committing suicide. For whatever reason it might be caused, suicide is never being appreciated as an act to be commended. As like other countries[3], Indian law since very long back decided to punish the person who attempts to commit suicide under section 309 of the Indian Penal Code (IPC), 1860, the Constitutional validity of which was upheld by the Supreme Court by saying that the right to life including right to live with human dignity would mean the existence of such a right up to the end of natural life. But the right to die with dignity at the end of life is not to be confused or equated with the right to die an unnatural death curtailing the natural span of life.[4] On the other hand Section 115(1) of the Mental Health Care Act (MHCA), 2017 conditionally decriminalize the act of suicide attempt. These two provisions of two different Acts seem to be contradictory to each other. It is reasonable here to have a comparative analysis of these two provisions to reach a proper conclusion.

[1] National Crime Records Bureau, Ministry of Home Affairs, "Accidental Deaths and Suicides in India" 194 (2019).
[2] World Health Organization, Department of Mental Health and Substance Abuse, Geneva, "Preventing Suicide – A Resource at Work" 1 (2006).
[3] According to the World Health Organization, at least 59 countries have decriminalized suicide. – Ng Yin Ping and Ravivarma Rao Panirselvam, "The Endgame of Section 309? An Appeal for Decriminalisation of Suicide" 28 *Malaysian Journal of Psychiatry* 2 (2019).
[4] See *Smt. Gyan Kaur v. State of Punjab*, (1996) 2 SCC 648.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

2. SOCIO-LEGAL ASPECTS OF SUICIDE

Close to 800000 people die due to suicide every year, which is one person every 40 seconds. Suicide is a global phenomenon and occurs throughout the lifespan. Effective and evidence-based interventions can be implemented at population, sub-population, and individual levels to prevent suicide and suicide attempts. There are indications that for each adult who died by suicide there may have been more than 20 others attempting suicide. Suicide accounted for 1.4% of all deaths worldwide, making it the 18th leading cause of death in 2016.[5] Every year, more than 1,00,000 people commit suicide in our country. A total of 1,39,123 suicides were reported in the country during 2019 showing an increase of 3.4% in comparison to 2018 and the rate of suicides has increased by 0.2% during 2019 over 2018.[6]

Causing one's own death should not be the resort of rest for an individual as it not only ends the life of the person in an unnatural manner but also dangerously affects many. It is said that 'A suicide is like a pebble in a pond. The waves ripple outward.' When someone dies by suicide, the people impacted most dramatically are those closest to the person who died: family, friends, co-workers, classmates. As a result, the people who interacted regularly with the individual who ended their life will miss the physical presence of that person and typically feel the loss most intimately.[7] One cannot imagine the effect on dependents. Traditionally, most of the world's religions have condemned suicide because, as they believe, human life fundamentally belongs to God.[8] Since modernization Common philosophical opinion of suicide reflected a spread in cultural beliefs of society that suicide is immoral and unethical. One popular argument is that many of the reasons for committing suicide such as depression, emotional pain, or economic hardship are transitory and can be ameliorated by therapy and through making changes to some aspects of one's life. It is indeed correct that the law cannot reach to catch a person who has committed suicide but however the law can deter a person who has attempted to commit the

[5] World Health Organization, "Mental Health Estimates" 2016 *available at*: https://www.who.int/teams/mental-health-and-substance-use/suicide-data (last visited on February 24, 2021).
[6] *Supra* note 1.
[7] Elana Premack Sandler, "The Ripple Effect of Suicide" *available at* https://www.nami.org/Blogs/NAMI-Blog/September-2018/The-Ripple-Effect-of-Suicide (last visited on February 25, 2021).
[8] Like the Holy Quran and Bible expressly prohibit the act of suicide. Hindu Dharma too believes that a person committing suicide will be devoid of attaining 'Moksha', i.e. free from the cycle of rebirth due to good fortune and that his soul will roam around with severe pain.

same so that he should not repeat it any more and others should also dare to commit it. At least they should come to know that what they have done or going to be done is wrong.

2.1. Demands to Decriminalize Suicidal Attempts Justified?

At the beginning of the nineteenth century, most countries around the world had laws that provided for punishment, including jail sentences, for persons who attempted suicide. However, in the last 50 years, the situation has changed significantly. Most, but not all, countries have decriminalized suicide.[9] There is a growing feeling even in India that attempting to commit suicide should no longer be regarded as a crime and section 309 deserves to be deleted from the statute book. So many reasons are being given in favour of this point of view including that one should be free to deal with his body in any way he likes and that the act of killing oneself does neither interfere with peace and harmony in society nor does it cause alarm to it. In addition to this, another important fact in favour of its abolition is that many countries in the world including Britain have no such crime and in the many American States the position is the same.[10]

It should be recalled here that the objective of the law is to control human behaviour. It is not correct to say that life belongs to oneself and one should be allowed to do anything with the same. If it so then why should we have reasonable restrictions on fundamental rights and why should we need administration of justice. The state is morally as well as legally, duty-bound to protect the life of an individual and no one should be allowed to abridge this right, neither the state itself and any third person nor the individual himself. Even today there is a growing demand that the right to die should be recognized as a fundamental right. One can imagine the serious consequences if such demand is fulfilled. One should understand that the safety rules and regulations, for example, wearing helmets/seat belts during driving are made to save lives and to show that life is more precious than any other thing in this world and it needs protection. In such a case how a state can make laws to finish life itself? How it will be justified?. The objective of criminalization of attempted suicide is not only to make it a deterrent against others for such attempts in society but also to show the recognition of the dignity of life. The dignity of life lies in its protection not in allowing to end it by an individual himself however he wants.

[9] World Health Organization, "Preventing Suicide – A Global Imperative" 51 (2014).
[10] T. Bhattachaya, *The Indian Penal Code* 588 (Central Law Agency, Allahbad, 10th edn., 2019).

It is important to understand the factors influencing suicidal behaviour. Suicidal behaviour is not caused by a single factor, but rather, a complex interaction of many underlying risk factors. These include a previous suicide attempt, the presence of any mental health condition, harmful use of substances, hopelessness, and psychosocial stressors.[11] The causes of suicide may be grouped under two categories:

Firstly, in the majority of cases reason behind the suicidal attempt is typically due to psychiatric illness or psychological distress, indicating that the person requires assistance in his personal and psychological life, not punishment by fine and/or imprisonment.

Secondly, many times, the suicidal attempt is a result of a host of factors, some of which are outside a person's control, such as endogenous biological causes, socioeconomic causes such as poverty, frustration in love, setbacks in finances, family, or other such reasons.

In the first case, it is logically acceptable that in this kind of case the legal process may further enhance the mental illness of the individual and it further disturb him. In this kind of situation, a person needs assistance and must undergo proper treatment, training, and counselling rather than prosecution and punishment. However, in the second case, whether committing suicide is only the solution, don't an individual owe a duty and responsibility towards his family, his relatives, and towards society? There are many other lots of options available to resolve these kinds of transitory situations. Recognition of the right to die will not help to tackle this.

Several questions are raised in the context of section 309 IPC. First, it comes under the category of crimes defined under Chapter XVI of IPC. All other crimes in this category include those committed to the 'human body of the other person' and the suicidal attempt is clubbed with them in the same category of crimes. The act of attempted suicide is inferred on basis of intention, which is inferred from circumstances. But the intention may be unclear or ambiguous in many cases. Further, the question of the legal treatment of attempted suicide as a crime against the state does not find many takers.[12]

[11] *Supra* note 3.

[12] Rajeev Ranjan, Saurabh Kumar, *et. al.,* "(De-) Criminalization of Attempted Suicide in India: A Review", 23 *Industrial Psychiatry Journal* 5 (2014).

Nothing wrong with including suicide under chapter XVI of IPC as suicide is also an offence against the human body. It is wrong to say that all other crimes under this chapter include those committed to the 'human body of the other person'. Factually Chapter XVI IPC is 'Offences affecting the human body' and 'attempt to commit suicide' falls under the subheading of this chapter 'of offences affecting life'. By attempting suicide, is not an individual committing an offence against the human body? or the same is not an offence affecting life? Even a layman's answer to this question will be positive. It is argued that the criminalization of an attempt to commit suicide is based on intention which may be ambiguous or unclear. It is to be noted that intention is internal human behaviour which one cannot ascertain perfectly except the person himself in all the criminal offences. The *'mens rea'* must be proved beyond a reasonable doubt in all the crimes except a few. The prosecution tries to establish the same and accused tries to rebut it. It is also argued that a suicide attempt should not be considered an offence against the state. The offences like murder, grievous hurt, etc. are offences affecting the human body and they are considered as such because the state is under obligation to protect the life of an individual. It is noteworthy here that the state is under an obligation to protect the individual's life not only from others but also from himself, as such, considering attempted suicide as an offence against the state is justified. Moreover, the principle of making the right to die unavailable can be upheld only with the continuation of section 309 IPC read with sections 115(1) and (2) of the MHCA.

In recent times, the court verdicts, however, have supported the humane treatment of suicide attempters. Not a single judgment was given by Supreme Court which support suicide as a crime over the past decade. Anyhow, it doesn't mean that the Judiciary is in total support of making suicide attempts legal. The Supreme Court is of opinion that section 309 IPC needs reconsideration as to deal with exceptional cases like suicide due to actual mental illness etc. and the Parliament has successfully accepted the opinions by enacting MHCA to deal with most of the suicidal attempts where rehabilitation prevails over prosecution.

3. LAWS RELATING TO SUICIDE ATTEMPT: AN OVERVIEW

3.1. Suicide Attempt as an Offence Under IPC

Section 309 IPC penalises the crime of attempting to commit suicide. It says that whoever makes an attempt to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term extending up to one year, or with a fine, or with both.[13] According to the section liability under this provision exists when an attempt is made to commit suicide and any act towards the commission of such offence is done. This is the only section in the Indian Penal Code where punishment could be meted for an unsuccessful act only and never for a successful one. In other words, suicide is not a crime, its attempt is.

3.1.1. The law under the code is sympathetic

The law under section 309 IPC is quite sympathetic to the offender is apparent from the fact that the quantum of the penalty prescribed is not harsh and also that the imprisonment is always simple, never rigorous. The words 'or with fine, or with both' were substituted for the words 'and shall also be liable to fine' by the Indian Penal Code Amendment Act, 1882. Even the Courts have shown leniency towards the people accused, while trying them under this section and only in exceptional cases have punished them. One of the main questions in all cases of attempt to suicide is to find out as to whether the act on the part of the accused has crossed the stage of preparation because except in exceptional cases as long as it is in the preparatory stage there is no liability.

Where the accused was caught grinding oleander roots with the intention of committing suicide by consuming the same, it was held that no offence under this section was committed as his act had not gone beyond the stage of preparation to fall into the stage of attempt.[14] The question is no different in cases of hunger strikes.

Where the accused woman with the intention of committing suicide ran towards a well with a view to jump into it but was prevented from doing so by a person who seized her, it was held that she could not be held guilty under this section as there was always a possibility that she could

[13] *S. 309. Attempt to commit suicide.*—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.
[14] *Emp. v. Tayee,* (1883) Unrep Cr. C 188.

change her intention and also because her act was still in the stage of preparation as she was caught before she did anything which could be regarded as the commencement of an offence.[15]

3.1.2. Hunger strike cases and fast unto death cases

In *Ram Sunder Dubey v. State,*[16] the accused, an employee in a mental hospital, was suspended from service. He went on hunger strike against his suspension. After three or four days he was removed to a hospital. He argued that at no stage did he have an intention to fast unto death and in fact, he had been taking lemon juice regularly, and so he could not be held guilty under section 309. He was not held guilty of attempted suicide because at the time of his removal to the hospital he was not on the verge of death, and there was always a possibility of his breaking the fast before it became too dangerous, and hence his act was in the stage of preparation only. In such cases even if a person declares beforehand that he was going on fast unto death, even then he could not be held guilty of attempting to commit suicide until the prosecution could prove that his condition had become so bad that he was on the verge of death.[17] Hunger strike cases are always long-drawn affairs and not eating for a short period may cause loss of weight but not death generally. There may, however, be an irony about such cases in India where the general impression may be that different yardsticks are applied in different cases. For instance, a saint leader of stature who had voluntarily left food and water a few days before he decided to end his life was not charged under this section. Similarly, the practice of following *'santhara'* is prevalent amongst the Jain community and this is quite frequently undertaken especially by Jain sadhus and sadhvis. Under this practice intake, food and water are totally left after one decides to die, and slowly the death results. But prosecution is not launched against such a person. However, when a similar act is done by any ordinary person, he is bound to be charged for attempted suicide.[18]

3.2. Constitutional Validity of Section 309 IPC – Whether Right to Die is a Fundamental Right?

[15] *Queen Emp. v. Ramakka,* (1884) 8 Mad. 5.
[16] (1962) 1 Cr LJ 697 (All.).
[17] See *Ramamoorthy alias Vannia Adikalar v. State of Tamilnadu,* 1992 Cr LJ 2074 (Mad.).
[18] *Supra* note 10.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Most of the positive rights in the Constitution include negative rights also within their ambit, like the right to freedom of speech and expression including the right to remain silent. The question, under Article 21 of the Constitution,[19] therefore, arises whether the right to life includes the right to die also? In the beginning, the Constitutional validity of section 309 IPC was been considered by various High Courts and as usual, we can find controversy amongst the High Court judgements regarding the same. The question for the first time came up for consideration before the Bombay High Court in *State of Maharashtra v. Maruty Shripati Dubal.*[20] The court held that the right to life guaranteed by Article 21 of the Constitution includes the right to die and consequently the court struck down Section 309 IPC. In this case, the Judges felt that the desire to die is not unnatural but merely abnormal and uncommon. They listed several circumstances in which people may wish to end their lives, including disease, cruel or unbearable condition of life, a sense of shame or disenchantment with life. They held that everyone should have the freedom to dispose of his life as and when he desires.

On the other hand, contrary to this decision, the Andhra Pradesh High Court in *Chenna Jagadeeswar v. State of A.P.,*[21] held that the right to die is not a fundamental right within the meaning of Article 21 and therefore, Section 309 IPC was not unconstitutional.

The issue as to whether the right to die forms a part of the guarantee under Article 21 was first raised before the Apex Court in *P. Rathinam v. Union of India.*[22] A Division Bench of the Supreme Court, in this case, held that a person has a right to die and declared Section 309 IPC unconstitutional. The 'right to live' in Article 21 of the Constitution includes the 'right not to live', *i.e.,* the right to die or to terminate one's life. The Court held that Section 309 of the IPC was violative of Article 21 and hence it is void. A person cannot be forced to enjoy the right to life to his detriment, disadvantage, or disliking. The Court considered Section 309 of the IPC as 'a cruel and irrational provision'. Further, the Court held that 'right to life of which Article 21 of the Constitution speaks of can be said to bring in its trial the right not to live a forced life'. Explaining the reason for its decision the Court said that Section 309 IPC, deserves to be effaced

[19] Article 21 in the Constitution of India: *21. Protection of life and personal liberty.* – No person shall be deprived of his life or personal liberty except according to procedure established by law.
[20] 1987 Cri LJ 743 (Bom).
[21] 1988 Cri LJ 549 (AP).
[22] AIR 1994 SC 1844.

from the Statute Book to humanise our penal laws. It is a cruel and irrational provision and may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide.

Thereafter, a very peculiar situation came up before the Supreme Court in *Smt. Gian Kaur v. State of Punjab*,[23] where a challenge was raised to the constitutionality of Section 306 of the IPC, i.e. abetment to suicide.[24] Herein, relying on *P. Rathinam*,[25] it was argued that abetment to suicide could not be penalised as the abettor was only assisting in the enforcement of a fundamental right. A five-judge bench of the Supreme Court, in this case, held that 'right to life' under Article 21 of the Constitution does not include 'right to die' or 'right to be killed'. The 'right to die', is inherently inconsistent with the 'right to life' as is 'death with life'. Any aspect of life which makes it dignified may be read into Article 21 of the Constitution but not that which extinguishes it and, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. Right to life is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, incompatible and inconsistent with the concept of the right to life. Referring to Protagonists of euthanasia's view, that existence in a persistent vegetative state (PVS)[26] is not a benefit to the patient of a terminal illness being unrelated to the principle of sanctity of life or the right to live with dignity is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of the right to life includes the right to die. The right to life including the right to live with human dignity would mean the existence of such a right up to the end of natural life. But the right to die with dignity at the end of life is not to be confused or equated with the right to die an unnatural death curtailing the natural span of life. A question may arise in the context of a dying man who is terminally ill or in a persistent

[23] AIR 1996 SC 946
[24] *S. 306. Abetment of suicide.*—If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
[25] *Supra* note 22.
[26] The term 'persistent vegetative state' was coined by Jennett and Plum in 1972 to describe the condition of patients with severe brain damage in whom coma has progressed to a state of wakefulness without detectable awareness. The vegetative state is a clinical condition of complete unawareness of the self and the environment, accompanied by sleep-wake cycles with either complete or partial preservation of hypothalamic and brain-stem autonomic functions. The condition may be transient, marking a stage in the recovery from severe acute or chronic brain damage, or permanent, as a consequence of the failure to recover from such injuries. The vegetative state can also occur as a result of the relentless progression of degenerative or metabolic neurologic diseases or from developmental malformations of the nervous system. – The Multi Society Task Force on PVS, "Medical Aspects of the Persistent Vegetative State, 330 *The New England Journal of Medicine* 1 (1994).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the right to die with dignity as a part of the right to live with dignity when death due to termination of natural life is certain and imminent and the process of natural death has commenced. The argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include the right to curtail the natural span of life. The court accordingly held that Section 309 IPC is not violative of Article 21 of the Constitution. It set aside the judgment of Bombay High Court in *Maruty Shripati Dubal*[27] and overruled *P. Rathinam*.[28]

- **Legal contours of euthanasia**

There is a range of differences between suicide and euthanasia. Suicide is an intentional act of killing oneself for whatever reasons whereas 'euthanasia' means killing a person or the ending of the life of a person suffering from some terminal disease. It is also described as 'mercy killing' or 'compassionate killing'. It is a process of painless termination of life to end physical suffering. Euthanasia can be classified as: (i) Active; (ii) Passive; (iii) Voluntary and (iv) Involuntary. In 'active euthanasia' a terminally ill patient's life is ended by taking active steps like giving a lethal injection or high dose of injection, tranquilizer, etc. In 'passive euthanasia' the patient's life is ended not by taking some active steps but by withdrawing medical support with the intention to cause the death of the patient. If the patient is consenting to end his life through any means it is termed as 'voluntary euthanasia' and if the patient cannot request because of his condition, e. g., the patient living in coma or brain death, by the consent of some person on his behalf, e.g., parent, guardian or spouse, his life gets terminated, is known as 'involuntary euthanasia'. Obviously, in all cases, the patient's fatal illness is a most important ingredient.

However, the issue of euthanasia is not as simple as the literal translation of the term. The issue is not only contentious but is also very complex, being one that involves several moral, ethical,

[27] *Supra* note 20.
[28] *Supra* note 22.

societal, and economic aspects. It has plagued humankind since ancient times and has occupied the centre stage on the intersection between bioethics and law.[29]

Passive euthanasia is morally superior to active euthanasia since it means allowing the patient to die and not killing him which can have complex moral issues. With passive euthanasia, the assumption is the patient is anyway going to die. But active euthanasia can mean killing a patient in a range of different circumstances. For example, a patient chooses to die just because he is unable to bear the constant pain even though there could be some chance of him getting better in the future.

In *Aruna Ramchandra Shanbaug v. Union of India,*[30] the Supreme Court allowed passive euthanasia of a patient in a permanent vegetative state (PVS) by withdrawing the life support system with the approval of a medical board and on the directions of the High Court concerned. The Court, however, held illegal active mercy killing of a patient suffering acute ailment with a poisonous injection or by other means. As India had no law about euthanasia, the Supreme Court's guidelines are law until and unless Parliament passes legislation. Legislation permitting passive euthanasia titled, 'The Medical Treatment of Terminally-ill Patients (Protection of Patients and Medical Practitioners) Bill, 2016' is currently pending in Parliament. The Bill allows patients to take a decision to withhold medical treatment for themselves, provided that they have taken an informed decision and are of sound mind. It provides protection to patients and medical practitioners from any liability for withdrawing medical treatment. The right to die as an issue under the Right to Life continues to be widely debated and scrutinised even today. The judgements ranging from *P. Rathinam*[31] to *Aruna Shanbaug*[32] talk about it, albeit in different areas.[33]

- **Right to die *vis-à-vis* Right to die with dignity**

[29] John D. Papadimitriou, P Skiadas, *et. al.*, "Euthanasia and Suicide in Antiquity: Viewpoint of the Dramatists and Philosophers", 100 (1) *Journal of the Royal Society of Medicine* 25 (2007).
[30] (2011) 4 SCC 454.
[31] *Supra* note 22.
[32] *Supra* note 30.
[33] Saisha Singh, "From Gian Kaur to Aruna Shanbaug: The Judicial Evolution of Right to die" 18 *Nyaya Deep* 125 (2017).

Gian Kaur[34] is a remarkable judgment of the Supreme Court in which the court differentiated between 'right to die' and 'right to die with dignity'. The court opined in this case that all fundamental rights are not the same and hence the same standard must not be applied to them. Therefore, while the guarantees under Article 19 have a negative component, Article 21 cannot be read in a similar manner. Further, even if Article 21 is interpreted in such a fashion, suicide could not be treated as a part of it, as it always involves an overt act by the person committing suicide. Thus, an unnatural termination of life could not be treated as a part of the right to life. However, the Court referred to the judgment of the House of Lords in *Airedale N.H.S. Trust v. Anthony Bland*[35] and distinguished between 'right to die' and 'right to die with dignity'. When a person is in a permanent vegetative state or in a terminally ill state, the natural progression of death has already begun and death, without life support technology, is inevitable.

Thereafter, in *Shanbaug*,[36] the Supreme Court, for the very first time, dealt with the issue of permitting euthanasia. A writ petition was filed in the Supreme Court by social activist Pinki Virani as a 'next friend' of nurse Aruna Shanbaug. In this case, the petitioner pleaded that former nurse Aruna Shanbaug, who had been brutally sexually assaulted in Mumbai KEM hospital in 1973 and had slipped into a permanent vegetative state, as a result, be allowed to die peacefully by putting a stop to the mashed food that she was being fed, which helped her to stay alive, however, it was held that she had no *locus* to file the petition as she could not be given the status of a next friend. However, the two-judge bench proceeded to rule on the issue, and relying again on *Airedale*[37] and other international jurisprudential approaches, it held that passive euthanasia may be allowed for terminally ill patients or patients in a permanent vegetative state provided that certain safeguards are followed. Recognising the autonomy of the patient, the Court held that if the patient is conscious and capable of giving consent, his or her opinion must be taken, otherwise, at least the opinion of a next friend is required, who should decide as the patient would have. In the event that he is incompetent to make choices, his wishes expressed in advance in the form of a 'Living Will'[38] shall also be considered in this regard. The matter would then go

[34] *Supra* note 23.
[35] [1993] A.C. 789.
[36] *Supra* note 30.
[37] *Supra* note 35.
[38] A living will (also known as advance directive or advance decision) is an instruction given by an individual while conscious specifying what action should be taken in the event, he/she is unable to make a decision due to illness or

to the High Court, where a division bench would be required to constitute a board of three competent doctors to examine the patient. Simultaneously the High Court has to issue the notice to the State and the relatives of the patient. After hearing them, the High Court bench should give its verdict. It further held that this above procedure should be followed all over India until Parliament makes legislation on this subject.

The Apex Court received another opportunity to resolve the issue of the right to die with dignity through a PIL raised by an NGO, Common Cause, seeking legalization of 'advance directives and attorney authorisations (living will)'[39] in order to enable people who are terminally ill and/or in a permanent vegetative state, to exercise the right to die with dignity. The Central Government responded on the issue and informed the court that it is assessing the drafting of a bill to allow passive euthanasia. Termed, the Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, the draft was released by the Union Health Ministry in 2016 based on the Law Commission of India's Report No. 241 (August 2012). The government, however, also said it does not support granting people the right to make "Living Wills", arguing that it would be against public policy and the right to life. The government told the court that consent for removal of artificial support may not be an informed one (should not be in a form of living will or in a form of attorney's authorization) as it could be enormously misused and result in the neglect of the elderly. A three-judge bench of the Supreme Court, while dealing with this matter had refrained from pronouncing any order but referred the matter to a five-judge bench to ensure that areas of conflict between the *Aruna Shanbaug case* and *Gian Kaur case* could be harmonized.[40]

Eventually, a five-judge bench of the Supreme Court in *Common Cause (A Regd. Society) v. Union of India*[41] held 'right to die with dignity' to be a fundamental right within the meaning of

incapacity, and appoints a person to take such decisions on his/her behalf. It may include a directive to withdraw life support on certain eventualities.

[39] The term 'living will' was used for the first time in 1967 by Dr. Louis Kutner to describe a document drafted by a competent adult as an advance directive to his physicians or family. Usually, the document provides that no extraordinary artificial life-support systems may be used to prolong the drafter's life or suffering in the event of terminal illness or injury which would render the person incapable of expressing one's wishes. – Susan Martyn and Lynn Jacobs, "Legislating Advanced Directives for the Terminally Ill: The Living Will and Durable Power of Attorney", 63 *Nebraska Law Review* 776 (1984).

[40] See *Common Cause (A Regd. Society) v. Union of India,* (2014) 5 SCC 338. [Euthanasia reference to Constitution Bench] On 25 February 2014.

[41] (2018) 5 SCC 1.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

'right to life' under article 21 of the Constitution. The smoothening natural process of dying of patients who are terminally ill or in a permanent vegetative state without any hope for revival, by withholding or withdrawing life-prolonging medical support or treatment, held, permissible. It upheld the right of an individual, who is capable of consent, to execute a living will in the form of 'advance directives and attorney authorisations' to allow for withdrawal of futile treatment or life support technology, if the patient is terminally ill or in a permanent vegetative state. The bench has derived the right to die with dignity from the privacy-autonomy-dignity matrix within the guarantee under Article 21 as expounded by the nine-judge bench of the Apex Court in *Puttaswamy*[42] judgement. Additionally, the bench has issued detailed and stringent guidelines in order to prevent any possible misuse of these directives and authorisations by family members or physicians. Further, the Court provided the manner in which such directives may be executed and implemented in order to ensure a balance between law and bioethics. The directions and guidelines given in this judgment are comprehensive and have also covered the situation dealt with *Shanbaug case supra.*

3.3. The Mental Health Care Act, 2017

The Mental Health Care Act, 2017 has been passed by the Parliament and came into force on 29 May 2018. This is a comprehensive law to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfill the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto.[43] Section 115(1) of this Act says that notwithstanding anything contained in section 309 of the IPC any person who attempts to commit suicide shall be presumed unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code. Section 115(2) of the Act says that the appropriate Government shall have a duty to provide care, treatment, and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide.

At first glance, it seems that the provisions of IPC and MHCA pertaining to suicide attempts are contrary to each other. The Supreme court very recently asked the Central Government's

[42] *Justice K.S. Puttaswamy (Retd.) v. Union of India,* (2017) 10 SCC 1.
[43] See Preamble to the Mental Health Care Act, 2017.

response and stand regarding the same. On 11 September 2020, while the bench was hearing deliberations over the PIL, raised a concern as to the conflict between the two laws. The bench asked the Government, whether there can be a blanket presumption on intentions behind suicides. 'It is not always that a person who is committing suicide is under extreme stress or is of unsound mind. Some priests and monks have killed themselves in protest and they were found to be incomplete calmness of mind. There are also people who do Santhara. The intention of Santhara is to not commit suicide, but to liberate yourself from this miserable world,' the bench said.[44] However, the Government is yet to respond in this regard.

Section 115(1) of the MHCA decriminalizes the offence of attempted suicide by presuming the accused to have severe stress. The words 'unless proved otherwise' under the section provide room for the prosecution to prove any other aspect other than the severe stress against the accused. Thus section 115(1) of the MHCA does not entirely decriminalize all suicide attempts.

3.3.1. Presumption and burden of proof

A presumption means a rule of law that Courts and Judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.[45]

The effect of a presumption is that a party in whose favour a fact is presumed is relieved of the initial burden of proof. The court presumes the existence of the fact in his favour and may act on it unless the contrary is shown.[46]

In *Sodhi Transport Co. v. State of U.P.*,[47] the Supreme Court observed: "A presumption is not in itself evidence but only makes a *prima facie* case for the party in whose favour it exists. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence. But when it is rebuttable it only points out the

[44] Bhadra Sinha, "Is Attempt to Suicide Punishable? Two Laws Have Opposing Views, SC Askes Government's Response", *The Print*, 11 September 2020, *available at* https://www.google.com/amp/s/theprint.in/judiciary/is-attempt-to-suicide-punishable-two-laws-have-opposing-views-sc-seeks-govt-response/500905/%3famp (last visited on February 26, 2021).
[45] Ratanlal and Dhirajlal, *The Law of Evidence* 63 (LexisNexis Butterworths Wadhwa, Nagpur, 21st edn., 2010).
[46] Atar Singh, *Principles of the Law of Evidence* 441 (Central Law Publications, Allahbad, 23rd edn., 2018).
[47] AIR 1986 SC 1099.

party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over."

After the commencement of MHCA, if any person attempts to commit suicide, he will not be prosecuted and punished at the first instance rather he will be medically assisted and will be rehabilitated. He will *pima facie*be presumed to have committed such an act due to severe stress. However, if the prosecution proposes to establish a different aspect that the person has attempted to commit suicide not because of severe stress or mental illness but for something else like for just silly reasons or to blackmail someone etc. then the Court is free to try the person under section 309 IPC.

3.3.2. Whether Section 309 IPC is redundant now?

The common question arises, whether, in view of the provisions of MHCA, Section 309 IPC becomes redundant? If not, is it necessary to amend the same? As it is very clear that MHCA has virtually decriminalized attempted suicide, not as a rule but as an exception. Section 115(1) of MHCA regards a person who attempts suicide as a victim of circumstances and not an offender, at least in the absence of proof to the contrary, the burden of which must lie on the prosecution. Section 115 marks a pronounced change in our law about how society must treat the people who attempt to commit suicide. It seeks to align Indian law with emerging knowledge on suicide, by treating a person who attempts suicide being need of care, treatment, and rehabilitation rather than penal sanctions. Thus, it is very clear that section 309 IPC continues to be the rule and hence does not become redundant. If at all the Government wants to decriminalize all kinds of suicidal attempts then the law needs to be reconsidered again which is *sub judice* as of now.

4. CONCLUSION

The man whose death is mourned by time is in fact glorious, and so all come into the world to die. Death should be embraced when its time comes. It is never appropriate to take a step towards suicide no matter how difficult a situation it may be. One should face every difficulty and make one's and the relative's life happy and prosperous. There is a growing demand to

consider the right to die as an inalienable right and one should have the right to choose between life and death, if anyone wants to live, he should be guaranteed the right to life and if he wants to die then the state has to recognize it and make arrangements for the same? How strange it is? Campaigning to end certain people's lives doesn't end suffering, it passes on the suffering to other similar people, who now have to fear they are the next people in line to be seen as having worthless lives. The dignity of life lies in protecting it and not in allowing for its destruction by whatever means the individual wants to. As every rule have its exceptions, the cases of euthanasia should be viewed in different angel and must be considered as an exception and the same should be allowed under stringent supervision to avoid its misuse.

It is respectfully submitted that the judgment given in *P. Rathinam* is not reasonable as the right to die shouldn't be recognized as an integral part of the right to life under Article 21 of the Constitution. The view taken by the Supreme Court in *Gian Kaur* is appreciated and suitable that the right to life does not include the right to die. The ruling continued to be the law of the land so far. The constitution bench in this case, however, did not express any binding opinion with respect to passive euthanasia. After *Aruna Shaunbaug*, passive euthanasia is legalized in India under strict guidelines. After *Common Cause* the practice got much recognition and much strict procedure was prescribed by the Supreme Court for the same. Patients must consent through a living will, and must be either terminally ill or in a vegetative state. These strict guidelines are necessary as one cannot rule out the possibility of mischief being done by relatives or others for inheriting the property of the patient and for other similar reasons.

In *Gian Kaur, Aruna Shaunbaug*, and in *Common Cause*, the Supreme Court has verifiably differentiated between 'right to die' and 'right to die with dignity', whereas the latter was considered to be a fundamental right impliedly available under the right to life. However, the 'right to die' *per se* was not considered as a fundamental right within the meaning of the right to life except in *P. Rathinam* which is overruled now. It is suggested that euthanasia should be regarded as the only viable option when all life care interventions fall short of ensuring a better life for the terminally ill patient or one who is in a vegetative state. There is a need to regularize passive euthanasia by passing the Medical Treatment of Terminally-ill Patients Bill, 2016 with necessary modifications and active euthanasia shall not be allowed in any case as it

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

not only devalues human life but may also create huge disturbances and may corrupt society including the administrative setup.

The provisions of MHCA can be considered as a big relief for the people who actually attempt to commit suicide because of mental illness and agony as they will not be again ruined by forcibly pushing into the clutches of prosecution. The appropriate Government is duty-bound to provide care, treatment, and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of an attempt to commit suicide. However, the term ‘unless the contrary is proved', used under Section 115(1) of the MHCA 2017 clarifies the intention of the legislature not to completely decriminalize attempted suicide but to retain the same for certain cases which do not necessarily fall under the mental illness of the accused. So, it can be rightly remarked that Section 309 IPC is the rule for which section 115(1) of the MHCA is the exception as to the reason behind any attempted suicide. After the enforcement of MHCA 2017, whoever attempts to commit suicide will be presumed to have done such an act under severe mental stress and will not be prosecuted or punished unless the prosecution establishes the different arenas beyond a reasonable doubt. In other words, Section 309 IPC shall be read with Section 115(1) and (2) of the MHCA 2017. Now it is left to the Courts to harmoniously construct these two statutes. Nothing wrong with exempting a person who is mentally ill or facing distrust from criminal liability under the code for attempting suicide. However, in certain circumstances, it is expedient to prosecute him though leniently. Moreover, there is no minimum punishment or minimum fine which should be levied in such cases, as such the Court need not send the offenders to jail, they may be sent to rehabilitation centres or any other care centers. The Court can even release such offenders after due admonition or on probation of good conduct under Section 300 Cr.P.C or under the provisions of the Probation of Offenders Act. In almost all the cases the court instead of punishing the accused under this law releases him after admonition. It is suggested that the law under section 309 IPC shall be continued and need not be changed.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

CORPORATE GOVERNANCE: A CRITICAL ANALYSIS

MUDASSIR NAZIR*

ABSTRACT

Effective governance is fundamental in any organisation. Effective and credible governance leads to better management. In the globalised world, the growing corporate culture has increased the importance of corporate governance. A fundamental dilemma of corporate governance emerges from the debate concerning the extent to which each actor should be given 'control' to drive the company. On the inside, the Board of Directors (BoD) is the key player, yet factors like disproportionate control in Indian companies and prejudicial nature of internal controls system as witnessed in frauds like Satyam continue to influence and compromise the board's independence. Problems created by the behavior and influence of insiders like the BoD and outside forces and actors like influences of the market for corporate control and disclosures and statutory auditing are resolved by certain internal and external control mechanisms instilled either by law or norms. This article seeks to present a corporate governance analysis of these inside and outside control mechanisms and highlight the deteriorating corporate governance practices in India vis-à-vis the 'control' in a company. The extent and importance of this mechanism are adjudged on the parameters of information, influence, and independence. Through a comparative analysis of the presence and viability of such inside and outside control mechanisms in India and Germany, it is realised that besides some additional checks and balances in the German model, the contrast in board structure makes all the difference. As an aftermath of huge corporate scams, it is believed that the lessons and rules have been learnt and accepted only in letters and not in spirit. The corporate governance regulations fail to maintain a balancing act in providing efficient safeguards as well as ensuring ease of doing business, thus suggesting a need for a collective conscience and for regulatory mechanisms to be modeled around best practices across the world.

* Assistant Professor, School of Law, Galgotias University, Uttar Pradesh.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

1. INTRODUCTION

Almost 25 years have passed since India steered its way into a new era of commercial liberalization and reform. With this opening up of the economy, significant growth in the domestic consumer demand, there has been an influx of foreign investment which has resulted in the strengthening of Indian companies. With such an influx, a wave of corporate governance has started which refers to, "the control of companies and the systems of accountability by those in control."[1] Good corporate governance entails a commitment by the controllers of a company to run it legally, ethically, and in a transparent manner.[2] The control held by the board, protection of shareholders' rights, and of investors and creditors have been the worry of corporate law ever since the public companies started emerging in the 19th century. Today, much of what is practiced as corporate governance norms across nations is already part of the company law statutes but very few have translated into reality. This debate is rather resentful because it is essentially about the turfs to defend. A fundamental dilemma of corporate governance arises from this debate which is, to what extent should each actor associated with the company be given 'control' to drive the company in terms of decision-making and upholding the interests of the shareholders. For instance, on one hand, the regulation of intervention by large shareholders may safeguard the small shareholders, but such regulations might also increase managerial discretion and scope for abuse. At this point, the agency problem of ownership versus control also seeps in. It emerges from the principal-agent relationship between investors, with shareholders and outsiders acting as 'the principal' and insiders and the management acting as 'the agent'. There is widespread awareness in the company law discourse that managers often indulge in actions that hurt shareholders. Frauds like Satyam speak to that effect. Thus, to lower the risk of incurring high agency costs, corporate governance norms introduce certain control mechanisms which can be categorized into two types, Inside and Outside.

One of the primary principles of corporate governance is to balance the inside control and the outside control of a company. Hopt's in his seminal book, *Comparative Corporate Governance,* highlighted the following elements as the "building blocks" of inside and outside control in

[1] JOHN FARRAH ET. AL., CORPORATE GOVERNANCE 3 (2nd ed 2005).
[2] CONFEDERATION OF INDIAN INDUSTRY (CII), REPORT OF THE CII TASK FORCE ON CORPORATE GOVERNANCE (2009) https://www.mca.gov.in/Ministry/latestnews/Draft_Report_NareshChandra_CII.pdf.

companies.[3] The chief element on the inside is the Board of Directors (BoD). India, like most other common law countries, has a one-tier board structure. It is the regulating body on the inside of a company constituting both non-executive and executive directors. The board's function is to delegate executive control on a day-to-day basis. Post the Satyam debacle of 2008, the composition, independence, and accountability of the board under the old company law was heavily questioned. An overhaul of the Companies Act, of 1956 somehow improved the situation but the corporate governance regime in India still has a long way to cover as loopholes in the law still try to impede its efficiency.

The strategic and fundamental elements of outside control are the capital markets, in particular the market for corporate control and disclosures and statutory auditing. The market for corporate control essentially constitutes the market for mergers and acquisitions with companies and individuals competing for control rights. In South-Asian countries like India and Japan and Germany which usually have family holdings, the market for corporate control tends not to be very dynamic since stock rights are more concentrated. But India has seen an upward shift in terms of the market for corporate control with a low rate of hostile takeovers. Although some incongruities with respect to the acquisition of control have impeded the flow of value-addition takeovers. Lastly, disclosure and auditing are considered by the legislators to be the foundation of the future of Indian corporate governance. This was again challenged in the post-Satyam deliberations resulting in some fruitful, some futile changes.

The paper aims to portray a corporate governance analysis of the Inside and Outside control mechanisms driving a company including different actors which control the company directly or indirectly. It poses to underline the dwindling corporate governance practices in India vis-à-vis 'the control' in a company. The extent and importance of such controls is adjudged on parameters like information, influence, and independence. Through this discussion about the 'control' of a company, the paper will also decode the norms and realities of corporate governance in India within the company and beyond. Lastly, a comparative analysis of the presence and viability of such inside and outside control mechanisms in India and Germany is presented.

[3] COMPARATIVE CORPORATE GOVERNANCE – THE STATE OF THE ART AND EMERGING RESEARCH, 1201-10 (Klaus J. Hopt et al. eds., 1998).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

2. HUES OF 'CONTROL' IN CORPORATE LAW

The concept of 'Control' is perhaps the most debatable issue under any corporate law regime but more so under the Indian corporate law regime. Despite its elusiveness, various attempts have been made to define 'control' and explore its facets within the sphere of corporate law. Scholars like Edward S Herman have tried to define it in a holistic way, "It relates to power—the capacity to initiate, constrain, circumscribe, or terminate the action, either directly or by influence exercised on those with immediate decision-making authority".[4] The board is the immediate decision-making authority and thus 'control' is predominantly associated with the restraints shown by the board and the influence held by it. Although the legal power to exercise control on the corporate affairs of a company lies with the board, shareholders are the ultimate controllers by virtue of ownership of shares in a company. Umakanth Varottil presents a spectrum along which the concept of control can be categorised as absolute or total control (100% voting rights), *de facto* control (less than 50% voting rights), management (no controlling shareholding).[5] Thus, it is pertinent to note that control usually exists in respect of ownership of voting shares in a company although it is not a *sin qua non*. Scholars[6] have argued that this is the very reason ownership structure in a company is often the source of corporate governance problems.

With a significant shift in the company law paradigm since its inception, the motivation behind having 'control' has also altered and may lie less in making a profit for the company's shareholders and more in the ability to satisfy other interests. Legal scholars like Adolf A. Berle believe that now control is not solely about an "attribute of stock ownership" or merely a definable portion of the bundle of rights held by stockholders, but a "function", "a non-statist political process" which is although private but entails substantial public responsibilities.[7] He also gives a perfect analogy to that effect, "Control is to a stock corporation what political parties are to a democracy".[8] That is to say, like how democracy would grapple in absence of political

[4] *See* EDWARD S HERMAN, CORPORATE CONTROL, CORPORATE POWER: A TWENTIETH CENTURY FUND STUDY 17 (1981).
[5] Umakanth Varottil, *Comparative Takeover Regulation and The Concept Of 'Control'* SINGAPORE JOURNAL OF LEGAL STUDIES (2015), pp. 208–231. *JSTOR*, www.jstor.org/stable/24872278.
[6] Jayati Sarkar, *Ownership and Corporate Governance in Indian Firms*, CORPORATE GOVERNANCE: AN EMERGING SCENARIO (N. Balasubramanian & D.M. Satwalekar eds., 2010) https://archives.nseindia.com/research/content/CG_9.pdf.
[7] Adolf A. Berle, *Control in Corporate Law*, 58 COLUM. L. REV. 1212, 8 (1958).
[8] *Id.*

parties, a corporation will break down in absence of an organization neatly tied with affirmative control. Another parallel that could be drawn from this analogy is how like the political parties often form a coalition in a democracy although there might be internal competition, in a corporation different actors and forces together control and influence the company while some compete to gain control of the company. These actors and forces can be categorized into inside control and outside control both of which need to be strictly governed by the mechanisms instilled by corporate governance norms.

2.1. Inside Control

The key player on the inside of a company is the board. It oversees the management and thus the overall strategy and direction of the company. Board members achieve control only by gaining the majority support of the shareholders of the company. Although the fundamental principle behind shareholders' democracy is the fact that majority rule must prevail. But it is also essential to ensure that the power exercised by the board is circumscribed within reasonable boundaries and does not oppress the minority voice, while also not leading to mismanagement.[9] India, like most other common law nations, has a unitary board structure. Board's responsibilities demand the exercise of judgment, thus it has to be vested with reasonable discretionary power. However, this power and control held by the board is subject to and must be governed by the legal and behavioural norms under the corporate governance regime like "well-informed and deliberative decision-making, management monitoring and fairness in performing duties towards the company and the shareholders".[10] To keep the board's behaviour in check, the 2013 Companies Act introduced concepts like performance-evaluation of the board, individual directors, and committee. In 2017, SEBI released a 'Guidance Note on Board Evaluation' elaborating different attributes of performance evaluation and calling for disclosing it to the public.[11] However, it is

[9] MINISTRY OF CORPORATE AFFAIRS, GOV'T OF IND., MINORITY INTERESTS, REPORT OF THE EXPERT COMMITTEE ON COMPANY LAW (2005) https://www.mca.gov.in/content/mca/global/en/data-and-reports/reports/other-reports/report-company-law/minority-interest.html.

[10] MINISTRY OF CORPORATE AFFAIRS, GOV'T OF IND., MANAGEMENT AND BOARD GOVERNANCE, REPORT OF THE EXPERT COMMITTEE ON COMPANY LAW (2005) https://www.mca.gov.in/content/mca/global/en/data-and-reports/reports/other-reports/report-company-law/management-and-board-governance.html.

[11] SEBI, GUIDANCE NOTE ON BOARD EVALUATION (Jan.5, 2017) https://www.sebi.gov.in/legal/circulars/jan-2017/guidance-note-on-board-evaluation_33961.html.

contended that such a disclosure may prove to be counterproductive as evaluation is a sensitive subject. Further, the independent directors are also obligated to follow the 'code of conduct.[12]

Following are some of the most common realities which impede the incorporation of good corporate governance practices with respect to 'control' in Indian companies. In addition, case studies and future recommendations are also provided.

2.1.1. Disproportionate Control

One of the key difficulties with the insider control of companies in India is that there is a constant battle between the inside actors. If we further dissect the insider control of a company, ownership of shares forms the basis of control. However, the classic agency problem of separation of ownership and control (Fama, 1980)[13] always seeps in. Business scholars[14] claim that India follows the concentrated form of ownership where the promoters are the block holders. A study shows that 38.78% of Indian companies have inside block holders holding more than 50% of the shares.[15] While only 0.20% of companies have institutional investors as stockholders holding 50% of the shares. Thus, it is evident that promoters are in control of the large majority of listed companies, and the influence of institutional investors through their shareholding as a counteracting force against the promoters is weak. This leads to disproportionate control on the inside. Such control also has a spillover effect on the management of the company. For instance, a study reveals that 67% of the companies in a sample of 307 out of 500 top companies had promoters either as a chairperson or as a managing director on company boards, and these promoters already have the controlling stakes which are on an average 50%.[16] Therefore, in such a scenario the information, independence, influence of the board is heavily prejudiced, resulting in an autocratic environment.

The Satyam debacle of 2008 was a testament to the crippling insider control of Satyam Computers. By exercising his disproportionate control over the management and ownership of

[12] DELOITTE INDIA, CORPORATE GOVERNANCE IN INDIA – PRACTICES, FRAMEWORK https://www2.deloitte.com/in/en/pages/risk/articles/governance-101.html.
[13] Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88, THE JOURNAL OF POLITICAL ECONOMY, 288, 2 (1980).
[14] N. Balasubramanian & R V Anand, Ownership Trends in Corporate India 2001 – 2011 Evidence and Implications (Indian Institute of Management, Bangalore, Working Paper No. 419, 2013) at p. 8 https://www.iimb.ac.in/sites/default/files/2018-07/WP_No._419_0.pdf.
[15] *Ownership and Corporate Governance in Indian Firms*, *supra* note 6 at 244.
[16] *Id.*

the company, Ramalinga Raju, the promoter committed the biggest corporate fraud India has ever seen. Analysts[17] have observed that the passivity of the directors led to the callous negligence bordering on 'collusion' with the promoters. Raju and Co. had been furnishing fictitious accounts to the BoD for 6 years prior to 2008.[18] Yet, no evidence was recorded by the directors including the independent directors. Even the proposed investment in Maytas which was placed before the Board in the meeting of 16th December 2008 had enough elements to arouse doubts and curiosity. For instance, the sheer magnitude of the investment in Maytas stood at a swooping $1.47 billion.[19] However, there seemed to be no record of any of the members of expressing suspicions about the investment. From the above observations, it is evident that the Independent Directors, as well as the board at Satyam Computers, failed to fulfil their fiduciary duties. Thereby, making it evident that the board is the supreme authority on the inside of a company and any failure on their part to fulfil their duties can lead to the breakdown of a company and unfairness to the shareholders.

Thus, in order to prevent a Satyam 2.0, it is imperative that measures be taken to check the excessive interference of promoters. In fact, very recently it was reported that SEBI is planning to substitute the notion of "promoters with controlling shares" to "shareholders with controlling shares". This is a refreshing change in the corporate structure as it would break the practice of concentrated ownership and bring India's market regulations at par with best global practices. While also ensuring that shareholders with controlling shares do not overshadow the board. An analogy fits correctly here that, "Moving away from promoters to controlling shareholders is like moving away from a 'family feudal concept to a democratic concept".[20] Companies might start to

[17] J.P. Singh, Naveen Shrivastav and Shigufta Uzma, *Satyam Fiasco: Corporate Governance Failure and Lessons Therefrom* THE IUP JOURNAL OF CORPORATE GOVERNANCE (2010). https://www.researchgate.net/publication/228118526_Satyam_Fiasco_Corporate_Governance_Failure_and_Lessons_Therefrom.

[18] RK Aneja, *The Satyam Scandal Explained*, THE HARBUS (Feb. 17, 2009) https://harbus.org/2009/the-satyam-scandal-explained-4479/.

[19] S. Prasad and S. Srinivasan S, *Satyam Row: Where was Corporate Governance?* IBNLIVE (2008) http://ibnlive.in.com/news/satyam-row-where-was-corporate-governance/80795- 7.html.

[20] *SEBI to replace promoters with controlling shareholders in new corporate structure: Report* MONEYCONTROL (Nov. 19, 2019) https://www.moneycontrol.com/news/business/controlling-shareholders-may-replace-promoters-as-sebi-rethinks-corporate-structure-report-4652021.html.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

be managed professionally while also checking the interference of promoters with a minority stake.[21]

2.1.2. Internal Controls System

The Board of directors while exercising their control must make sure they act in compliance with the company's goals and objectives and also maintain an effective system of internal control. These are mechanisms implemented by a company to ensure the integrity of financial and accounting information, compliance with laws and regulations, promote accountability, and prevent fraud.[22] For this, the BoD shall constitute an audit committee as mandated under S.177 of the Companies Act, 2013. The audit committee oversees the internal controls and reviews the efficiency and effectiveness of the system as a whole. The BoD must make sure they satisfy the audit committee and provide them reasonable assurance that the policies, processes, tasks, behaviours facilitate an efficient operation along with maintaining quality internal and external reporting and conformity with applicable laws.[23] An effective internal controls system pivots on the right-tone set at the top, that is the board along with the audit committee must convey a strong and clear-cut message that the responsibilities against the internal controls system must be taken sincerely. Thus, the influence and importance of the audit committee are supreme on the inside.

In the past, some of the biggest corporate scams in India have robbed the nation of its citizens' trust, money, and reputation. The Satyam scandal of 2008 was an accurate demonstration of the breakdown of the internal control machinery and a prima facie failure on part of the directors and the audit committee to prevent the unfortunate turn of events. Facts show that although the company complied with the provisional requirements of appointing an audit committee which unfortunately indulged in prejudicial auditing practice.[24] The dubious nature of the Maytas investment *inter alia* was not disclosed and reported. The Satyam scam not only highlighted the importance of 'independent directors' but also underlined the significance of fiduciary

[21] Pavan Burugula, *Sebi Plan Faces Resistance from Promoter-Driven Companies* THE ECONOMIC TIMES (2020) https://economictimes.indiatimes.com/markets/stocks/news/sebi-plan-faces-resistance-from-promoter-driven-companies/articleshow/76378490.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.
[22] Will Kentan and Julius Mansa, *Understanding Internal Controls* INVESTOPEDIA (2020) https://www.investopedia.com/terms/i/internalcontrols.asp.
[23] KPMG INTERNATIONAL, ASSESSING THE SYSTEM OF INTERNAL CONTROL (2018) https://assets.kpmg/content/dam/kpmg/be/pdf/2019/12/assessing-system-of-internal-controls.pdf.
[24] *Ownership and Corporate Governance in Indian Firms*, *supra* note 6 at 244.

cooperation between the actors when it comes to internal control. Because even though Satyam's auditing committee had independent directors, the fraud still occurred.

Under the overhauled Companies Act 2013, several changes were made to improve the transparency in the internal control system. An internal financial control (IFC) system was introduced via Section 134(e), which ensures efficient conduct of the company's business along with the prevention and detection of fraud. Section 143(11) requires the auditor's report to include a statement on prescribed matters.[25] Recently, to further increase the robustness, Companies Auditor's Report Order (CARO) Rules, 2016 were introduced which mandates disclosure of financial statements by auditing committee in its report on subjects like fixed assets, a loan given by the company, deposits, etc.

Yet in another scandal involving Punjab National Bank (PNB) and Nirav Modi, where in order to obtain loans from branches of Indian banks overseas, fake PNB guarantees worth $1.77 billion were used by the latter.[26] It was claimed by analysts that one of the primary reasons for the fraud was the failure of the audit report to recognise potential risk zone.[27] They also said that had an adequate system and controls been in place to identify these risks and all internal audit reports were shared with the Government and RBI, the fraud could have been detected earlier and appropriate action could have been taken.[28] Post-this in 2018, the RBI tightened rules saying no SWIFT transactions were to be made without making sure that it reflected in the accounting system.[29] Even within PNB, the internal auditing process has strengthened to give more prominence to the off-site monitoring mechanism which detects any deviations when transactions are made. It is contended that it will not only reduce unnecessary dependence on underperforming physical audits to identify these fraud risks but also improve transparency.[30]

---

[25] NEERAJ BHAGAT & CO, INTERNAL FINANCIAL CONTROLS: NEW PERSPECTIVES AS PER COMPANIES ACT 2013 AND CARO *2016* (2016) https://neerajbhagat.com/pdf/IFC.pdf.
[26] *What Is PNB Scam | Who Is Nirav Modi | PNB Fraud Case | Nirav Modi Case* BUSINESS STANDARD https://www.business-standard.com/about/what-is-pnb-scam.
[27] NEERAJ BHAGAT & CO., INTERNAL CONTROLS (2016) https://neerajbhagat.com/pdf/Internal%20Controls.pdf.
[28] *Id.*
[29] Sankalp Phartiyal & Devidutta Tripathy, *RBI Orders Changes to Bank Protocols After $1.8 Billion Fraud Case* REUTERS (22 Feb. 2018) https://in.reuters.com/article/punjab-natl-bank-fraud/rbi-orders-changes-to-bank-protocols-after-1-8-billion-fraud-case-idINKCN1G70JK.
[30] *After Nirav Modi Episode, What Punjab National Bank Is Doing to Curb Frauds?* THE FINANCIAL EXPRESS (May 1, 2018) https://www.financialexpress.com/industry/banking-finance/after-nirav-modi-episode-what-punjab-national-bank-is-doing-to-curb-frauds/1152258/.

These scams unfolded a series of grave corporate governance failures in the Indian corporate law regime prevalent on the inside of a company and show the board's and internal controls system's influence in driving the company forward. Moreover, it needs to be independent. Thus, with the thrust of the digital economy and trust within the board and other actors, the corporate governance regime may sustain itself only to improve by the day. In the end, it is all about self-governance and self-scrutiny.

2.2. Outside Control

The insider control mechanisms of corporate governance are far from being invincible. Where they become ineffective, it is crucial to set in motion some external control mechanisms to realize the aim of corporate governance.

2.2.1. The market for Corporate Control (MCC)

The market for corporate control especially the dispute over control rights are a reflection of the external control mechanisms where problems arising out of corporate governance are resolved through external pressure. The dispute for control rights has two sides – firstly, with respect to the company's acquisitions and mergers, particularly hostile takeovers, and secondly, in terms of procurement of proxy voting rights.[31]

A. Mergers and acquisitions in companies

The functioning of MCC has become a popular debate over the years. Analysts claim that India provides a favourable business environment for public takeovers due to its deep and liquid stock markets. While there have been only a few hostile takeovers in the past, there is a growing consensus in the public discourse that if companies are more efficiently managed, the incidence of such takeovers can be further reduced. Thus, it is argued that MCC forms a new corporate governance mechanism under which companies indulge in increased self-governing due to the threat of a takeover. Henry G. Manne first posed the possibility of the governance function of the MCC. He emphasized that a strong relationship exists between managerial performance and the share price of a company. "Lower the share price makes takeovers more attractive for those who

[31] Grossman, *Chapter 4: The theory of the market for corporate control and the current state of the market for corporate control in China* OECD (2004) https://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/31601011.pdf.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

believe that they can manage the company more efficiently".[32] It is a natural push-back mechanism wherein shareholders of the company exit as a response to the poor managerial performance, resulting in falling of share prices which eventually creates incentives for outsiders to hoard control rights and replace the management. Thus, it is evident how the market for corporate control has implicit control over a company and can strongly influence decision-making. It induces a feedback mechanism between the decision-making process and the stock market while enhancing the scope for shareholders to make their voice heard because their exit incites a threat for takeover. Due to the lacking shareholder activism in India, the chances of shareholders adopting this route in order to make this voice heard are relatively high. While, this implicit driving force is stronger in western nations, especially the UK and the USA where more than 200 takeovers resulted in mergers instead of acquisitions in a year.[33]

B. Acquisition of Proxy Voting Rights

The second method of gaining corporate control is through proxy voting rights. Company law provides for shareholders' voting rights to be exercised by a proxy on the due authorization. In the Indian context, Section 105 of the 2013 Act read with Rule 19 of the Companies (Management and Administration) Rules, 2019 governs the appointment, rights, obligation, penalties of the proxies. Basically, allowing a minority of shareholders to publicly acquire such delegated proxy rights from others. In 'Takeovers, Restructuring, and Corporate Governance', Weston observed that even if a proposed acquisition fails, this conflict over proxy rights still has a deep effect on the company's decision-making and the capital of the company's shareholders.[34] It is argued that the acquisition of such proxy rights not only gives minority shareholders to voice their opinions but also becomes a source of external pressure over the majority shareholders and the management, thus having some controlling influence over it. Under the 2013 Act, the proxies are still deprived of the right to vote by show of hands, contrary to the law in the UK. This not only impedes the momentum of the meeting but also contravenes the objective of the proxy system which was to increase shareholder participation in the meeting. Thus, the issue must be

[32] *See* Henry G. Manne, *Mergers, and the Market for Corporate Control*, 73, JOURNAL OF POLITICAL ECONOMY, 110, (1965).
[33] Shilpi Thapar, *Markets for Corporate Control – An Effective Mechanism Of Corporate Governance?* (Chartered Secretary Ed. 2009) <https://sites.google.com/site/professionallegalexpert/markets-for-corporate-control-an-effective-mechanism-of-corporate-governance>.
[34] *The theory of the market, in China supra* note 31.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

addressed promptly so that the acquisition of proxy voting rights can flourish as a proper external control mechanism to uphold the aim of corporate governance.

Therefore, it is imperative that external control mechanisms like the market for corporate control are sustained in order to maintain good corporate governance and ensure compliance as regulatory authorities like SEBI cannot keep checks and balances at all times.

C. The Post-Takeover Saga over Control Acquisition

One of the key principles of corporate governance is shareholders' primacy especially the protection of minority shareholders' interests. There are certain unresolved issues with respect to 'control' even when a deal of acquisition has been signed between the target and the acquirer company. India's takeover regulation resists the implementation of the mandatory-bid-rule (MBR) which seeks to give equal treatment towards the minority shareholders by giving them an option to exit in the event the control of the company changes hands. It is argued that this resistance hampers the occurrence of value-enhancing takeovers and undermines the salient principles of corporate governance. For instance, the much-talked-about Jet Airways-Etihad Airways deal of 2013 brought up serious regulatory concerns and revealed certain inconsistencies in the law. The parties had entered into several contractual arrangements governing the operations of Jet. However, some clauses with respect to Etihad's right to appoint nominees on the board, appoint vice-chairman and members of audit committee etc. were seen to give Etihad undue and excessive powers. It attracted attention from the regulators, while both SEBI and CCI had different views. In SEBI's view, these contractual agreements did not result in acquisition of control by Etihad. However, the CCI observed that the effectively the arrangements aimed that establishing the acquirer's joint control. In light of this, SEBI served show cause notices to promoters of Jet and Etihad alleging that such joint control required an open offer under regulation 4 of the Takeover Code.[35] It was SEBI's contention that that on comparing the definition of 'control' under the Competition Act, 2002 and the Takeover Code, 2011 the former deals with "controlling the affairs and management"[36] as against the latter which has a narrower approach and includes, "to appoint a majority of the directors" or "controlling the management or policy decisions". Eventually, SEBI cleared these arrangements because the Abu

[35] Abhinav Harlalka & Nishchal Joshipura, *SEBI Clears Jet-Etihad Deal - Corporate/Commercial Law - India* MONDAQ.COM (May 20, 2014) https://www.mondaq.com/india/securities/314658/sebi-clears-jet-etihad-deal.
[36] Competition Act, No. 12 of 2003, §5 (Ind.).

Dhabi-based airline held a 24% stake in Jet Airways, and thus it was not mandatory for them to make an open offer for Jet since, under SEBI rules, the acquirer company having a 25% stake in the target has to make an open offer to the shareholders which is an Indian customized version of the MBR.[37] But these developments further muddied the waters on the issue of MBR and the acquisition of control, thereby leading to uncertainty for the shareholders to get a chance to exit fairly and lucratively. Moreover, these issues further flame up the existing agency problem of ownership and control. This also impedes the efficiency of the management as the decision-making is stalled while the institutional mechanisms are at battle figuring out the definition of 'control'. Such issues also create impediments to a flourishing and conducive market for corporate control, the essentiality of which has been highlighted before. Thus, this issue needs clarifications at the earliest.

2.2.2. Disclosure and Statutory Auditing

Proper compilation of the financials of a company and its due disclosure to the shareholders is central to the credibility and integrity of the company and goes to the heat of healthy corporate governance. Accountability is the underlying corporate value attached to such auditing. Statutory auditing is the 'outsider' equivalent of the internal control mechanism. It obliges companies to mandatorily conduct an audit as required by the statute, the Companies Act, 2013 It is carried out by independent professionals appointed as auditors. It is argued that the auditors resolve the agency problems prevalent in a corporate structure while also forms an external controls mechanism in a corporate governance regime. They act as neutral decision-makers and presents an autonomous check on the workings of the agent. It facilitates the principal to maintain trust and confidence on the agent. Auditors often act as 'gatekeepers' with a crucial task to give unprejudiced assertion that a company's financial condition is portrayed fairly. Thus, statutory auditors although being outsiders have a great influence on the inside of the company as their report makes or breaks the future of the company.

[37] P.R. Sanjai Anirudh Laskar, *Sebi exempts etihad from open offer to hold stake in jet* MINT (May 9, 2014) https://www.livemint.com/Companies/RN5lwHcydANKjcLYQabN8N/Sebi-exempts-Etihad-from-open-offer-to-hold-stake-in-Jet.html.

It is contended that although the key task of auditors is to resolve agency problems, but their appointment often creates a new series of agency problems.[38] As pointed out by Gavious, the reason for these new problems is the involvement of the management in practice who gives recommendations to the shareholders as to the appointment of auditors.[39] Moreover, the fear of losing payments from long-term audit contracts and some additional services often bring into line mutual incentives between the auditors and management, thereby, leading to conflict of interest problems.[40] These conflicting interests could severely jeopardise the independence of auditors impeding them to resolve the real agency problems.

The biggest auditing failure was witnessed in the Satyam debacle of 2008 wherein Satyam Computers' independent auditor, Price Waterhouse Coopers (PWC), one of the Big Four was said to have callously conspired to defraud the public. For nearly eight years, PWC was not able to detect the fraud while Merrill Lynch (now Bank of America) discovered it within ten days. It was contended by several accounting and auditing experts that the presence of 'non-interest-bearing deposits' on Satyam Computer's balance sheet was an unmissable indication of an impending fraud as a reasonable company would either invest money or return the extra to depositors. The Auditors did no independent verification with banks where the money was deposited.[41] PwC, sanctioned all the misrepresented financial statements.[42] Satyam used to create fictitious sources whenever income was needed to be shown. Thus, it is evident that the disclosure and statutory auditing requirements indirectly play an influential role in how companies make decisions and how its mistakes can have a large impact on the company's control.

Post-Satyam two major premises of policy reforms surfaced - firstly, the need for an autonomous oversight body for auditors, secondly, legal strategies for tackling auditors' conflicting

[38] MINISTRY OF CORPORATE AFFAIRS, GOV'T OF IND., FINDINGS AND RECOMMENDATIONS ON REGULATING AUDIT FIRMS AND THE NETWORKS (2018) http://www.mca.gov.in/Ministry/pdf/2018_CommitteeExperts_Report_08112018.pdf.
[39] Gavious, *Alternative perspectives to deal with auditors' agency problem*, 18, CRITICAL PERSPECTIVES ON ACCOUNTING, 451 (2007).
[40] *Supra* note 38.
[41] Arpit Khurana, *Corporate Governance: - A Case Study of Satyam Computers Services Ltd.*, SCHOLARLY RESEARCH JOURNAL, 3 (2016) http://www.srjis.com/pages/pdfFiles/147367354829.%20ARPIT%20KHURANA.pdf>.
[42] V. Gopalan, *Corporate Scams in India: Lessons to be learnt*, COMPANY LAW JOURNAL, 76 (2009).

interests.[43] For this, several committees and task forces were set up to give recommendations on corporate governance regimes in India, like ICAI constituted an expert study group to look into the functioning of audit firms in India. An overhaul of the Companies Act, 1956 occurred giving birth to the new Companies Act, 2013 wherein rotation of auditors was introduced to prevent the statutory auditors of a company and the management getting into a mutually benefitting relationship that might disrupt an audit to be conducted independently. Moreover, as per the new rules, a firm can be the statutory auditor for only 5 years.[44]

One of the major setbacks in India's external auditing regime many Indian audit firms follow the methodology and processes adopted by their networks of Multi-National Accounting Firms (MAF), thereby creating an imbalance in maintaining consistent standards within India. It is argued that although these networks bring good business opportunities, this inconsistency often leads to frauds and therefore needs to be subjected to proper checks and balances under the corporate governance regime. Following the global trend of shifting from the Self-Regulatory Organisation (SRO) model to an independent regulatory model in auditing business, the 2013 Act introduced the formation of the National Financial Reporting Authority (NFRA).[45] However, it is argued that the implementation of NFRA has severely affected the powers of ICIA, but as long as an ICAI continues to exist as a governing body separate from NFRA, effective implementation is difficult.[46] It is hopeful that these impediments are resolved in the future to realise the aim of corporate governance.

3. COMPARATIVE ANALYSIS: THE GERMAN MODEL

Some common corporate governance norms tend to exist around the world, but each country's approach is derived from its own legal, cultural, and political milieu, thereby offering diverse approaches. This section will focus on the German approach in comparison to India.

3.1. Inside Control Mechanisms

A. Board Structure

[43] *Supra* note 40.
[44] Companies Act, No. 18 of 2013, §139(2)(b)(Ind.).
[45] S*upra* note 40.
[46] Manendra Singh & Suhail Nathani, *The National Financial Reporting Authority (NFRA) – A Case Of New Audit Governance In India* BW BUSINESSWORLD (Feb. 23, 2019) http://www.businessworld.in/article/The-National-Financial-Reporting-Authority-NFRA-A-case-Of-New-Audit-Governance-In-India-/23-02-2019-167457/>.

German law requires a two-tier board structure or the dual-board system for stock companies. It consists of a management board and a supervisory board.[47] Members cannot sit as members on the other board.[48] The responsibility of managing and running the everyday activities of the company is on the management board. The management board must comprise one or more directors and with a minimum of two directors if the company's capital exceeds EUR 3,000,000 unless the company's AoA provides otherwise.[49] While, on the other hand, the supervisory board must consist of at least 3 members and at most 21 members, contingent on the specified capital of the company.[50] The duties of the supervisory board include appointment and removal of directors of the management board while also supervising the management of the company.[51]

As against the Indian regime of singular board structure where the management board acts autonomously with no supervising body except following regulatory mechanisms, the German system provides to the supervisory board certain control mechanisms over the management board. For example, it has a right to ask the management board for any information about the company, if the AoA provides for certain kinds of transactions to be approved by the supervisory board, then it has to be.[52] Moreover, it can also comment on the management board's decisions, and in case of rejection of their opinion, justification needs to be provided by the management board.[53] However, reality may be different as public debate in Germany raises questions vis-à-vis the influence, information, and independence of the members of the supervisory board.[54] Thus, in principle, Germany's two-tier board structure provides a robust accountability system on the inside of the company, preventing instances of management board acting arbitrarily, chances of which are high in a one-tier board structure like in India. Although in India, non-executive directors or independent directors can also fulfil the monitoring role of the supervisory board to some extent. For example, under the 2013 Act, companies are required to constitute an audit

[47] Stock Corporation Act 2007, § 76(1), § 95 § 96 (Eng.).
[48] Richard Thomas ed, COMPANY LAW IN EUROPE (2003).
[49] *Id.*
[50] Stock Corporation Act 2007, § 95 (Eng.).
[51] Stock Corporation Act 2007, § 111 (Eng.) *See* http://www.gesetze-im-internet.de/aktg/.
[52] Elizabeth Shi, *Board Structure and Board Composition in Australia and Germany: A Comparison in the Context of Corporate Governance*, 4, MACQUARIE J BUS L,197 (2007).
[53] Stock Corporation Act 2007, § 111 (Eng.) *See* http://www.gesetze-im-internet.de/aktg/.
[54] OECD, MODERN COMPANY LAW PROBLEMS: A EUROPEAN PERSPECTIVE KEYNOTE SPEECH BY PROF. KLAUS J. HOPT (2000) https://www.oecd.org/daf/ca/corporategovernanceprinciples/1857275.pdf.

committee supervised by independent directors. Moreover, the autonomous existence of the audit committee from the board adds additional protection for the shareholders.

B. Labour Codetermination

With respect to the representation of employees and shareholders' interests, the German model provides for 'labour codetermination'. It refers to the co-operative decision-making at the management level by involving shareholders' as well as employees' representatives.[55] The German law allows company workers to elect representatives to the supervisory board. Although some scholars believe that this may lead to a long-term increase in the productivity of the company. But it is argued that given the principal goal of the employers to maximize profit in the interest of the shareholders, labour codetermination might revamp the company's goals in the interest of the employees. India does not have such a system that keeps such administrative conflicts at bay.

C. Effect of Bank-based v. Market-based economy

Germany has a bank-based system, thus making the role of banks crucial in corporate governance regime on the inside of a company by controlling management through their position as creditors or even as owners of equity stakes in large German companies.[56] With respect to the voting process, banks control equity voting rights as they exercise proxy votes on behalf of shareholders who deposit their shares with these banks.[57] Thus, it is not like the proxy system as understood in India. Moreover, this voting power also helps banks to place their representatives on the supervisory board, thereby giving them supervisory control over the management. Scholars claim that "Bank monitoring partially resolves the agency problem, while market-finance is more "hands-off".[58] From a comparative point of view, India has a mixed system both market-based and bank-based with a little bent towards the latter. The former is still in the developing stages. Recently RBI noted that the credit disbursement by Indian banks has shown a

[55] *See* E McGaughey, *The Codetermination Bargains: The History of German Corporate and Labour Law*, 23, COLUMBIA JOURNAL OF EUROPEAN LAW, 135 (2016).
[56] *See* Jeremy Edwards & Marcus Nibler, *Corporate Governance in Germany: The Influence of Banks and Large Equity-Holders*, Faculty of Economics and Politics University of Cambridge (1999) https://www.ifo.de/DocDL/ces_wp180.pdf.
[57] Theodor Baums, *Corporate Governance in Germany: The Role of the Banks,* 40, THE AMERICAN JOURNAL OF COMPARATIVE LAW, 503, (1992).
[58] Shankha Chakraborty & Tridip, *Ray Bank-Based Versus Market-Based Financial Systems: A Growth-Theoretic Analysis* (2002). SSRN: https://ssrn.com/abstract=332501.

massive increase, it is still below the world average.[59] While market-capitalization has also increased sharply. Thus, there is no indication suggesting that banks have an overpowering control in Indian companies.

i. Outside Control Mechanisms

Coming to the outside control mechanisms, historically the German corporate governance system relied exclusively on institutional control and not a market for corporate control as a means to drive management control.[60] Until 1992, no public hostile takeover was successful. But as seen in the aforementioned discussion, the future belongs to market control. The German example is very similar to Indian as there is slow but steady development in the capital markets, along with the emergence of public takeovers. For example, the hostile takeover of Mannesmann by British mobile phone group Vodafone AirTouch.[61] With respect to disclosure and auditing requirements, under the German Corporate Governance Code, the boards of public-listed companies have to disclose instances of non-compliance with the code's recommendations on an annual basis ("the comply-or-explain-principle)."[62] While India has some peculiar mandatory regulations like a mandatory requirement for board evaluation. The rotation and independence of statutory regulators is something very recent in both countries but is equally relevant and important. [63]

4. CONCLUSION AND SUGGESTION

The concept of control has seen a shift in paradigm as actors are more interested in personal gain than for the benefit of the companies and ultimately the shareholders. Therefore, they act in a prejudicial manner when encountered with the situation of conflict of interest, leading to corporate governance problems. These problems created by the behavior and influence of insiders and outsiders in a company are resolved by the internal and external control mechanisms instilled either by law or by norms as explained through the discussion above. Although on the

[59] N Satyananda Sahoo, *Financial Structures and Economic Development in India: An Empirical Evaluation*, DEPARTMENT OF ECONOMIC AND POLICY RESEARCH (2013) https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/2WPSN140313.PDF.
[60] *Supra* note 57.
[61] Thorsten Schulten, *Vodafone's hostile takeover bid for Mannesmann highlights debate on the German capitalist model* EUROFOUND (1999) https://www.eurofound.europa.eu/publications/article/1999/vodafones-hostile-takeover-bid-for-mannesmann-highlights-debate-on-the-german-capitalist-model.
[62] PRICE WATER HOUSE COOPERS (PWC), DOING BUSINESS AND INVESTING IN GERMANY (2018) http://.de/de/internationale-maerkte/doing-business-in-germany-guide-2018.pdf.
[63] *Id.*

inside, the board is the key player there are certainly other factors that influence and compromise its independence. Firstly, disproportionate control in Indian companies which further feeds into the agency problem of ownership versus control. Secondly, the internal control system whose prejudicial nature may drive the company in an unhealthy direction often leads to bad decision-making. Frauds like Satyam speak to that effect. While, in addition to these insider controls, some forces and actors on the outside play an influential role in driving the company. The decision-making by the board is often heavily influenced due to external pressure from the market for corporate control where companies compete for the acquisition of control, specifically in situations of hostile takeovers. Secondly, the external control mechanism of disclosure and statutory auditing forms the backbone of the corporate governance regime in India. Acts of PwC in the Satyam debacle speaks volumes for its improvement. With respect to India's comparison with Germany, it is noted that the contrast in board structure makes all the difference. It cannot be said that one is better over another, but the German model does instill some additional checks and balances. Having highlighted a few loopholes in the law and in practices, there is still a wide gap between the norm and reality. Compliance with regulations has effectively improved and no big-scale scam like Satyam has occurred but they have not reduced drastically even after the strictness in regulatory mechanisms. It is believed that the acceptance of rules has happened in letter and not in spirit. Despite these effective attempts to manifest good corporate governance within companies, the corporate governance regulations fail to strike a balance between providing efficient safeguards and ensuring ease of doing business. Thus, there is a need for a collective conscience for achieving the desired results and for business practices to flourish. Thus, going forward, regulatory mechanisms must be modelled on best practices across the world that suit the business environment in India coupled with the embracement of these mechanisms by the board and other actors – both in form and in spirit.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

MAPPING CASES OF FAILURE OF PROSECUTION

SHIVANI SHEKHAR*

ABSTRACT

There are several Supreme Court and High Court cases that have revealed how investigations were pursued in order to frame innocent people or subject them to harassment. The issue is not that the prosecutions have failed in these cases, the issue is that the prosecutions failed because the entire structure was built upon falsehoods. The path of justice has become so tortuous, so expensive that extricating oneself from evil manipulation of police is extremely difficult. The victims are bound to suffer the most harrowing experience for illegal detention, an agonising trial. I have based my inferences on decided cases of the Supreme Court and High Court where it was categorically established that the police had prosecuted the victims maliciously.

1. INTRODUCTION

Today's victim is not just a victim of crime but a victim of the numbness of the criminal justice system.

The State has a responsibility to protect its citizens. However, every crime committed is considered a failure of the State for not being able to prevent the commission of the crime. So, in order to protect its citizens, every crime committed is considered that it is committed against itself and it prosecutes the case under its name.[1] The responsibility of the public prosecution is taken over by the State in order to maintain public confidence and faith in the criminal justice system. The UN guidelines for the role of public prosecutor provide that the public prosecutor must use all the legitimate means for obtaining justice and no improper methods should be used which could result in a wrongful conviction.

* Assistant Professor, School of Law, Lords University, Alwar, Rajasthan.
[1] R.V. Kelkar, Lectures on Criminal Procedure (EBC Publishing Pvt. Ltd.).

This paper analyses the role of prosecutors in India and maps its failure through various cases. The paper is further divided into VI parts. In part II, it explores the duty of the public prosecutor, in part III it will go through the relevant sections provided for the appointment of the public prosecutor, in part IV it will talk about the existing challenges in India. Further, under part V, it will discuss various cases where there has been the failure of prosecution followed by a conclusion with final analysis and suggestions for efficient prosecution.

2. DUTY OF THE PUBLIC PROSECUTOR IN THE CRIMINAL JUSTICE SYSTEM

The public prosecutor holds an important position in the criminal justice system. They are required to produce the true picture of the crime. The State steps into the shoes of the victim and the victim take a backseat as they become witness rather than the position of stakeholder. The victim tends to count heavily on the performance of the public prosecutor as they can help them win justice. An ideal public prosecutor is considered the agent of justice. The role of the prosecution is to seek the truth rather than to seek conviction at any cost. Some of the qualities that the public prosecutor must have, are to be impartial, truthful, and fair not only as a public executive but because he belongs to the profession of ethics and law which demands such qualities from the public prosecutor.

The role of the public prosecutor is not to think in one way direction that is to secure conviction irrespective of the evidence but his ideal role is to get the justice delivered. The word procurator is derived from the word 'procuro' which means I secure, prevent and I care.[2] In ***S.B. Sahana v State of Maharashtra***[3], it was held that irrespective of the executive or judicial nature of public prosecutors, the public prosecutor is expected to be impartial and fair in criminal prosecution. The duty of the public prosecutor is to see that justice is vindicated and there is no unrighteousness of the conviction, which was held by Allahabad High Court. There should be no anxiousness on behalf of the public prosecutor to secure a conviction. The criminal trial's purpose is to adjudicate the guilt or innocence of the accused, the duty of the public prosecutor is to represent the State and any particular party is not represented. So, the State is not activated by

[2] Pillai, K. N. Chandrasekharan. "PUBLIC PROSECUTION IN INDIA." *Journal of the Indian Law Institute*, vol. 50, no. 4, 2008, pp. 629–639. *JSTOR, available at*: www.jstor.org/stable/43952181.
[3] (1995) SCC (Cri) 787.

any revenge or motives to retaliate but is only there to protect the interest of the community at large. The public prosecutor is not supposed to make the case worse against the accused by a statement rather its only aim should be to aid the court in finding or discovering the truth. He should avoid influencing witnesses on either side or intimidating them. The public prosecutor is to produce all the material facts which he possesses irrespective of whether they are against or in favor of the accused so that there is no miscarriage of justice by the court. The public prosecutor is bound to place all the evidence whatever he has with himself and it is the court to decide on the basis of the evidence whether the accused has committed or not committed the offence. The public prosecutor is charged with a statutory duty and he is an independent statutory authority. The duty of the public prosecutor is not to represent the police rather their duty is to represent the State. She/he is appointed as an officer of the State government and does not take part in the investigation. The intention of the Parliament was that the public prosecutor should be free from the control of the police department. If the public prosecutor behaves in a manner as if he is defending the accused, there is no fair trial. A fair trial means an impartial judge and a fair prosecutor. The public prosecutor becomes a liability if he acts more like counsel for the defense and does not perform his duty fairly. The decision upon withdrawal, a statutory responsibility is vested on the public prosecutor. The public prosecutor has discretion for the withdrawal of the case. She/he has to see whether the cause of the justice would be advanced or retarded by withdrawal of the prosecution. The major factor, the administration of justice has to be seen while withdrawing from the prosecution and no political pressures. There can be no command or order from the District Magistrate or the Superintendent of Police to the public prosecutor to move for withdrawal. The District Magistrate can only bring into the notice of the prosecutor and indicate to whether withdraw the prosecution or not. There can be only recommendations and no order or command. It should be brought to the attention of the court by the public prosecutor if there is some issue that could have been raised by the defense but has not raised that issue. Therefore, the public prosecutor functions as the officer of the court and not to obtain the conviction as he is not a counsel of the State. Ensuring that justice is done, is the duty of the prosecutor.

3. RELEVANT SECTIONS IN THE CRIMINAL PROCEDURE CODE DEALING WITH THE "PUBLIC PROSECUTOR"

Section 24 of the Criminal Procedure Code (Cr.P.C.) provides for the appointment of public prosecutors in the district and in the High Courts by the State government or Central government[4]. Sub section3 provides that the State government shall appoint a public prosecutor for every district and may also appoint one or more Additional Public Prosecutors for the district. The subsection provides that the district magistrate shall prepare a panel of names who are fit to be appointed as Public Prosecutors, in consultation with the District Magistrate. Subsection 5 provides that unless his name appears in the panel of names prepared by the District Magistrate under subsection 4, he shall not be appointed by the State government as the public prosecutor. Subsection 6 provides that where the State has Cadre of Prosecuting officers and if there is no suitable person available in the cadre then the appointment will be according to subsection 4. Subsection 7 provides that a person shall be eligible only if he has been an advocate in practice for not less than 7 years. Section 25 provides for the appointment of an Assistant Public Prosecutor for conducting prosecutions in the courts of Magistrate.[5] By the virtue of these provisions, there is a statutory factor attached to these appointments through the Criminal Procedure Act, 1973.

Also, Section 321 is important. This section provides that the Public Prosecutor or Assistant Public Prosecutor with the consent of the court before the judgment is pronounced can withdraw from the prosecution of any person. This power given to the prosecutor should be exercised in the administration of justice. This is a statutory power and should be fairly exercised in the administration of justice.[6]

In ***Krishan Singh Kundu v State of Haryana***[7], the Punjab and Haryana High Court has held that it is appalling to the letter and spirit of section 24 and 25 Cr.P.C. for appointing a police officer in charge of the prosecution agency. In another case ***S.B. Sahana v State of Maharashtra***[8], it was held that from the office of public prosecutor one expects impartiality and fairness in

[4] Section 24, Code of Criminal Procedure, 1973.
[5] Section 25, Code of Criminal Procedure, 1973.
[6] Section 321, Code of Criminal Procedure, 1973.
[7] 1989, Cri. LJ 1309, Punjab and Haryana High Court.
[8] 1995 SCC Cri. (787).

criminal prosecution. In yet another case, ***Mukul Dalal v Union of India***[9], it was held that the office of the public prosecutor has a social purpose and his office is a public one. The malpractices of various public prosecutors have eroded this value and its purpose.

4. EXISTING CHALLENGES IN INDIA AND PUBLIC PROSECUTION

In India, after the crime is committed the police investigates the crime and files a charge sheet and subsequently the prosecutor prosecutes the case. Before the Criminal Procedure Act, 1973 the public prosecutors back then were linked to the police and were accountable to the Deputy Superintendent of the Police. Since 1973, the enactment of the Code of Criminal Procedure, the public prosecutor is not under the police and they are detached from the control of the police.[10]

However, since then there is no proper coordination between the police and the prosecutor. The prosecution department is now independent and is now placed under an authority called the Directorate of Prosecution. This separation has definitely affected the quality of the investigation. A fouled-up investigation by the police results in a weak case with the prosecution and subsequently before the court. A prosecutors' efficiency is dependent on coordination with various agencies. Apart from the police a prosecutor also depends on the report of forensic which are hugely delayed which in turn weakens the case of the prosecution. Also, the witnesses turn hostile and the prosecutor has no way to guarantee the safety and security of the witnesses. This is all controlled by different agencies. When the case reaches the stage of trial or when it reaches the court, the police are unaware of the status of the case. This has however led to problems for the proper functioning of the system and is continuing to date. There should be certain powers given to DSP to review the performance of the prosecutor in the case. M.L. Sharma recommends that a report of the performance should be prepared by the DSP of each assistant public prosecutor and should be given to the District Magistrate in order to check on their performance and assist in the accountability mechanism.

Section 41-A of the Code has to be adhered to. However, it is the most neglected provision of the Code of Criminal Procedure, which commands the investigating police officer to serve the notice

[9] 1988 3 SCC 144.
[10] Madan Lal Sharma, The role and function of prosecution in criminal justice, *available at*: https://www.unafei.or.jp/publications/pdf/RS_No53/No53_21PA_Sharma.pdf.

before arresting in conditions. We observe in plenty of judgments that the officers breach the mentioned provision, and arrest the person without following the due process of law. The law of the land is bail and not jail and such persons wrongfully arrested are not granted bail due to improper investigations, lack of evidence. As a result of which we have the highest population of undertrials in the world. It is not that there is no provision in the Code of having a discharge from the case if falsely prosecuted but the question arises how many accused have been discharged from the offences they are charged with?

Once the investigation is completed the police with the consultation of the prosecutor prepare the charge sheet and then send the charge sheet to the court. However, in ***R. Sarala v T.S. Velu***[11], it was held that the public prosecutor is an officer of the court and stressed the fact that their role is limited to the post-investigation stage and their work is inside the court which indicates that their role is removed during the investigation stage. Also, the Code does not provide any provision that deals with the irregularities committed in investigation-by-investigation officers.

4.1. Law Commission Report

The Law Commission of India submitted its report on wrongful prosecution (miscarriage of justice). The Commission noted that there is no legal framework currently to provide relief to those who are wrongfully prosecuted. The framework provided by the 277th LCR is still poorly developed. According to the report, the cause of action arises only in cases of malicious prosecution and prosecution instituted without good faith. The report excludes the instances when there are technical lapses on part of the investigation. The LCR continuously uses the word accused which deprives the victim of its victimhood. It does not provide a concrete method for calculating the compensation which will lead to arbitrariness in the calculation. The court is not allowed to order to restore the victim directly by the erring official. There is a lack of conceptual clarity on the report and more research is required to be done in the aspects of wrongful prosecution.

4.2. Overburdened Courts and delay in Courts

[11] (2000) 44 SCC 459; AIR 2000 SC 1731.

The major issue that concerns us today is the overload of courts and not enough strength of judges. The trial should commence at an entrusted point of time. The more the trial is outstretched, the more time it will draw to assess if someone was wrongfully prosecuted. If one has to be found innocent by the Courts, it is indisputably important for that matter to be listed for the hearing, given that our courts are heavily burdened it is, therefore, unlikely that the matter will be listed soon, as there are heaps of cases filed every day and we do not have adequate strength of judges in the judiciary. It only results in the suffering of that person who is wrongfully prosecuted and is granting compensation enough to the persons wrongfully prosecuted or is it effective to provide early trials. A considerable question mark is raised on the character of that person who is wrongfully prosecuted. Is it not necessary to make an explicit provision for these people?

5. MAPPING CASES OF FAILURE OF PROSECUTION

The prosecution has failed to prove the case is a statement that is often used and is not surprising to anyone. It has been in the news in various cases in which the accused were acquitted. Various cases indicate that nothing is well with the prosecuting system of the country.

5.1. Zahira Habibullah H Sheikh v. State of Gujarat

In the case of ***Zahira Habibullah H Sheikh v State of Gujarat***[12] also known as the "Best Bakery Case", the judgment in this case in which 14 people were killed on March 1, 2002, in the post godhra carnage in Gujarat acquitting all 21 accused has evoked wide discussion. The main witnesses like Zahira Sheikh and others turned hostile which led to the acquittal. This case though was tried by a fast-track procedure still took 2 years or more than that to decide the case. There was no security provided to the witnesses especially Zahira Sheikh who was the main witness in the case and whose father was killed when the mob had set fire to the bakery and whose family owned the Best Bakery. Though she turned hostile and said that the 21 alleged for the crime were indulged in the crime, however later in a press conference she admitted that she had turned hostile under compulsion and she had received threats and no one came to rescue.

[12] (2004) 4 SCC 158; 2004 SCC (Cri) 999; 2004 Cri LJ 2050.

Biased and faulty investigation and also disinterested trial had darkened the sanctity of bringing the culprits to books.

The public prosecutor did not take any step to protect the star witness especially when 4 out of 7 injured witnesses had deviated from statements made during the investigation. The public prosecutor was not acting in a proper manner. He did not even request to hold the trial in front of the camera when a large number of witnesses were resiling from the statements made during the investigation. The public prosecutor did not examine the injured witnesses. Though the witness was present he dropped him on the ground that he was not mentally fit to depose. The prosecutor was acting in a manner that he was defending the accused. One of the reasons for the fresh trial was the alleged deficiencies of the public prosecutor in conducting the trial and for not bringing on record the contradictions in the statements that were recorded during the investigation. The conduct of the prosecutor and the investigating agency was not bona fide is very apparent.

5.2. State of Gujarat v. Kishanbai

In another case of ***State of Gujarat v Kishanbai***[13], a complaint was lodged alleging the kidnap or abduction of a 6-year-old girl child called Gomi by the accused Kishanbai. It was alleged that the girl was enticed by the accused with ice cream and had taken her to a field where he raped her. He had murdered her by inflicting injuries on her head and various other parts of the body by using brick. In order to steal her anklets, he chopped off her feet. The Trial Court sentenced Kishanbai to death by hanging subject to confirmation by the High Court of Gujarat. The criminal appeal filed by Kishanbai was accepted by the High Court and was acquitted by him a benefit of the doubt. Dissatisfied with the order passed by the High Court, the State of Gujarat approached this court by filing SLP. The leave to appeal was granted.

The main witness who had identified Kishanbai as the very person who had pledged the anklets with him was not produced as a prosecution witness. The prosecution could have easily established the identity of the pledger by comparing the thumb impression. This was an important lapse on the part of the prosecution. A vital link of the chain of events had broken to establish the rape of the victim by non-examining of Dr. P.D. Shah, a prosecution witness. The report given by the medical officer relating to medical examination was not produced by the

[13] (2014) 5 SCC 108; 2014 Indlaw SC 11.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

prosecution. No sketch map had been prepared or details regarding the distance were given for the courts to determine all that was alleged in the prosecution version of the incident. The deficiency in the prosecution evidence is construed as a serious infirmity. There were glaring inconsistencies and unreliability in the statements made by the prosecution witnesses. The delay by the investigating agency in confirming the version of the accused respondent in respect to the weapon of the crime renders the prosecution version suspicious. Also, the evidence produced for proving the charges are completely shattered and therefore tearing down the prosecution version and non-production of evidence which the prosecution withheld and due to which the justice has not been served. The prosecution has messed it all up. In furtherance of the above purpose, it was considered essential to direct the Home Department of every State to examine all orders of acquittals and reasons to be recorded for the failure of each prosecution case. Judgments like these and more judgments may be added to the training programmes. The prosecution should be fully trained to handle the same. All such erring officers responsible for failure of prosecution must suffer departmental action.

5.3. Ankush Maruti Shinde and others v. State of Maharashtra and another

In this recent case of ***Ankush Maruti Shinde and others v State of Maharashtra and another***[14], Trambak and all his family members were looted by 7-8 dacoits. They were beaten and assaulted by the dacoits. The women of the family were also raped. However, two witnesses survived. The witness who had regained her consciousness identified four accused with names who were other than the accused 1-6. It was held that the prosecution withheld the evidence and the material facts were suppressed. The accused stripped the ornaments from the wife and daughter of Trumbak. The witnesses were identified in the TI parade and or before the court and there is no other evidence for corroborating the prosecution case. There is no explanation by the prosecution for holding the TI parade belatedly late. There is no forensic report corroborating the prosecution's evidence. The DNA, fingerprints evidence does not support the case for prosecution.

PW8 was subjected to rape but the prosecution failed to prove rape on her by leading evidence and more specifically the forensic evidence. The prosecution has suppressed the material facts from the court. Neither the investigating agency nor the special executive magistrate stated

[14] 2019 SCC Online SC 317.

anything regarding the statement of PW8, she has identified four persons from the album. The four persons identified by PW8 were never arrested nor was there any investigation against them. Therefore, there is a serious lapse on the part of the investigating agency. The prosecution id directed to conduct the further investigation for those who were identified by PW8. The prosecution had failed to prove the case against the accused beyond a reasonable doubt.

5.4. State Tr.P.S. Lodhi Colony New Delhi v. Sanjeev Nanda

In this case[15], a BMW car driven rashly and negligently dashed violently against six people, the driver who was also intoxicated at that point in time. On the conclusion of the trial, after the evidence had been put on record the respondent was found guilty of commission of come under 304 Part II of the IPC and awarded him sentence for 5 years and other charges were acquitted. A criminal appeal was filed aggrieved by the said judgment and the order of conviction. Sanjeev Nanda's sentence was reduced to two years by the learned single bench after considering the matter at great length and found the accused guilty under 304A IPC.

The prosecution had failed to use either the breath analyzer or Alco meter for recording a definite finding in this regard. Various PCR messages which were of great significance were suppressed by the prosecution Also one of the victims of the accident who was in a jeep had disclosed various facts which were suppressed by the prosecution. The key prosecution witnesses turned hostile and the prosecutor could protect them from turning hostile as the respondent accused was a very influential party. The judgment pronounced by Verma J. held that there was a lacuna in the prosecution case as there was a failure to conduct a breath analysis.

5.5. Somnath Sharma v. State of Sikkim

This case, ***Somnath Sharma v State of Sikkim***[16] was based on circumstantial evidence and the guilt of the accused was not proved due to the failure of the prosecution. The circumstances established by the prosecution are wholly inconsistent with the guilt of the accused and the prosecution had failed to prove the series of events or the chain of circumstances beyond a reasonable doubt. It was pointed out that the prosecution failed to prove that the appellant and the deceased were together at the time of the incident. There was a delay in registering the FIR

[15] (2012) 8 SCC 450.
[16] 2018 SCC Online Sikk 213.

and forwarding the same to the Magistrate is unexplained. As there was no eyewitness to the incident it was wholly based on circumstantial evidence.

In this case, the appellant was married to the deceased and they were living in a rented room. The deceased had joined a computer class. Chandra Kala Sharma (accused no.2) started living with the couple and the appellant and the accused no.2 fell in love. The appellant pushed the deceased as he wanted to get rid of the deceased towards a treacherous steep cliff. The appellant had filed a false missing report intentionally to screen himself from the punishment. The prosecution has placed no evidence at all to prove the allegation of the affair as a motive of the murder. The prosecution has not even produced the primary or secondary evidence of the details of the call records. The prosecution also failed to prove that the appellant lodged a false missing report in order to screen himself from the punishment. It was held that the investigation in the present case was lethargic and the prosecution halfhearted. The quality of the prosecution and the investigation is very displeasing. The appellant is acquitted as the prosecution failed to prove the series of events beyond a reasonable doubt.

5.6. Dr. (Smt.) Nupur Talwar v. State of U.P. And Anr.

The Noida double murder case[17], murder of 13-year-old girl Aarushi Talwar and Hemraj who was working as domestic help employed by her family. The two were killed at Aarushis home in Noida. The trial has convicted the appellants on the basis of circumstantial evidence and therefore criminal appeals have been preferred. The present case is based on circumstantial evidence and the law is imperative that motive needs to be proved. The motive suggested by the prosecution to commit the murder of their only daughter was that they saw Hemraj and Aarushi in a compromising situation and due to grave and sudden provocation, the appellants murdered both of them. However, no evidence has been found that Hemraj was assaulted in Aarushis room or of any sexual activity between the two. The prosecution during the investigation produced different kinds of murder weapons at different stages. The prosecution has failed to prove that by any cogent evidence that despite having the keys of the terrace they did not provide the same to the Investigating Officer where Hemraj was killed. The allegation by the prosecution that the appellants had changed their clothes in the morning was disproved by the prosecution's own witnesses. The prosecution had failed to gather the fingerprints who had put the cooler panel and

[17] 2017 SCC Online All 2222; (2018) 102 ACC 524.

compared it with the fingerprints of the appellants and there were no cogent reasons for putting the cooler panel. The prosecution has failed to establish that the appellants had destroyed the material evidence. They were not able to prove the crime weapons with which the double murder was committed. In view of the testimony of several witnesses, it cannot be ruled out there was the possibility of outsiders which goes against the prosecution theory that the crime was committed by the appellants as there was no possibility of outsiders.

It will be extremely difficult to prove the guilt of the accused if strict rules of circumstantial evidence are required by the Court. It is held that the prosecution has failed to prove its case against the accused-appellants and the conviction recorded by the Trial Court cannot be sustained.

5.7. Dhananjay Shankar Shetty v. State of Maharashtra

In this case of ***Dhananjay Shankar Shetty v State of Maharashtra***[18], the sole appellant has challenged his conviction under Section 302 read with Section 34 as upheld by the Bombay High Court. The facts of the case are that 3 constables were on patrolling duty within the jurisdiction of their said police station and they noticed four persons running with swords and weapons. One of the constables recognized Dhananjay Shankar Shetty as he was a known history-sheeter and was also wanted in several criminal cases. The police after registering the case had taken up an investigation regarding this. During the investigation, two others were also arrested and were recognized by the constables and a charge sheet was filed. On conclusion of the trial the other two were acquitted and the appellant was convicted which was also upheld by the Bombay High Court.

In the appeal, there is a reappraisal of evidence if the court finds there are compelling reasons and there would be a failure of justice. As there was no direct evidence, it was a case of circumstantial evidence. There should be an unbroken series of events that should be proven by the prosecution. There was no recording of the name of the appellant when the 3 constables had called at the police station and it was not safe to place reliance on the testimony of the constable's witnesses. The prosecution completely failed to explain the injuries on the body of the appellant and on its failure to do so, the prosecution story is to be disbelieved. However, it was held that the prosecution has failed to prove its case beyond a reasonable doubt, and the

[18] (2002) 6 SCC 596; 2002 SCC (Cri) 1444.

High Court was not justified in upholding the conviction of the appellant. The conviction is set aside and he is therefore acquitted of the charges.

5.8. NIA v. Naba Kumar Sarkar & Others

The Panchkula special court acquitted all four accused in the Samjhauta case. The judge remarked that the best evidence was withheld by the prosecution and was not brought on record. Few of the independent witnesses were never examined or declared hostile for cross-examination when they did not support the prosecution case. The judge remarked that there are gaping holes in the prosecution evidence and an act of terrorism has remained unsolved. In the present case, no evidence has been proved to show that there was an agreement to commit any crime. Nothing was proved regarding the meeting of minds. There was no concrete evidence oral, documentary, or scientific brought on evidence. No motive was made out from the prosecution case on the part of the accused. The judge underlined the importance of witness protection due to a large number of witnesses turning hostile and a workable witness protection scheme. The best evidence in the shape of CCTV footage was withheld by the prosecution. There was no new fact placed on record like as to how and from where the raw materials for making bombs were procured, as to who had prepared, etc. The whole case of the prosecution is based on inadmissible evidence. It also did not produce a document on where the accused stayed a night before. The court refused to rely on the circumstantial evidence against the accused holding that there should be a full chain of events that did not form in the present case.

6. CONCLUSION

The effective functioning of the prosecution depends on the coordination between different agencies. The prosecutor suffers from a lack of autonomy. The prosecutor does not have a considerable amount of power. The withdrawal of cases by the prosecutor is often driven by political considerations. There is a need to widen the role of the prosecutor. Different agencies should be headed by the prosecutor and not by police officers. The number of cases can be known but there is no data for the total number of prosecutors upon whom there is so much workload. There are no incentives provided to the public prosecutors. A remarkable judgment of Rudal Shah led to the evolution of compensatory jurisprudence for violation of fundamental

rights under the Constitution. Is it justifiable that spending years behind the bar for the crime you did not commit, the only remedy you have is to seek compensation from the State? It is necessary to come up with a mandatory provision to deal with violations done by the investigating officers and it is further pivotal to provide early hearings to the undertrials. These are apparently the only measures to rectify the wrongful prosecution and deliver justice to the sufferers.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

AN ANALYSIS OF THE EXPANDING HORIZONS OF WOMEN'S RIGHTS IN INDIA THROUGH JUDICIAL ACTIVISM IN THE 21ST CENTURY

RAJDEEP GHOSH*

ABSTRACT

India is known as a patriarchal form of society where men are considered as breadwinners and women are treated as homemakers but the Indian judiciary has always been a savior for protecting women's rights. Basically, whenever the judiciary finds an opportunity to protect and expand the avenues of women's rights it never hesitates rather it proactively deals with the same. The 21st century has although brought a great ray of hope for women in this globalized world where women have been achieving new heights every day but simultaneously, they need to face new challenges along with the existing ones. In fact, the first two decades of the 21st century have witnessed the expanding horizons of women's rights through judicial activism in India in many spheres including decriminalization of adultery, legalization of life in relationships, providing equal rights of property, equal rights in the army and air force, etc. The present paper would strive to find out the ratio decidendi of a few landmark judgments meant to provide new rights to the Indian women in the last two decades and their implication in the prevailing society.

1. INTRODUCTION

Swami Vivekananda rightly said that just like one bird cannot fly with one wing only, similarly, a nation can never go ahead if the women community of it are left behind as men and women are regarded as the two holes of a perfect whole. Each has what the other does not have. Each completes the other. The relation between male and female in any given society is very well illustrated in our Nyaya Darshana by the analogy of mind and matter, which signifies that men and women are closely and inherently associated with each other as the soul and body.[1] The Constitution of India enshrines the principle of equality and to some extent, it also provides for

* Assistant Professor of Law, Rashtriya Raksha University, Gandhinagar (A Central University and an Institution of National Importance).

[1] Retrieved from https://www.legalserviceindia.com/ laws/women_issues.html, last visited on dated 14th day of October, 2021.

some special protection of women.[2] Therefore, women ought to get all the rights, immunities, and liberties which a man might possess in this society as per both the law and religion in general. But time and again in practice, we see discrimination and inequalities between men and women giving special preferences to men and sufferings to women which notion often places barriers in the way of overall development and unleashing of the society as discrimination, inequality and overall development of the society cannot go hand in hand. Indian Judiciary has played a prominent role in recognizing, upholding, and safeguarding the rights and liberties of women since its very recognition. Two decades of the twenty-first century have gone and these two decades Indian judiciary has recognized, upheld, and opened up new horizons of women's rights which attracted the attention of all strata of the society i.e., from laymen to the legal luminaries.

2. LANDMARK CASES IN THE 21ST CENTURY EMPOWERING INDIAN WOMEN

2.1. Decriminalization of Adultery

The constitutional validity of Section 497 of the IPC was challenged in **the landmark case of Joseph Shine v. Union of India[3].** In this particular case, the petitioners stated that criminal law ought to be used only as of the last means of social control and it ought not to be used to check or control the private state of affairs or private morality or immorality. Centre in response to that put forward the argument that adultery is an offense as it is an intentional action that impinges on the sexual fidelity and sanctity of the marriage in society. It is an intentional act that is done knowingly and willingly with the full knowledge that the same would be hurting the family, children, and the spouse.[4]

After hearing both the parties, the Honorable Supreme Court of India in a Bench headed by the then Chief Justice of India, Justice Deepak Misra, observed that Section 497 of the Indian Penal Code is invalid, unconstitutional and hence struck it down. The Apex Court held that the provision of Section 497 of IPC was based on gender stereotypes and not on equality and hence violated Article 14 (equality before law and equal protection of laws) and Article 15 (non-

[2] Article 14, 15, especially 15 (3), 16, 39 etc. of the Constitution of India may be referred in this regard.
[3] 2018 SCC OnLine SC 1676.
[4] Retrieved from https://blog.ipleaders.in/supreme-court-struck-adultery-law-section-497-ipc-justified/.

discrimination on grounds of sex etc.) of the Indian Constitution of India. The Court also struck down Section 198 (2) of the Code of Criminal Procedure, 1973 which empowered a husband to bring charges against any man with whom his wife has committed adultery. The Court also held that if adultery is to be termed as a criminal offence, it becomes essential that one of the spouses committed suicide in the course of the concerned events of adultery. In such a case only, the other spouse can be made.[5]

2.1.1. The future implications of the judgment

This judgment has paved one more step towards safeguarding women's rights in a patriarchal form of society where women are treated as the property of men by declaring the long-standing controversial offense of adultery as unconstitutional. All the learned judges agreed that women have the right of individual choice, bodily integrity, and personal autonomy in the context of family and her personal matters. But simultaneously, it gives birth to another consideration as to in absence of the offense of adultery in the criminal law the only option that remains in the hand of the husband or wife whose marriage has been shaken by the practice of adultery is to approach the authorized family Court for Divorce under concerning laws for the time being in force. So, if now adultery gets committed by any spouse to any marriage, then the other aggrieved spouse would have to choose either to go for divorce or to stay silent and endure the same but in Indian society till date getting a divorce is to a great extent is deemed to be a social stigma and further in such situation, if the married couple has any living issue, then divorce also hampers the future prospects of the child. So, research to find out a new alternative to the offense of adultery is also ought to be done. The judgment, in this case, would act as a launchpad for striking down other such laws against women's marital rights ensuring greater equality, freedom, and independence within the private spheres of the society.

2.2. Recognition of live-in relationship and several rights incidental thereto

Live in a relationship are those relationships where couples without being married to each other stay together under one roof and may do all activities which a married couple can do. In India, there is no specific law that deals with live-in relationships and the rights and liabilities of the parties or couple involved therein along with the status of the issues/children born out of such

[5] Ibid.

relationship, if any. Indeed, to date, it is unregulated as no law provides rights, obligations, and responsibilities to live-in couples. However, the courts in India have from time to time have clarified the concept of live-in relationships and the ancillary activities involved therein through various landmark judgments**.** Hon'ble Mr. Justice A.K. Ganguly in **Revanasiddappa v. Mallikarjun**[6] opined that **"with changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today".** Although, Indian law is still unclear about the status of such relationships yet few rights have been granted by the Indian Judiciary by interpreting and amending the prevailing legislation so that the misuse of such relationships can be prevented by the partners and none is deprived therein.[7]

Section 125 Cr.P.C., 1973 was incorporated in order to avoid vagrancy and destitution for a wife/minor child/old age parents, and the same has now been extended by judicial interpretation to partners of a live-in relationship.[8] Where partners live together as husband and wife, a presumption would arise in favour of wedlock.[9]

In the landmark case of **S. Khushboo v. Kanniammal**[10], the Supreme Court of India held that living in a relationship between two adult/major persons is legal and permissible under Article 21 of the Constitution of India which enumerates the right to life and personal liberty.

In another leading case of **Koppisetti Subbharao v. State of A.P.[11]**, the Supreme Court held that the classification "dowry" has no magical charm. It alludes to a request for cash in connection to a conjugal relationship. The court has not accepted the contention of the defendant that since he was not legally married to the complainant, Section 498A did not make a difference to him in a stage ahead in shielding the lady from badgering for dowry in a live-in relationship.

The Supreme Court upheld the legitimacy of children born out of a live-in relationship in **S.P.S. Balasubramanyam v. Suruttayan[12].** The Supreme Court had further aptly observed that "If a man and woman are living under the same roof and cohabiting for some years then there will be

[6] (2011) 11 SCC 1: (2011) 2 UJ 1342.
[7] Retrieved from https://www.scconline.com/blog/post/2019/01/23/live-in-relationship-and-indian-judiciary/, last accessed on the 19th day of October 2021.
[8] Ajay Bhardwaj v. Jyotsna, 2016 SCC OnLine P&H 9707.
[9] Chanmuniya v. Virendra Kumar Singh Kushwaha, (2011) 1 SCC 141.
[10] (2010) 5 SCC 600.
[11] (2009) 12 SCC 331.
[12] (1994) 1 SCC 460: AIR 1994 SC 133.

a presumption under Section 114 of the Indian Evidence Act, 1872 that they are living as husband and wife and the children born out of such relationship to them will not be illegitimate merely because of that fact instead they will be legitimate."

The Supreme Court in **Tulsa v. Durghatiya**[13] held that issues born out of a live-in relationship are legitimate children of the lived-in partners but the precondition of the same is they should have lived together for a considerable period just like a husband and a wife and it should not be a simple "walk-in and walk-out" relationship.

2.3. Recognition of Equal Coparcenary rights of women over ancestral property

In India, Hindu men and women were not treated equally pertaining to ancestral property distribution. Men were regarded as superior over women and women were treated as the assets of another family i.e., the family of her husband and hence they were deprived of the rights of share in the ancestral property, unlike their male counterparts. The Hindu Succession Act, 1956 deals with the matters relating to succession and inheritance of the property of Mitakshara Hindus including Buddhists, Sikhs, Jains, and also the followers of the Arya Samaj, and Brahma Samaj. But this Act recognized male persons of the family as the legal heirs only and thereby excluding the female counterparts but finally in the year 2005, an amendment has taken place in the same Act which gave equal rights to women pertaining to share of property through succession and inheritance among Hindus in India. But there remained one doubt regarding the application of the said law as to whether it should be made applicable prospectively or retrospectively as generally when the Legislature is silent on the time of applicability of any law then it is presumed that the concerned legislature seeks to make it applicable prospectively only. The implication of the prospective application of the same was that the women whose fathers had died before the due date of 2005 could not claim a share in their ancestral property as to claim the same their respective father must die only after the due date of such amendment in the year 2005. But Indian Supreme Court changed this notion for the larger interests of womanhood.

In the notable case of **Danamma v. Amar**[14], the Apex Court of India held that Section 6 of the amended Hindu Succession Act, 1956 in the year 2005 vests Indian women with full

[13] (2008) 4 SCC 520: AIR 2008 SC 1193.
[14] (2018) 3 SCC 343.

coparcenary rights as to their ancestral property, and thus any coparcener including daughters are entitled to claim their ancestral property including partition irrespective of the date of the death of their father i.e. before 2005 or after 2005. In the present case, the father of the claimant died in the year 2001 i.e., before the said amendment, leaving behind two daughters, two sons, and a widow. The daughters, sons, and the widow were given 1/5th share in the property by the endeavor of the Honorable Supreme Court of India.[15]

The effect of this judgment would be that the longstanding discrimination against women as to their right over an ancestral property in comparison to their male counterpart's rights would come to an end and could be legally implemented with effect not only from the year 2005 but also retrospectively.

2.4. Recognition of the right of the shared household in favor of wives in maintenance and domestic violence cases

Earlier, if any case is filed by any woman against her husband or in-laws under the provisions of the Domestic Violence Act or for maintenance of herself or her issues under any law then she was forced to leave the house in which they were residing if it was her in law's house. But the Supreme Court of India changed this notion by its landmark judgment in the case of **Satish Chander Ahuja v. Sneha Ahuja**[16] where it was held by the Supreme Court that an estranged wife can claim a right to reside in a household belonging to the husband's relatives. This judgment overrules the earlier precedent of the Supreme Court as laid down in **S. R. Batra v. Taruna Batra**[17] and will have an indelible impact on the jurisprudence surrounding "The Protection of Women from Domestic Violence Act, 2005". In simple words, a shared household is a household where an estranged wife has lived at any stage in a domestic relationship. Such a household may be owned or rented jointly between the estranged wife and her husband. It also includes a household that is owned or rented by either one of the disputing couples. A shared household may belong to the joint family of which the husband is a member, irrespective of whether the husband or the estranged wife have any right, title or interest in the said household.

[15] Retrieved from https://indianexpress.com/article/explained/reading-supreme-court-verdict-on-hindu-womens-inheritance-rights-6550767/, last accessed on 18th day of October, 2021.
[16] AIR 2020 SC 2483.
[17] 2007 3 SCC 169.

2.5. Landmark judgment granting women equal rights in the Indian army

The Supreme Court in the significant case of **Secretary, Ministry of Defence v. Babita Puniya & Ors**[18] held that the women officers in the Indian Army shall be granted and allowed permanent commission. The Apex Court rejected the Central Government's stand of the physiological limitations of women as being based on "stereotypes" and "gender discrimination against women". **Dr. Justice Chandrachud** then observed that even if the women are found less fit for combating roles, these would be a tiny fraction of roles in the Indian Armed Forces and our women can thus be given a permanent commission in other roles. He further opined that "two things are required to rid any form of gender discrimination viz., administrative will and change in mindset".

The impact of this judgment would be far-reaching in as much as it relates to the participation of women in armed forces and it will also raise the egalitarian attitude that women are not inferior to men which shall further pave another way towards women empowerment.

2.6. Abolishing Instant Tripple Talaq (Talaq Ul Biddat)

In the case of **Shayara Bano v. Union of India**[19], In this case, the Indian Supreme Court had invalidated the then-existing instant triple talaq (talaq ul biddat) which was practiced by Indian Muslim men from long-standing time in which the man counterpart can just pronounce three times the word 'talaq' and thus the divorce takes place immediately. The Supreme Court found it very unreasonable, arbitrary, and discriminatory against womanhood so it invalidated and set aside the same practice. The effect of this judgment was that the long-standing unilateral practice of giving instant triple talaq on the part of Muslim men to their married wives came to an end.

2.7. Entry of Women to Sabarimala Temple

Sabarimala temple is a famous temple located in the State of Kerala which has been dedicated to the Lord Ayappa. In this temple from time immemorial, it had been a tradition that menstruating women could not enter into the premises of the temple and the same restriction to the entry of women was also mandated by an Order of the temple authority. The Supreme Court of India in

[18] Civil Appeal No. 9367-9369 of 2011.
[19] AIR 2017 9 SCC 1 (SC).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

the case of **Indian Young Lawyers Association v. the State of Kerala & Ors** in the year 2018 observed that such practice to restrict the entry of women into the premises of the said temple was violative of the provisions of fundamental right religion of the women enshrined under the Constitution of India and on this footing held that the women of all the age groups are allowed to freely enter into the premises of this famous temple and thus can worship the God.

There has been a great controversy as to this judgment and various segments of people alleged that the Judiciary is trying to involve itself in religious affairs which is not its task and several petitions against this judgment have been filed before the Supreme Court of India but the Supreme Court's stand in this judgment in proving the equal right of entry to the women has not been changed yet.[20]

The implication of this judgment is also far-reaching in as much as it provides equal rights of women in a religious affair which means that women should possess equal rights in religious fields also and the same is another step forward towards eliminating discrimination against women on any ground whatsoever it may be.

3. PREVAILING NOTABLE LEGAL YET HIGHLY DEBATED ISSUES CAUSING IMPEDIMENT IN WOMEN EMPOWERMENT IN INDIA

Post-independence, many laws have been enacted by the concerned legislatures in India to uphold the integrity, safety, and empowerment of women. Judiciary has also played an active role in the same empowerment process from time to time but still there remain few notable yet highly debated issues that are causing impediments in the way of women empowerment which may be as follows among others:

i. **Marital Rape:** Marital rape is when the husband forcefully indulges his wife in sexual activities. The United Nations Population Fund observed in its study that more than two-thirds of India's married women between the age of fifteen to forty-nine have been beaten, raped, tortured, and were forced to involve in sexual activities by

[20] Retrieved from https://www.theleaflet.in/sabarimala-verdict-a-watershed-moment-in-the-history-of-affirmative-action/, last accessed on 06/12/2021.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

their husbands.[21] India is one country among the total 36 countries in the whole world which have not criminalized marital rape yet.[22] Section 375 of the Indian penal Code, 1860 defines the term 'rape' which lays down few exceptions simultaneously and one of the exceptions is that there cannot be a rape of a married woman above the age of fifteen years but the Supreme Court of India has made it eighteen years in its recent judgment for the interest of womanhood. But a woman who encounters such a situation is legally free to invoke the provisions of Section 498-A of I.P.C. that relate to cruelty or may seek justice under the Domestic Violence Act, 2005. So, it is alleged that marital rape should be criminalized for the sake of women empowerment as it seems to violate any fundamental rights of the women viz., Article, 14, 15, 19, 21 of India Constitution and simultaneously it is immoral, unjust, and further UN High Commissioner for Human Rights published one declaration in the year 1993 to criminalize marital rape considering as a violation of human right.

ii. **Widows not being coparceners of their in-laws:** The right to property forms an integral part in the development and freedom of any human being. In Indian society men and women were not treated equally in terms of ancestral property. Although the husband is treated as the master of the wife in the traditional family set up in India but after the demise of the husband the wife is not legally entitled to avail or get the ancestral property of the husband and the reason for the same has been argued to be that women get ancestral property rights in their original parental family but in the existing set up once a woman is married he is deemed to be the member of her husband's family and claiming property by her in the parental family is not looked in a good manner. Widows are not considered to be the coparceners in her husband's family and as such if a woman becomes a widow then she cannot claim property of her in-laws in the absence of her husband which could be claimed by her deceased husband.

iii. **No adequate representation in the political sphere:** When we see the participation of women in the political activities in India then we find that their representation there

[21] Retrieved from https://centreforfeministforeignpolicy.org/journal/2017/10/13/marital-rape-in-india, accessed on 24/11/2021.
[22] Retrieved from https://www.thequint.com/neon/gender/marital-rape-laws-in-india-criminal-acts-against-women, accessed on 24/11/2021.

is not adequate or is not at par with the men.[23] Although there are provisions in the Constitution of India regarding reservation of women of about 33% in the grass-root level democracy of India that is to say in Panchayat Raj system and Municipality system still their actual participation could not be ensured as in many cases they are only rubber stamp and their official activities are looked after by their male counterparts who are known as 'representatives' in common parlance.[24] There is no reservation policy yet in favor of women in the legislative assembly and parliamentary elections of the country although the parties pretend to be interested in the same.

iv. **Restitution of Conjugal Rights:** The Court through the provisions relating to restitution of conjugal rights contained under Hindu Marriage Act, 1955 compels one of the spouses who has left the other spouse intentionally and voluntarily for whatever reason t may be, to return against his/her will. When it comes to women then it is more sensitive than men because in the existing society women are seen to leave their spouse's home only if certain unavoidable circumstances exist.

4. CONCLUSION

To conclude, it may be put forward that the judiciary in India has always played a significant role in upholding and strengthening women's rights since its inception including a few landmark cases as such in the twenty-first century although many people from time to time have criticized judiciary on the allegation that it has not done sufficient justice pertaining to the safeguarding and opening up of the horizons of rights of the women community. The implication of the judgments pronounced by our judiciary had been felt in the society but the real fulfillment of the same could be attained only if the society becomes educated and aware and leaves the patriarchal mindset by opting for egalitarian, liberal, merit-based, and gender-neutral outlook along with that the Judiciary should also endeavor to remove the prevailing disparities and discriminations against women in Indian society so that proper women empowerment may be ensured.

[23] Retrieved from https://journals.sagepub.com/doi/full/10.1177/2394481119849289, accessed on 23/11/2021.
[24] Retrieved from https://journal.lexresearchhub.com/wp-content/uploads/2020/06/vol1-issue3-21.pdf, accessed on 23/11/2021.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

MEDIA'S FREEDOM OF PRESS: ERASING THE BLURRY LINE BETWEEN THE POWER AND RESPONSIBILITY

ESHA MAKEN*

ABSTRACT

The fundamental right of speech and expression is one of the many beautiful and significant rights provided by our constitution to all the citizens of the country. While considering the provisions of this right in-depth, we realize that this right, although not explicitly but does include the freedom of the press and it's the right to educate people through various investigations, analysis and to share only and only the truth. While the freedom of the Press didn't come in handy and had a lot of struggles to reach a position where it is today, it becomes necessary to understand how much is this power used in a way to actually achieve its objective and not merely to pervert or divert the audience from the reality. With an immensely powerful position, the media is now able to have an impact on how people think, what opinions do they have, and what kind of ideas they perceive regarding any recent happenings or matter in and around the world. The present paper tries to find out how the fundamental right to freedom of the press is being utilized by the existing media and what is the impact caused by it on the general public. The paper tries to understand the existing scenario of the media and its functioning through various aspects along with the socio-legal ramifications.

1. INTRODUCTION

The constitution of India has provided its citizens with tremendously unique rights. The Constitution of India has always proved itself to be a democratic one while putting the citizens and their rights ahead of everything else. Our nation is known for its golden history, a past full of struggles, and also the present scenarios of unique happenings in the country. The World knows about how we have emerged as such a great nation in the past.

* Research Associate, Rashtriya Raksha University, Gandhinagar Gujarat.

While drafting the Constitution of India, the lawmakers had paid a lot of attention to see to it that the citizens of the country are handed over with such a bundle of rights that can help them have an equal amount of advantage as well as accountability and responsibility for them. The rights of one individual must not overlap the rights of the other in any case or circumstance.

While we talk about individual rights, especially under Article 19[1](1) (a) of the Indian Constitution, the fact that the freedom of the Press will also be included in the freedom of speech and expression cannot be ignored. To keep the feeling of democracy intact and make the people feel secure about their rights, it becomes essential that the rights under the Freedom of Speech and expression are preserved and maintained.

Although the provision under the article does not clearly state that the Freedom of Speech and Expression forms a part of the Freedom of Press, the Press enjoys the right of Freedom of Speech and Expression. Even though the rights enshrined under the Constitutional ambit as the fundamental rights, more importantly, belongs to the citizens, the Freedom of Press also must be considered in the same.

2. FREEDOM OF PRESS: WHERE DOES IT COME FROM?

The Media is considered the fourth pillar of our nation. Media helps us reach places where we cannot physically reach otherwise. Media stands as a transparent wall between the happenings of the world and the stagnancy, between the government and the common citizens, between the rumours and the reality, between the knowledge and the facts.

The media and the press bring us the facts and the information of the most recent happenings in and around the world. In such a situation, it becomes necessary that certain special rights are granted to the media personnel and the Press so that they can make the most out of it and also deliver and publish true and accurate information to the Public. Moreover, being a Democratic country, the Freedom of Speech and expression has to be given a special kind of importance.

The history of the Press Laws in India can be traced back to British times. James Augustus Hickey who pioneered the beginning of the Bengal Gazette which is also known as the Calcutta

[1] The Constitution of India, 1950.

General Advertiser in the year 1780 is the person who gave India its first-ever newspaper. But this newspaper was later subjugated in the year 1872 for its forthright and straight from the shoulder comments for the government.[2]

There has been a long history full of struggles to secure press rights in India. There were many instances found wherein the steps to censor the publications of the media were taken but with a lot of efforts and passing of many regulations, statutes and acts, there was some liberalisation provided to the media to publish the information that is necessary for the public to be known and that is true and accurate too.

The foremost regulatory measures can be considered the one taken by Lord Wellesley in the year 1799 when the Press Regulations were promulgated which had the effect of imposing pre-censorship on a small newspaper publishing industry.[3] This was promulgated anticipating the French invasion of India. These restrictions were later relaxed during the times of Lord Hastings when in the year 1818, pre-censorship was dispensed with.[4]

This was followed by a number of such acts and regulations like Licensing Regulations, 1823, Press Act of 1835 or Metcalfe, Licensing Act, 1857, Registration Act, 1867, and so on. The Press and Registration of Books Act, 1867 still continues to be in force. Later, Governor-General Lord Lytton promulgated the Vernacular Press Act, 1878 which allowed the Government to control the content of the publication that was found to be seditious. In the year 1908, Lord Minto had also passed an act the Newspapers (incite to offences) Act, 1908 which authorised the local authorities to take action against the editor of any newspaper that published any content that might intimidate the public for revolution.

There were many movements both during the pre and the post-Independence era, many committees were formed, various reports were submitted and ultimately the Press Commission

[2] History and Development of Indian Press and Press Acts, Your Article Library, available at: https://www.yourarticlelibrary.com/history/history-and-development-of-indian-press-and-press-acts/23717 (last visited: Feb 21, 2021).
[3] Freedom of Press-Printing Media Law, Legal Service India available at: http://www.legalserviceindia.com/article/l46-Freedom-of-Press.html (last visited: Feb 21, 2021).
[4] History and Development of Indian Press and Press Acts, Your Article Library, available at: https://www.yourarticlelibrary.com/history/history-and-development-of-indian-press-and-press-acts/23717 (last visited: Feb 21, 2021).

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

under Rajadhyaksha recommended, in 1954, to establish the All India Press Council which had made various regulatory frameworks and reforms for the publication of the newspapers.

Later then, after so many stages of struggle, the Press was given the freedom of speech and expression under Article 19(1) (a) of the Indian Constitution. The Press, in India, thus enjoys a great status to freely express the true and accurate information to the public under the right to the freedom of speech and expression.

3. MEDIA AND THE RIGHT TO CRITICISM

The Media is something that breaks the wall between the real and the fictional world in a sense that there are so many creational and fictional concepts that are shown to the public and the public is made to believe in the belied versions of things that do not actually even exist on the first hand. Media gives voice to the public; media is the way of the people's grievances to the government.

When media plays such an important and crucial role in a democratic country, it has to be given certain freedoms and liberal restrictions when it comes to the publications of original, true, and accurate information regarding anything, especially the government.

The US Constitution specifically lays down that the Freedom of Press and expression cannot be truncated or abridged by any of the laws, thereby safeguarding this right through the First Amendment made to the US Constitution.[5] Thomas Jefferson who was an American statesman and also a lawyer, an architect, a philosopher, a spokesman for democracy, and Founding Father who served as the President of the United States once stated that, if he were to choose between "a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter"[6] Jawaharlal Nehru, the former Prime Minister of India had parallel views in this regards. Once while delivering a speech at the Newspaper Editor's Conference, he said, "I would rather have a completely free press with all the dangers involved in the wrong use

[5] Freedom of Press- Article 19(1)(a), Legal Service India, available at: http://www.legalservicesindia.com/article/1847/Freedom-of-Press---Article-19(1)(a).html (Last Visited: Feb 21, 2021).
[6] Jefferson's preference for "newspapers without government" over "government without newspapers" (1787), available at: https://oll.libertyfund.org/quotes/302 (last visited: Feb 21, 2021).

of that freedom than a suppressed or regulated press."[7] Voltair, who was a very witty writer, philosopher, and well-known historian once said: "I do not agree with a word you say but I defend to the death your right to say it."[8]

Media serves the purpose of the public. It helps the public know the happenings in and around the world and therefore, in order to make sure that this information provided by the media is true and accurate, the Press has to be provided with the right of criticism too so that the real image of everything can be put forward in front of the public. None of us, as common citizens has any direct knowledge about what is happening in and around the globe; it is something beyond our range to find out the most recent updates and happenings without the aid of the media. The truth for us is what media shows us as the truth and therefore it has to be a truth in the real sense. So, basically for the common and ordinary person, whatever media do not publish, do not even exist for us. Therefore, in order to draw a clear picture of everything in front of the public the freedom of speech and expression is given to the media, especially the right to criticism too so that a true, fair, and genuine information can be transmitted.

4. THE BLAMELESSNESS OF MEDIA OR MISUSE OF ITS POWER- ANALYSING THE GROUND REALITIES

The Media, being given such importance in India, is considered as the Fourth Pillar of the Democracy, the voice of the public, the transmitters of the information, the protectors of the rights and what not! Indian Media has attained a position of great significance in the country. Media literally influence the thinking process of the public nowadays. People have their own opinions but most of the time people believe what they see or hear from the different kinds of press and media available to them in order to gain information in and around the world.

The Media has attained such a position after a lot of struggles. It is indeed an important place for media and it also makes it accountable to stay fair while publishing any news, any information, or any content through various platforms. As media plays a crucial role in impacting the minds

[7] Nehru on India Press, SARCAJC SOUTH ASIAN RESEARCH CENTRE FOR ADVERTISEMENT, JOURNALISM & CARTOONS, available at: https://www.sarcajc.com/nehru-on-indian-press.html (Last Visited: Feb 21, 2021).
[8] V.S. Gupta,Vir Bala Aggarwal, Handbook of Journalism and Mass Communication, India, Concept, 2001.

and the opinions of the public, it makes it accountable and duty-bound to see that media itself is not being biased by getting influenced by a number of external factors that could negatively affect the correctness of the information being disseminated by the media to the public.

While considering the various powers and rights that the press and media enjoy, it becomes necessary to understand what are the emerging as well as existing issues when it comes to the exercising of the right of criticism.

4.1. The Right to Freedom of Press- Is it Making the Indian Media Biased?

Providing accurate information and updating or educating the audience, listeners and the citizens of the country are the duties or powers that the media is vested with but this very thing has now become a matter of concern. It looks like we have, in the efforts to ensure that media is vested with the right amount of powers, have made it exceptionally powerful. It is a noteworthy fact here that whatever news we consume is a manufactured one, meaning thereby that the news that we all watch, hear or come across reach to us after a well appropriate selection process and is presented to us in a pre-defined manner after going through proper scrutiny.[9]

There are many issues related to media that prove that Media, in the urge to gain publicity, many times is found twisting the facts, publishing aid news, depicting not so important issues such as the Breaking News, and so on. These activities of the Media only lead to wrongly influencing the public and making them believe something that actually is not!

4.2. Twisted Facts

There have been instances wherein Indian media has acted in an irresponsible manner where it was supposed to act in a democratic manner. Once, it was found in a leading English newspaper a publication on its front page a photograph of Justice Gyan Sudha Misra of the Honourable Supreme Court of India with the caption: “Supreme Court Judge says that her daughters are liabilities.” Now the real scenario was that the Supreme Court Judges have to disclose their assets and liabilities and for the same purpose, Justice Gyan Sudha Misra had mentioned “Two daughters to be Married” in the column of the liabilities. Now the intention of the Honourable

[9] Tine Ustad Figenschoua and Karoline Andrea Ihlebæk, “Media Criticism from the Far-Right: Attacking from Many Angles”13 Journalism Practice, 2019.

Judge behind mentioning the daughters was totally different than what was falsely depicted by the media to the public, totally distorting the facts and fallaciously publishing the information.[10]

There have been instances where media was found swivelling the facts in order to grab unrequired attention and publicity. The idea of using clickbait in order to tempt the readers, viewers, and listeners is the strategy these news media channels are adopting these days. It seems like these press and media companies are no longer working for the nation as a dutybound citizens or journalists but merely for earning value and money for the profit-making industry that they are a part of, the current situation makes it a cause of concern for the common citizens as even the fourth pillar of the nation cannot be blindly trusted, even the facts stated by them needs to be questioned. We have been betrayed many times by showing us only half-told facts or one side of the story and this is not the way we expect our media to function. The media is often found taking sides and misleading the facts too which has put the reliability of the existing media in grave danger.

4.3. Paid News

The news media and industry have started making huge profits out of the news broadcasted. In such a scenario, it has now become a practice to carry out cash transactions and present news about various entities and topics.

The instances of Paid News are also not less when it comes to the Media. According to the Press Council's report, paid news is "any news or analysis appearing in any media (print & electronic) for a price in cash or kind as a consideration".[11] It was a "complex phenomenon" that had "acquired different forms over the last six decades, ranging from "accepting gifts on various occasions, foreign and domestic junkets, various monetary and non-monetary benefits, besides direct payment of money"[12].

It mentioned that private treaties signed between media companies and corporate entities could also be part of the phenomenon.

[10] Markandey Katju, Media and Issues of Responsibility, The Hindu, Oct 21, 2011, 23:21 IST, Updated: Sept 27, 2016.
[11] Press Council of India, available at: http://presscouncil.nic.in/ (last visited: Feb 21, 2021)
[12] Press Council of India, available at: http://presscouncil.nic.in/ (last visited: Feb 21, 2021)

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

The EC feels that paid news, as defined by the Press Council, "plays a very vitiating role in the context of free and fair elections" since electors attach greater values and trust news reports more compared to clearly specified advertisements. "Paid news is masquerading as news and publishes advertisements in the garb of news items, totally misleading the electors. To make matters worse, the whole exercise involves the use of unaccounted money and underreporting of election expenses in the accounts of election expenses of the candidate…"[13]

4.4. Non-Issues and Real Issues

There are also instances found wherein the Media is found highlighting the issues that are not "so important" as the "only important" issues, publishing single news repeatedly, even when it is not required or necessary. Many times, Media is also found branding the products, persons, political parties, etc in the urge to gain more publicity and money. All these activities of the Media only distort the whole purpose of the Freedom given to it in the light of disseminating true and genuine information to the public.

Many times, it is observed that the non-issues take a front seat while the important and significant issues are cast aside. India, as a developing nation, has got numerous issues that need attention and these issues are even escalating at an alarming rate. We need news that focuses on the economic, legal, and social conditions, the existing realities, the solutions to the problem that actually proves to be effective but what we find on the media channels is which actress is expecting a baby, who is the baby going to be – a girl or a boy?[14] Do we really need to know or are going to have any benefit by knowing this private information about a celebrity?

At another instance where approximately about 512 recognized journalists were covering the event of the Lakme Fashion Week wherein the models were found exhibiting cotton attires, costumes, and garments. Now there was nothing wrong in covering the fashion show but the people who actually grew that cotton while working diligently towards it, that almost took their blood, sweat, and tears were not even highlighted, except for a couple of reporters reporting locally.[15] Not even half the percentage of journalists bothered about making our citizens aware of

[13] Krishn Kaushik, what is 'the menace of paid news'? The Indian Express, Thursday, February 25, 2021
[14] Markandey Katju, 'Media and Issues of Responsibility', The Hindu, Oct 21, 2011
[15] Markandey Katju, 'Media and Issues of Responsibility', The Hindu, Oct 21, 2011

who these people actually are who keep their nose to the grindstone in order to earn a livelihood and strive hard for their survival every single day.

5. IS FREE PRESS BEING UTILISED FOR DEFAMATION?

The conflict between the fundamental freedom of speech and expression and personal reputation[16] is an ongoing one since time immemorial. While the media believes it is its duty to bring the truth to the public by hook or by crook, it sometimes has an impact, even negative on the reputation of the person who the news is all about. Even though defamation is a crime only when the statement made against a person is incorrect, the way media broadcasts the news, the damage to the reputation is too soon to be handled at a later stage even if the person is found to be innocent.

The way media disseminates the information and the news, it has a significant amount of impact over the common people. The way people think and perceive the personalities of various people is not getting affected by what and how the media represents and what it showcases. Many a times, a particular person is targeted and depicted in a very negative manner and that too repeatedly by the news media channels and this causes the general public to believe it, no matter how much truth the news hold. It has also been observed that in the hurry to broadcast breaking news, the media personnel even fail to cross-check the authenticity of the information. For media, these days whatever can grab the attention of the people is news, doesn't matter what impact it has post display.

It has to be remembered that no right is absolute and media being in a position that is significantly very strong, it becomes necessary that they consider it an obligation to ensure the news and information that is being broadcasted by them is accurate and unobjectionable, not hurting the feelings of people or negatively affecting the reputation of anyone.

The Supreme Court has very well laid down that if the news media cannot freely speak, then there can be no free citizens and it is therefore that Freedom of expression, as its very core, has the journalistic freedom or say the freedom of the press but it is not absolute.[17]

[16] Universal Declaration of Human Rights, 1948; The Constitution of India, 1950.
[17] Arnab Ranjan Goswami v Union of India on 19 May, 2020, Writ Petition (Crl) No. 130 of 2020.

In one of the very celebrated cases, the Supreme Court addressed media as a "public educator" and also observed that there has to be seen that the press practice certain "reasonable restrictions". The Court also recorded that "reckless defamatory comments are unacceptable" and that is because press and media have "great power in impressing minds".[18]

6. CONFLICTS BETWEEN SOCIAL MEDIA AND TRADITIONAL MEDIA PLATFORMS

Social media has these days become the most used and approached media by the majority of the people. People are relying on and using social media apps so much so that it is slowly taking over the traditional forms of media and the changes it is bringing along is quite an issue that demands attention. Having easy access to social media, the information disseminated through various social media apps has a greater reach to the audience, and that by the virtue of reshares and social media algorithms, reach father and more easily as compared to the traditional news medium.

6.1. A Shift from the Traditional Media to the Social-Media

While everything ranging from shopping clothes, medicines, and everyday grocery and amenities to even electronic gadgets have now gone online, people have begun to approach social media apps instead of the traditional media for updating themselves about the recent happenings. People in general have now begun to rely on and trust anything and everything that they see on social media without even cross-checking the facts. The appealing presentation and user-friendly interface of the various social media platforms have made the people use it repeatedly and that too for a longer duration of the time period.

7. INFORMATION AND NEWS BEING INFLUENCED

With all of this shift happening, now the communication of news is not one way anymore. The consumers of the news and information can now even influence it. Moreover, gone are the days when the news reached us hours after the actual happening or of it taking place. We now have access to real-time news where within a few seconds of a major event happening, we get the information, the facts, the views of the public, the reaction of the viewers all at once. All this is

[18] Dr. Subramanian Swamy v Union of India & Ors on 11 February, 2014.

hugely affecting the way we perceive the news now because everything that reaches us is influenced by the general public, who is sometimes educated and sometimes not because surprisingly social media has made everyone believe in their talent of journalism which they never knew they possessed.

The social media handles and influencers have a great deal of impact on the users these days. The general public is so much so cajoled by the various manoeuvres of these social media celebrities and popular personalities that they believe them blindly whenever any information is shared by them. Now the news and information shared on social media always have a tinge of opinions that the person sharing it owns and these opinions slowly become the perceptions, ideas, and beliefs of those who follow them. Consequently, simple news becomes an issue of discussion, deliberations, and debates among the users turning them into the so-called torchbearers of the movements for deciding the right or the wrong.

7.1. One and all have an outlook and everyone now has an opinion

Social media has made people believe that having an opinion makes them cool, no matter if the opinion has any logic to it. Suddenly people have realized their right to expression and that they have the right to raise their voice. As much as this is a significant and appreciative benefit of the social media platform, it has endangered the authenticity of the information that keeps circulating throughout the internet.

No matter how flexible or accessibly easier the social media platforms prove to be, the kind of news provided through the traditional media platforms are comparatively more reliable as the news we receive from the traditional media platforms reach us after a due process and considerations from the experts and professionals of mass media and the same don’t always happen in the case of the social media. Therefore, we need to be careful as to what we believe and how much we believe. The following measures can be taken:

7.1.1. Preventive Steps

There are numerous problems that can be found in the existing system and the functioning of the media but every existing problem has got certain solutions to it. The preventive steps can help, in solving, if not fully, at least partly the existing dysfunctional matters.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

7.1.2. Spreading Awareness

It becomes necessary that the general public is made aware and educated about the news and information that they receive. They must be made aware of the fact that not everything they come across in the name of the news is actually always accurate. An educated public can make a lot of difference in bringing about a positive change and curtailing the problems.

7.1.3. News Media Platforms Readiness

The news media platforms must readily take the responsibility to make sure that they cross-check every news that they broadcast. The media personnel must take it as a personal duty to make sure that only relevant and trustworthy source is approached t while gathering the information and news that has to be broadcasted.

7.1.4. Addressing the fake news

This is one of the most difficult problems when it comes to solving it. In order to solve this problem, it would be required that technological up-gradation is made and fact-checking of every news and information shared is made. Advanced technology and digital scrutiny can help in identifying the reliability and truthfulness of the information.

7.1.5. Social Media Influencers

Social Media influencers can help by accepting responsibility and duty to disseminate any kind of information on their websites or page. They should understand how every information provided by them affects a large number of masses and audience and so they must, before sharing anything, make sure and get a check about how the notion would be perceived and what kind of reaction could be expected.

7.1.6. Regulatory Provisions

The provisions under the law could be made stringent when it comes to penalising the ones who spread fake news, defamatory information, or irrelevant data across various media. Stricter regulations can help in bringing about fear in the minds of those who freely share anything and everything on various media platforms.

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

8. CONCLUSION

While Media has so much to do ranging from being updated itself to making the public updated too regarding the most recent happenings, it has definitely got a lot to do on its bucket list. But as the saying goes, "With Great Powers comes Great Responsibilities", we need to acknowledge the fact that Media is the loudest voice of the public, and therefore, it becomes its duty to see to it that everything goes up to the mark when it comes to publicizing any of the information.

The Media in India has always been in the limelight with its past struggles, movements, transformations, scandals, sting operations, and many such events that have proved that Media can do anything and everything to make the people believe what it wants people to believe. Media can indeed play with the psychology of the public and there have been many instances wherein Media has proven itself as the saviour by disclosing and publishing the gravest of the truths in front of the public. It is therefore only that the Indian Judiciary has entitled the Media to such noble rights as the Freedom of Speech and Expression.

Media, with its wide influencing power, can make anything happen, and thus it is always expected out of Media to be true, honest, and genuine with the information that it has to give to the public. The Media not only informs the public but also educates the public. The world is growing at a really speedy pace and only the Media helps the public to match that pace and stay up to date.

Media can utilize the great powers vested into it either as a shield to hide the truth or as a sword to disclose it and let the power of it known to everyone. It is all up to the Media what it wants to make out of its Power and rights to freedom of Speech and Expression.

Therefore, it could be concluded that Media has a great responsibility to be fulfilled and when the Public has put trust into it, it is Media's duty to make the people believe that Trust is not always broken!

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Volume 10 (2)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Geeta Group of Institutions
Panipat, Haryana, India

Volume 10 (2) December 2021