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EDITORIAL

Research is very important for the development of our society. It is a phenomenon which helps society and humanity to move forward. With the present state of the art development, there has been constant rework and modification of our ways of doing research. Nonetheless, the basic objective of research is to analyse and have a look into anonymous and unperceived things and bring out new opportunities.

Research articles are a very important method to disseminate new ideas and findings in a consolidated manner. Writing a research article is a phenomenon and it has to be executed in an appropriate manner so that the basic idea of research is justified. They are a medium to showcase one's ability and expertise in a particular or various fields of knowledge and achievements and how it can be communicated to the whole world.

The NLUALPR is a blind peer reviewed journal with ISSN: 2455-8672. It is a compilation of selected articles contributed by eminent scholars and academicians in various fields of law and recent developments in the same. This journal is a platform to bring out discussions and to analyse various aspects of law and other multidisciplinary areas. This issue has been able to garner positive response in the path of research and development through its articles which reflect on the importance of research and its contribution to the development of the society.

In this issue of NLUALPR,

Arvind P. Bhanu, in the article titled 'Locating Social Transformation and Law as an Instrument to Change' has discussed the movement of law as an instrument of social change. In the paper the author has discussed theories that support law and judiciary as an instrument of society which helps in achieving justice and transformation.

M.R. Sreenivasa Murthy, in the article titled 'IP Backed Financing: Challenges in Implementation a Comparative Study of China, South Korea, Singapore and India' has discussed the need to amend the existing laws relating to investment and securities law and banking regulation in India to accommodate IP backed Financing. It also focuses on promoting IP backed financing and to adopt best practices which are followed in countries like China, Singapore and South Korea.

Diptimoni Boruah, in the article 'Sexual Autonomy of Women in Marital Life: Gauging Gap in the Indian Criminal Justice System' has discussed about the inhuman practices which a woman has to face in Indian Society which is largely patriarchal in nature where woman depend upon the mercy of men and woman are considered as a property owned by men and are considered as an inferior being. One of the institutions created by this male dominant society is marriage which provides a license to men to rape woman which is in violation of bodily integrity and sexual autonomy of a woman.

Ravinder Kumar and Tanya Bansal, in the article titled 'Fake News: Desecrating The Fundamental Rights And Costing Human Lives' have discussed about the importance of information and news in a person's life and how fake news

jeopardise the fundamental right of freedom of speech and expression as it escapes the clutches of law with defence of freedom of speech. The paper further discusses how the menace of fake news can be curbed by imbibing responsible behaviour amongst the individuals when they share any information.

Jupi Gogoi and Tania Sebastian, in the article titled 'Planning for Empowerment: Examining Effectiveness of Copyright Societies and other Collective bodies for Actors in Select Jurisdictions' have discussed the issues with regard to monitoring and enforcing the performing right on an individual in India. The paper presents a comparative view of the rights available with the author and the actor in jurisdiction like France and the United Kingdom in regard to remuneration, royalty, equal opportunities, period of rest and duration of work in contrast to India.

Savita R. Rasam, in the article titled 'Consumer Protection Act, 2019 – A Boon in Changing Dynamics of World' has discussed the various provisions of Consumer Protection Act, 2019 and has interpreted various provisions of the act which majorly focuses on effective implementation of the Act and speedy justice delivery to the consumer in a time bound and cost-effective manner.

Mayengbam Nandakishwor Singh, in the article titled 'Third World and Underdevelopment: Notes on Contesting Theories' has explored the correlation between the third world countries and the developed nations of the world and the challenges which these third world countries face while they adopt development process with help of developed nations to make their economies more globalised.

Archa Vashishtha, in the article titled 'National Education Policy and Inclusive Education for Disabled' has discussed about the importance of imparting education to the persons with disability and how National Education Policy 2020 is a step towards implementing inclusive education in India and the various challenges which are still there in providing education to the people who have no access to it due to their disability.

Ankur Madhia, in the article titled 'The Issues and Challenges Involving Digital Currency: An Appraisal' has discussed about the issues involved in adopting digital currency as an alternative to the centralized currency and the wrangle between people who are long term investor in any stock exchange and the people who support digital currency as the future asset of world economy.

Mudassir Nazir, in the article titled 'A Critical Appraisal of Net Neutrality Issues and Concerns in India' has discussed the issue of network neutrality which aims at keeping the internet open, accessible and neutral to all users, application providers and network carriers. It also focuses on the issues related to privacy, security, freedom to communicate and control over the internet in absence of state control over its traffic.

Parineeta Goswami, in the article titled 'Insolvency & Bankruptcy Code, 2016: Issues and Challenges' has discussed about the Insolvency and Bankruptcy Code which was introduced in the year 2016 for recovery of debt from corporate debtors which aims at removing all barriers related to trade and business in India with an ultimate objective of increasing foreign and domestic investment in Indian market but the IBC code has faced various challenges in implementing its objectives which are resolution in a time bound manner and problems faced by

financial creditors, resolution professionals and adjudicators while implementing the code.

Suparna Bandyopadhyay, in the article titled 'Live and Let Live: Animal Rights Jurisprudence in the Light of Karnail Singh v. State of Haryana' has discussed the issue related to stray dogs, trespassing cattle, birds in cages, bull races, animal sacrifice and poaching the help of the judgement passed in Karnail Singh v. State of Haryana which has conferred a personhood on animals and has reminded us about the mantra Live and Let Live.

Sagnika Das, in the article titled 'A Study of the Right of Child with Disabilities in India in the Light of Persons with Disabilities Act, 2016' has discussed various national and international provisions related to rights of persons with disability and how lack of awareness is an obstacle in implementation of provisions of the Persons with Disabilities Act, 2016.

Tathagat Sharma, has reviewed the book by Analysing the Relevance of Niccolo Machiavelli on International Law in light of David Roth-Isigkeit's "Niccolo Machiavelli's International Legal Thought: Culture, Contingency, Construction"; System, Order, and International Law: The early History of International Legal Thought from Machiavelli to Hegel edited by Stefan Kadelbach, Thomas Kleinlein and David Roth Isigkeit, Oxford University Press (2017).

We extend our gratitude to the authors for their well-researched articles and acknowledge their contribution towards realizing the goal of bringing about legal and judicial reforms through their engaging scholarship.

LOCATING SOCIAL TRANSFORMATION AND LAW AS AN INSTRUMENT TO CHANGE

Arvind P. Bhanu*

Abstract

Every society whether it is being governed by their Constitution or not, has inherent operation to movement from bad to good or vice versa. Every such movement is called transformation. However, expression social transformation does not contribute negatively. The author in this paper traces transformation in Indian system as to how they are built in and how there is only social transformation and not transformation. In the Indian system, the author finds that any transformation, if it goes in reverse direction, is stopped by law so that the transformation can remain as social transformation. It is a controlled and regulated transformation. This system is constitutionally governed. Therefore, social transformation guarantees a transformation by law. It is pertinent to know that not all transformations are social transformation in the context. In the following discussions, the characters and qualifications of social transformation have been tried to find out. The paper

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simultaneously discovers the place, course content and the mechanism through right, duty and liability operators and evolvement of doctrines. It further analyses the movement of law as an instrument of social change in various directions and concludes with identifying characters and effective features of social transformation.

Keywords: Social transformation, Constitution, society, law as an instrument.

Introduction with Interfacing Discipline

Whenever law is called as an instrument for social change, it gives extended functional identity encompassing the other discipline in the same way. Now, it is established that law is not absolute command of sovereign, but it is an instrument for social change too. Each of modern constitutions is agreed to perform in the direction of social change. India as the largest constitutional democracy in the world is the example to see the social transformation when it got independence and committed for social transformation by enforcing its social document for social change- the Constitution of India. The Indian struggle for independence was fought for social transformation. This refers towards a particular kind of social condition prevailing at that time. The social condition as referred here is a condition in which social relations operate. The law invoked for bringing change in society must be well aware of social condition and its own path to go ahead.

Here Ehrlich's observation as 'practical concept of law' becomes pertinent to mention where he invoked sociology rather than psychology in order to assess a link between society and its law

component leading to social relations, that is, relations between people. In terms of view of normative design, he discards consideration of legal norms. He only recognises social norms that always form the result of social relations, working in the same way in all spheres of human practice. He emphasised on the point that all laws are made of the same material as social life at large[1]. Hence, in order to bring optimum results, the Sociology must be, as it is, conscious of the law as a social institution and law must be conscious as the social conditions in which it is intended to operate.

After a long debate on the treatment of law and Sociology as two distinct disciplines, the Socio-legal theorists sanctioned the path for social transformation on the consideration from many socialists' side that law is derivative of broader sociological concerns- social control and deviance. And Sociology of law as a discipline has emerged which is more often taught in law schools by law academics (albeit with a strong interest in the social sciences and/or social science training) than in sociology departments. The consensus has emerged on law as an instrument to change and it is settled that law should be treated as a route for social change. This is further affirmed by Dicey's concept of rule of law that every action must be backed by law[2]. The rule of law has been recognized in *Kesavananda Bharati*[3] as

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[1] EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW, (Routledge Taylor & Francis Group London and New York).

[2] ALBERT VENN DICEY, THE LAW OF THE CONSTITUTION (1885).

[3] His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr., AIR 1973 SC 1461.

a basic feature of the Constitution which permeates the whole of the constitutional fabric and is an integral part of the constitutional structure. The view is further strengthened by the fact that in history of social change, the resort of litigation and/or lobbying has been made for bringing first legislative change, some recent examples are by filing PILs (Public Interest Litigations), Anna Hazare[4] for Jan Lokpal, 'Ready to Wait' campaign[5] (*Sabarimala Temple* issue) by a group of five women lawyers.

Social Transformation and Law

India not only fought for its independence from the British rule, but it continued to fight against unequal social order, a fight for values of liberty, equality, fraternity and justice. The change in system took place and was enforced on 26th January 1950. However, this change in system could not be equated with social transformation. Transformation in system is a pre-condition to bring change in societal structure. The new constitutional system with full deliberations contemplated the directions in which the social transformation move was to be brought in. The goals are set out in the preamble-an objective part of the constitution.

To secure to all citizens social, economic and political justice; liberty of thought, expression, belief, faith and worship; equality of status and opportunity, and to promote among them fraternity

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[4] Anna Hazare, *A man behind RTI revolution*, annahazare.org

[5] *Ready to wait till 50 to enter Sabarimala: Women's group*, *The Hindu* https://www.thehindu.com/news/national/Ready-to-wait-till-50-to-enter-Sabarimala-Women%E2%80%99s-group/article16082574.ece; also visit *Ready to Wait campaign*, Wikipedia.

so as to secure the dignity of the individual and the unity and integrity of the Nation.[6] Dr. Ambedkar drew attention of the constituent assembly to his own experiences and struggles and the social reformers in their movements against social injustice. The Constitution- a fundamental document- was drawn aiming at social transformation. The founding fathers laid their vision in preamble for social emancipation. This was made a constitutional responsibility[7].

The Constitution marks a vision of social transformation. It marks a break from the past – one characterized by a deeply divided society resting on social prejudices, stereotypes, subordination, and discrimination destructive of the dignity of the individual. It speaks to the future of a vision which is truly emancipatory in nature[8]. The Indian judiciary has also quoted social transformative vision from South African Constitution as it "requires a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class, and other grounds of inequality. It also entails the

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[6] *India Constitution*, Preamble; See also P.A. Inamdar v. State of Maharashtra, AIR 2005 SC 3226, wherein the Court affirmed that Justice, Liberty, Equality and Fraternity, including social, economic and political justice, the golden goals are set out in the Preamble of the Constitution of India" and they are to be achieved.

[7] CONSTITUENT ASSEMBLY DEBATES, November 25, 1949, Vol. XI, 662.

[8] Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1 (Famously known as Sabarimala Temple case).

development of opportunities which allow people to realise their full human potential within positive social relationships.[9]"

Dr. Ambedkar referred three principles- *liberty, equality, and fraternity* as foundation for social transformation in democracy which are inseparable.

> *"The principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality liberty would produce the supremacy of the few over the many. Equality without liberty, would kill individual initiative"*[10]

In this section, the discussion is upon constitutionally aimed social transformation. Granville Austin has referred to the Indian Constitution as a "social revolutionary" document, the provisions of which are aimed at furthering the goals of social revolution.[11] Further, he has also referred Fundamental Rights (Part IIIrd) and the Directive Principles of State Policy (Part IVth) in the Constitution as the "conscience of the Constitution" and the

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[9] *Id.*

[10] CONSTITUENT ASSEMBLY DEBATES, November 25, 1949, Vol. XI, 6733.

[11] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 63 (Oxford University Press 1966).

connect between India's future, present, and past.[12] In *Government of NCT of Delhi v. Union of India*[13], in the context of constitutional morality, which was pleaded as a basis for change in this case, the Court observed that no explanation of constitutional morality will be complete without understanding the uniquely revolutionary character of the Constitution itself. As above brought forth that transfer of political power from a colonial regime to a regime under law of a democratic republic is only one facet of the Constitution. The other constitutional vision is of achieving a social transformation. In colonial regime, their philosophy was to keep individual in subordination to the state[14]. Thus, every social transformation set out in preamble or brought out later through the amendment of the constitution[15] or judicial interventions is addressed by the constitutional vision. It has its supremacy over all the laws and customary practices which claims their continuation since centuries, but they are against the constitutional vision of a just society. This view demands that existing structures and laws be viewed from the prism of individual dignity[16].

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[12] *Id.* at 63.
[13] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501, 297.
[14] Kalpana Mehta v. Union of India, AIR 2018 SC 2493, ¶ 271.
[15] See for instance, Bhanumati v. State of U.P., (2010) 12 SCC 1 ("This Seventy-third Amendment of constitution is a very powerful "tool of social engineering" and has unleashed tremendous potential of social transformation to bring about a sea change in the age-old, oppressive, anti-human and status quoist traditions of Indian society. It may be true that this amendment will not see a quantum jump but it will certainly initiate a thaw and pioneer a major change, may be in a painfully slow process.").
[16] Babulal and Anr. v. Sau. Resmabai Narayanrao Kaurati and Anr., AIR 2019 Bom. 94.

Mechanism for Social Transformation

Almost all the theorists agree that law as an instrument of society, performs the function of achieving justice.[17] The social transformation envisioned by the Constitution is- justice. The Constitution, as a supreme law of the land, employs right, duty and liability mechanism to achieve its transformative goal. One class of rights are inalienable and got place in the fundamental law of the land. They connect to secure and protect life, liberty, equality, fraternity, and justice which are the basis of transformation. The other rights identify themselves as constitutional rights and statutory rights. Article 13[18] of the Constitution is the testing provision for the rights enacted in any law or any practice against the constitutional vision of a just society on the ground of unconstitutionality in order to secure the supremacy of the Constitution. Meaning thereby, all rights created by any law in India are subordinate to the inalienable rights placed in IIIrd Part of the Indian Constitution.

Every legal right has four elements;[19] (1) holder of the right; (2) the act or forbearance to which the right relates; (3) the *res* concerned (object of the right); (4) the person bound by the duty.

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[17] P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 60 (12th ed. 1970, Indian economy reprint 2010); See also ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 99 (1930).

[18] *India Const*. art. 13, cl. 2: "The State shall not make any law which takes away or abridges the rights conferred by this Part (part IIIrd) and any law made in contravention of this clause shall, to the extent of the contravention, be void….(3) (a) "law "includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law".

[19] GW PATON, A TEXTBOOK OF JURISPRUDENCE 285 (1st ed. 2004).

The system of rights has been mechanized in such a way that every entitlement of either of an individual or society must be strengthening the basic aim of 'we the people'[20] and ultimately, in the direction of achieving it. Knowing it with jural correlatives as analysed by Hohfeld[21], the rights herein do have their jural correlative duties on the part of the state. To enforce the duty on the part of the state, the mechanism is provided under Article 32[22] of the Constitution. The sole object of this provision is the enforcement of the rights guaranteed by the Constitution in its III[rd] Part.

The right in generic sense has four distinct kinds[23] as right (in the strict sense), liberties, powers, and immunities. In structure of social transformation, power plays a vital role. In a constitutional democratic system like ours, great difficulty lies in this that 'we the people' first enable the government to control the us; and in the next place we oblige it to control itself. As James Medison assess and evaluates that *"…a dependence on the people is, no doubt, the primary control on the government; but experience*

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[20] *India Const*. preamble: "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation".

[21] WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (Yale University Press 1923).

[22] *India Const*. art. 32, cl. 4: "The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution".

[23] PJ FITZGERALD, SALMOND ON JURISPRUDENCE 224 (Indian Economy Reprint 2010).

has taught mankind the necessity of auxiliary precautions"[24]. The Constitution of India is well aware of the use of power arbitrarily by the government, and to control it, with reference to the principle of constitutionalism, the concept of limited government has been incorporated. Supremacy of the Constitution[25], rule of law[26], principle of separation of powers[27], principles behind fundamental rights[28], objectives specified in the Preamble[29], judicial review[30], federalism[31], secularism[32], freedom and dignity of the individual[33], principle of the equality[34], essence of other fundamental rights[35], concept of social and economic justice-to build a welfare state[36], balance between fundamental rights and

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[24] James Madison (as Publius), *Federalist* 51 quoted in Manoj Narula v. Union of India (2014) 9 SCC 1; See generally State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501, 501 and also K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.

[25] His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr., AIR 1973 SC 1461.

[26] Indira Nehru Gandhi v. Rajnarain, AIR 1975 SC 2299; Indra Sawhney v. Union of India, AIR 1993 SC 477; I. R. Coelho v. State of T.N., AIR 2007 SC 861.

[27] S.R. Bommai v. Union of India, AIR 1994 SC 1918.

[28] I. R. Coelho v. State of T.N., AIR 2007 SC 861.

[29] His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr., AIR 1973 SC 1461.

[30] *Id.*

[31] *Id*.

[32] S.R. Bommai v. Union of India, AIR 1994 SC 1918.

[33] His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr., AIR 1973 SC 1461; S.R. Bommai v. Union of India, AIR 1994 SC 1918.

[34] Raghunathrao Ganpatrao v. Union of India, AIR 1993 SC 1267.

[35] Waman Rao v. Union of India, AIR 1981 SC 271.

[36] His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr., AIR 1973 SC 1461.

directive principles[37], independence of judiciary[38], and parliamentary democracy[39] are necessary precautions in response to the principle of constitutionalism and as basic structure of the Constitution[40], so that the power can only be utilised to realise the transformative vision of the Constitution.

Going further, right in strict sense must have its correlative duty. If we examine it in generic sense, we find other kinds of the correlations. Under Part III[rd] of the Constitution, the fundamental rights are given to citizens and non-citizens against the state. At the same time, duty not in strict sense, the state is, with reference to the transformative vision, under constitutional obligations. For instance, in *Srinivasa Theatre v. State of Tamil Nadu*[41], the Supreme court was requested to explain the meaning of both the expressions- *equality before law* and *equal protection of law*-in Article 14[42] of the Constitution. The Court observed that *'equality before law'* and *'equal protection of law'* do not give the same meaning, though they much in common. While ascertaining the meaning and content of these expression, it has to be found and determined, having regard to the context and scheme of our Constitution, that the word "law" in the former expression is used in a generic sense-a philosophical sense-

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[37] Minerva Mills v. Union of India, AIR 1980 SC 1789.
[38] Shri Kumar Padma Prasad v. Union of India, (1992) 2 SCC 428.
[39] Kuldeep Nayar v. Union of India, (2006) 7 SCC 1, 451-52.
[40] Non-amendable as held in His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr., AIR 1973 SC 1461.
[41] Sri Srinivasa Theatre and Ors. v. Government of Tamil Nadu and Ors., AIR 1992 SC 999.
[42] *India Const*. art. 14: "The State shall not deny to any person equality before the law or the equal protection of the law within the territory of India".

whereas the word 'law' in the latter expression denotes specific laws in force. *Equality before law* is a dynamic concept having many facets. One facet of this expression is that no one is above the law or privileged person or class. The other facet is utmost relevance which put a constitutional obligation on the state to bring more equality in the society through the machinery of law. To bring more equality must have reference to the goals in Preamble and DPSP (Part IV of Constitution).

For equality before law can be predicated meaningfully only in an equal society, i.e., in a society contemplated by Article 38[43] of the Constitution. Both the parts (IIIrd & IVth) conjoin the objectives enshrined in the Preamble of the Constitution. The duty of state in Part IIIrd is enforceable by the Court because of the right-duty correlation. However, the state is also under the duty in Part IVth to implement directives contained in various provisions of the part, but they are not enforceable through the court of law because they do not create justiciable rights in favor of individuals[44], i.e., right not in strict sense.

Though the duty in this part (IVth) is not enforceable but through judicial reasoning, duty sounded complementary to each other[45]. The Constitution aims at the synthesis of two parts (Part IIIrd and

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[43] *India Const*. Art. 38, cl. 1: "The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social, economic and political, shall inform all the institutions of the national life".

[44] His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr., (1973) 4 SCC 225, 134, 139,1714; P.M. Ashwathanarayan Setty v. State of Karnataka, AIR 1989 SC 100.

[45] State of M.P. v. Pramod Bhartiya, (1993) 1 SCC 539; Unnikrishnan J.P. v. State of A.P., (1993) 1 SCC 645.

Part IV[th]). The directive principles of state policy constitute 'conscience of the constitution.' Together they form the core of the Constitution[46]. There is no disharmony[47] between two parts - directive principles and fundamental rights. Both the parts have the same goal to bring social change as contemplated in the objective part (preamble) of constitution[48]. The rights in part III[rd] and the DPSP in part IV[th] are the two wheels of the chariot, as an aid to make social and economic democracy a truism[49].

Examining it from the duty perspective, which is enforceable, and adaptation of the court as a part of state on the basis of Article 36,[50] read with Article 12,[51] the judicial process constitutes 'state action'[52]. The courts have a responsibility in so interpreting the Constitution[53] as to ensure implementation of the directives and to harmonize the social transformative objective underlying the directives with individual rights. As observed by the Court:

> *"Primarily the mandate is addressed to the Parliament and the State Legislatures, but, in so far*

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[46] V. Markendeya and Ors. v. State of A.P., AIR 1989 SC 1308, 9.
[47] Minerva Mills v. Union of India, AIR 1980 SC 1789, 16, 115, 117.
[48] His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr., AIR 1973 SC 1461.
[49] Jilubhai Nanbhai Khachar v. State of Gujarat, AIR 1995 SC 142.
[50] *India Const*. art. 36: "In this Part, unless the context otherwise requires, "the State" has the same meaning as in Part III".
[51] *India Const*. art. 12: "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".
[52] His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr., (1973) 4 SCC 225, 134, 139,1714.
[53] *Id.*

as Courts of justice can indulge in some judicial law making, within the interstices of the Constitution or any Statute before them for construction, the Courts too are bound by this mandate"

Thus, with judicial law-making power and applying the doctrine of 'harmonious construction'[54], the Court has shifted the duty of state organs under the directive principles to adjust the ambit of the fundamental rights[55], to remove inequalities and also attempt to achieve a fair division of wealth amongst the members of society. To add enforceable character to the duty under directives, the judicial approach in order to realize transformative vision, it is settled position that the provisions in Part IIIrd are to be interpreted in such a way that they must have support from objectives set out in Preamble and the directive principles in part IVth of the constitution[56]. More specifically, as observed by the Court, a fundamental right like Article 21 may be read together with directive principles-Articles 39(a)-(f), Articles 41-42 in order to enforce the directives through the fundamental rights[57].

Litigation to Law

This is a settled position that any change should take place with reference to the constitutional objectives and through the machinery of law[58]. Rule of law is part of the basic structure of

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[54] Minerva Mills v. Union of India, AIR 1980 SC 1789, 16, 115, 117.
[55] Mohd. Hanif Quareshi and Ors. v. State of Bihar, AIR 1958 SC 731.
[56] Union of India and Ors. v. Hindustan Development Corporation and Ors,, AIR 1994 SC 988.
[57] Bandhua Mukti Morcha v. Union of India and Ors., (1984) 3 SCC 161, 10.
[58] *Supra* note 41.

our constitutional system[59]. It is social justice based on public order. The law exists to ensure a proper social life. However, it is not a goal in itself but a means to allow the individual to live in dignity and develop himself. It is for creating a balance between the different rights and between human rights and the proper needs of society[60]. Expressing on the efficacy of law for transformation the Kerala High court in *Jain Babu v. Joseph*[61], observed that the modern sovereigns have been making use of the laws - even the penal law as a powerful tool of social engineering and societal transformation. Recently, the Parliament has enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019, a penal law to stop a civil practice (*triple talaq*) of divorce in the Muslim community. The law came in after the Supreme court verdict holding *triple talaq* a customary practice for separating lawful marital ties, unconstitutional in *Shayara Bano v. Union of India*[62] (2017). The Court held the practice violative of the fundamental rights to equality and life of Muslim women under Articles 14, 15 and 21.

Similar other instances from litigation to the law have found a place to bring social change. Credit to PIL (public interest litigation) cannot be undermined in the walks of social life which requires social justice. The ambit of the rule of *locus standi* has been widened to redress the public interest. The Supreme Court

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[59] Supreme Court Advocates-on-Record Association and Ors. v. Union of India, (1993) 4 SCC 441, 531.
[60] National Legal Services Authority v. Union of India and Ors., (2014) 5 SCC 438, 131.
[61] Jain Babu v. Joseph, (2008) 4 KLT 16, 10. [Reversed in TGN Kumar v. State of Kerala, (2011) 2 SCC 772]
[62] Shayara Bano v. Union of India and Ors., (2017) 9 SCC 1.

in *Maharaj Singh v. State of U.P.*,[63] anticipating the future development observed: "Where a wrong against community interest is done, 'no *locus standi*', will not always be a plea to non-suit an interested-public body chasing the wrong-doer in court…… *'Locus standi'* has a larger ambit in current legal semantics than the accepted, individualistic jurisprudence of old"[64]. Justice V.R. Krishna Iyer with transformative vision through judicial process stated that "Procedural prescriptions are handmaids, not mistresses, of justice.... Our adjectival branch of jurisprudence deals not with sophisticated litigants but the rural poor, the urban laymen and the weaker societal segments for whom law will be an added terror[65]. PIL was a new chapter added to the redressal book which allowed a public-spirited person or journalist or social action group for those class or group of persons who are in disadvantaged position on account of poverty, disability or other social or economic impediment, and are unable to enforce their rights[66]. Thus, social change through litigation (a very important feature in the US and India also) is treated as a highly effective device for producing social change. In continuation to above, the following instances are capable to show that litigation to law has played a vital role in changing the face of society.

The Supreme Court in *Mohini Jain* (1992) held that the word 'life' in Article 21 of the constitution includes 'education'

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[63] Maharaj Singh v. State of Uttar Pradesh and Ors., AIR 1976 SC 2602.
[64] *Id*.
[65] Mumbai Kamgar Sabha, Bombay v. Abdulbhai Faizullabhai and Ors., (1976) 3 SCC 832.
[66] Subhash Kumar v. State of Bihar and Ors., AIR 1991 SC 420, 7, 8.

because education promotes good and dignified life. Interpreting in the context the court accepted that the constitution does not expressly guarantee the right to education, as such, as fundamental right. But reading cumulatively article 21 along with the directive principles contained in Articles 38, 39 (a), 41, and 45,[67] the court opined that the framers of constitution made it obligatory to the state to provide education for citizens[68]. After ten years, the constitution was amended in the year 2002 and education as fundamental right was added as article 21-A[69]. Thereafter, to actuate the fundamental right to education, the Parliament enacted the RTE Act, 2009. The Supreme Court made it clear that under Article 21-A r/w RTE Act 2009 and RTE rules 2010 the budgetary constraints or financial implications can never be a ground if there is a violation of a fundamental rights of education of a citizen[70]. To ensure equal opportunity in

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[67] *India Const*. Art. 38 cl. 1: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life"; *India Const*. Art. 39: "The State shall, in particular, direct its policy towards securing- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood"; *India Const*. Art. 41: "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want"; *India Const*. Art. 45: "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years".

[68] Mohini Jain (Miss) v. State of Karnataka and Ors., AIR 1992 SC 1858; See also MP Jain, *Indian Constitutional Law*, 1129 (2007).

[69] *India Const*. Art. 21-A. Right to education- The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

[70] State of Bihar and Ors. v. Bihar Secondary Teachers Struggle Committee, Munger and Ors. (2019) 18 SCC 301,115.

employment, the parliament enacted a law in 2013 (Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal Act 2013). This was followed after the Supreme Court took the judicial notice of the equal right of women at the workplace in *Vishaka v. State of Rajasthan*[71], (1997). The incidents of sexual harassment of working women violates their fundamental right under Article 14, 15, and 21 of the constitution. Right work with human dignity and safeguard against sexual harassment are implicit in Articles 14, 15, 19 (1) (g) and 21 of the constitution. The court also issued guidelines which were a significant source to evolve the above-mentioned law to ensure gender equality. The Supreme Court in a subsequent case held that sexual harassment at the workplace is a form of sex discrimination[72]. The *Shah Bano*[73] verdict of the Supreme Court made the central legislature to enact the Muslim Women (Protection of Rights on Divorce) Act, 1986.

To evolve law and remove it from statute book if obstructing in transformation, through judicial process is the other side of the process but in the same direction of realising the goals set out in the preamble. On many occasions, the highest court of the land through judicial vision assessed the existence of a right to give specific moves to unequal social order. On equal opportunity to access to justice for all citizens, the Supreme Court in *Hussainara Khatoon*[74], interpreted a fundamental right to free

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[71] Vishaka and Ors. v. State of Rajasthan and Ors., (1997) 6 SCC 241.
[72] Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC 625.
[73] Mohd. Ahmed Khan v. Shah Bano Begum and Ors., AIR 1985 SC 945.
[74] Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, Patna, AIR 1979 SC 1369.

legal aid and duty on the part of the state to see the legal system provides access to justice. The Supreme court in *Lata Singh v. State of U.P.*[75](2006) acknowledging the caste system is a curse on the nation and the nation is passing through a crucial transitional period. It must be destroyed. It is the right to choose of women which will end up the caste system in India. In a free and democratic country like ours, if a person is major, he/she must have a right to marry whosoever he/she likes. Removing caste barriers is the one of the constitutional goals to be achieved. In the direction of removing unequal treatment to transgender. The Court in *National Legal service Authority*[76] interpreted the meaning of 'person' in Article 14 and 21 of the constitution and stated that the expression person includes *Hijaras*/transgender who are not male or female. They are entitled to all spheres of state activity, including employment, healthcare, education as well as civil and citizenship rights, as available to other citizens of India. Principles of liberty, equality and fraternity were debated and discussed in constituent assembly as ultimate transformative values. They found their place in the objective part of the constitution. The subsequent parts of constitutions in order actuate them adopted and allowed to be placed among fundamental rights. Article 21[77] extends its protection and supports for promotion to the basic values of life and liberty. To ensure the freedom of an individual to enjoy life and liberty, the

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[75] Lata Singh v. State of U.P. and Anr., (2006) 5 SCC 475, 16-17; see Also Shafin Jahan v. Asokan K.M. and Ors., AIR 2018 SC 1933.

[76] National Legal Services Authority v. Union of India and Ors., (2014) 5 SCC 438.

[77] *India Const*. art. 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law".

privacy domain requires many entitlements. They came in for judicial assessments in *K.S Puttaswamy,*[78] (2018) the court treated them as an indispensable part of human dignity and held the privacy of a person as fundamental right. This has given a change in various dimensions of life and liberty. This is a great transformation through judicial measure towards the protection of personal liberty since emergency during 1975-77, with reference to Supreme Court judgement in *A.D.M Jabalpur*[79] (1976). Article 21 is the sole repository of rights to life and personally liberty and it was put under suspension by the PO of 1975. The Court by a majority of 4 to 1 justified the detention during an emergency even if an order of detention was not in conformity with the MISA (Maintenance of Internal Security Act). It could not be challenge giving it meaning that a person could be put in prison with impunity without his getting his relief whatsoever. Professor M.P. Jain assessed this situation as article 21 became more of liability rather than an asset during emergency, perhaps the position of an individual could be better off if article 21 were not there[80]. In its journey, the supreme Court invited to look into a religious custom being practice since long time wherein on the ground of 'Menstruating years' (between the ages of 10 to 50), women were not allowed to enter into the temple of Lord Ayyappa. The temple is known as Sabarimala temple, considered the abode of Lord Ayyappa. The temple is known as Sabarimala temple, considered the abode of Lord Ayyappa, located in state of Kerala, India. The Court going

[78] K.S. Puttaswamy and Anr. v. Union of India and Ors., (2017) 10 SCC 1.
[79] A.D.M., Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207.
[80] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1450 (8th ed. 2018).

through article 17[81] among other provisions of the constitution, brought forth that this provision consists of transformative ideal of the Constitution. It is valuing centuries' old struggle of social reformers and revolutionaries and a revolt against social norms, which subjugated individuals into stigmatized hierarchies. Any form of stigmatization which leads to social exclusion is violative of human dignity and would constitute a form of "untouchability." This needs to be transformed[82]. Decriminalizing consensual acts of adults[83] under section 377 of IPC and to declare section 497 of IPC unconstitutional[84], among other instances, are in the way towards actuating the constitutional vision of for social transformation. There is another recent instance of *Ram Janmabhumi Temple*[85] (2019) which had been the longest dispute in Indian legal history and remained a cause of disharmony between two religious communities- Hindu and Muslim. The issue involved the religious faith and belief of both the communities that triggered political, historical, and socio-religious debate in India for many decades. The first legal fight began in 1885 by filing a suit against Secretary of State for India in Council in the civil court of Faizabad, in state of Uttar Pradesh. The issue came to an end by

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[81] *India Const*. Art. 17: "'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law".

[82] Indian Young Lawyers Association and Ors. (Sabarimala Temple, In Re) v. State of Kerala and Ors.**,** (2019) 11 SCC 1, 341-42.

[83] Navtej Singh Johar and Ors. v. Union of India Through Secretary, Ministry of Law and Justice*,* AIR 2018 SC 4321.

[84] Joseph Shine v. Union of India. (2019) 3 SCC 39.

[85] M. Siddiq (Dead) Through Legal Representatives (Ram Janmabhumi Temple Case) v. Mahant Suresh Das and Ors., (2020) 1 SCC 1.

unanimous verdict of five judges' bench of the apex court. The disharmony between two people of different faiths came to rest. Referencing the trinity- liberty, equality and fraternity which is inseparable (*supra*), the Ayodhya dispute-from disharmony to harmony-if it is read in Ambedkarian view of inseparable three principles of transformation as given in preamble it could be set an example of social transformation.

Evolving Doctrines for Transformation

Indian struggle for independence was fought for getting freedom from colonial clutches and for the social transformation through the mechanism of law (supra). In order to ensure transformation through law, a specific provision in Article 13 was placed in part III[rd] of Indian constitution so that the implied power under the provision can check whether the said 'law' is one as contemplated by transformative vision of the constitution. This was known as judicial review power. The judiciary while testing 'law' applied it as one of the constitutional doctrines and developed certain facets to the Judicial Review and also claimed that while interpreting the legislation, it must be made sure that the law is in coherence with the constitution[86]. Chief Justice Kania in *A. K. Gopalan* (1950) observed that in a country like India, it is the constitution which is the most supreme and hence all statute laws should be in conformity with it and it should be for the interpreters to decide whether any law is constitutional or

[86] L. Chandra Kumar v. Union of India and Ors., AIR 1997 SC 1125.

not[87]. Here, it is also most contextual to bring what Granville Austin-a great author has said in his book:

> *"The judiciary was to be an arm of the social revolution upholding the equality that Indians has longed for during colonial days, but had not gained not simply because the regime was colonial, and perforce repressive, but largely because the British had feared that social change would endanger their rule.... The courts were also idealized because, as guardians of the constitution there would be expression of the new law created by Indians for Indians. Judicial review, assembly members believed, was ' an essential power for the courts of a free India, with a federal constitution"*[88]

Under the judicial review doctrine, the Court have evolved several doctrines to realize the Founding fathers' vision of transformed India. Structured on Rule of Law[89], the constitution guarantees that no one is above the law[90] and puts an obligation on the part of the state to bring more equality[91] in the society. In the direction towards ending up the social inequality, the Calcutta High Court engineered doctrine of reasonable classification[92].

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[87] A. K. Gopalan v. State of Madras, AIR 1950 SC 27.
[88] Granville Austin, *The Indian Constitution: Corner Stone of a Nation* (Oxford Publications 1999).
[89] Supreme Court Advocates-on-Record Association and Ors. v. Union of India, (1993) 4 SCC 441, 531.
[90] Sri Srinivasa Theatre and Ors. v. Government of Tamil Nadu and Ors., AIR 1992 SC 999.
[91] *Supra* note 41.
[92] Anwar Ali Sarkar v. The State of West Bengal, AIR 1952 Cal 150.

"…the constitution permits 'Reasonable Classification' and not 'Class Legislation'- 'like should be treated alike'[93]. In *E.P. Royappa v. State of T.N.*[94] in a concurring judgment, P.N. Bhagwati, J., speaking for himself and Chandrachud and Krishna Iyer, JJ. said that the essence of the rule of equality lay in its anti-arbitrariness. Subsequent to this in *Ajay Hasia v. Khalid Mujib Sehravardi*,[95] he pointed out that reasonable classification was not a paraphrase of equality and that it was only one of the means whereby a Judge could decide whether there was an element of arbitrariness or not.

This doctrine gave a source for emanating and determining the domain to 'equal work and equal pay' principle. The Court while examining the circumstances for its application as a fundamental right, observed that the principle is found its incorporation in Article 39 (d)[96] and it should be read with Articles 14[97] and 16 of the constitution. But there are various restrictions in application of the doctrine[98]. Even within the same organisation, when different wage structure is based on similar consideration, the application of the doctrine would be fraught with danger and may seriously affect efficiency, and at times, even the functioning of the organisation. But the doctrine can be applied to correct

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[93] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.
[94] E.P. Royappa v. State of Tamil Nadu & Anr., (1974) 4 SCC 3.
[95] Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors., (1981) 1 SCC 722; see also A.L. Kalra v. Project and Equipment Corpn. of India Ltd., (1984) 3 SCC 316; Air India v. Nergesh Meerza and Ors., (1981) 4 SCC 335; Central Inland Water Transport Corp. Ltd. and Anr. v. Brojo Nath Ganguly and Anr., (1986) 3 SCC 156.
[96] Randhir Singh v. Union of India and Ors., (1982) 1 SCC 618.
[97] *Supra* note 44.
[98] Harbans Lal and Ors. v. State of H.P. and Ors., (1989) 4 SCC 459.

irrational and inexplicable pay differentiation which can be looked as discrimination against an employee or a given set of employees. Unless there is no such identifiable discrimination the doctrine should not be applied[99].

Further, classification of persons or objects is prohibited on the grounds mentioned in Articles 15 (1) and 16 (1) like race, religion, and caste etc. Even, the doctrine of reasonable classification cannot make those prohibited grounds for making class. Hereto, it is a commitment to the principle of equality. At the same, an obligation on the part of the state to bring more equality[100], refrain from discriminating on the prohibited grounds[101] and actively undertake to remove existing discriminatory practices in all spheres of life is constitutional mandate. India is full of disparity with different social strata in the country, parity has to be brought in, but prohibited grounds not to be the grounds of discrimination, the scheme of Constitution directs and empowers the Government to undertake special measures for the advancement of backward groups[102].

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[99] Associate Banks Officers' Assn. v. State bank of India and Ors., (1998) 1 SCC 428.

[100] *Supra* Note 41.

[101] *India Const*. Art., 15 (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.; *India Const*. Art., 16, (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

[102] *India Const*. Art., 15 (4) Nothing in this article or in clause (2) of Art. 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes; *India Const*. ART. 16 (4) Nothing in this article shall prevent the State from making any provision for the

Such Preferential treatment for the advancement of backward groups is not only permitted but directed also i.e., the backwards class should be compensated and if that be called discrimination, it must be tolerated as compensatory discrimination.[103]. Under this constitutional philosophy of new India, the doctrine of compensatory discrimination which also knows as doctrine of affirmative action or protective discrimination took birth. In *Ram Krishna Balothia v. Union of India*[104], it was held that Article 15 (4) embodies the doctrine of protective discrimination. The word 'advancement' in clause (4) need not any qualification and not restricted to social and educational advancement. Article 15 (4) is special provision for advancement, and applicable to every kind of advancement. Regarding Article 16 (4), it was observed that the law relating to affirmative action and protective discrimination by way of reservation of posts for the members of the Scheduled Castes invoking Clause (4) of Article 16 of the Constitution of India is reflected by constitutionalism and acknowledged under doctrine of protective discrimination[105]. However, the state is not free to enact legislation in the name of protective discrimination in order to get political benefit. It has to be kept in mind that legislations in the name of 'protective

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reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

[103] Shri Joy Kanta Hira v. The State of Assam and Ors., AIR 1988 Gau 24, 6.

[104] Ram Krishna Balothia v. Union of India and Ors., AIR 1994 MP 143.

[105] Subhash Chandra and Anr. v. Delhi Subordinate Services Selection Board and Ors., (2009) 15 SCC 458.

discrimination' may serve as double-edged swords.[106] They are subject to scrutiny of objectives and reverse discrimination.

In 1973, to give protection to the transformative vision enshrined in the constitution the Supreme Court through it largest bench in the history of Indian constitutional jurisprudence propounded the theory of basic structure[107]. The theory secured from making any change in the supremacy of constitution, republic character of the state and the founding fathers' transformative vision in preamble[108]. The theory has been affirmed in subsequent cases[109]. The theory lifted the protective cover from ninth schedule[110] of the constitution[111]. The said schedule was excluded from the preview of judicial review. Justice Matthew who was the one of the propounders of the theory discovered the concept 'Empty vessel' which has been vitally useful to bring changes:

> "*The Directive Principles nevertheless are fundamental in the governance of the country and all the organs of the State, including the judiciary, are bound to enforce those directives. The Fundamental Rights themselves have no fixed content: most of*

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[106] Anuj Garg and Ors. v. Hotel Association of India and Ors., (2008) 3 SCC 1.
[107] His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr., AIR 1973 SC 1461.
[108] *Id.* (held Preamble as basic structure of the Constitution).
[109] Indira Nehru Gandhi Smt. v. Raj Narain, 1975 Supp SCC 1; Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.
[110] The Ninth Schedule brought into existence by Article 31B in 1951 contains a list of central and state laws which cannot be challenged in courts.
[111] I.R. Coelho (Dead) by LRs v. State of Tamil Nadu, (2007) 2 SCC 1.

them are mere empty vessels into which each generation must pour its content in the light of its experience."[112]

The doctrines like harmonious construction and due process of law among other doctrines do have their very prominent role for pacing the transformation against what was remained untraceable since centuries. Doctrine of harmonious construction as expression suggests, it brought justiciable and non-justiciable rights together to fight against various curses in the society. As it was rightly observed in *Re-Kerala education*[113], that in deciding the fundamental rights the court must consider the directive principle and adopt the principle of harmonious construction. So, two possibilities are given effect as much as possible by striking a balance. As far as doctrine of due process of law is concerned, it had travelled a long journey starting from *A.K. Goapalan*[114] (1950) coming through *R.C Cooper*[115] *(*1970) to *Maneka Gandhi* (1978),[116] prior to *Maneka Gandhi*, Article 21 was a guarantee against executive action unsupported by law[117]. But in this case the Court opened new dimension and laid down that it imposed a limitation upon the legislature that any law depriving a person of his life or personal liberty, must provide a procedure and such procedure must qualify the test for being *reasonable, fair, and*

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[112] *Supra* note 99, 1714.
[113] In Re the Kerala Education Bill, 1957 Reference Under Art. 143(1) of the Constitution of India, AIR 1958 SC 956; See also Commissioner of Income Tax v. Hindustan Bulk Carriers, (2002) 7 SCC 705.
[114] A.K. Gopalan v. State of Madras, AIR 1950 SC 27.
[115] Rustom Cowasjee Cooper v. Union of India, (1970) 2 SCC 298.
[116] Maneka Gandhi v. Union of India and Anr., AIR 1978 SC 597.
[117] *Id.*

just.[118]. Thus, the judicial crafted doctrines have paved the way for social transformation as contemplated by the constitution of India. Only some important doctrines because of word limit have been discussed here.

Conclusion

Transformative vision of constitution, rights, duty and liability mechanism, basic and evolved doctrines, and recognised efficacy of law as an instrument of social change have realised transformation in many walks of life. However, a considerable is still to be addressed. The accountable system for change is showing maturity to address the issues inviting constitutional strength of itself and that of the citizens. New grounds of pleadings for change are being scrutinized at every level for transformation; for instance, invoking the constitutional morality[119] for transformation. The Constitution has provisioned for accepting the changing facets of the morality of society. The Lockean concept of constitutionalism has played a significant role in curbing the arbitrary use of powers by the state[120]. The judiciary has ventured into social problems and mischiefs and has endeavoured to rectify them by putting social transformation into motion. Several doctrines driven social transformation have been

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[118] Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors., AIR 1981 SC 746, 3.

[119] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1; Joseph Shine v. Union of India, (2018) 3 SCC 39; Indian Young Lawyers Association v. State of Kerala, (2016) 16 SCC 810; NCT of Delhi v. Union of India, (2018) 8 SCC 501.

[120] Dr. AC Joshi, *John Locke & Contemporary Indian Legal System,* HINDUSTAN TIMES https://www.hindustantimes.com/india/john-locke-contemporary-indian-legal-system/story-QFCdw1JKIFP3Pn4w2qq2qK.html.

evolved and implemented by the Indian courts to bring the required changes in the society. Hence, it can be concluded through this research as compiled herewith and opined upon in this article that law along with judiciary is an efficient tool for social transformation and throughout this process, the Indian Constitution has stood as a strong backbone for changes.

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IP BACKED FINANCING - CHALLENGES IN IMPLEMENTATION: A COMPARATIVE STUDY OF CHINA, SOUTH KOREA, SINGAPORE AND INDIA

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Abstract

The verdict of the Hon'ble Supreme Court of India in Canara Bank v. N. G. Subbaraya Setty decided on 20th April 2018 raised the debate about the need to amend the existing legal regime relating to investment and securities laws and banking regulations in India to accommodate IP backed financing. On 23rd July 2021, Parliamentary Standing Committee on Commerce in 161st Report on Review of the IPRs in India while appraising the need for promoting IP backed financing raised the need for adopting best practices followed in countries such as China, Singapore, Korea etc. to boost their economy by promoting IP securitization especially in the Covid 19 pandemic to support the SMEs and start-ups, According to the World Intellectual Property Indicators, 2020 China is in 1st position and Korea is in 4th position about the IP activity. A detailed study of their IP backed financing regime provides the interrelationship between promotion of innovation, effective enforcement and management of IP rights, standardization of IP valuation methods, convergence of financial institutions with the IP administration are the strategies adopted to promote use of IP as

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collateral. The article attempts to find answers to the following Questions: Though the IP backed financing is need of the hour and successful model, what challenges are there before India to promote IP backed financing regime? What best practices followed by China, South Korea and Singapore can be adopted by India to facilitate IP securitization. The article attempts to provide cross jurisdictional study of legislative, administrative and market framework adopted by China, South Korea, and Singapore to promote IP backed financing and challenges faced by India and way forward.

Keywords: IP backed financing, IP Securitization, IP as collateral, IP valuation & Management, IP enforcement

Introduction

In *Canara Bank v. N. G. Subbaraya Setty*[1], the apex court ruled that a defaulting barrower cannot assign his trademark to the bank. A defaulting borrower cannot settle the claims of the bank, simply by surrendering the ownership over the trademark to the possession of the bank. The apex court interpreting Sections 6, 8 and 46(4) of the Banking Regulation Act held that trademarks cannot be used as security for loans or advances.[2] Sec.8 of the Banking Regulation Act, 1949 provides that '*notwithstanding anything contained in Section 6 or in any contract, no banking company shall directly or indirectly deal in the selling of goods, except in connection with the realization of security given to held*

[1] Canara Bank v. N. G. Subbaray Setty (2018) 9 SCC 472

[2] The Apex Court ruled that, "*A bank cannot use the trademark 'eendau' to sell agarbathies*."

by it'. Banks are refrained from granting permission to third parties to use the trademark 'Eenadu' and earn royalty upon the same from the purview of Section 6(1) and would be prohibited further by Section 6(2) which states that no bank shall engage in any form of business other than those referred to in Section 6(1).

This verdict of the Supreme Court of India raised the debate about the future of IP backed financing in India. According to analysts, if the entire matter looked from the angle of Securitization and Reconstruction of Financial Assets and Enforcement Security Interest Act, 2002 (SARFAESI Act), IP backed financing must have been a possibility. This logic is based on the definition of property provided under Section 2(1)(t) of the SARFAESI Act, 2002 which specifically includes intangible assets, being know-how, patent, copyright, trademark, license, franchise or any other business or commercial right of similar nature.[3] Further, the expressions *security interest*[4] *and secured creditor*[5] includes intangible assets under its definition.

What is holding back India to move towards the IP backed financing? How to overcome the hurdles and ensure benefit to the industries who are keen in developing & using IP assets in all situations of need? What is the global stand in terms of IP backed financing? Whether by not promoting IP backed financing in

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[3] M Umarji, *Why Intellectual Property Rights as security for loans is correct in legal terms*, The Economic Times https://economictimes.indiatimes.com/news/economy/finance/why-intellectual-property-rights-as-security-for-loans-is-correct-in-legal-terms/articleshow/64657067.cms?from=mdr.

[4] SARFAESI Act, 2002 § 2(1) (zf), No.54, Acts of Parliament, 2002 (India).

[5] SARFAESI Act, 2002 § 2(1) (zd), No.54, Acts of Parliament, 2002 (India).

India, is it causing the Indian industries to lose the pace in the global competition? These are the obvious questions, which will come to the minds of any reader who knows and understand the importance, value, and capability of IP assets.

The techno-knowledge economy is the mantra of the 21st century and intangible assets are the backbone of it. In mergers and acquisitions, IP asset valuation became the important integral step fetching crores of rupees revenue to the companies. The number of patents which company is holding, good will and reputation of the company in terms of trademark etc., are major source of revenue when companies are transferred from one hand to another hand. The million dollars are involved in the merger and acquisitions where brand value, patents, data etc., plays a crucial role in fixing the prize.

In 2021, start-ups outdid both the Mergers and Acquisition and PE segment July 2021 with 109 deals worth $1.6 billion. During Covid 19, IT companies, online education service providers, e-commerce industries gained lot of brand value because of the increasing number of customers or users. This increased their brand value, value of the data and technology etc., it can be seen from the illustration of BYJU's acquisition of the companies, ed-tech company Epic of USA for $500 million, Great Learning for $600 million is classic example and Flipkart raising $3.6 billion in fresh funds from global investors.[6] M&A transactions mainly

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[6] *India companies seal 181 deals worth $13.2 billion in July: Report*, Business Standard https://www.business-standard.com/article/companies/india-companies-seal-181-deals-worth-13-2-billion-in-july-report-121081001119_1.html.

are targeted to acquire particular brands. Philip Morris, Chief Executive Officer (CEO) of Hamish Marshall while acquiring Kraft for $12.9 billion stated that, '*The future of consumer marketing belongs to the companies with the strongest brands.*

Mergers & Acquisitions though is a different topic altogether when we look from the perspective of IP backed financing, still it provides us the clear picture about the increasing role of IP assets in deciding the corporate transactions. The question is when an IP owner wants to raise money without selling or licensing the IP assets, can he go to the bank and pledge his IP assets like any other tangible asset? Can the companies use IP as collateral to raise the loans to deal with their financial crisis?

This article attempts to deal with all the questions and will attempt to analyse the importance of IP backed financing, importance of promoting the same from the perspective of SMEs, global practice across the jurisdictions and critical evaluation of the India's position towards IP backed financing. The article also attempts to provide suggestions to remove the impediments in promoting IP backed financing by quoting the best practices across the globe.

IP backed financing: Overview

Financing IP is all about converting a creative idea into a financial asset. Though intellectual property includes the expression property in it and categorized as intangible asset, the characters of this type of asset do not receive equal treatment to that of tangible asset. By virtue of its intangibility, valuation of IP assets requires a special method and technique.

For example, the patent valuation procedure covers the NPV (Net Present Value), Future Value Forecast, and Financial Modelling to Estimate Cash Flows which are to be estimated with discounting for patent contribution and discounting for patent risk assessment.

Patent risk assessment includes analysis of validity of patent claims, possibilities of design around patents, potential risks of infringement of patent, lawsuits etc., Likewise, when referring to the brand value assessment, the actual benefits of future ownership, calculating multiple or discount rate by considering the inflation and risk etc., becomes crucial.

Financing IP in the traditional context is about selling, licensing, or assigning the IP assets by claiming royalties, which are defined to be part of IP rights. In the modern context, financing IP or use of IP assets to gain access to credit is getting importance over the traditional understanding of financing IP. MNCs to SMEs, every industry, corporation, or business entity is looking forward loans based on IP. The method of using IP as collateral asset is gaining prominence slowly in the corporate world. Securitization of IP assets is the one of the safest methods of borrowing money from adequately secured lenders.[7]

In film industry, music industry, internet-based businesses, high technology sectors etc., using IP asset as collateral became an accepted practice. Bowie bonds is a classic example of IP based finance raising. David Bowie, an English singer-songwriter and actor raised $55 million dollars by issuing the ten-year asset backed bonds based on future royalties on publishing rights and

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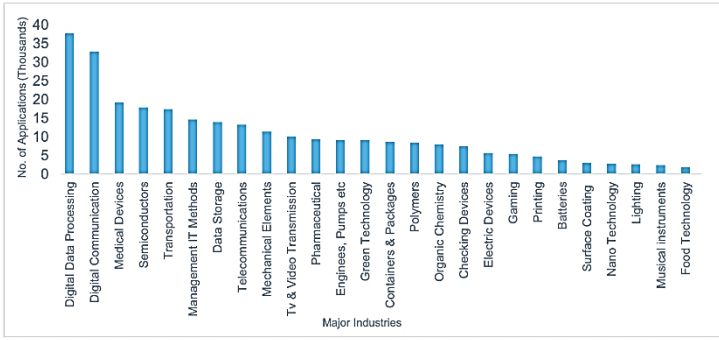
[7] *Intellectual property financing – An Introduction*, WIPO Magazine, September 2008, https://www.wipo.int/wipo_magazine/en/2008/05/article_0001.html.

master recording from 25 pre-recorded albums in the year 1997. The purchaser of the bonds will have the right to receive future royalties on Bowie's albums until the repayment of principal plus 8% annual interest.[8]

The trend of securitization started during mid-1990s and became a central debate. The growing investment in the intangible assets is also one of the reasons for raising demand for IP backed financing. The IP merchant bank Ocean Tomo conducted a study in the year 2015 about the increasing economic value of IP assets. The study shows that 84% of the value of firms was attributable to intangible assets and only 16% to tangible assets such as physical property.[9]

The below graph depicts industries that raised applications to secure debt financing using their patents as collateral:[24]



Source: Relecura.com

Source[10]

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[8] *Id.*

[9] Alfred Radauer, *Opportunities to finance innovation with IP*, WIPO Magazine, June 2021. No.2 https://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2021/wipo_pub_121_2021_02.pdf

[10] Duff & Phelps, CII, *IP-Backed Financing: Using Intellectual Property as Collateral*, Confederation of Indian Industries, published on December 2019,

For example, during Covid-19 lockdown, the companies shifted their policy of working from office to home. Work from home policy showed advantage to the employers as they can gain required input from employees without creating an office space and other supporting infrastructure. The work from home policy shifted the path of investment from tangible to intangible. Instead of creating office spaces, physical infrastructure etc., to the employees, the companies started investing in technologies which can enable their employees to work from home.

In the post-Covid scenario, one can see a keen shift in the corporate investment from tangible to intangible. These strategic investments can increase the firm's competitiveness and productivity by enhancing the innovation. As a result, the shift in the composition of investment toward intangible assets has been observed to be having the potential to reverse the productivity growth.[11]

Compared to the financing of tangible assets, intangible assets pose peculiar risk such as uncertain returns, large synergies, low redeploy ability. Though challenges and risks are involved in IP backed financing, still the growing investment in intangible assets compared to tangible assets in economies are forcing the

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https://ciiipr.in/pdf/CII-Duff-&-Phelps-Report-on-Using-IP-as-Collateral-2019.pdf.

[11] OECD, *Bridging the gap in the financing of intangibles to support productivity: Background paper*, OECD Publishing, Paris (2021), (Aug. 12, 2021 1.00 PM), https://www.oecd.org/global-forum-productivity/events/Bridging-the-gap-in-the-financing-of-intangibles-to-support-productivity-background-paper.pdf.

financing institutions to open the doors for IP backed financing or permitting IP as collateral.

The Global Innovation Index 2020 has been issued with the question, who will finance innovation? By quoting the Covid-19 pandemic and its impact of SMEs. According to the report, Covid-19 pandemic affected the SMEs in such a way that they became bankrupt and incapacitated to pay back the loans. The only option left is to mortgage or sell the enterprises and the brand value or IP assets come to their rescue in raising finances.[12] In times of distress, the companies such as Xerox, General Motors, Eastman Kodak, LSI, Avago etc., used IP as collateral during times of distress.

As the companies continue to grow their IP portfolios, IP backed financing will be seen increasingly as a realistic alternative to traditional financing. Banks, government bodies, non-bank lenders, government bodies, and the financing wings of large corporate bodies started providing IP-backed financing. The following diagram shows the list of top financing institutions issuing IP-backed loans. [13]

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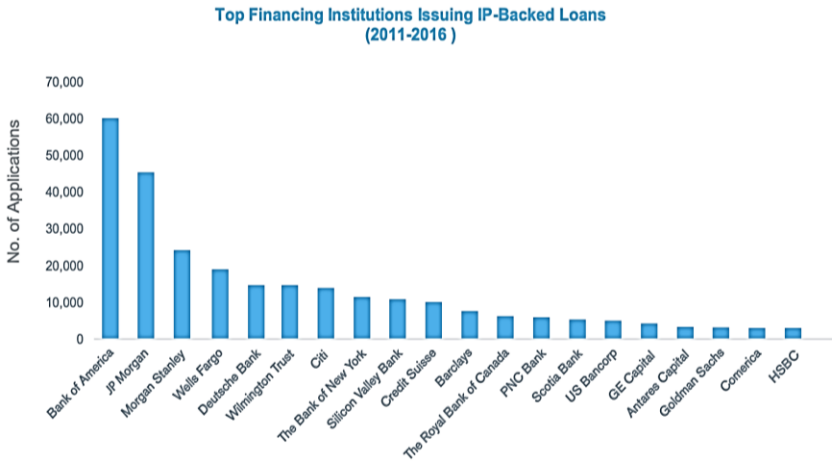
[12] Cornell University, INSEAD, and WIPO, *The Global Innovation Index 2020: Who Will Finance Innovation?* Ithaca, Fontainebleau, and Geneva. ISSN 2263-3693, ISBN 978-2-38192-0009-9 https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2020.pdf.
[13] DUFF & PHELPS, CII, *supra* note 10.



SMEs and IP backed financing

In the 21st century, Micro-Small-Medium Enterprises (MSMEs) became the base for the technological innovation and economic development. Their struggle to survive by escaping the shadows of mega-multinational corporate entities is a regular story in every economy. The Acquisition of Little Eye Labs, a start-up based in Bangalore by Facebook for $9 million is one of the examples of the economic significance of SMEs or Start-ups in the technology-based economy. As on June 2021, BYJU's acquired Singapore based Great Learning, Toppr, US digital reading platform Epic and furthermore fifteen companies by spending millions of dollars. The MNCs adopt different methods to acquire the brand value, technology, data of SMEs or Start-ups which became popular in short span of time. The struggle of new entities to fight the MNCs can be seen from the case study of the Mind Tree, Bangalore based IT firm's efforts to oppose the hostile takeover of L&T in the year 2019. According to the promoters of MindTree, the takeover by L&T would destroy their progress and the same a grave threat and value destructive to their

organization. Though at the end of the story, MindTree was acquired by L&T, it reflects that the survival of SMEs and Start-ups is essential to boost the techno-economies, and their survival can be only by supporting them through all means.

Though many SMEs and Start-ups are IP rich, in the times of economic crisis or in battles against hostile takeovers, when they look to generate finance, raising fund by using IP asset as collateral, became the *res extra* due to the traditional methods of raising finances by using tangible assets. This is creating hurdles for the innovative companies, including creative digital enterprises to obtain capital.[14]

As on today, the techno-economies are compelled to broaden the financing strategies available to MSMEs, entrepreneurs and start-ups so that they continue to play their rule in investment, growth, innovation, and employment.

The China National Intellectual Property Administration while referring to their 13th Five-Year Plan Period and initiatives to promote IP pledge financing stated that '*Many SMEs face sluggish development, which is a common difficulty caused liquidity pressure despite their possession of IP rights such as patents and trademarks. IP pledge financing allows enterprises to attract financing support through IP pledge, broadening their financing options and creating new opportunities for their development.'*

Hurdles in moving from traditional to IP in financing

As mentioned in the introduction part, *Canara Bank v. N. G. Subbaraya Setty*[15] case is the first to raise the question about the

[14] John P. Ogier, *Intellectual Property, finance and economic development*, WIPO Magazine, February 2016, https://www.wipo.int/wipo_magazine/en/2016/01/article_0002.html.
[15] Canara Bank v. N.G.Subbaray Setty, *supra* note 1.

status of IP securitization in India. But this case didn't put a blanket ban on securing IP backed financing. In 2009, Kingfisher raised Rs. 2,000 crores from State Bank of India by using its trademark[16] as collateral. In April 2014, when Kingfisher defaulted, State Bank of India's attempts to sell the trademarks didn't receive any serious bids. A detailed analysis of the case study shows the difficulties faced by the State Bank of India in auctioning of one liner tag of Kingfisher airlines 'Fly with Good Times'.

The reason for the under-exploitation of IP based financing especially for SMEs is because of problems in redeployability of IP, immaturity of IP exist markets, increase of transactions costs due to the asymmetric information in relating to IP, lack of efficient management of IP by SMEs, insufficient corporate reporting of IP assets, lack of understanding of banks about IP assets etc.,[17] Another important problem in rolling out IP backed financing is because of lack of uniform standard methodologies for IP valuation. When valuation involves cross-jurisdictional issues, the valuation becomes further critical because of differences in characteristics of regulations, competition, and demographics in different countries.[18] The following are the barriers in promoting IP based financing:

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[16] Nine trademarks including Fly Kingfisher, Flying Models, Funliner, Fly the Good Times, Kingfisher, and Flying Bird Device

[17] OECD Chapter 9, *IP based financing of Innovative firms*, OECD https://www.oecd.org/sti/ieconomy/Chapter9-KBC2-IP.pdf.

[18] Adrian Wong, *Banking on Intellectual Property, The Edge*, Malaysia, 2015, https://www.pwc.com/my/en/assets/press/150209-theedge-banking-on-intellectual-property.pdf.

Hard to redeploy	IP when is combined with complementary tangible and intangible assets, the value of IP is contingent on the presence of those other assets, hence disposing IP in isolation during financial distress may become difficult or the economic value of IP without complementary assets may be reduced.
Immature IP exit markets	Lack of knowledge to assess IP risks or selling it in illiquid and non-formalized markets.
High transactions costs	Asymmetric information about IP valuation and risk assessment drives up the transaction cost necessary to gather compelling evidence about the credibility of IP assets.
Lack of effective IP management by industries	Industries especially SMEs lack awareness and strategic action about the effective management of IP assets. Inefficient IP management reduces the value of the IP asset.
Insufficient corporate reporting of IP assets	Inadequate corporate reporting of IP assets in balance sheet, financial statements etc., also reduce the value of the IP assets
Lack of understanding of Banks and other financial institutions about IP assets	Lack of experience to provide regulators the necessary assessment of risks.
Lack of standard method of IP valuation	There are different methods of IP valuation and lack of legislatively approved standard method

	confuses the financial institutions in valuing the IP for using it as collateral.
Lack of skilled human resource equipped with knowledge about IP, corporate law, and market analysis	At present, there is a dire need of developed skilled experts who can appreciate IP valuation methods, corporate financing, market analysis etc., which are relevant to IP backed financing

Source[19]

Cross Jurisdictional Study of China, Republic of Korea, and Singapore

1. China:

In China, in the year 2019, the newly pledged patents and trademarks financing across the country is 58.35 billion yuan (8.48 billion US dollars), up 2.5 percent annual growth, involving 3,086 cases, up 21.6 percent annual hike.[20] The following are the steps taken up by the China Government to promote IP backed financing in the year 2019:

- For strengthening IP Pledge Financing work the National Intellectual Property Regulatory Commission (NIPRC), the China Bank Insurance Regulatory Commission

[19] OECD, *supra* note, 17.

[20] *China to promote intellectual property pledge financing*, (last updated on July 10, 2019) http://www.xinhuanet.com/english/2019-07/10/c_138215265.htm.

(CBIRC), the National Intellectual Property Administration and the National Trademark Administration jointly issued notice in 2019 to achieve the objective of optimizing and strengthening of IP Pledge financing service system, financing innovation and risk management.

- The China National Intellectual Property Administration (CNIPA) in collaboration with the China Banking and Insurance Regulatory Commission (CBIRC) and other financial departments promoted financial institutions to establish and improve the working mechanism of IP pledge loans and provided guidance to the banking industry to develop an IP based credit approval system and interest rate pricing mechanism tailored to suit to the IP framework, so that more innovative SMEs can get the support.[21]

Highlights:

- In 2020, patent and trademark pledge financing reached 218 billion, with an annual growth of 43.9% and the number of pledge projects was 12,093, with an annual growth of 43.8%.
- In 2020, the amount of patent pledge financing in China was 155.8 billion yuan and banks and banking financial institutions such as credit unions became the largest pledgers, covering 67.4% of the pledge projects.
- In November & December 2020, a series of matchmaking and awareness seminars were organized by CNIPA and CBIRC at 53 industrial parks wherein approx.. 220 banking financial institutions and 1400 enterprises and parties signed contracts valuing a total 710 million yuan.

Source[22]

[21] DUFF & PHELPS, CII, *supra* note 10.

[22] China National Intellectual Property Administration, *Patent and Trademark Pledge Financing in China Gains the largest Increase in the 13th Five-Year Plan* https://english.cnipa.gov.cn/art/2021/3/9/art_1340_157495.html.

During Covid 19 outbreak CNIPA and IP bureaus implemented six priorities plan to carry out measures to promote the innovation and service, and to improve the financing services such as IP pledge financing.[23] Further, CNIPA promulgated the ten measures by collaborating with the State Administration for Market Regulation and National Medical Products Administration for promotion of IPRs and resumption of work and production by taking measures to prevent and control epidemic spread. Jointly the State administration came up with 70 documents approx. on business continuity policies and distributed the same in all regions to keep the IP financing going on even in tough times. A green channel was created by CNIPA for facilitating and expediting the registration of patent and trademark pledges to over 5000 enterprises. To expedite the application process for pledge of trademarks and patents, CNIPA revised the relevant provisions to adopt the notification-commitment system, simplified the registration material and process and fixed the time frame for processing of paper documents to only two working days for trademarks, three working days for patents and one working day for digital processing. [24]

As a result, in the year 2020, industries pledged 97.9% patents, reaching the largest percentage in the 13th Five-Year Plan period. This is an evidence to conclude that IP based pledge financing has played an important role in IP transformation and the development of the economy. In November and December, 2020, through match making exercise, CNIPA and CBIRC came

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[23] *Id*.
[24] *Id.*

out with 224 case studies of IP financing pledge and insurance which were distributed to IP bureaus, banks and insurance companies as a guide.

According to the China IP Newsletter, July 2021, it was mentioned that the CNIPA, CBIRC and NDRC is planning to offer more funding options to 100 industrial parks and 10,000 enterprises through IP-backed financing policies. The plan proposes that, by the end of 2023, China will improve the accessibility of IP-backed financing services, whilst significantly increasing the implementation rate of pledged patents. The plan also sets out measures for achieving the above goals, including through research and guidance, incentives, innovating evaluations and evaluation tools.[25]

2. Korea

Korea is the 4th largest country at the global platform in terms of patent application filing under WIPO's international patent system. The government of Korea supports IP related financing and the valuation is subsidized by the Korean Intellectual Property Office (KIPO). The IP valuation activity is undertaken by bodies such as Korea Invention Promotion Association (KIPA).[26]

In 2019, a total amount of transactions for IP financing in Korea is KRW 1.34 trillion (equivalent to US$ 1.11 billion (up by 77% from KRW 763.2 billion in 2018). According to the statistics of

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[25] China IP Newsletter, July 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/

[26] DUFF & PHELPS, CII, *supra* note 10.

KIPO, there are KRW 433.1 billion IP collateral transactions, KRW 724 billion guaranteed loans based on IPRs and KRW 193.3 billion IP based investments which in the year 2019 increased 4.9times from previous year. Despite of all efforts, KIPO is expressing the underuse of IP backed financing by SMEs in the Republic of Korea due to banks dependence on mortgage and credit loans, insufficient awareness about IP, and the lack of legal framework. Despite of all the efforts, the Korean Government stated that local firms faced additional liquidity risks during Covid 19.

KIPO is currently targeting to reach KRW 2 trillion by 2022 for IP backed financing by providing benefit up to 2,960 firms from 741 in the same period and is gearing up to generate 20,000 new jobs. In July 2020, KIPO came out with the complementary plans to establish platforms for individuals and enterprises to directly invest in IP, gain profit from royalties, sales and incubation of IP based Start-ups.[27]

According to the KIPO newsletter published in March 2021, IP finance transactions of South Korea surpassed KRW 2 trillion.[28] According to the newsletter, after reaching KRW 1 trillion in 2019, the scale of South Korea's IP backed financing rapidly increased by 52.8% to record KRW 2.64 trillion in 2020. The

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[27] *Id.*

[28] KIPO News, *IP Finance Transactions of South Korea surpass KRW 2 Trillion*, (published on March 03, 2021), (Aug. 15, 2021 11.30 PM), https://www.kipo.go.kr/en/BoardApp/UEngBodApp?a=&c=1003&seq=1712&supp_cd=001&board_id=kiponews&cp=1&pg=1&npp=10&catmenu=ek06_01_01&sdate=&edate=&type=&bunryu=&tag_yn=&searchKey=1&searchVal=

total amount of loans using IP as collateral was KRW 1.93 billion, and the amount of investments on companies with IP assets and direct investment on the IP itself was KRW 262.1 billion. The guarantees using the online patent evaluation system reached KRW 250 billion, which is a 44.5% increase from the previous year. Further, the Korea Credit Guarantee fund (KODIT) and the Seoul Guarantee Foundation is currently expanding its IP smart guarantees based on the SMART3 grade evaluation system which calculates grades in real time. Further Korea Technology Finance Corporation (KIBO)'s IP fast guarantees started operating on the KIBO Patent Appraisal system II (KPAS II) which takes only about one week. After these initiatives, according to Korean government, a start-up company that develops online advertisement platform which is unable to secure operational funds from financial institutions as due to lack of sales, can successfully secure a bank loan based on an IP guarantee issued through the online appraisal by KIBO. In July 2020, the Korean government announced a policy for IP finance investment virtualization to enhance awareness of IP investment by private investment institutions, implementation of which played a key role in achieving the success in IP backed financing.

The Director General Ho-Hyeong Park of the IP Policy Bureau at KIPO stated that, *KIPO will spare no resources in the effort to vitalize financial support for innovative enterprises such as by working to provide high-quality IP evaluation services.* As a case study, he quoted that in 2013 an SME which was producing LED and semiconductor materials received a KRW 1.6 billion investment from a patent account subsidiary cooperative based on their material-related patent value and successfully localized

their materials, and by 2020, it was recognized as the No.1 company in the global solar battery material (TMA).[29]

3. Singapore

In the year 2014, Singapore launched the IP Financing Scheme (IPFS), a five-year scheme aimed at facilitating IP transactions and to promote IP-backed financing among IP rich but asset light companies. IPFS facilitated the use of IP as a collateral to obtain loans from the Participating Financing Institutions (PFIs) and it has been agreed that Government of Singapore will share the risk of IP-backed loan. The Singapore government offered valuation subsidies to defray the cost of IP valuation and the subsidy was capped as, 50% of the IP valuation cost, 2% of the value of the IP or SG$25000 whichever is lower.[30] The first such case of IP backed financing in Singapore is the Masai loan which was backed by DBS bank, one of the four PFIs. [31]

> The representative of the DBS bank issued the following statement while dealing with the IP backed financing:
> '*As the principal banker for the Masai group, we recognized that the patents acquired would essentially translate into future earnings. We are very pleased that the collaboration with IPOS to monetize these intangible assets, recognizing the patents as an alternative security, has worked well. With this as the first successful case of an IP backed loan in Singapore, we. can help our SMEs unlock the hidden wealth in their intangible assets and convert into cash for their business growth'.*

On 26th April 2021, Singapore launched 10-year plan named Singapore Intellectual Property Strategy 2030 (SIPO 2030)

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[29] *Id.*
[30] DUFF & PHELPS, CII, *supra* note 10.
[31] Bryan Tan, *First IP-backed loan approved in Singapore*, (Published on June 06, 2016) https://www.pinsentmasons.com/out-law/news/first-ip-backed-loan-approved-in-singapore.

aiming to make Singapore as a global hub for intangible assets and intellectual properties. Through this initiative, Singapore is planning to complement the envisioned innovation ecosystem by putting relevant IP valuation practice standards and guidelines to build a credible and trusted IP valuation eco system to encourage and facilitate transactions, and help enterprises effectively unlock the value of their IP.[32]

IP backed financing in India

The following are the relevant laws governing IP backed financing in India:

Companies Act, 2013	Chapter VI, Section 77 – allows a company to create a charge on its 'property or asset' whether tangible or otherwise Schedule III of the Act classifies intangible assets under Clause (j) and includes good will, computer software, brands/trademarks, copyrights, patents and other IPRs etc.,
SARFAESI Act, 2002	Section 2(1)(t)(v) - property includes intangible assets, being know-how, patent, copyright, trademark, license, franchise or any other business or commercial right of any nature. Section 2(1) (zf) – security interest means right, title and interest of any kind whatsoever upon property created in favor of a secured creditor and includes mortgage, charge hypothecation, assignment
Patent Act 1970	Section 68 – an assignment of a patent or share in a patent, a mortgage, license, or the creation of any other interest in a patent shall not be valid unless the same were in writing and the agreement between parties concerned is reduced in the form of a document
Trademark Act, 1999	Section 37 – a proprietor of a registered or unregistered trademark to assign his rights in said trademark, either with or without the goodwill associated with such trademark.
Designs Act, 2000	Section 30(2) – security interest created by way of mortgage, license, or other interest apart from assignment to be recorded.

[32] Intellectual Property Office of Singapore, *Singapore IP Strategy 2030*, https://www.ipos.gov.sg/manage-ip/singapore-ip-strategy-2030.

In India, to pledge IP as collateral and valuate the IP assets the following formalities must be followed:

- Filing with the Registrar of Companies (ROC)
- Filing with the CERSAI (Central Registry of Securitization Asset Reconstruction & Security Interest in India
- Filing with IPR office (except for copyrights) – assignments and release deeds

On 23rd July 2021, Parliamentary Standing Committee on Commerce introduced the One Hundred and Sixty First Report in Rajya Sabha on 'Review of Intellectual Property Rights Regime in India', in which they pondered upon the topic IP financing. While referring to IP financing as an emerging business option, it was recommended to create opportunity for companies to create pro-IP financing environment in the country to cope up with the international practices. It was mentioned in the report that while deliberating with the financial institutions, the Committee apprised about the advantages of IP backed financing by comparing the advantages and disadvantages between tangible assets and intangible assets. The committee created awareness among the financial institutions about the increase in value of IP assets over a period as against value of tangible assets which tends to depreciate, and efforts were made to apprise them that IP backed financing is the better and alternative means to traditional financing.[33]

[33]Parliamentary Standing Committee on Commerce, *Review of Intellectual Property Rights Regime in India* RAJYA SABHA, Report No.106, Para 11.3,

Among the seven objectives of the National IPR Policy, commercialization of IPR is one of the components and the objective is turning IP portfolios as a collateral to raise the financial benefit. Acknowledging the need of securitization of IP rights to open new avenues for organizations to generate income from IP assets, it was stressed that effective IP management shall be the focal point to promote IP backed financing. Under the National IPR Policy, CIPAM is provided with the task of IPR commercialization by enabling valuation of IPRs through uniform standard methodologies and guidelines by enabling legislative, administrative and market framework so that securitization of IPRs and their use as collateral become smooth. Facilitating IP based investments and providing financial support via banks offering IP-friendly loans and linking financial institutions such as banks, angel funds, venture capital funds and crowd funding mechanisms for generating financial support for development and commercialization of IP assets.[34]

The report suggested that the financial institutions are reluctant to move towards IP backed financing the difficulty in realizing any substantial part of the advanced amount by lenders from the charged IP.

(Presented in Rajya Sabha and Lok Sabha on July 23, 2021), https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/141/161_2021_7_15.pdf.

[34] Department of Industrial Policy & Promotion (DIPP), *National IPR Policy 2016,*https://dipp.gov.in/sites/default/files/National_IPR_Policy_English.pdf.

In the Parliamentary Standing Committee report, the following reasons were mentioned for slow promotion of IP backed financing in India:

- Lack of awareness among owners of IP and the financial institutions about the value of the intangible assets
- Lack of initiation in shifting from traditional pledging to IP pledging
- Not interested in undertaking the risk of lending against IP assets.
- Lack of clarity and uniformity about IP valuation
- Complexity of applicable rules and procedures about the valuation of IP assets
- Difficulty in assessing the value of IP holdings including the market resale value by any financial institutions or companies
- Lack of human resource expertized in IP valuation methodologies

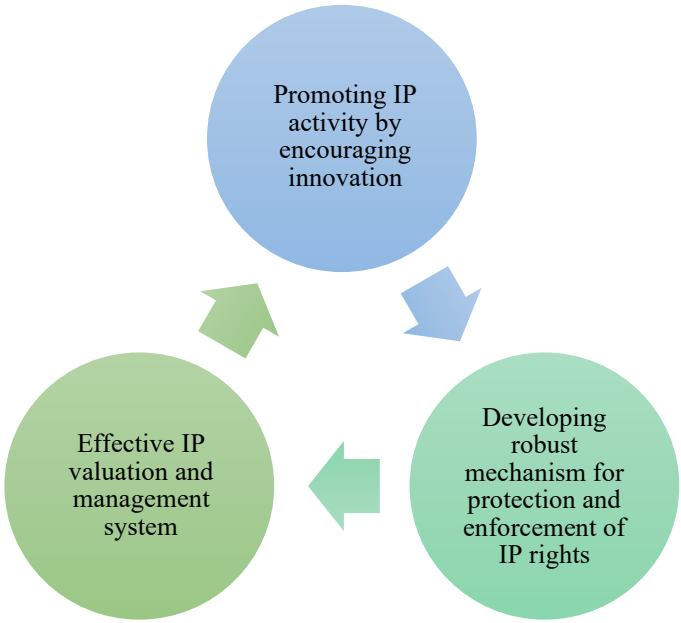
The following are the recommendations of the Committee to overcome the challenges in promoting the IP backed financing:

1. Generating awareness and better understanding of IP backed financing and IP portfolio management
2. Collaborating with the financial institutions, banks and other stakeholders of IP backed financing to promote the adaptation to practice of accepting IP as collateral and IP securitization *via* the training programmes and workshops.
3. Exploring ways to devise a uniform and standard system of IP valuation
4. Developing mechanism to appoint IP evaluators.
5. Roping in the insurance sector to cover financial losses in covering/protecting faced by an IP to minimize monetary risks by suitable amendments in Insurance Act, 1938.
6. Better implementation of SARFEASI (The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest) Act, 2002, which supported the system to create security interests in IP and maintenance of records pertaining to such transactions, will further be useful in increasing the IP backed financing.
7. Revisiting of IP legislations to include provisions providing for IP backed financing.

8. *Suigeneris* law for IP financing with details framework, standards etc.[35]

Challenges in promoting IP backed financing & Strategies needed to be adopted

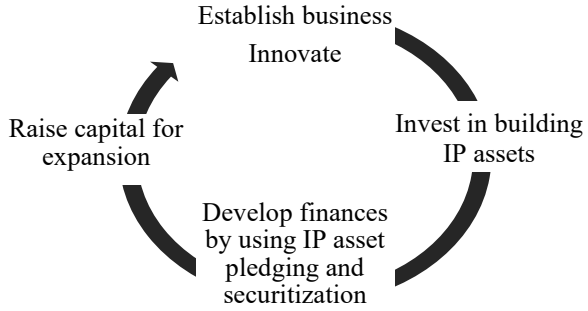
IP backed financing is primarily dependent upon three things i.e., *first,* promoting IP activity in the country by encouraging innovation, *second,* developing robust mechanism for protection and enforcement of IP rights and *third,* effective IP valuation and management system.



[35] *Id.*

Promoting IP activity & innovation

There is an undeniable relationship between promoting IP activity & innovation *vis-à-vis* IP backed financing. To promote innovation and IP activity, a belief is to be developed among industrialists that IP is an asset on which one can rely on to raise finances during crisis. In general, finding funding for a new business or idea itself is very challenging and after duly establishing the brand value or developing IP assets, if the same do not come to rescue in financial crisis to raise the funds, it will lead to the valley of death for innovation.[36] This is all because of the lack of ways to monetize the IP assets through the existing financial system, which results into the inability of companies to obtain the capital for business innovation and expansion by using IP assets. The following chart will explain the discussion:



[36] WIPO, *Intellectual Property and Innovation: Intellectual Property for Investment/Financing/Funding – Communication from Australia, Canada, Chile, the European Union, Japan, Switzerland, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Mastu, the United Kingdom and the United States*, IP/C/W/679, Council for TRIPs, (published on 27th May 2021),https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W679.pdf&Open=True.

In previous discussion, it has already been established that China and Korea are the forerunners in catching the IP backed financing regime. CNIPA on March 31, 2021, through China IP News claimed that their calculated measures inspired innovation from SMEs.[37]

Success story in 2020

- More than 20,000 SMEs are benefitted from the IP trusteeship services
- More than 8,000 SMEs obtained loans of more than 60 billion yuan by using IP as collateral
- Approx. 53,000 companies, most of which were SMEs, obtained enterprise IP management standards certificate
- 5,729 national IP template enterprises were cultivated, 76% of which were SMEs
- The research and development intensity, the average number of valid invention patents and IP pledge financing of SMEs from template enterprises were respectively 4.8%, 29.4 and 1.08, much higher than the national average numbers, namely 2.2%, 2.9 and 0.01

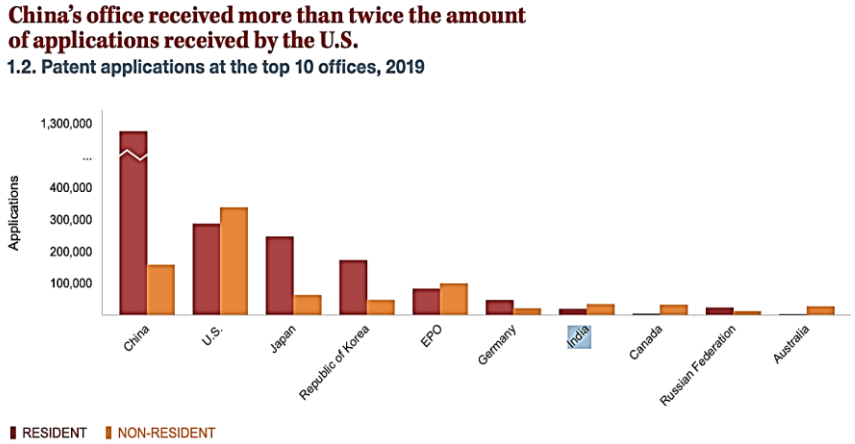
China is ranked number one in IP filing activity by origin, 2019 in the World Intellectual Property Indicators 2020. This reflects that the strategies adopted by China are giving good results.

World Intellectual Property Indicators 2020

Ranking of total (Resident and Abroad) IP filing activity by origin, 2019

Country	Patents	Marks	Designs
	Rank		
China	1	1	1
Korea	4	10	3
India	11	13	5
Singapore	26	28	40

[37] China IP News, *CNIPA's Calculated Measures Inspire Innovation from SMEs*, (published on March 31, 2021), China National Intellectual Property Administration (CNIPA), https://english.cnipa.gov.cn/art/2021/3/31/art_2509_158131.html.



According to the World IP Indicators 2020, The Republic of Korea (+4.3%), Singapore (+19.3%) and India (+7.1%) had a increased number of patent applications in 2019 than in 2018 and in contrast China (-9.2%) saw a decline.[38]

The CNIPA's custom-made IP policies i.e., promotion of IP commercialization, expedited IP handling, on-the-sport service to support to promote GI products production and sales kept innovation going even during the Covid 19. The guided local IP administration by introducing seventy pieces of IP policy texts to promote local enterprises' development throughout the year, easy access to patent and trademark applications and pledge registrations etc., kept IP activity and innovation alive even in the times of distress. Quality and efficiency of IP examination were improved to foster development and reduced the pending examinations and special attention is provided to applications

[38] WIPO, *World IP Indicators in 2020*, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2020.pdf.

from SMEs. To get quick financing SMEs were encouraged to implement the enterprise IP management standards from the day one of receiving IP registration acknowledgement and nearly 53,000 companies (majority of which are SMEs) were provided with the enterprise IP management standards certificate.

Republic of Korea bagged the name, the most innovative country in the world, by topping the Bloomberg Innovation Index (released on February 2021for the eighth consecutive year in Asia.[39] KIPO's role in expansion of IP financing to support Korean SMEs to overcome financial difficulties due to the Covid-19 outbreak, created awareness about the importance of obtaining IP and IP management to increase the IP value.[40] The result can be seen from World IP Indicators report 2020 which shows the rankings of China and Republic of Korea at the top list.

Developing robust mechanism for protection and enforcement of IP rights

In the 21st century, it is an undeniable fact that efficient, balanced, and well-designed IP system is a key lever to promote investment in innovation and growth. IP Rights are the principal means

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[39] *Korea, the World No.1 in Innovation – Why is Korea the most innovative Country in the world?* https://www.investkorea.org/upload/kotraexpress/2021/02/images/Why_Korea.pdf.

[40] KIPO, *IP Finance Transactions of South Korea Surpass KRW 2 Trillion,* https://www.kipo.go.kr/en/BoardApp/UEngBodApp?a=&c=1003&seq=1712&supp_cd=001&board_id=kiponews&cp=1&pg=1&npp=10&catmenu=ek06_01_01&sdate=&edate=&type=&bunryu=&tag_yn=&searchKey=1&searchVal=.

through which companies, creators and inventors generate funds on their investment in innovation and creativity.[41] But these crucial IP Rights are undermined and devalued on all fronts by infringement, whether by the counterfeiting, piracy or data theft, patent infringement etc., Lack of IP rights safety will create a chilling effect on the owners in commercially exploiting the IP. The better one protects their IP, the more the value of the IP will be.

An effective protection and enforcement IP mechanism guarantees ownership of the innovation. Private investors, whether equity or debt investors always aim to maximum return by keeping risks as low as possible. The risk of infringement, which may cause damage to the economic value of the asset always creates high risk of IP backed financing in the minds of the equity or debt investors. Any such unpredictability in protecting and enforcing IP and risk of infringements may diminish the attractiveness of the future value or receivables based on IP securitization. For example, piracy of copyrighted music or videos reduce the value of the IP involved.[42] Infringement of IP affects the value of the IP asset by making the

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[41] European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A balanced IP enforcement system responding to today's societal challenges*, COM(2017) 707, https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-707-F1-EN-MAIN-PART-1.PDF.

[42] Dashpuntsag Erdenechimeg, *Using IP as Collateral: An International Experience and a Mongolian Perspective*, WIPO (2016) https://www.itcilo.org/sites/default/files/inline-files/Erdenechimeg.pdf.

intangible asset unattractive for future royalty or cash flow or receivables based on securitization.

Effective IP valuation and management system

In IP securitization issues, the valuation and calculation of IP assets becomes critical. Calculation of value of the IP assets is necessary to determine the feasibility of securitization and to predict future cash flow. At practical level, what is hindering the promotion of IP backed financing is the IP asset valuation uncertainty. The difficulty of accurately measuring the value of the IP asset, results into challenges in analysing future cash flows, receivables, or royalties etc., the assessment of future cash flow or royalties are dependent upon the effective protection of IP rights from infringement.

The other challenge which is there in developing effective IP valuation and management system is the complex interdisciplinary laws associated with it such as, Intellectual property, corporate law, capital market, corporate finance and other areas. IP securitization involves not only the IP issues but also but the whole finance system. IP securitization requires convergence of IP professionals, corporate professionals, investment experts, legal practitioners, insurance companies, appraisers, market analysts, financial analysts etc.

Another important point in developing an effective IP valuation is to come out with a standard IP valuation model. There are different types of IP valuation models, and the results of each method will be different. It further adds on to the complexity of the situation and destabilizes the confidence in IP assets. The investors, creditors or financial institutions needs IP valuation experts who is convergent with all related laws, market analysis and investment matters.

There is no official standard of IP valuation nor any legislation to deal with the same and there is lack of IP valuation expert.

The strong the IP management, the more the value of the IP assets will grow. IP Asset Management (IPAM) is nothing but strengthening one's IP portfolio. IP managers are responsible for streamlining and automating the IP portfolio management. Effective IP management will give time to the company to make more strategic decisions, developing data integrity mechanisms. The efficient IP management will help the company in protecting the data, reduce risk and comply with global legislation, and will facilitate the connections between right people at right time through customized, collaborative workflows tailored to the needs of the company.

Conclusion

> *Intellectual Property is the new type of asset in the 21st century, which allows anyone with a new idea to acquire it.*
> *Park Wonjoo, KIPO Commissioner.*

Source[43]

IP though became an important asset in mergers and acquisition, the industries are still struggling to rely upon the IP assets in times of economic crisis, because of lack of IP backed financing system. The e-commerce industries, companies like Ola, Zomato etc., already proved that in near future, the companies may not need huge tangible assets to run the business. In 1980s, tangible assets accounted for 80% of company value and the rest was made up by intangibles, including IP. In 2021, the world is

[43] WIPO, *supra* note 38.

witnessing the reverse situation wherein 80% of the company's value is made up intangible assets.

The following table provides the ranking of total IP filing activity by origin in 2019 as provided in the World Intellectual Property Indicators 2020. According to the World IP Indicators 2020, The Republic of Korea (+4.3%), Singapore (+19.3%) and India (+7.1%) had a greater number of patent applications in 2019 than in 2018 and in contrast China (-9.2%) saw a decline.[44]

World Intellectual Property Indicators 2020

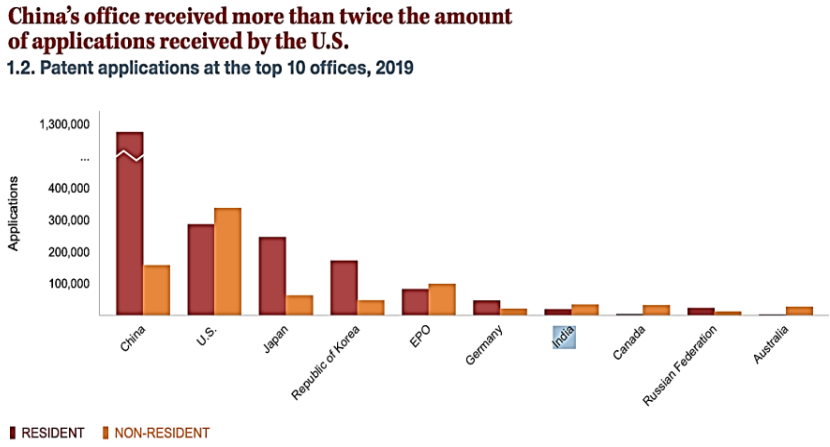
Ranking of total (Resident and Abroad) IP filing activity by origin, 2019

Country	Patents	Marks	Designs
	Rank		
China	1	1	1
Korea	4	10	3
India	11	13	5
Singapore	26	28	40

China and Korea are developing Growth based IP regime with an objective of promoting innovation, strengthening enforcement of IP, and developing standards in IP valuation and management to promote IP backed financing. These countries are moving towards knowledge economy and extracting the fruits of IP regime to boost economies. The following figure shows that China's IP office is receiving more than twice the number of applications received by the US. The reason behind the success

[44]WIPO, *supra* note 38.

of China and Korea is the robust IP enforcement mechanism and IP backed finance avenues.



For SMEs specifically, IP backed financing will be a boon in enhancing their business and innovation. The better IP backed financing environment will support SMEs to grow faster. It is proven fact that SMEs have the remarkable ability to contribute in nation's economic growth, can create job opportunities, drive the trend of innovation, and expand the tax base.[45] SMEs also increase the competition in the market and bring forth new ideas, skills, and innovation. In the present era, the SMEs are a large proportion of all businesses in every country and statistics shows that over 90% of SMEs improve the employment rate. Boosting SMEs by providing IP backed financing by supporting them in registered IP, managing and enforcing IP and providing support

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[45] *The impact of SMEs in the global economy*, https://www.iqualifyuk.com/library/business-management-section/the-impact-of-smes-in-the-global-economy/.

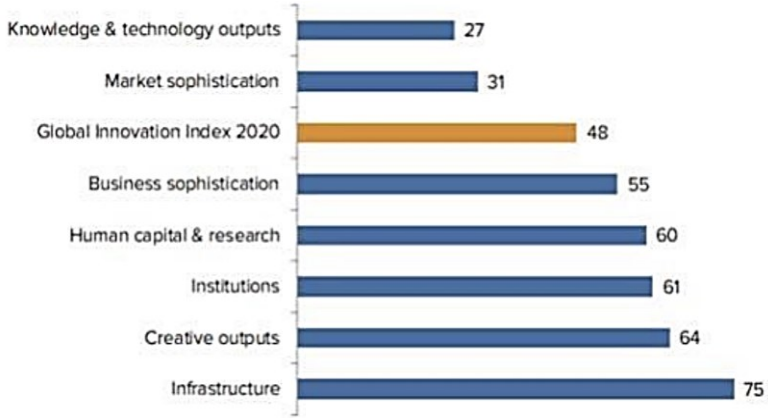
in valuating IP is the secret behind the success of China, Japan, Republic of Korea etc.,

The following are the initiatives taken up by the republic of Korea to promote public interest in IP backed financing by supporting it by robust government policies which includes the following:

- Apart from state-run banks, five major commercial banks started engaging IP-backed financing since 2019.
- A recovery institute specific to IPR collateral was established which was co-funded by Korean government and commercial banks. The duty of this institute is to purchase the defaulted IP assets from banks where it is used as collateral, for up to 50% value of the default amount and to make profit by liquidating or repossessing purchased IPRs through licensing or disposal.
- The Korean government provided reductions of up to 50% for the IP security fees of banks that hold collateral in the form of IP rights generated by SMEs.

India has a long way to go about IP backed financing. In India, IP activity is increasing day by day and developed itself as the third largest economy for start-ups in IP intensive industries like technology and biopharmaceuticals. In 2020, for the first time, India entered the top 50 innovating countries in the Global Innovation Index (GII). It improved its rank from 81 in 2015 to 48 in 2020. India ranked 1st in Central and South Asia and 3rd

amongst lower middle-income group economies.[46] The following are the areas and ranks which India bagged in the GII:



Government initiatives such as National IPR Policy, 2016 efforted to develop effective enforcement system and promoted IPR commercialization. The National IP Policy is aimed to enable valuation of IP assets by application of standard methods and guidelines and to facilitate use of IP as collateral and IP securitization by creating the enabling legislative, administrative and market framework. India declared 2011-2020 as decade of innovation and India Innovation Fund and Tata Capital Innovation Fund etc., were introduced to fund technology based entrepreneurial ventures. The IP backed financing regime yet to gain momentum in India and the *Canara Bank v. N. G.*

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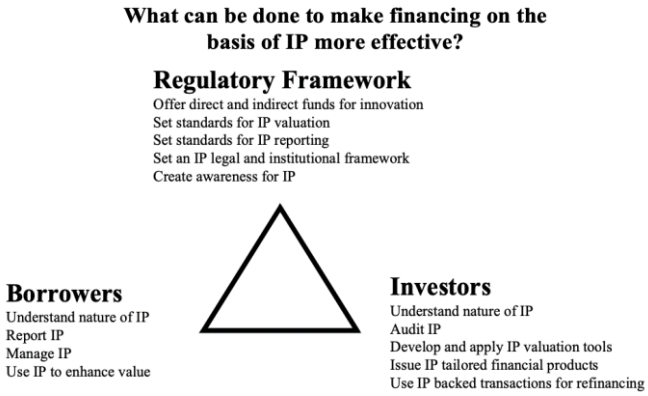
[46] 1 (1), IP India, *Educate, Innovate, Produce, Prosper and Develop*, IPR News Letter http://www.ipindia.gov.in/writereaddata/Portal/Images/pdf/APRIL_NEWSLETTERFinal.pdf.

Subbaraya Setty[47] case raised the debate of using IP as collateral to generate funding.

The following diagram will show what can be done to make financing based on IP more effective:



Source[48]

The following suggestions were made by the Parliamentary working committee to boost the IP backed financing:

- Amending Banking Regulation Act to include intangible assets under the definition of property
- Promoting the use of Securitization and Reconstruction of Financial Assets and Enforcement Security Interest Act, 2002 (SARFAESI Act) for widening the scope of IP backed financing
- Convergence of Indian Patent Office (IPO), Financial Institutions, banks etc., to create a green corridor for

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[47] *Id.*

[48] Roya Ghafele, *Financing Technology on the Basis of IP: The preliminary role of IP in developing technology markets in countries in transition* https://www.oecd.org/education/research/34616910.pdf.

industries to avail IP backed financing by introducing risk management framework through IP financing specialists, strengthening the management of collaterals, and closely monitoring the business of borrowers

- Infrastructural changes to be brought in for better financial reporting of intangible asset information to reduce information asymmetry between businesses and capital providers
- Provide valuation subsides to defray the cost of IP valuation
- Establishing uniform standards for IP valuation
- Strengthening the IP enforcement
- Conducting conferences, workshops, and awareness programmes by bringing all the stake holders of IP backed financing on to one single platform
- Accelerated IP grant procedures to be adopted.

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SEXUAL AUTONOMY OF WOMEN IN MARITAL LIFE: GAUGING THE GAP IN THE INDIAN CRIMINAL JUSTICE SYSTEM

Diptimoni Boruah*

Abstract

The struggle of women against the inhuman practices of men is a never-ending tale. As truly said, the destiny of a female beginning from the mother's womb till the graveyard depends on the mercy of men. It is a shocking reality that the patriarchal dominant Indian culture perceives women as an inferior being and as a property to be owned by her husband. This pathetic attitude has plagued the minds of many husbands and this is evident from the numerous cases of marital rape committed against their wives. It would not be an exaggeration to put that marriage is used as a license to marital rape by the husband. Marital rape indeed symbolizes a paradigm shift in the mode of sexual violence against women. Marital rape amounts to the violation of bodily integrity and sexual autonomy of women. Despite the fact that it defies the notion of right to live with dignity, the right to freely exercise sexual autonomy, and equal protection of the law, marital rape of women from the age of 18 years has not yet been criminalized. The Parliament failed to

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include the recent recommendation of Justice Verma Committee to criminalize marital rape in the Criminal Law Amendment Act of 2013 for reasons best known to them. In the light of these serious concerns, this paper is an endeavour to identify the cultural, socio-economic problems in the area of marital rape, to critically appraise the gap in the criminal justice system, to weigh the gravity of the rights jeopardized, and to develop a strategy to counter the problem. The discourse in this paper is primarily based on the major premise that marital rape is the product of patriarchal Indian culture and the legislators has failed to acknowledge this social reality in the Indian society.

Keywords: Marital Rape, Patriarchal Culture, Sexual Autonomy, Gender Injustice, Criminal Justice System

Introduction

In India, the sexual violence of rape outside the marriage is no longer surprising news to anyone since its occurrence is reported after every minute across the country. It has become almost like a normal affair which is forgotten sooner or later, and it's left to the fate of the victims themselves. Despite of the fact that the crime of rape still persists to haunt the Indian women, societal awareness and concern against this inhuman and uncivilized animal instinct of the masculinity is gradually growing. Unlike the situation prevalent in few decades ago, Indian women have managed up to a certain extent, to come forward to raise their voice against this offence of rape outside the marriage notwithstanding the social stigma they have to face. On the other hand, marital rape of a wife by her husband within the confines of her home is also not an uncommon experience to many women. In this later case, women hesitate to come forward to

report the matter of marital rape against their husband for fear of unpleasant consequences which they have to face from their husbands, in-laws, and the insensitive society. Their complaints are also not taken cognizance of by the Indian Penal Code 1860 (unlike the offence of rape outside the marriage)[49] if at all they manage to gather their courage to file a complaint to the police by going against the Indian cultural norm of bearing silently as a dutiful wife. The law makers expect our Indian women to silently bear the brunt of their abusive husbands even if they caused severe physical and mental injury by raping them. The husband is shielded against any criminal liability by the protective *Indian Penal Code* because of the illogical presumption that the wife had impliedly consented to sexual intercourse even against her will as a legally wedded wife in all circumstances. This differential treatment of rape within and outside the marriage does not commensurate to the requirement of equal protection of the right of women's sexual autonomy within and outside the marriage. This gap in the law calls for a serious scrutiny from a sociological and cultural view point since Indian women are forced by social and cultural circumstances to be vulnerable and submissive to the violence of male and they need special protection not only outside the marriage but also within the confinement of marital life. As against this background, the discussion is carried out by drawing out the major premise that *'marital rape is the product of patriarchal Indian culture' and the law need to take into account of this social reality*. It is made clear at the very outset

[49]The relevant legal provisions and authorities cited in this research paper are as it stands currently, September 2018.

that the term 'marital rape' which is defined in the later section of this paper is used only to connote marital rape of a wife.[50]

Objective

To appreciate the major premise as mentioned above, it is pertinent to identify the peculiar features of a society with a patriarchal attitude which affects the treatment towards the women folk. With this central question in mind, through this paper the author intends to portray the various factors inherent in the Indian cultural set up, which contribute in causing the problem of marital rape of women. After establishing the magnitude of marital rape and its causal factors the paper seeks to gauge the gap in the Indian criminal justice system which sanctions and legitimize the continuous transgression of the women's right to bodily integrity and sexual freedom. To fill the gap in the law, strategic measures enthused from the criminal justice system of some countries are suggested in the closing section of this paper. Thus, to put in a nutshell, this paper seeks to defend the contention that marital rape is the product of the patriarchal attitude in the Indian culture and it should be perceived as a paradigm shift in intruding into the sexual autonomy of women; and that the legislators has overlooked this social reality in the administration of criminal justice.

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[50] Kate Painter preferred to use the term 'wife rape' rather than using 'marital rape' or 'spousal rape' to emphasize on the fact that 'wife rape' would more appropriately connote rape committed solely by a husband against his wife within marriage and not *vice versa*. (Paper presented in the American Society of Criminology, 50th Anniversary Meeting, 20th -30th November, 1991, San Francisco).

Methodology Adopted and Plan of Discussion

This paper is developed through the employment of doctrinal research method based upon primary data like the text of the Constitution, statutes, international conventions, as well as secondary data covering existing research reports on the same issue, statistical data of sexual violence against women published by respective authorities, reported Indian and foreign case laws, law commission reports and online resources. For the purpose of discussion throughout the various sections of this paper, analytical, critical and comparative research approaches are applied. The discussion in the following section of this paper starts with a descriptive note on the patriarchal set-up of Indian society which ultimately affects the status of Indian women and the realization of their right to sexual autonomy within the confines of marital bond. A humble attempt is made in the next following section to critically appraise the existing legal framework on the issue of marital rape in India from a sociological perspective since cultural factor is taken as the major premise for this research. To throw more light on the shortcomings in the Indian criminal justice system, a comparative study is made by taking into account the criminal justice system developed in the United Kingdom in the area of marital rape. The final section of this paper interprets the analytical findings and attempts to develop suggestive measures for refining the criminal justice delivery system in India.

Marital Rape as a Product of Indian Patriarchal Culture

The Declaration on the *Elimination of Violence Against Women*, 1993 declares that violence against women is a manifestation of historically unequal power relations between male and women,

which have led to the domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. 'Discrimination against women' may be defined as a gender-based violence directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.[51]A manifestation of this violence against women is in the form of sexual violence.[52] Sexual offences against women can be multifaceted spanning from rape accompanied by murder, sexual harassment in workplace, outraging the modesty of woman, sexual assault to marital rape behind the veil of a sacred marriage. Throughout the history, women have never had the right to have control over their own bodies and they are still treated as merely sex objects in contemporary society.[53]The increasing sexual violence against women in a patriarchal society, within and outside the marriage, accounts for the masculinity sexual prowess of men which overpowers the femininity of women. The patriarchal value

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[51] Para 6, General Recommendation 19, UN COMMITTEE ON ELIMINATION OF DISCRIMINATION AGAINST WOMEN; also Art. 1 of the CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW).

[52] Other forms of violence against women are: assault, murder, female genital mutilation, trafficking and prostitution, sexual harassment at workplace, forced abortion, female foeticide and infanticide, forced marriage, honour killings, widowhood violence, etc. (see Sally Engle Merry, p. 21).

[53] R.N. Prasad, *Domestic Violence against Women and their Human Rights*, R.N. Prasad (ed.), HUMAN RIGHTS IN INDIA: ANALYTICAL PERSPECTIVES, New Delhi: Kanishka Publishers, 2011, pp. 132-137.

system of Indian society confers a male privilege to legitimize gender hierarchy within the family as well as outside the family and the use of various forms of violence against women. Patriarchal system is evidence of the very negation of democratic values because it treats women as a means and not as an end.[54]Femininity can be juxtaposed with submissiveness of women and the dominating role of men in a marital sexual relationship.[55] This submissiveness of femininity should not be read as qualifying the criteria of free consent[56] in all sexual encounters within the marriage. On many occasions, the wife is subjected to forced and violent sexual intercourse for many reasons which would be discussed shortly. In such situations, the wife either simply gives up without much resistance apprehending for the violent attack or repercussion which might follow from her husband in case should there be any protest from her side, or, she might gather full courage to fight back against the forced sexual demands her husband made but ultimately with no scope to rescue herself.[57] In either case, her right to sexual autonomy and personal dignity is jeopardized. It is necessary to

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[54] *Id*. R.N. Prasad at 133.

[55] For better appreciation of the link between marriage, sex and masculine power on the one hand and marital rape on the other hand; Aditya Shroff & Nicole Menezes, *Marital Rape as a Socio-Economic Offence: A Concept or a Misnome*r, Student Advocate, Vol. 6, available at www.manupatra.com.

[56] § 74 of the U.K.'s SEXUAL OFFENCES ACT of 2003 for the understanding of how 'consent' shall be termed as a free consent.

[57] It has been reported in various studies that women who have testified against their violent husbands on account of domestic assaults have retracted due to extreme fear of their life being in danger because of probable retribution from their husband. (Cretney and Davis, 1997 cited in Sue Lees*, Marital Rape and Marital Murde*r, (Quoting Clark 1987) available at http://www.bunker8.pwp.blueyonder.co.uk/Sue/wiferape.htm).

understand the various reasons or factors influencing marital rape which are normally deep rooted in the cultural set up of Indian society. The discussion which would now be carried out in this section of the paper is an attempt to throw light on the major premise of the research drawn up in the introductory part. Marital rape of women is known to be caused mainly due to patriarchal mindset of the Indian male. The superior complexity of men inherent in the Indian culture reflects in the manner they behave with their spouses. Even in today's contemporary society, men want consciously or subconsciously to establish dominance over their wives through various means including marital rape. Sometimes, the wife is sexually exploited against her free consent deliberately to inflict pain to punish her or to teach her a lesson for some or the other reason. On many occasions of non-fulfilment of dowry demands, women are found to be sexually abused by their husbands through violent sexual intercourse. Educationally and economically empowered women are often raped by selfish husbands who could not bear to see the progress of their spouses and in order to prove their dominance over her. If a wife resists against the sexual demands of her husband based on health considerations, the aggressive macho husband could not come in terms with his wife having her say in deciding her sexual autonomy. She would be raped for not being the so-called conservative 'ready to bear anything' Indian wife, who should not raise her voice against her husband to live up to the cultural expectation. An empirical study report established the fact that the offence of rape (including marital rape) is more to do with the use of sexuality to express issues of power and domination over female by male and not necessarily the sexual pleasure they seek to derive out of the act. For instance, Groth and Birnbaum (1979), American psychologists, who ran a treatment programme for

convicted rapists, concluded that rape should be considered as pseudo-sexual act, a pattern of sexual behaviour that is concerned more with status, hostility, control and dominance rather than with the sensual pleasure of sexual satisfaction.[58]It should further be noted that marital rape occurs at the expense of physical and mental health, sexual privacy and bodily integrity of women.

Legality of Marital Rape and Sexual Autonomy in India and U.K.: Critical Appraisal

Freedom, justice, dignity and equality for women were the rights postulated as essential for nation building in the nationalist consensus symbolized in the Fundamental Rights Resolution of the Indian National Congress, 1931 and which is guaranteed in the Indian Constitution.[59]This constitutional safeguard is hardly true in reality considering the fact that sexual exploitation of women in various forms plagues the post-modern Indian society. The term 'rape' can be defined as non-consensual penetration of the victim's vagina by the penetrator's penis.[60] Penetration can further be defined as the insertion by a male of his penis into the vagina or anus of a sexual partner.[61]Of late, the scope of the definition of rape has been widened in many countries. For

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[58] Sue Lees, *Marital Rape and Marital Murder*, (Quoting Clark 1987) available at http://www.bunker8.pwp.blueyonder.co.uk/Sue/wiferape.htm.
[59]Indu Agnihotri, Vina Mazumdar, *Changing Terms of Political Discourse: Women's Movement In India*, 1970s-1990s, ECONOMIC AND POLITICAL WEEKLY, Vol. 30, No. 29 (Jul 22, 1995), p. 1869 available at http://www.jstor.org/stable4403023.
[60]WHO, World Report on Violence and Health, 147 (Etienne G. Krug, et al. eds. 2002) available at http://whqlipdoc.who.int/publications/2002/9241545615_chapter6_eng.pdf.
[61]Shorter Oxford English Dictionary 2145 (5thedn. 2002).

instance, the U.K.'s *Sexual Offences Act* of 2003[62] (which repeals major provisions of the previous *Sexual Offences Act* of 1956)[63] defines 'rape' under section 1 as the intentional penal penetration into the vagina, anus or mouth[64] of another person, without the victim's consent and without the reasonable believe of having consent.[65] It may be noted that 'rape' was previously defined in a narrow manner under the *Sexual Offences Act* of 1956 (as was amended in 1976) in conjunction with the *Criminal Justice and Public Order Act* 1994 by covering only the aspect of anal[66] and vaginal non-consensual sexual intercourse.[67] Marital rape is thus, a husband's sexual intercourse with his wife by force or without

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[62] The Sexual Offences Act of 2003 is extended to the territory of England, Wales, Scotland and N. Ireland.

[63] However, § 33 to 37 of the Sexual Offences Act of 1956 still survives.

[64] 'Penal penetration' into the mouth is an offence which can be committed only by men though a woman may be convicted of aiding and abetting rape. (Nicola Padfield, CRIMINAL LAW, New York: Oxford University Press, 7thedn. 2010, p.255.)

[65] For additional information on the manner and circumstances in which lack of consent in sexual intercourse may be presumed, see §75 and § 76 of the Sexual Offences Act of 2003. Further, a separate offence of 'assault by penetration' is created under section of the Act of 2003 by defining it as the penetration with any object to the vagina or anus. This new section is intended to take cognizance of non-consensual vaginal or anal penetration with any objects other than the penis.

[66] 'Anal rape' would also imply male rape. (Nicola Padfield, CRIMINAL LAW, New York: Oxford University Press, 7thedn. 2010, p.255.). Further, see section 142 of the Criminal Justice and Public Order Act 1994 which introduced the offence of anal rape.

[67] Prior to 1976, though the offence of rape was given a statutory basis, but no definition was statutorily defined since the Sexual Offences Act of 1956 simply provided that it is a felony for a man to rape a woman. Further § 1(2) provided that a man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape. (David Ormerod, CRIMINAL LAW, New York: Oxford university Press, 12thEdn. 2008, p. 694.)

her consent.[68] The Act of 2003 under section 79 (2) provides that penetration is a continuing act from entry to withdrawal. Thus, if at any stage during the intercourse the other party withdraws his or her consent, the act becomes rape.[69] According to Rape, Abuse & Incest National Network (RAINN), the largest anti-sexual violence organization in the United States of America (USA), marital rape is a "… form of intimate partner violence, that is an abuse of power by which one spouse attempts to establish dominance and control over the other". Research shows that it can be equally, if not more, emotionally and physically traumatizing than rape by a stranger.[70] The feminists' movement shows a strike reaction against the distinction drawn between rape within and outside of the marriage.[71] Marital rape has been criminalized in 104 nations out of which in 32 countries it has been made a separate specific criminal offence while the remaining countries covers it within the ambit of general rape provision.[72] The reason as to why the marital rape immunity law

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[68]SHORTER OXFORD DICTIONARY 1374.

[69] Nicola Padfield, CRIMINAL LAW, NEW YORK: Oxford University Press, 7thedn. 2010, p.255. For detail understanding of the implications of withdrawal of consent during the act of intercourse see Kaitamaki v. R (1985). Further see, the Law Commission Report ON CONSENT IN SEX OFFENCES (2002).

[70]Ruth Olurounbi, *Spousal rape and the Need for Constitution Amendment*, Available at http://www.tribune.com.ng/news2013/index.php/en/features2/item/21100-spousal-rape-and-the-need-for-constitution-amendment.html.

[71] Under the Nigerian law, § 282 of the Penal Code and § 357 of the Criminal Procedure Code 1973 exempts the husband from criminal liability of committing marital rape if the wife has attained puberty.

[72] See UNITED NATIONS SECRETARY GENERAL, REPORT of the Secretary General*, IN-DEPTH STUDY ON ALL FORMS OF VIOLENCE AGAINST WOMEN*, U.N. Doc./A/61/122/Add. (Jul 6, 2006); In a landmark

still survives in other jurisdictions of the globe is noted by some authors that such abolition would challenge the orthodox view of women as possessions and passive objects of their husband's desires,[73] or to preserve the survival of family institution which is dependent on the bonding between the husband and wife. In India, the definition of rape[74] does not extend to 'marital rape' and anomalies exists between the *Child Marriage Restraint Act* and the *Indian Penal Code* in that consent is not required for sexual intercourse in marriage before the age of eighteen.[75] The exception to section 375 of the IPC exempts 'marital rape' from the purview of criminalization. It says that sexual intercourse by a man with his wife, the wife not being under 15 years of age, is not a rape. It thus, implies that sexual intercourse by the husband with his wife who is below 15 years of age shall amount to rape regardless of whether consent was taken or not. On the other hand, sexual intercourse by a husband with his wife who is 15 years of age or above shall not amount to rape regardless of the fact that consent was not given by the wife. 'Consent' herein signifies an active will in the mind of a person to permit the doing

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precedent, the supreme Court of Korea on May 16, 2013 for the first time criminalize marital rape (available at http://www.hani.co.kr/arti/english_edition/e_national/587926.html).

[73] This contention was put forth by Naffine, an Australian sociologist in 1994 and was referred to by Sue Lees, *Marital Rape and Marital Murder*, available at http://www.bunker8.pwp.blueyonder.co.uk/Sue/wiferape.htm.

[74] Rape is defined in § 375 as; A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling-against her will; without her consent; with her consent but taken by putting her or any person in whom she is interested in fear of death; with her consent taken by false impersonation as her husband; with her consent given with an unsound mind or under the condition of intoxication; with or without her consent when she is under sixteen year of age.

[75] *Supra* Indu Agnihotri, at 1871.

of the act and knowledge of what is to be done. Consent supposes essentially three components: a physical power to act, a mental power of acting, and a free and serious use of them.[76] This 'no culpability rule' of marital rape is made on account of the matrimonial consent the wife has given to her husband which deprives her of the right to retract from her earlier consent to marital sexual intercourse with her husband, no matter what may come.[77] Another justification relied upon to support decriminalization of marital rape is the necessity of preserving family institution by ruling out the possibility of fabricated and motivated complaints of rape by wife against her husband. Further, the wife is treated as part and parcel of the husband in the eye of law. Kalpana Kannabiran argues that granting the husband an absolute immunity solely on the basis of matrimonial consent was against the tenets of gender-neutrality.[78] Another paradoxical discrepancy in the IPC is the differentiation created between the punishment provided for the offence of rape committed by a husband to his wife under the age of 12 years and the punishment in the case of a wife in the age group of 12 to 14 years of age.[79] This indicates the anomaly existing between the

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[76] Uday v. State of Karnataka (2003) 4 SCC 46. Furthermore, section 90 of the IPC provides that a consent is not a consent as is intended by any section of this Code, if the consent is given under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

[77] Empress v. Hurree Mohan Mythee, (1890) 18 Cal. 49; Sakshi v. Union of India AIR 2004 S.C. 3566.

[78] Pallavi Arora, *Proposals to Reform the Law Pertaining to Sexual Offences in India,* http://docs.manupatra.in/newsline/articles/Upload/62E06DEA-C615-4356-AA69-666E5E83F79C.pdf

[79] In the former case, the punishment shall be rigorous imprisonment for not less than ten years but which may extend to life imprisonment and shall also

IPC and the *Child Marriage Restraint Act*. While the later statute provides 18 years as the minimum legal age of female for valid marriage, the Penal Code contradicts it by authorizing the husband non-consensual sexual intercourse with his wife who is not below the age of 15 years of age, thereby, implying that non-consensual sexual intercourse with the wife (a minor) who is even below 18 years is licensed if she is not below 15 years. Though marital rape of a wife of 15 years of age and above has been kept beyond the bounds of criminality, but sanction in the form of civil remedy has been provided under the *Protection of Women from Domestic Violence Act*, 2005.[80] As opposed to the 42nd Law Commission of India report, the 84th Law Commission preferred to retain the originality of section 375 with the exception as to marital rape intact though it seeks to increase the legal age of marital sex to 18 years of age to make it in consonant to the minimum age requirement of 18 years for marriage by females.[81] Not surprisingly, the 172nd Law Commission Report[82] as well as the latest *Criminal Law Amendment Act* of 2013 maintained the *status quo* of section 375 by not recognizing marital rape as a culpable offence. The Amendment Act of 2013 was contrary to the recommendation made by the Justice Verma Committee to criminalize marital rape. However, section 376A

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be liable to fine, whereas in the latter case, the punishment may be imprisonment up to two years or with fine or with both. See § 376 of IPC, 1860.

[80] See § 3 of the Protection of Women on Domestic Violence Act, 2005 (India).

[81] See the 84th Law Commission of India Report on RAPE AND ALLIED OFFENCES: SOME QUESTIONS OF SUBSTANTIVE LAW, PROCEDURE AND EVIDENCE, 1980.

[82] The 172nd Law Commission of India report on

gives minimal respite to a wife who is undergoing a judicial separation,[83] against forced sexual intercourse by her husband by providing punishment with imprisonment of either description which may extend to two years and along with fine. A mere decree of judicial separation does not dissolve a valid marriage, as is in the case of a divorce. Nevertheless, her conjugal rights and those of her husband during the period of judicial separation remain suspended. For this reason, even though marital rape is not recognized as a crime in India, forcible sexual intercourse during judicial separation is a criminal offence.[84] This remedial safeguard is however not sufficient to protect the dignity and sexual freedom of women. The demarcation drawn between 'rape outside the marriage' and 'marital rape' also points to another popular myth that marital rape is perceived as a less serious and less traumatic than rape in other cases. This myth has been demolished by an empirical finding reported in 1990 in the United States where it was found that out of the 930 women randomly interviewed, 52% of the women who were raped by their husbands and 39% of the women raped by strangers

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[83] § 10 of the *Hindu Marriage Act* of 1955 provides for petition by either of the spouse for judicial separation based on any of the grounds specified in § 13(1) and in case of a wife also on the grounds as specified in § 13(2). Further, § 22 of the Divorce Act of 1869 allows either the husband or the wife to obtain a decree of judicial separation on the grounds of adultery, or cruelty, or desertion for two years or above. Please note that the word "India' as was used in the Indian Divorce Act of 1869 has been omitted by the *Indian Divorce (Amendment) Act* of 2001.

[84] 'Know Your Rights: Divorce Laws' available at http://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&sqi=2&ved=0CC4QFjAB&url=http%3A%2F%2Fwww.manushi-india.org%2Fpdfs_issues%2FPDF%2520140%2F03%2520kyr%252024-25.pdf&ei=3_aBUuvNKIaMrQeF74GADw&usg=AFQjCNFUOgcxNYJZzLOVW0cNi78VOmKrCw&bvm=bv.56146854,d.bmk.

suffered traumatic long-term effects.[85] Deviating from the orthodox notion of irrevocable implied consent of the wife to give herself unto the dominance of her husband, many nations have undertook to reform their municipal criminal justice system. Mention may be made here for instance, of the UK Criminal law which now has criminalized marital rape in all cases even though previously the same position as in India was maintained based upon the same rationale of implied consent of the wife.[86] The unjustified notion that 'women agree to sexual intercourse on marriage and cannot retract that consent' is a principle established in the U.K. by Chief Justice Mathew Hale in 1736, but may be traced back to St. Augustine's time and even before. The observations made by Chief justice Hale may be quoted as: *"But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract"*.[87] By virtue of an

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[85] Russell (1990), as well as see the findings of the American researchers – Koss and Harvey (1991), as cited in Sue Lees, *Marital Rape and Marital Murder*, available at http://www.bunker8.pwp.blueyonder.co.uk /Sue/wiferape.htm.

[86] See the Criminal Justice and Public Order Act, 1994; In R v. R [1992] 1 A.C. 599, it was held by the House of Lords that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband, and therefore, a husband could be convicted of rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse.

[87] The male prerogatives over the wife in English Common law evolved around the conviction that a wife became her husband's physical and sexual property as part and parcel of the marriage contract. (Kate Painter, *Wife rape in the United Kingdom*, Paper presented in the American Society of Criminology, 50th Anniversary Meeting, 20th -30th November, 1991, San Francisco, available at

Amendment in 1976, the *Sexual Offences Act* of 1956 in the U.K. provided that a man commits rape if he has unlawful sexual intercourse with a woman whom at the time of the intercourse does not consent to it. The 1956 Act also clarified that the expression 'unlawful' sexual intercourse had been used to connote intercourse only outside marriage. In this manner, the Parliament by using the word 'unlawful' it intended to retain the marital immunity.[88]This outdated proposition however is no longer followed in subsequent judicial precedents as well as by virtue of the United Kingdom's *Sexual offences Act* of 2003.[89] Lord Keith in *R case* observed that section 1(1) of the *Sexual Offences Act* 1976 presents no obstacle in declaring that in modern times the supposed marital rape exception in rape forms no part of the law in England.[90] A key notable feature observed in the *Sexual Offences Act* of 2003 is the inclusion of the definition of 'consent' as agreeing by a person by choice, and having the freedom and capacity to make that choice.[91] This provision nullifies the

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www.crim.cam.ac.uk%2Fpeople%2Facademic_research%2Fkate_painter%2Fwiferape.pdf&ei=k_iFUpy5JcGOrQfC3YC4DA&usg=AFQjCNGXHBat6sW361VDIBmgZdjc_nyZgQ&bvm=bv.56643336,d.bmk).

[88]Sue Lees, Marital Rape and Marital Murder, (Quoting Clark 1987) available at http://www.bunker8.pwp.blueyonder.co.uk/Sue/wiferape.htm. Also see, Law Commission Report 1992; Clarence (1888) 22 QBD at 51.

[89] See generally, R v. Clarke [1949]2 ALL E.R. 448; R v. O'Brien [1974] 3 ALL E.R. 663; R v. C [1991] Crim LR 60.

[90]R v. R (1991). In C [2005] Crim LR, the Court of Appeal upheld the conviction of marital rape by the defendant of his wife. For more information on prosecutions for marital rape, refer David Ormerod, CRIMINAL LAW, New York: Oxford university Press, 12thEdn. 2008, pp. 701-702.

[90]SHORTER OXFORD DICTIONARY 1374.

[91] See § 74 of *the* Sexual Offences Act of 2003.

previous presumption of 'implied consent' which put the wife in a disadvantage position.

Another point which can be mooted against the retention of marital rape exemption in the IPC is the violation of right to bodily integrity or self-determination of a competent individual. Every individual has the right to bodily integrity or self-autonomy or liberty to control over one's own body or to determine as to what should be done with one's own body. The right to self-autonomy forms the basic core of Immanuel Kant's principle of liberty. This right is one of the most basic human rights recognized in various international instruments.[92] This liberty is the superstructure based upon which the right to sexual privacy of an individual is erected. The right to privacy is a right to be let alone and it is built on the premise of an inviolate personality and personal immunity springing from the instinct of nature.[93] Thus, coercive sexual intercourse by the husband to his wife without her express or implied consent amounts to abuse of her right to privacy and bodily integrity.[94] The right to privacy was described by the Hon'ble Court as a right based on natural modesty and human morality and as the birth right of a human being[95]and is available also to a woman of easy virtue.[96] This right is implicit in the protection of right to life and personal

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[92] See for instance article of the Universal Declaration on Human Rights, 1948; the International Convention on Civil and Political Rights, 1966, etc.
[93]*Supra* Sunil Deshta and Kirandeshta, p.105.
[94] The right to bodily integrity is corollary to the right to self-autonomy of an individual which is a notion espoused by Immanuel Kant.
[95]Nihal Chand v. Bhagwan Dei, AIR 1935 All. 1002.
[96]Maharashtra v. Madhulkar Narain AIR 1991 SC 207.

liberty under Article 21 of the Constitution of India.[97] In this context, an author writes that the law on rape gradually evolved not with the purpose to protect the bodily integrity of women *per se* but to protect the patriarchal ownership of her sexuality. Since the law gives male power over the wives an institutional legitimacy, it is believed that it is not possible for a husband to rape his wife.[98] Further, it can be argued that forceful sexual intercourse at the whims and fancies of the husband devoid of any respect of the wife's decision strikes at the very core of an individual's right to dignity protected under Article 21 of the Indian Constitution. The failure to respect the decision or wishes of the wife by licensing full freedom to the husband to sexually exploit her, tantamount to wilful neglect of her right to existence as an independent individual who should enjoy equal status at par with her husband in the eye of law. The right of an individual to have an independent identity and an equal status with dignity is inherent in the fundamental right to life and right to equality guaranteed under Articles 21 and 14 of the Constitution respectively. Rape weakens a person's dignity and their fundamental rights to safety, and the freedom of choice which are *sine qua non* for the enjoyment of the right to a meaningful life. A relevant case ruling to this effect was made in *Trammel* v. *U.S.A.* when the U.S. Supreme Court observed that a woman in a modern society cannot be treated as merely a chattel or

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[97]For detail information on the judicial response to the concept of right to privacy see generally, *Govind* v. *State of M.P.*, AIR 1975 SC 1378; *R. Rajagopal* v. *State of Tamil Nadu*, AIR 1995 SC 264; *Mr. 'X'* v. *Hospital 'Z'*, AIR 1999 SC 495.

[98]Sue Lees, *Marital Rape and Marital Murder*, (Quoting Clark 1987) available at http://www.bunker8.pwp.blueyonder.co.uk/Sue/wiferape.htm.

demeaned by denial of a separate legal entity and the dignity associate with recognition as a whole human being.[99] Apart from this, the intrusion by the husband into the sexual freedom of women through coercive means and by inflicting physical and mental injury to the wife could also amount to the tort of sexual assault and battery under the common law. Such coercive force used against the will of the wife amounts to the breach of her personal liberty protected under Article 21 of the Indian Constitution. The right to personal liberty cannot be interpreted in a narrow and pedantic manner but it includes within its fold all those rights necessary for the development of human personality in its fullest extent and happy life, and it shall include right against the use of any coercive force against the person of any individual.[100]

The stark contrast between the Indian male ego and the dominance a husband exercise over his wife in every aspect and on the contrary, the frail and ever submissive nature of Indian women cannot be overlooked at by the state in adopting its legislative policy. Shouldn't it be the constitutional duty of the state to realize this cultural and social reality which defines Indian patriarchal society while formulating law? When a Statute by its express provision sanctions to the husband to employ coercive means to satisfy his sexual gratification without any consideration of the mental and physical trauma the wife would undergo, it patently reflects the legislative will tinted with

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[99]445 U.S. 40 (1980).

[100] Sunil Deshta and Kirandeshta, FUNDAMENTAL HUMAN RIGHTS: THE RIGHT TO LIFE AND PERSONAL LIBERTY, New Delhi: Deep & Deep Publications, 2007, pp. 102-103.

patriarchal shades. This legislative will or the command of the sovereign in John Austin's diction can be aptly put as the 'command of the patriarchal attitude' against the vulnerable and inferior women class. Even if one presumes that preservation of family institution is the rationale applied by the state in exempting marital rape from the purview of rape, yet, this logic could not be sustained in the light of the reformed criminal justice administration initiated by many countries by criminalizing the offence of marital rape. If the state prefers to maintain this rationale of preservation of family institution, with due respect, the state may be asked if in those nations which have criminalized marital rape, has it started witnessing the downfall of family institution? If in those nations the possibility of rape of the wife within the confinement of marriage is apprehended and thus, consequent upon it penal provisions are made in that regard, why such similar approach could not be made in India? Further, if one compares the status of married women as to their spouse in some of the developed nations which have criminalized marital rape with that of the status of women in India, it would not be a shocking reality that Indian women enjoy much lower status. This significant comparatively lower status of Indian women is relevant if one would have to stick to the argument that 'by criminalizing marital rape, it would afford more scope to the wife to make false allegations of marital rape against her husband thereby shaking the stability of a marriage institution.' The rationale for its relevance is that if in a society like UK, where women are comparatively much bolder and enjoys almost equal status to that of their male counterpart, and there is culpability of marital rape then, by application of the logic of 'probability of misuse' it follows that there is much higher possibility of this penal provision being misused by these high spirited women in

U.K. In other sense, it can be put that if U.K. can sustain the preservation of family institution in spite of its high probability of misusing the penal provision of marital rape by women, what is stopping the Indian government from reforming the aged old sicken Penal Code? The pitifully submissive Indian wives imprisoned by male dominance and conservative society dogma would hardly afford to find the courage to come forward even to file a genuine case of marital rape against her husband as compared to those highly liberated women in the U.K. My argument does not however, negate the possibility of misusing the law if at all 'marital rape' is legalized by the state. But then again based on the ground of probable slippery slope, the growth of law through reformation cannot be stagnated. Further, if genuine cases of marital rape are to be ignored on the grounds of not wanting to invade into the privacy of domestic matters and to preserve family institution, which could not be sustained as discussed in the previous section, the only logical inference which could be drawn from this is that it is the insecurity of the male ego who fears to entrust to the women the weapon of 'security to their dignity' and 'sexual autonomy' through the recognition of marital rape as a culpable offence which is stopping from criminalizing marital rape.

Though admitted that tradition in India plays a crucial role in moulding the minds of the people and subsequently in the way how patriarchal society treats the women, but tradition is no good excuse for the failure to protect the human rights of women. Tradition can neither be recreated retrospectively nor can it be disowned overnight, nevertheless, it is possible to unearth the best values in the tradition which promotes the protection of equal rights of men and women, which has been buried deep by

the vested interests.[101]Many prominent Indian leaders like Swami Dayananda, Swami Vivekananda, Raja Rammohan Roy, Mahatma Gandhi, etc. were against the manipulation of tradition and denounced the practice of subordination of women in the society. In all ancient literatures known to Indian history like the Vedas, Agamas, Brahmanas, Upanishads, Smritis, Puranas, Dharmasastra, etc, the protection of human rights of all human beings is very much evident.[102]

Sexual rights' being fundamental rights in the area of sexuality would be understood to guard human sexual dignity, as manifestations of a basic principle of sexual autonomy and sexual self-determination. This basic right to sexual determination does encompass two sides: the right to engage in wanted sexuality and the right to be free and protected from unwanted sexuality, sexual abuse and sexual violence. The protection of both these rights is essential for the full recognition and respect of human sexual dignity.[103] The recognition of these rights is also corollary to the recognition of the right to respect for private life. The right to

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[101]Mahendra Singh, *Human Rights In The Indian Tradition-Search For An Alternative Model* in MahendraSingh, Helmut Goerlich, Michael Von Hauff (eds.), HUMAN RIGHTS AND BASIC NEEDS: THEORY AND PRACTICE, Delhi: Universal Law Publishing Co., 2008, p. 33. (Emphasis supplied).

[102]Mahendra Singh, pp. 3-45. *Contra*, the author in R.N. Prasad, *Domestic Violence against Women and their Human Rights*, pp. 133-134, writes that the subjugation of women to the male dominance had the sanction of Manusmrithi and other Hindu mythologies, by providing the ground rules of how women should behave with her husband. For instance, the author mentions about the duty of a wife as spelt out in Manusmrithi that 'a wife should work for him like a servant, and satisfy him like a prostitute in the bedroom.'

[103] Art. 8 of the ECHR obligates the states to provide adequate protection against sexual abuse and violence.

respect for private life further covers the right to physical and moral integrity and security.[104]

Acknowledging the existence of violence against women in various dimensions in marital sphere, the *Protection of Women from Domestic Violence Act* 2005 has been enacted by the Indian Parliament with a purpose to give full recognition and protection of human rights of women in domestic sphere. This affirmative action taken up by the state is in pursuant to the power conferred to it under Article 15(3) to formulate special laws for the protection of women. The step also promotes the equality notion of gender justice expressly guaranteed in Article 14. Domestic violence is a violation of the basic right to live with dignity safeguarded in Article 21. The obligation on the part of the state to enforce Article 21 in letter and spirit demands not only the enforcement of 'procedural due process' but also 'substantive due processes.[105] Section 3 of the PWDVA defines 'domestic violence' as any act, omission or commission which harms or injures or endangers the health, safety, life or limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing *inter alia* physical abuse and sexual abuse. Explanation I (ii) to section 3 provides that 'sexual abuse'

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[104] Helmut Graupner, *Sexual Autonomy: A Human Rights Issue', Australian society for sex Research*, A Keynote lecture delivered at the 8th International Conference of the International Association for the Treatment of Sex Offenders (IATSO), "Sex Offending is Everybody's Business, Athens, 6th -9th October, 2004.(Available at www.graupner.at%2Fdocuments%2FIATSO-SexualAutonomy.pdf&ei=NO6FUp7dDImPrges-oGABw&usg=AFQjCNF_DPv42xIzAIzswHWZ-d-UpgovlQ&bvm=bv.56643336,d.bmk).

[105] Maneka Gandhi v. Union of India AIR 1978 SC 597.

includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman. A 'forced sexual intercourse' is an apt instance of sexual abuse within the meaning of the foregoing explanation.[106]

There is no dispute with the fact that marital rape is an act against the general moral conscience. But the question is should every immoral act be legally recognized as a crime? The relation between law and morality can be established within the confined limits of those definite overt acts or omissions, capable of being distinctly proved, which inflict definite evils, either on specific persons, or on the community at large. In regard to acts like murder, rape, arson, robbery, etc, Law and morality equally condemns it as wrongful acts.[107] Since the criminal law is erected upon the principle that it is morally right to hate criminals, it justifies that sentiment by inflicting upon criminal punishments which express it,[108] and so, why shouldn't the act of rape within the confines of marital relationship be given a legal sanction as a criminal offence. Why should a differential treatment be given between marital rape and rape outside marital bonds?

The criminal process is undisputedly a palpable area for the notion of human rights to play a fundamental role. It is the state authority which at times poses as the greatest threat to human rights in the area of criminal justice process since it is the state alone which determines the criminality of an action through its

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[106] Indira Jaising (ed.), Handbook on law of Domestic Violence, Haryana: LexisNexis ButterworthsWadhwa, 2009, p. 15.
[107], PSA Pillai's CRIMINAL LAW, Haryana: LexisNexis ButterworthsWadhwa Nagpur, 11th edn., 2012, pp. 7-8.
[108] K I Vibhute, p. 8.

legislative will. The fact that the state denies to recognize marital rape of women as violation of the human rights of women shows a positivists attitude. To the positivists rights can only be justified by rules formulated by the sovereign authority (state) and it is conceptually wrong to argue that we should change or retain certain rules. Since the essence of human rights is premised not on posited rules but on morally significant aspects of human nature, the denial of the state to recognize and to protect the right to bodily integrity, dignity and privacy of women within the confines of marital relationship is not justifiable.[109]

Conclusion

Since gender violence is deeply embedded in systems of kinship, religion, warfare and nationalism, its prevention requires major social changes in communities, families, and nations.[110]

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[109] For a clearer understanding of the interplay between criminal process and human rights, see chapter 7 (Human Rights and the Criminal Process) in Asima Sahu, HUMAN RIGHTS VIOLATIONS AND THE *Law*, Jaipur: Pointer Publishers, 2007, pp. 260-289.

[110] Sally Engle Merry, *Human Rights & Gender Violence: Translating International law Into Local Justice*, New Delhi: Oxford University Press, 2009, p. 2.

FAKE NEWS: DESECRATING THE FUNDAMENTAL RIGHTS AND COSTING HUMAN LIVES

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Abstract

An informed individual is able to make informed choices vital for his economic, social, physical and mental wellbeing. Our Constitution has also underscored the relevance of information in an individual's life and thus, right to information is being considered as one of the integral part of freedom of speech and expression. However, this right is vehemently desecrated by the vice of fake news. Fake news is not only jeopardising fundamental rights of individuals but is also giving lethal blow to human lives. Whether it is infodemic caused during Covid-19 pandemic or communal discord, mob-lynching incidents or vaccine hesitancy, all have emerged on the hotbed of fake news. Even though fake news has always been existing but it has soared to a new high in recent times with advancement of information technology. Social media platforms are adding fuel to the fire of fake news. Moreover, fake news is escaping the clutches of law pleading the defence of free speech. However, it is a pertinent question whether a speech actually remains free when it is viced

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by mis-information or dis-information? And doesn't the fake news desecrates an individual's right to information as well? The paper aims to shed light on these critical aspects and endeavours to underline how fake news has been deepening its roots in India and is seeding communal tensions, inducing information warfare, strangulating free speech and trampling right to information. Fake news can act as a new lethal weapon that can be used to strike hard on Indian democracy and thus, this menace needs to be curbed as early as possible.

Keywords: Fake news, Free Speech, Socio-Legal implication of fake news, social media, Indian democracy

Introduction

The 21st century which was believed to be an era of free flow of information bringing more transparency and accountability in systems, turned out to be a century of information warfare due to rampant surge of fake news. It could not have been more evident than today when along with Covid-19 pandemic, the people have also succumbed to 'infodemic'. It wouldn't be an exaggeration to state that many lives were lost due to fake news during Covid-19 period. Similarly, the instances of mob-lynching, communal riots present before us the appalling ramifications of fake news. It is, therefore, indispensable to understand what this 'fake news' is and how is it being disseminated to masses and the material injury it causes to fundamental rights of individuals and therefore, of society. The paper aims to map the terrain of this menace of fake news especially in India and endeavours to understand how it prey the innocent people and what implications it has over individuals' fundamental rights. Part I of the paper is the introduction elucidating the concept of fake news, Part II

elaborated upon the reasons that have contributed to surge in fake news, Part III enshrines the types of fake news which got recently disseminated, Part IV of the paper endeavours to examine the implications of fake news over fundamental rights and dichotomy it has arisen between freedom of speech and other rights and Part V is the Conclusion.

Fake News: The Concept

Fake News is much-talked about phenomenon today. The magnanimity of the phenomenon can be simply understood from the point that Collins dictionary rated 'Fake News' as the word of the year in 2017. It has been defined as "false, often sensational information disseminated under the guise of news reporting." However, it is essential to note that it is not a new phenomenon. It has always existed in society in form of propaganda, disinformation, misinformation, mal-information, lies, deceptions etc. But due to increase in access to internet and advancement in the field of Information Technology, there has been proliferation of fake news. The mushrooming of social media platforms has added to this menace further. There is so much information over flowing that the thin line between the news and fake news has blurred. What is concerning in this scenario is the social impact it is having over people. People are becoming victims of this fake news and the purveyors behind it are living in their safe havens.

While fake news is an old phenomenon, it becomes a buzzword after the 2016 US elections. Fake news is widely accepted as false information, although politicians often use it to discredit investigative journalistic reports. Scholars hardly come to a consensus for an acceptable definition of fake news and end up

defining it in many ways. For example, Allcott and Gentzkow stated that fake news is "intentionally and verifiably false" that could mislead people. In contrast, Jaster and Lanius argued that fake news may not necessarily be false and it can mislead people even presenting true information. On the other hand, Muigai defined fake news as false or fabricated information that misleads people, and it can be both deliberate and accidental.[1]

While understanding this notion of fake news one comes across various terms such as misinformation, disinformation and mal-information. Mis-information is sharing of false information but intention or knowledge to deceive is absent. Whereas Dis-information is sharing of false information with intention to deceive public and spreading dishonest information. And Mal-information includes sharing of genuine information with the intention to harm an individual such as in the case of hate speech or for harassing an individual.

The propagation of fake news, mis-information and hoaxes has proven to be a catastrophe for Indian society. All these fake news disseminated through print, graphics and social media has altered the social landscape of nation. Incidents of mob lynching, mob violence, defamation, and riots are intended or unintended consequences of fake news and pose a perilous threat to society. It has been found that most of the fake news has been disseminated to spread communal discord. It has also been found that fake news disseminated through WhatsApp has resulted in

[1] Md. Sayeed Al-Zaman, *COVID-19-Related Social Media Fake News in India,* 2 JOURNALISM AND MEDIA, 100–114 (2021).

murders and lynching. Thus, the social cost of fake news which society is paying is evident from these instances.

Rampant Surge in Fake News

With mushrooming of online media platforms and social media platforms, the instances of fake news have escalated to an unprecedented level. The platforms are brimming with news and mostly with fake news. People are overwhelmed with the information they receive or read over various platforms which takes a vicious turn when people believe in false information disseminated only to mislead them. The consumption of fake news is perhaps more because it has term 'news' attached to it and people consider that this term 'news' tantamount to credibility and authenticity. In a country like India where literacy level is low coupled with media illiteracy[2], it has turned this problem of fake news into a menace. This is evident from the series of incidents where believing on a piece of false information circulated on WhatsApp people resorted to heinous crime like mob-lynching. Another contributing factor towards the surge in fake news is shift in individual's habit of listening news on television to reading or listening on social media. The television sets and mainstream media has largely been substituted by social media platforms such as Facebook, Twitter, YouTube for news access. And appallingly people consume what is being served to them on these platforms without thinking of a second of its truth before they lay their belief on it and before they share it. This false information snowballs into fake news and proves

[2] Md. Sayeed Al-Zaman, *COVID-19-Related Social Media Fake News in India,* 2 JOURNALISM AND MEDIA, 100–114 (2021).

vehemently injurious to people and for some it turns fatal. The following factors therefore, can be attributed to rampant surge in fake news:

- **More Internet Penetration:** The internet users in India have soared to a new high. In 2019 it reached to more than 500 million.[3] The internet penetration is not only substantial in urban areas but in rural areas as well. Therefore, access to online news and consequently fake news have increased.[4]
- **Mushrooming of Social Media platforms:** There has been wide proliferation of fake news over social media platforms and due to its large userbase it has been able to mislead its users. According to official sources in India WhatsApp has 53 crores users, YouTube has 44.8 crore users, Facebook has 41 crore users and Instagram has 21 crore users and Twitter has 1.75 crore users.[5](see fig 1). These platforms serve as the best medium to create and spread fake news. These platforms are not regulated under any law and creation and dissemination of content is unhindered due to lack of

[3] Digbijay Mishra and Madhav Chanchani, *For the First Time, India Has More Rural Net Users Than Urban,* TIMES OF INDIA*, available at*: https://timesofindia.indiatimes.com/business/india-business/for-the-first-time-india-has-more-rural-net-users-than-urban/articleshow/75566025.cms

[4] Tabarez Ahmed Neyazi, Antonis Kalogeropoulous, Rasmus K. Nielsen, *Misinformation Concerns and Online News Participation among internet Users in India*, SOCIAL MEDIA + SOCIETY, (2021).

[5] Ankita Chakravati, *Government Reveals Stats On Social Media Users, Whatsapp Leads While Youtube Beats Facebook, Instagram*, *India Today*, available at: https://www.indiatoday.in/technology/news/story/government-reveals-stats-on-social-media-users-whatsapp-leads-while-youtube-beats-facebook-instagram-1773021-2021-02-25.

regulation. Therefore, it is one of the most adopted and convenient platform for the perpetrators of fake news.

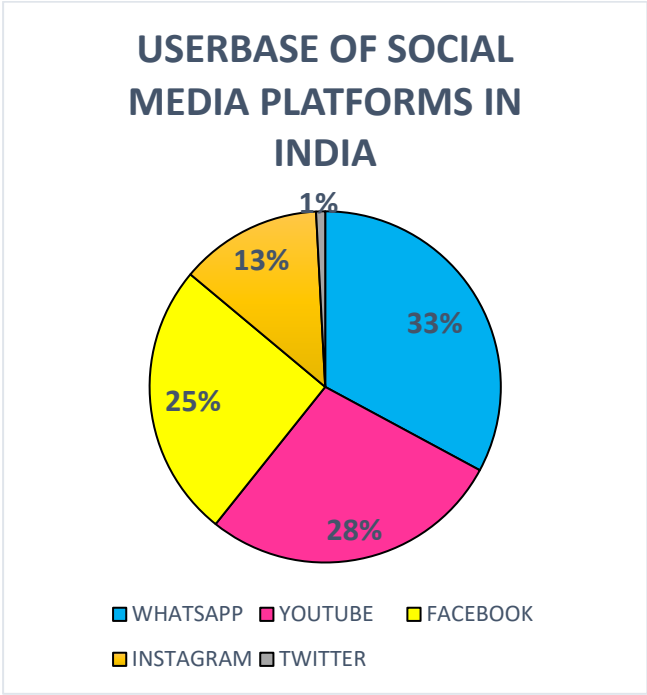

Fig. 1

- **Online News Access:** It has been found in a study that people especially up to the age group of 35 years have been using social media platforms for news access. Thus, there has been a shift in the habit of individuals of watching news on television to reading, watching and listening news on social media platforms.[6] This makes spread of fake news convenient and speedy for the disseminators.

[6] DR. KARNIKA SETH, FAKE NEWS, (Kindle E-Book, 2021).

- **Media Illiteracy:** W. James Potter theory of media literacy has explained that how an individual, in an information explosion in a media saturated society, will absorb information and will arrive at faulty interpretation from those pieces of information.[7] This generally happens when there is fear and ambiguity in society and people believes in every information that they come across. In India the problem of media illiteracy has added to the menace of fake news.[8] This was evident during Covid-19 where people relied on any information that they got relating to home remedies, vaccination aftermath, medicines administered in hospitals, a particular community spreading the disease etc. furthermore, the media illiteracy has also made Indians an easy target for the purveyors of fake news. It is essential that people are made media literate and aware that not every piece of information is news and thus, worth believing and relying.
- **Sharing of Information without verifying it:** Owing to this media illiteracy people have been widely sharing the information they get over any social media platform or through some other source without checking its veracity. In many cases this behaviour proves advantageous to the producers and disseminators of fake news as they know that a simple post on any social media platform will automatically get snowballed into fake news. It has been found that most often the language of these fake news items is so provocative

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[7] Adharsh Raj and Manash Pratim Goswami, *Is Fake News Spreading More Rapidly Than Covid-19 In India*, 11 JOURNAL OF CONTENT, COMMUNITY AND COMMUNICATION, 209 (2020).

[8] Md. Sayeed Al-Zaman, *COVID-19-Related Social Media Fake News in India,* 2 JOURNALISM AND MEDIA, 100–114 (2021).

that it arouses strong emotional response and thereby inducing the reader to share it without even thinking about its veracity.[9] This can be seen in India where fake news messages are circulated on WhatsApp in local language to have deep penetration and provoke wide dissemination.[10]

Types of Fake News

The omnipresence of fake news in almost all the spheres has caused gross violation of rights of individuals. Recently the following four types of fake news has plagued Indian society.

- **Fake News leading to Lynching**

To cite an ominous instance of WhatsApp fake news where rumours of child abductors disseminated in various states and resulted in twenty people losing their lives. The main driving force behind these instances of mob-lynching was the mistrust and suspicion it created in the minds of people as these messages were circulated along with the agonic images and videos of child abductors being assaulted by masses.[11] In an another instance fake news was circulated over WhatsApp in Maharashtra that gangs were abducting young girls and extracting their organs. This too resulted in mob-lynching.[12] Another fact which got uncovered from these rumours were that they were circulated in

[9] Paula Herrero-Diz , Jesús Conde-Jiménez, and Salvador Reyes de Cózar, Teens' Motivations to Spread Fake News on WhatsApp, SOCIAL MEDIA + SOCIETY, (2020).
[10] A. SIDHARTH, PRATIK SINHA, S. SHAIKH, INDIA MISINFORMED: THE TRUE STORY, (Harper Collins India, Noida, 2019).
[11] *Id.*
[12] *Id.*

local languages. For if the message was circulated in Maharashtra, it was written in Marathi and where it was intended for Gujarat, it was written in Gujarati. Such behaviour is uncommon in dissemination of misinformation where the central narrative remains same and does not change.[13]

- **Fake News spreading communal discord**

Fake news has been disseminated to spread communal discord as well. For instance, in October 2018 there was a tragic train accident that took life of more than sixty people. The train was bound for Amritsar which scythed down Dusshera revellers who were standing on the railway tracks watching the *Ravana* effigy burning. The fake news which got circulated thereafter was that this accident was intentional and was carried out in rage of 'train-jihad'. It was a Muslim driver who drove the train and purposely mowed down the Hindu revellers. However, later this fake news was debunked and name of driver was found to be Arvind Kumar and it was made public.[14] However, what can be seen from these instances is that how easy it is to mislead people and it is being done as well. It is evident from the fact that messages are circulated in local languages to achieve maximum dissemination and intended impact. The occurrence of recent Delhi riots[15] have

[13] *Id.*
[14] *Id* at 30.
[15] On ill-fated day of 23 February, 2020 horrendous Delhi riots broke out between the supporters and opposers of Citizenship Amendment Bill. The riots soon assumed communal colour and costed lives of 53 people and over 200 people getting injured. The shops and houses were lit on fire and religious places of worship were also attacked, see "*What are Delhi Riots 2020"*, available at: https://www.business-standard.com/about/what-is-delhi-riots-2020).

put forth a horrendous example as to how fake news can be weaponised to radicalise masses and thereby, perpetrate communal riots.[16] During Covid-19 many religiopolitical fake news was spread to create communal tensions. For instance, a fake news stated that "Muslim vendors are spreading Covid-19 by spiking fruits and vegetables." And people believed in them and some feared buying these items from Muslim vendors and even abused them.[17]

- **Fake News caused infodemic during Covid-19**

India has battled a two front war in Covid-19, *viz.,* one with pandemic and another with infodemic. According to NCRB report there has been 214% rise in the instances of fake news during Covid-19.[18] The reports states that cases of fake news in 2020 surged to 1,527 as compared to those reported in 2018 and 2019 as 280 and 486 cases respectively. The hardships faced by people in pandemic were augmented multi-fold due to fake news. The social media was brimming with fake news pertaining to shortage of oxygen cylinders, ventilators, Covid-19 beds in hospitals. UP CM even warned perpetrators of fake news that

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[16] "*Delhi riots chargesheet details how fake messages were weaponised by mob*", INDIAN EXPRESS *available at:* https://indianexpress.com/article/cities/delhi/feb-riot-chargesheet-details-how-fake-messages-were-weaponised-by-mob-6718966/.

[17] "*Abused, Stopped from Selling Vegetables, Allege Muslim Vendors in UP"*, available at: https://www.ndtv.com/india-news/coronavirus-uttar-pradesh-abused-stopped-from-selling-vegetables-allege-muslim-vendors-in-up-2210963.

[18] *"NCRB data: 214% rise in cases relating to fake news, rumours*, available at: https://indianexpress.com/article/india/214-rise-in-cases-relating-to-fake-news-rumours-7511534/).

National Security Act would be invoked against them.[19] It was found in the study that Indians disseminated and circulated Covid-19 related fake news much more during the peak of pandemic.[20] The fake news was largely related to vaccine and medical facilities. Some of them were spread with the intention to have monetary gain such as to boost sales of certain medicines.

- **Fake News caused vaccine hesitancy**

Furthermore, vaccine hesitancy was also induced by this fake news.[21] There was fake news circulating that vaccine are administered to people of particular community to make them impotent. Among others, one stated that vaccine would lead to death of individual in two years.[22]

Fake News and Fundamental Rights: A Dichotomy

There has been repeated concerns regarding stifling of freedom of speech and expression in case restrictions have been imposed to regulate fake speech. But the question is that even if restrictions are not imposed and public platforms are flooded with fake news, in these circumstances is the speech still free?

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[19] *Supra* note 17 at p. 6.
[20] Md. Sayeed Al-Zaman, *COVID-19-Related Social Media Fake News in India,* 2 JOURNALISM AND MEDIA, 100–114 (2021).
[21] R Butler, "*Vaccine Hesitancy What it Means and How we Should Tackle it*", available at: https://www.who.int/immunization/research/forums_and_initiatives/1_RButler_VH_Threat_Child_Health_gvirf16.pdf.
[22] Suryagani Roy, "*Fake News on Social Media leads to Vaccine Hesitancy in parts of Kolkata",* (March 29, 2022, 8:59 AM) available at: https://www.indiatoday.in/cities/kolkata/story/fake-news-social-media-vaccine-hesitancy-kolkata-1810021-2021-06-02.

Does the distorted information upheld our right of freedom of speech and expression because we are not free when we are acting and expressing our views on the basis of fake news disseminated to mislead us. And more than what we opine after reading and relying on fake news, it is effecting our decisions and actions which we will take thereafter. For instance, during Covid-19 pandemic a small piece of fake news that 'there is shortage of oxygen cylinders' could create ruckus in hospitals, panic the victims like anything and some might even succumb to it. Or a fake news that 'Muslims vendors are trying to spread Covid-19 by spiking fruits and vegetables with their mucous' had the tendency of inciting offences such as mob-lynching or communal riots. And where it would have resulted into mob-lynching, whom should we blame for the loss of innocent lives? Instances of Mob-attacks on doctors were not unfamiliar during Covid-19. Therefore, there exists a dichotomy between the right to free speech including right to disseminate information and dissemination of fake news.

Underscoring the pertinence of right to disseminate information, the apex Court has opined that an informed citizenry is germane for the existence of a true democracy. An informed citizen is able to participate in the affairs of polity which is quintessential of a healthy democracy. However, vices like mis-information, dis-information, rumours or mal-information has the effect of creating a uniformed citizenry which makes democracy a farce. The citizens will not be able to express their views as the information on which they rely is monopolised by partisan forces or by private individuals. Right to disseminate and receive information has, thus, been held to be part of right to freedom of

speech and expression enshrined under Article 19 (1) (a).[23] Therefore, it is not only free speech and expression which is being guaranteed by Article 19 (1) (a) but it also safeguards rights of an individual to receive, listen or read that speech or information.[24] But it has to be fathomed that when reading right to disseminate information as part of freedom of speech and expression, the prime objective is to enable people to form opinion and views on matters of public concern.[25] It has never been intended that by embezzling this right people are misled as done by disseminators of fake news. And as observed by the Court in *Dinesh Trivedi case*[26] that even 'right to know' is not absolute because in a democracy this fundamental freedom cannot be granted in such a way that every decision or action of the Government or the political authority is transformed into a public controversy and is subjected to public enquiry to pacify their sentiments. The court opined that this will have chilling effect on the decision makers, thereby paralysing the whole system. Similarly, 'right to disseminate any information especially untrue' cannot claim the guard of Article 19 (1) (a) primarily on two grounds— firstly, it does not furnish the objective with which it was elevated to the stature of fundamental right, *viz.* to harness informed citizenry. Secondly, its protection under free speech and expression is vitiated by the ramification it produces which may be mob-lynching, communal discord,

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[23] Secretary, Ministry of information & Broadcasting, Govt. of India, and Ors. v. Cricket Association of Bengal and Others, 1995 (002) SCC 0161 SC.
[24] Tata Press Ltd. v. Mahanagar Telephone Nigam Limited and Others, 1995 (005) SCC 0139 SC.
[25] People's Union of Civil Liberties v. Union of India, 2003(001) SCW 2353 SC.
[26] Dinesh Trivedi v. Union of India (19997) 4 SCC 306.

riots, vaccine hesitancy or panic, fear or mistrust among masses. It will be hit by Article 19 (2) that stipulates that even this fundamental freedom is not absolute and on reasonable grounds[27] specified can be restricted.

Fake news has also been used as a weapon to spread hatred, divisiveness, communal tensions and create fault lines amongst various religious groups. Instances of mob-lynching and communal riots were fuelled by the divisive fake news. Multiple attacks have been done on the cultural pluralism of the country and fake news has proved to be most lethal weapon. As rightly opined[28] by Malik that among all political rules mob rule is worst and mobocracy is imminently perilous for democracy in general and rule of law in particular. This mob rule is mindless and muddle the communal peace and harmony. This mobocracy is incited by fake news that has costed innocent lives.

Apex court has also opined that acts that causes alienation and schematism and impinges upon the unity and diversity of the country with an objective to ruin public order has to be dealt with law. It further remarked that rights and freedoms cannot be extended in such a way so as to armour those who threatens public order or incite violence. Without public order, the freedom of speech and expression would be challenged and restricted for safeguarding the interests of common people and law-abiding

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[27] Art. 19 (2) of Constitution of India puts restrictions on Article 19(1)(a) on grounds of sovereignty and integrity of India, friendly relation with other states, security of state, public order, morality and decency, contempt of court, incitement of offence and defamation.

[28] M. Asad Malik, *Communal Harmony: Need of the Hour*, JAMIA LAW JOURNAL (2016).

citizens.[29] The way it is necessary to draw a distinction between free speech and hate speech, on the analogous lines a distinction needs to be drawn between right to disseminate information and dissemination of fake news. Preamble of Constitution of India itemize liberty of thought, faith and worship, fraternity, unity and integrity as objectives of Indian state and spell out nature of Indian state as secular. Preamble is, as beautifully quoted by N K Palkhivala, "*an identity card of the Constitution*." It has been held to be a key to open the minds of Constitution-makers.[30] Furthermore, Constitution of India enshrines right to freedom of religion[31] as fundamental right under Part III which is germane to its secular nature. And it follows the ideals of positive secularism where state maintains principled distance with all religions but interferes to protect individual's religious freedom.[32] All these components are the cornerstone to the edifice of pluralistic, secular Indian society which is sine qua non for the existence of democratic Indian polity. And fake news spread with the intention to muddle the communal harmony and peaceful co-existence of cultural and religiously diverse society such as India, is a direct ambush on Indian polity. It desecrates right to freedom of religion vehemently and endangers the communal harmony of the country. The Constitution also casts an obligation upon citizens in form of fundamental duty to promote brotherhood and communal harmony amongst the

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[29] Amish Devgan v. Union of India, (2021) 1 SCC 1.
[30] Re Berubari Union, AIR 1960 SC 845.
[31] Arts. 25 to 28 of the Constitution of India specifies the provisions ensuring right to freedom of religion.
[32] RAJEEV BHARGAVA, THE DISTINCTIVENESS OF INDIAN SECULARISM, Oxford University Press, Delhi, 20-53 (2006).

people of India.[33] Instances of mob-lynching which were tainted with communal hue and the recent occurrence of Delhi riots[34] are the express evidence of the dreadful ramifications of fake news. In *Raghunathrao Ganpatrao v. Union of India*[35] it was observed by the Hon'ble Supreme Court that fraternity is one of the basic objective of Preamble of Constitution of India and in a country like India there are numerous schematic and disruptive forces be it on religious lines or on linguistic lines. And it is the spirit of brotherhood only which can act as the cohesive force preserving the unity and integrity of nation.[36] Apex Court took a stern view on perpetrators of communal discord in *State of Karnataka v. Dr. Praveen Bhai Thogadia*[37] and observed that communal harmony of the nation should not be left at the mercy of individuals. All persons of any religious community whether majority or minority should be ensured that they can live individuals professing different faith with peace and harmony. Pertaining to cherished right to freedom of speech and expression court opined that it has to be, in certain cases, restricted to pave way for public order and rule of law that forms the nucleus of democratic life. The higher ideals of Constitution are slained by any speech which ostracizes the communal harmony and therefore, needs to be curtailed.[38]

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[33] Art. 51-A (e) of Constitution of India states that "it shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the *people* of India transcending religious, linguistic and regional or sectional diversities."
[34] *Supra* note 15 at page no.6.
[35] AIR 1993 SC 1267.
[36] M. Asad Malik, *Communal Harmony: Need of the Hour*, JAMIA LAW JOURNAL (2016).
[37] AIR 2004 SC 2081.
[38] State of Karnataka v. Dr. Praveen Bhai Thogadia, AIR 2004 SC 2081.

Accentuating on the explosion of fake news or misinformation on social media platforms such as Facebook, the Supreme Court in *Ajit Mohan v. Legislative Assembly National Capital Territory of Delhi*[39] observed that this spread of misinformation on social media has become a weapon for those who have recognized its disruptive potential. It has been used to polarise people by peddling out extremist views in mainstream. And its effect on stable society can be cataclysmic and catastrophic dividing the society vertically.

Article 21[40] of the Constitution of India has also been pitted against Right to freedom of speech and expression due to dissemination of fake news. Article 21, being wide enough to include within its fold all rights of an individual, gets grossly violated due to spread of fake news. Be it the instances of mob attacks where innocent lives were being slained, or communal riots that again engulfs life of individual and communal harmony, or right to health that was gruesomely trampled by fake news or rumours specifically during pandemic. The 'Right to health' forms an intrinsic part of 'Right to life' as enshrined under Article 21. This right to health is read along with Article 47 of the Constitution. While accentuating the significance of this right, the Supreme Court observed in *Vincent v. Union of India*[41] that sine qua non of all human activities is a healthy body and quoted adage "*Sariramadyam Khaludhrma Sadhanara."* It also casts an

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[39] 2021 SCC Online SC 456.
[40] art. 21 of Constitution of India states that "no person shall be deprived of his life or personal liberty except according to the procedure established by law."
[41] (1987) 2 SCC 165.

obligation upon the State to ensure people 'right to health' and this requires establishment of efficient healthcare. During Covid-19 period, apart from efficient public healthcare system, reliable and veracious information also constituted an indispensable element. People were to took pivotal decisions concerning their lives and of their loved ones on the basis of this information. But lamentably, the information was paralysed by misinformation. Instead of showing individuals light, it forced them into dark space of suspicion, panic, fear, anxiety and helplessness. According to a study[42] a single instance of fake news related to medicine ended up claiming around 800 lives and hospitalisation of 5800 people. This evil of fake news gobbled up many lives defeating right to health and mocking humanity as a whole. Article 21 mandates the State to safeguard right to life of all individuals and therefore, it is obligated to preserve human life. This is done by providing people adequate health facilities.[43] However, fake news has led religious minorities become sceptical of the Indian healthcare system and resultantly, denial of it.[44]

Therefore, it is evident that under the protection of freedom of speech, fake news has been claiming human lives, polarising people, acting as a lethal weapon in hands of schematic forces and abridging fundamental rights and freedoms vehemently.

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[42] Md. Sayeed Al-Zaman, *COVID-19-Related Social Media Fake News in India,* 2 JOURNALISM AND MEDIA, 100–114 (2021).
[43] State of Punjab v. Ram Lubhaya Bagga*,* (1998) 4 SCC 117.
[44]*Supra* note 33 at page no.10.

Conclusion

Fake news is the real peril that needs to be dealt with. The impact of fake news can be manifestly seen and it is high time that this problem is given due weightage and importance. Unless and until it is being accepted that imperil of fake news exists in India and has caused catastrophic damages to both Indian society and individuals' rights, this menace cannot be curbed and instances of fake news cannot be culled. Furthermore, it is essential that an effective check is maintained on social media platforms which serve as a hotbed to fake news. The Supreme Court has also took note of the role essayed by Facebook in Delhi riots.[45] The Court came down heavily on Facebook that it cannot escape the liability by simply urging that it is merely a platform which posts third-party information. Having such a large userbase in India, it has to be accountable to those who rely on these platforms. Court also remarked that 'unity in diversity' of country cannot be jeopardised by anyone in name of professed freedom by shirking their responsibility.[46] Therefore, intermediary liability needs to be fixed[47] and these platforms should not be allowed to claim the safe harbour impleading that they are just host of content and neither producer nor disseminator. In addition to this, the social media platforms should also showcase responsible attitude by keeping a stern check on instances of fake news. Endeavour

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[45] *Supra* note 15at page no 6.

[46] *Role of Facebook in Delhi riots must be probed, social media entities should remain accountable: Supreme Court*, available at: https://zeenews.india.com/india/role-of-facebook-in-delhi-riots-must-be-probed-social-media-entities-should-remain-accountable-supreme-court-2375084.html.

[47] DR. KARNIKA SETH, "FAKE NEWS", (Kindle E-Book, 2021).

should be made by these platforms that by apposite steps including, inter alia, suitable algorithms, complaint and redressal mechanisms etc., the instances of fake news can be restrained. At the same time the Government should come up with an anti-fake news law culling out from amongst the existing laws so that special emphasis and regulation of this hazard of fake news can be trammelled. However, these attempts are futile unless people will participate in this war against misinformation and fake news. The people's participation can be ensured by making them media literate, making individuals understand that there is existence of misinformation on various platforms and not every information is true.[48] Furthermore, a responsible behaviour needs to be imbibed amongst individuals' that before sharing any information they receive or hear, they should at first instance verify it. And only after they are assured that information is true, they should share it. We are in deep and troubled water and timely steps and awareness can only make us swim across the tide of this menace.

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[48]Adharsh Raj and Manash Pratim Goswami, *Is Fake News Spreading More Rapidly Than Covid-19 In India*, 11 JOURNAL OF CONTENT, COMMUNITY AND COMMUNICATION,209 (2020).

PLANNING FOR EMPOWERMENT: EXAMINING EFFECTIVENESS OF COPYRIGHT SOCIETIES AND OTHER COLLECTIVE BODIES FOR ACTORS IN SELECT JURISDICTIONS

Jupi Gogoi* and Tania Sebastian**

Abstract

The role of an actor is of paramount importance in cinematograph films. At times, the presence of an actor is the single most important factor behind the success of a movie. Acting skills come within the concept of intellectual creation, which in turn is the basis for granting intellectual property rights. The rights of the actors come within neighbouring rights, a concept closely associated with copyright. Academic discourses on the rights of actor's vis-a-vis Intellectual Property Rights (IPRs) regime are limited although the concerns are many. An insight into different legal systems will be helpful in dealing with these concerns effectively. The focus on natural law and a person's personality is central to copyright protection in France. This also entails the protection granted to every contributor to a work, including a performer/ actor, albeit slightly restricted in scope than that of copyright. However, a holistic protection is granted as a result of other laws that include the IP Code and the labour law in France. A combination of three laws make the

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French system of protection the most progressive of protection accorded to performers, however glitches remain in terms of treatment of extras, etc. In the midst of which Copyright societies take up the space for collective management especially in the context of inadequacies of a bargaining power when there is a skewed balance in terms of rights among creators and actors. Hence, the advocacy surrounding collective societies and other collective associations in terms of ease of business is examined in this paper. The protection granted in the other jurisdiction of United Kingdom (UK) is symmetrically opposite, and so is India. Hence, historical development of societies and other associations in France and UK are looked at to understand the past and reflect on its present stand. This paper will examine the practice of ease/ difficulty to monitor and enforcing the performing right on an individual basis and conclude with suggestions and recommendation for a holistic regime in India.

KEYWORDS: Copyright Societies, Collective Bodies, Performers, Rights of Actors

Introduction

Under the scheme of protection of copyright, a wide range of rights and persons are granted some type of recognition. This recognition under copyright in turn results in benefits that are accorded to the right-holders with respect to their works. This paper looks at author and performers as right-holders and the recognition accorded to them in the countries of United Kingdom and France. These two countries specially can hold the key to the present condition of less protection of actors and performers in India, with both UK and French laws and societies providing for an effective protection of performers and giving some sort of

bargaining power to the actor and performer. This is done primarily through organizations and societies that were put in place for the specific purpose of aiding actors and performers with regard to their remuneration, royalty, equal opportunities, period of rest, duration of work, etc.- all that provide for a minimum efficient, safe and healthy area of work. This was based on the ease of business that could be achieved by providing a one-stop service to represent the interest of the members that would also reduce cost and time. All over the world there are numerous of these societies and organizations like SACM, SACEM, ADAMI and SPEDIDAM in France, and BECS in UK.

Actors and Performers, and their protection entails various practical aspects that include the magnitude of persons and roles of a performer. There is also the element of the multitude of performers employed in a work ranging from different sizes from lead actor to an extra to a background performer and this has a range of roles from having few sentences to nothing. All these dimensions need to be addressed when looking into the lack and in-comprehensiveness of protection of Actor and Performers in India. This paper addresses these issues prevalent in the Indian scenario and looks for possible recommendations.

Protection of Actors and Performers in United Kingdom: Effectiveness of Copyright Societies and Other Collective Bodies

a. Provisions in Copyright, Designs and Patents Act (CDPA), 1988

In United Kingdom, the copyright and neighbouring rights are currently governed by the CDPA, 1988. The earliest legislation

on performers was in 1925 titled The Dramatic and Musical Performances Act followed by Dramatic and Musical Performances Protection Act, 1958. The importance of this Act in context to the discussion in hand is that the provisions of this Act covered performances in cinematograph films. If the film was made without the performer's consent knowingly, it was considered to be an offence. The consent had to be taken in writing. There was an amendment brought with regard to rights of performers in 1963 *vide* a legislation titled The Performers' Protection Act, 1963 in order to incorporate the provisions of the Rome Convention. Importantly, even though Rome Convention did not include provisions on performers in cinematograph films, the amendments retained the protection to such performers, not obliging the Rome Convention.[1]

The next legislation was brought in 1988 titled CDPA and the separate enactment of performers was done away with and brought within the umbrella of the CDPA. The CDPA did not provide any definition of performer, though it defined performance.[2] The Act listed out rights in the form of proprietary,

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[1] Sadasivan G Nair, PERFORMERS RIGHTS IN INDIA: A STUDY WITH SPECIAL REFERENCE TO THE AUDIO-VISUAL INDUSTRY, Doctor of Philosophy Thesis submitted to Cochin University of Science and Technology, p, 10, https://shodhganga.inflibnet.ac.in/bitstream/10603/68019/9/09_chapter%202.pdf.

[2] Performance is defined in section 180(2) as "a dramatic performance including dance and mime, a musical performance, a recitation or a reading of literary work and performance of an act of variety or any such similar presentation, which is a live performance of one or more individuals; and "recording" of performance meant a film or sound recording which was made directly from the live performance, or which was made from a broadcast of the

non-proprietary and moral rights to the performers. Proprietary rights were fully transferable, while non-proprietary[3]/quasi proprietary[4] rights were not. Also, two moral rights, right to be identified as a performer and right to object to derogatory treatment of the work were included in the Act. These moral rights though unassignable[5] could be waived.[6]

b. Provisions in CDPA on the Rights of Performers

The property rights can be broadly divided into four, reproduction right (section 182A), distribution right (section 182B), rental right and lending right (section 182C) and making available right (section 182CA). The non-proprietary rights are right of fixation and broadcast of a live performance, public performance and broadcasting by means of recording made without consent and dealing in illicit recording.

Proprietary Rights

Section 191A of the CDPA states that reproduction rights (182A), distribution rights (182B) rental right and lending right (182C) and making available right (182CA) are the proprietary rights of the performer. Section 182A states that anyone who

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performance, or which was made, directly or indirectly from another recording of the said performance."

[3] Performers' rights were not given a property status initially. All they were given were civil rights to seek redress for violation of statutory duty. The rights hence were unassignable. See, *supra* note 1.

[4] Cornish et.al mentions in their books that they may by contract assign their interest, it is *quasi proprietary.*

[5] Art. 205L

[6] §. 205 J.

makes a copy of a recording which includes the performance of the performer without his consent is stated to be an infringement of the rights of the performer.

Section 182B makes issuing copies of the recording of the performance without consent an infringing act. It does not include, however, any subsequent sale, distribution, hiring, or loan of copies which was put into circulation previously (distribution right).

Section 182C provides that if anyone rents or lends to the public any copies of the recording of the performance will be considered to be an infringer. Rental is defined as making a recording available for use on the condition that it shall or may be returned. It is for direct or indirect economic or commercial advantage. Lending is stated to be making a copy of a recording available for use on condition that it shall or may be returned. However, it shall not be for direct or indirect commercial or economic advantage. Lending shall be done through an establishment which is accessible to the public.

Under section 182 CA, the right of making available is infringed if a person without the consent of the performer makes available to the public a recording of the performance of the performer who may access the recording from any place or time chosen by them.

Non-proprietary rights

Section 182 states that if without the consent of the performer, anyone makes a whole or substantial recording of a live performance, or do a live broadcast or makes a whole or substantial recording of the broadcast of the live performance, it

will be held to be infringement of the performer's rights. These three things are not permitted under section 182:

i) "to make a recording of a whole or substantial part of a performance from a direct live performance." [CDPA 1988, s 182(1)(a)]
ii) "broadcast live the entire or a substantial part of a performance." [CDPA 1988, s 182(1)(b)]
iii) "make a recording of the entire or a substantial part of a performance from a direct broadcast of the live performance." [CDPA 1988, s 182(1)(c)]

Under section 183, if any recording of a performance is done of a performer without his consent and the same is shown or played in the public or communicated to the public, it becomes an infringement.

Under section 184, it is considered to be an infringement if a person imports into UK any performance which was an illicit recording. It is also applicable in cases if someone sells, gives on hire, offers for sale or hire any such illicit recording.

Defences in case of non-proprietary rights

In context to section 182 and 184, it is clearly mentioned that the defendant would not be considered an infringer if he was able to prove that when the infringement occurred, he had reasonable grounds to believe that consent was there.[7] With regard to section 184, if the defendant is able to prove that the illegal recording

[7] §. 182.

was acquired innocently (there was no reason for the person who acquired it to believe that it was an illegal recording), then the only remedy was a reasonable payment as damages.

Basic difference between Proprietary and Non-Proprietary Rights

Under the CDPA 1988, the non-proprietary rights are not assignable, but they are transferable on death.[8] The property rights mentioned earlier are transferable only by assignment or on death.[9]

Example, when a performer is performing live, and, someone without permission, records it, that is a violation of the non-proprietary rights, but if someone makes copies of recording to which performer has not consented, it is violation of proprietary right of reproduction.

Rental Rights of Performers in Films

Under section 191 F of the CDPA, 1988, in cases of film production agreement, there is always a presumption that the rental rights are transferred unless there is an agreement to the contrary.

However, the next provision, that is, section 191 G provides that in case a performer transfers his or her rental right of a sound

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[8]https://www.squirepattonboggs.com/~/media/files/insights/publications/2012/10/performance-rights/files/performance-rights-practice-note/fileattachment/performance-rights-practice-note.pdf.
[9] *Id.*

recording or of a film to the producer of the sound recording or the film respectively, he or she still retains right of equitable remuneration for the rental rights. This right is assignable only to a collecting society who enforces the right on behalf of the performer.

Moral Rights

Although the CDPA recognises two moral rights, the first one is right to be identified as an author (right of paternity). Section 205C states that "when a person (a) produces or puts on a qualifying performance that is given in public, (b) broadcasts live a qualifying performance, (c) communicates to the public a sound recording of a qualifying performance, or (d) issues to the public copies of such a recording, the performer has the right to be identified as such." So, (a) & (b) clearly states that it is performance in public and (c) & (d) are related to sound recording. Hence moral right to paternity is not extended to performers in films, that is, actors.[10]

The second moral right included in the CDPA is right to integrity. It is only granted to a performance which is broadcasted live or is performed in the public or is communicated to the public through a sound recording.[11] So, even this moral right is not granted to actors.

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[10] *Supra* note 1, page 67. See, also, https://www.squirepattonboggs.com/~/media/files/insights/publications/2012/10/performance-rights/files/performance-rights-practice-note/fileattachment/performance-rights-practice-note.pdf.

[11] Art. 205F.

UK on the other hand has now signed the Beijing Treaty, 2012 which obligates it to recognise moral rights of actors. So, now, probably, UK will change its laws to accommodate provisions on moral rights to actors.

c. Other Miscellaneous Rights

There is no law in UK to provide any remuneration for private copying.[12] The exception to private copying was first introduced in UK on October 1st, 2014 by a legislation titled the Copyright and Rights in Performance (Personal Copies for Private Use) Regulations.[13] However, this statutory instrument was quashed in the case of *R (British Academy of Songwriters, Composers and Authors and others)* v. *Secretary of State for Business, Innovation and Skills*[14] with prospective effect by the High Court. Hence the exception of private copying is still not a part of UK copyright law.

The provision on cable retransmission rights is included in section 144A of the CDPA, 1988. The provision states that this provision is only applicable to copyright owner of literary, musical, dramatic or artistic work, film or sound recording. It does not mention anything about performers in films.[15]

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[12] *Infra* note 15. Katherine Sand.
[13] https://www.legislation.gov.uk/uksi/2014/2361/made.
[14] [2015] EWHC 2041 (Admin), 17 July 2015
[15] However, one author notes that a partial solution of the problem is possible by a labour agreement between the two performers' trade unions and BBC. BBC has since 1984 paid the unions a particular percentage of the money that they receive from simultaneous cable retransmission into Belgium, Netherlands etc. See, Katherine Sand, Study on audiovisual performers'

d. Copyright Societies and Other Collective Bodies for Performers in United Kingdom

Like many other countries, collective bodies play an important part in strengthening the rights of the performers in UK. Labour law can play a crucial role in managing those rights with the help of collective bargaining agreement as well as through contract. The performer can become a member of a trade union and the union can collectively negotiate with the film producers. Although there is no compulsion in UK to join any union,[16] however, there seems to be many advantages in joining one. Firstly, if a performer joins a union it gives power to the union to set terms and conditions with producers to cover minimum terms even covering performer's rights. The unions formulate some minimum terms of employment also called collective bargaining agreements which the producer has to include in the contract they enter into with the actors. Since these includes only minimum terms, the actors can get a better negotiating terms depending on the stature and bargaining power of the actor.

e. Trade Union for Actors

On behalf of the producers of films, there is an association called PACT (the Producer's Alliance for Cinema and Television) and

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contracts and remuneration practices in Mexico, the United Kingdom and the United States of America, (2003) https://www.wipo.int/edocs/mdocs/copyright/en/avp_im_03/avp_im_03_3a.doc

[16] Katherine Sand, *Management of the rights of performers in contracts and collective bargaining agreeements* 8, https://www.wipo.int/wipo_magazine/en/2012/04/article_0002.html.

the association of actors in UK is Equity. There is no one specific collective bargaining agreement covering audio-visual performances.

Since this study is focused on actors in films, it is important to note that Equity came as a union in the beginning only for stage actors. Then it slowly covered other actors, singers, dancers, stunt performers, circus artist etc.

The agreements try to lay down certain provisions to regulate the working relationship between producers on one side and the actor and performers on the other side.

Broad overview of the provisions of the Collective Bargaining Agreement of 2016

The recent agreement is the Pact Equity Cinema Films Agreement 2016. The Agreement defines artist as any actor or performer excluding musician and crowd artist engaged in a film. Basically there are three options/formats (Option A, B and C) provided which the producer can choose from to enter into contract with actors and other performers. However, there are certain conditions, such as, the Producer of a Low Budget Film (Production Budget of £3,000,000 or less) or Very Low Budget Film (Production Budget of £1,000,000 or less) is required to choose Option A or B. In cases of films in which the budget is over £20 million, it is mandatory to choose Option B or Option C for further use fees. The only exception to this rule is if the Union agree that Option A can apply. In cases of films with a budget of less than £20 million but more than £3 million, the Producer shall have the choice to opt either A, B and C. Hence,

it can be clearly observed that the budget of a film is an important factor in UK for the minimum agreement.

Some of the common provisions irrespective of the options/format of agreement are that there are provisions on protecting the interest of actors, like regulation on working hours, meal breaks, rest period. Work hours include the time utilised for make-up, hair dressing, wardrobe etc. It also includes a detailed provision on pay for overtime work. There is mention about paid holidays, contribution towards pension as well insurance (a special provision is there for insurance for dangerous work).

There are provisions on equal opportunities and special mention about non- discrimination irrespective of race, age, creed, disability, marital status, parental status, sexual orientation or gender etc. The Agreement also mentions review of the operation of the equal opportunities clause. Moreover, some special provisions are also to prevent exploitation in the course of shooting as well as in the auditions.

Undoubtedly, the rates of the payment on uses is different in all the options, the most important provision is the net profit payment provision in Option A and Royalty payment in Option B and C. It is stated that in case the Producer choose Option A, 3% of the profit (net) of the Film will be shared amongst the Artists.

Option B and C include Royalty payments. The royalty payments are more enhanced in Option C in comparison to Option B since the producer takes all the ancillary rights.

Copyright Matters in the Agreement

This provision states that all consent required under the current provisions of CDPA or any amendments or modifications later to allow the producer for perpetuity to use the services or products of the artist shall be granted. There shall be an assignment with full title guarantee by the artist to the producer which includes all copyright and related rights existing or new rights in future for the entire copyright period and as far as possible in perpetuity.[17]

Along with the aforementioned provision which is common to the three contract agreement, there is a special provision transferring copyright and related rights to producers under Option C. It states that producer shall own all copyright and performers rights and shall the right to exploit including authorising others to exploit these rights in any means currently existing or that which may evolve later in future. There shall be no restriction or limitation to the right of the producer all through the world for the whole copyright time and as far as possible in perpetuity.[18]

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[17] The Artist/performer shall give such rights to the Producer under the CDPA,1988 or any that is required to equip the producer with the full use of the services of the Artist and the products for perpetuity. The Artist shall further transfer all rights to producer either present or future free from third party relating to the performance and services of the artist. It will be assigned all through the world and for the entire term of copyright and for perpetuity.

[18] Whereas, the producer of a film falling under Option C shall get all the performance and services of the artist/performer and can exploit the dame by all means and via any media. There will be no limitation and restriction on such right and it will be granted for the entire copyright term and for perpetuity.

Difference between trade union and collective societies in terms of actor's rights management

The actors or other performers' rights are not transferred to the union. They only have the power to bargain on behalf of the actors. The collective bargaining agreements provides what an individual contract with producer should minimum contain, there is always scope for the actor to have more favourable provisions. In case of copyright societies, the societies act as the agent of the actors.

f. Collective Societies for Actors in UK And Their Role

In UK, there are many collective management organisations (CMOs) which manages and protects various copyright and related rights of creators of different works. The British Equity Collecting Society (BECS) established in 1988 is the only collective management organisation for performers in audio-visual works in UK. As per section 191G (1)(6), "collecting society" means "a society or other organisation which has as its main object, or one of its main objects, the exercise of the right to equitable remuneration on behalf of more than one performer."

g. British Equity Collecting Society (BECS)

The important task of the British Equity Collecting Society (BECS) hence is to enforce such performers' rights in the United Kingdom (UK) as well as to collect revenue in other countries from the compulsory collective administration of statutory rights. BECS gets a mandate from the members of the society to collect remuneration as per the Memorandum and Articles of Association of the society.

In the UK, the role of the BECS is collecting payables to the performer, whether in terms of remuneration of income for any rentals whether sound recording of films or an equitable remuneration.

Internationally, the income and remuneration which is collected by BECS for its members in relation to audio-visual works usually is different in different countries depending on the legal provisions and rights of the country. The main types of rights that are collected include, internationally[19] are rental[20] and lending rights,[21] public performance rights,[22] right to make available,[23] private copying[24] and cable retransmission rights.[25] BECS mentions that it negotiates agreements with the collecting or copyright societies in foreign countries for revenue share for its members.[26] It also mentions that it already has international agreements with many collective management organisation in many European countries as well as Peru, Chile and Colombia

[19] https://becs.org.uk/payments/#income-sources (last visited on August14, 2021).
[20] Fee paid to the rental outlet or company.
[21] Lending rights allows payments from compensatory payment from government for the copyrighted works by archives, libraries and educational establishments on the basis of the free loan.
[22] This is the use of audio-visual works in public places.
[23] This a right exclusive for prohibiting or authorizing dissemination of work of performs through the internet and other interactive networks.
[24] Private copying means reimbursement for the general public right to copy music, film and TV from an original lawful version.
[25] Cable retransmission means simultaneous, unaltered retransmission of a primary broadcast intended for reception by the public in a closed cable network system by a party other than the primary broadcasting organisation.
[26] https://becs.org.uk/about-us/#what-does-becs-do.

and aims to expand its agreements with such collective organisations in other countries too.[27]

h. Protection Of Actors and Performers in France: Effectiveness of Copyright Societies and Other Collective Bodies

The French laws for protection of actors and performers makes it focus on natural law and a person's personality that forms the core to copyright protection. This also entails the protection granted to every contributor to a work, including an actor and performer. The peculiarity of the protection under French laws is that it not only offers the Intellectual Property Law (Copyright) protection for the actor and performer for his/her work but also the protections under the labour code and contract. A combination of these laws make the French system of protection the most progressive of protection accorded to performers, however glitches remain in terms of treatment of extras, etc. In the midst of which Copyright societies take up the space for collective management especially in the context of inadequacies of a bargaining power when there is a skewed balance in terms of rights among actors and performers, and producers.

To begin with, the word performer is used in different connotation under the French laws. The words 'entertainment artist' are used for the French word *artiste du spectacle*, 'performing artist' for the French word *artiste-interprte*, and the word 'extra' for the French word *artiste de complement*. These three French terms are not used interchangeably, and each of

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[27] *Id.*

them has its own meaning in French dictionaries. For example, even though the translation of the 'entertainment artist' is *artiste du spectacle*, the French laws only provides a non-exhaustive list of entertainment professions and categories rather than a definition of what is an entertainment artist is. It is from this list that one had to decipher who an entertainment artist is. So *l'artiste lyrique (*formally trained opera, choir and classical singers*), l'artiste de vari~t~s (*actors, dancers, show entertainers*), le chansonnier (*musicians, popular and folk singers*), l'arrangeurorchestrateur (*orchestra conductors, orchestra arrangers*),* and film *l'artiste de complement (extras)*. It also needs mention that an entertainment artist includes a performing artists and is not considered as an extra. The French law has devised other mechanisms for an artist to be considered an actual performer to be one who has more than 13 lines to be performed, and has gone even further to state that even if the scene is for a few seconds, it needs to be considered.

Moving on to the statues, the copyright law, the French Author's Rights Law, 1985 contributes to regulation of performers' rights in audio-visual productions. This law enables extensive rights to performers that would authorize them to use the audio-visual works of their performances. The aspect of remuneration and the performer being entitled to it based on certain principles was also enumerated in the law. This law was then incorporated into the Intellectual Property Code (IP Code). The *Code de la propriété intellectuelle* (hereinafter the IP CODE), today regulates actors and performers rights. This IP Code protects the performers who are defined as "*persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or*

puppet acts" by related rights.[28] Also, The Intellectual Property code under Article L. 311-7 states that the division for remuneration is fifty percent to authors and twenty five percent in the case of both phonogram producers and performers when it came to private copying in the audio sector, and for videograms it is equal distribution between the three parties.[29]

This also finds mention in Article L.762-1 of the French Labor Code. This Labor Code provides actors and performers with exclusive rights, with performers considered as employees. This means that they are treated as salaried persons.

Articles L. 762-1 and 762-2[30] of the French Labour Code subject to Article L. 216-6 of the Labour Code compliment authorization and remuneration of performer by stating that:

> *"[t]he performer's written authorization shall be required for fixation of his performance, its reproduction and communication to the public as also for any separate use*

[28]Art. L. 212-1.

[29] Translated text available. Law on the Intellectual Property Code (No. 92-597 of July 1, 1992 as last amended by Laws 94-361 of May 10, 1994 and 95–4 of January 3, 1995), https://internet-law.ru/law/int/nation_cleo/france/fr003en.pdf This Article states as follows "The remuneration for private copying of phonograms shall belong in half to the authors within the meaning of this Code, in quarter to the performers and in quarter to the producers. The remuneration for private copying of videograms shall belong in equal parts to the authors within the meaning of this Code, the performers and the producers."

[30] Art. L-762-2 of the Code du Travail.

of the sounds or images of his performance where both the sounds and images have been fixed."[31]

The nature of protection under Article L.762-1 of the French Labour Code also need to be in the written form and individual. However, when there are several artists employed for the same performance can be a single contract. Other than as an employee, there is also the flexibility of actors to work as independent contractors. Commentators reveal that such a practice is nevertheless rare if non-existent.[32]

A combined reading of IP Code and French Labour code entails the conclusion that in case of assignment of the rights of the performer also, there is surety that a fair compensation is provided to the future uses of the fixed performances of the performer. This means that for each and every mode of exploitation of the work entails a separate remuneration that needs mention in the contract parties (in this case, between the performer and the producer) with the mention of remuneration either individually (contract) or in a collectively (agreement). It is pertinent to note here that Protection is, nevertheless, guaranteed even if there is no such contract as it will be based on the common tariffs for the profession in each sector based on specific agreements between organizations (employees and employers). It is important to note here that the Ministry of Culture has made it mandatory for these collective bargaining

[31]Art. L. 212-3.
[32] Memorandum of the *Syndicat français des artistes-interprètes*. February 2003.

agreement related to performers right in film production and television.

French law divides collective administration of performers' rights in the audio-visual sector into collective bargaining agreements negotiated by performers' and producers' trade unions and collective administration of certain rights and remunerations by performers' collecting societies, on the other hand. In the chapter, the collective bargaining conventions and agreements in force as of 2020 are discussed.

In the case of collective agreements, the journey began on 3rd July 1777 when a group of 23 authors including Beaumarchais formulated a response as a result of their under-remunerated use of their work by Théâtre-Français. This was the culmination of the treatment meted out from powerful theatrical institutions and this specifically involved poor remuneration. This and other political pushes brought about changes resulting in 1791 wherein the first law on authors right was passed. this was ratified on 19th January 1791 by Louis XVI. This 18the century initiative was the earliest seen anywhere in the world and was followed up with the Society of Dramatic Authors and Composers (SACD) in 1829[33] that combined two pre-existing societies. As of October 2020, two categories in terms of collective management are found on the official website of SACD: Collective Management in Audiovisual and Collective Management and live performance. Royalty rates etc. are mentioned however translation to English

[33] https://www.sacd.fr/en

is are not available on the website. [34] The Collective Management Organization (CMO) was the first collective licensing body, and dealt with music, was established in the year 1851. In the same year, Society of Authors, Composers and Music Publishers (SACEM) was also established so that there could be a platform to administer public performance in musical work. The birth of SACEM has events similar to the SACD that was the result of a French composer Ernest Bourget challenging the live performance of his music composition that was played in a Paris Cafe. Court sided with Bourget and prevented the cafe from playing his music without payment of royalty. Appeals in 1848 and 1849 upheld the decision in favour of authors and composers having a performing right in their works and the right to be paid in the event that their work was ever used or performed in public. It was to monitor and enforce these performing rights for an individual that SACEM was set up. [35]These developments have to be read in conjuncture with the fact that these societies existed even before the Berne Convention 1886 that aimed to protect artistic and literary works.

On the practical side of law, the French system ensures there is a written contract between the performing artist and the producer that mentions remuneration for each mode of exploitation and can be attained through collective bargaining agreements too. This is irrespective of whether the performers are permanent or freelancer - the collective bargaining agreement is obligatory and

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[34]https://www.sacd.fr/sites/default/files/conditions_generales_exploitation_av.pdf .

[35] International Confederation of Societies of Authors and Composers, The History of Collective Management, https://www.cisac.org/What-We-Do.

apply to even performers not party to these agreements. These agreements contain provisions for remuneration with the minimum initial salary being fixed, which is regarded as a supplement to salary thereby providing social security benefits for performers. The agreement covers the entire sector and does not differentiate between individual performers or producers are represented by the contracting parties. Collecting societies like ADAMI (Collective management organization for the rights of performers)[36] are involved. The most recent application form for Author-Composer mentions a category of "Split of Public Performance Rights and Mechanical Reproduction Rights" that also mentions that "In cases where there are multiple rights holders within one or more category (author, composer, adapter, arranger, publisher) with the option being available from 1st January 2019 and shall apply to works registered after that date and exclusively to them."[37] There is the added issue of whether or not the remuneration received post performance is part of the wage or has to be listed otherwise. The law and the societies are clear on this point too in the event that three conditions are met and includes the following: "there must a recording of a performer's performance; the remuneration must be paid relative to the sale or exploitation of the recording, and the physical presence of the performer is not required for the exploitation of the recording".[38] For remuneration regulated by copyright societies, there are few categories that can be made out. For

[36] https://www.adami.fr/en.
[37] Document available at: https://createurs-editeurs.sacem.fr/en/brochures-documents/membership-application-author-composer-all-rights-and-territories.
[38] *Droit de l'audiovisuel at 519*.

private copying, remuneration is collected by societies as a legal license that enables collection from importers and makers of blank video and audio recording media. As a result of loss of income due to private copying, this remuneration allows relief to authors, performers and producers (in music and audiovisual sectors). There are two societies that fixes the remuneration amount that is consists of a fixed commission consisting of representatives of rights holders and users. These are the SORECOP and COPIE FRANCE. As an example, the remuneration for private copying as of February 2020 for analogic blank carriers in the case of audio tapes for a recording duration per 100 hours is 28,51 euros and for video Tapes (VHS) per 100 hours is 42,84 euros.[39]

These provisions, contracts and assessments provide an understanding that a complete protection of the performer in terms of remuneration and exploitation of her work in multiple forms resulting in generation of revenue should also be traced back to and enrich the performer in monetary form. This remuneration is inalienable thereby disabling the right to assign it contractually to another party.

The French societies also look at other ways that the performers' talent can be exploited as in the case of cable re-transmission of a work. Compensation is provided for cable retransmission of the performances of the performer under the collective bargaining

[39]Document available at Copie France, https://www.copiefrance.fr/images/documents/tarifs_EN_2020_02_-_D20.pdf .

agreements which is a percentage of the revenues from exploitation of the work. As in other forms of use of performers work, supplement to their salary is the remuneration in the case of cable retransmission. There is no additional remuneration for cable retransmission under author's rights law for the performers.

Under the societies, there is a need to look at Collective Bargaining Agreements, like the *Convention collective de travail de la production cinématographique (*actors*),* the oldest among the agreements (September 1967) and is extended annually thereafter. This mentions the need for a written agreement between performer and producer before work has begun, details of minimum remuneration, employment relations, remuneration for post-synchronization work, etc. Unlike UK, there is no clause that contains provision for assignment of rights to producer. It does, however, mention that there is a right for the producer to re-assign part or all of the rights, if an individual employment contract does not mention otherwise. This applies to actors and performers and producers with headquarters in France, to all productions taking place in France and its territories, and to French productions taking place abroad provided it is not contrary to the law or professional practices of the place where the film is being shot. These provisions also apply to all or parts of foreign films shot by a foreign producer in France, regardless of the language of the film.

Another is the *Accord spécifique concernant les artistes interprètes engagés pour la réalisation d'une oeuvre cinématographique*, concluded in June 1990, that looks into performing artists employed in film productions as required under French authors' rights law of 1985. There is then a fixing

of minimum remuneration to be paid to the performer by the performer.

The other collecting society represents backstage performers and other performers – those not entitled to credits in the productions and assists them by negotiating their rights and remuneration on their behalf- *Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse* (SPEDIDAM).

What emerges from this discussion on the French system of protection accorded to actors and performers is that there exists a comprehensive plan for the protection of their rights. This step for their protection includes detailed information about remuneration, associated use of the work that is not just the one time output of acting, retention of the performer in case of sickness, illness, and other provisions in case of withdrawal from work.[40]

i. Protection Of Rights of Actors in India: Legal Provisions, Collective Associations and Copyright Societies

a) Provisions in the Copyright Act, 1957

India for the first-time recognised rights of Performers in 1994. The current provision provides the following rights to performers including actors in films. Firstly, section 38 recognises the rights of actors till fifty years since the performance was made. The

[40]https://www.coover.fr/conventions-collectives/production cinematographique.

calculation of fifty years is from the beginning of the next calendar year next in which the performance was made.

In 2012, certain amendments were made in the Act relating to performers' rights. The rights of the performers were placed in a specially carved provision under section 38A. This section mentions the four essential rights of distribution, reproduction, communication to the public and commercial rental rights.

Section 38A (1) states that the performers rights is an exclusive right to do or authorise the doing of some acts, like that of recording of the performance, whether audio or video. This right includes "reproduction of the performance in any material form including the storing of it in any medium by electronic or other means, (ii) issuance of copies to the public, (iii) communication to the public, (iv) selling or giving it on commercial rental or offer for sale or commercial rental any copy of the recording-To broadcast or communicate the performance to the public except if the performance is already a broadcast."

Special provision for performance included in cinematograph films and Royalty

Section 38A (2) provides that if a performer through an agreement consents to incorporate her work in a film, there shall be no objection from the performer thereafter to the producer for enjoyment of the performers' rights in the film.

The proviso to section 38(A)(2) provides that the fact that incorporation of the performers work in the film and subsequent enjoyment of the performers' rights in the film by the producer will not affect the entitlement of royalties to the performers for performance entailing commercial use.

Moral Rights of performers

Another positive development of the 2012 amendments to the Copyright Act is the insertion of section 38B that brings recognition of a performer's moral rights. The two rights included in the provision are right to paternity[41] and right against distortion.[42] However, it was clarified that removing any portion for "editing or to fit the recording within a limited duration, or any other modification which is required entirely for technical purposes shall not be considered derogatory to the reputation of the performer."[43]

Exceptions to Performers' rights

Section 39 provided that performers' rights shall not be infringed when a sound or visual recording is made for private or bona fide use like research or teaching. The other exception is when the performance is used in reporting current events or for bona fide purposes that include review, teaching or research. Other acts which do not constitute infringements of copyright under section 52 are also exempted.

Other provisions on performers' rights

Provisions relating to modes of transfer for copyrighted subject matter, copyright societies, certain provisions on infringement

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[41] "(a) to claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance."
[42] "(b) to restrain or claim damage in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation. "
[43] Explanation to §. 38B.

and offences with necessary modifications will be applicable to performers' rights.

The first proviso to section 39A provides that where performers rights subsist in case of any broadcasted performance, consent to reproduce the broadcast has to be given only after getting the consent of the performer.

When performer's rights will not be qualified to be protected

The second proviso to section 39A provides that performer will not have right under the Copyright Act if the performance happens to be an infringement of the copyright. There is also the mention of a performers' right that shall never be affected by a separate copyright in any work in respect of which the performance is made.[44]

b) **Copyright societies and other collective bodies for performers in India**

Copyright Societies in India

The collective societies functions on behalf of the copyright owners all the "exclusive rights" conferred by Section 14 to copyright owners and Section 38 to performers of the Copyright Act of 1957. The primary function of these copyright societies is to restricted to issuing licenses and collecting fees on these licenses for copyright owners; distribution of these fees to the

[44] § 39A (2).

owners of rights after making necessary deductions against expenses of the society.[45]

Before the 2012 amendments to the Copyright Act, there were four copyright societies in India. The first one was Indian Performing Rights Society (IPRS) which issued licences to users of music and collected royalties from them, for and on behalf of its members. The members included the authors, composers and publishers of music. Royalty was distributed amongst the members after deducting administrative overheads of the IPRS. The second copyright society was the Phonographic Performance Ltd. (PPL) which was functioning as the Performing Rights Society for Sound Recordings. The third one is the Indian Reprographic Rights Organisation (IRRO), the sole and exclusive copyright society that can issue blanket / transactional reprographic usage licenses for foreign and Indian authors and publishers in India. The last one is the Society for Copyright Regulation of Indian Producers of Films and Television (SCRIPT) which dealt with administration of rights of producers of Films and Television owners.

Currently as per the Copyright Office in India, the existing copyright societies are[46] (a) For literary works associated with Musical Works is the Indian Performing Right Society Limited (IPRS), (b) for Reprographic (photo copying) works, it is the Indian Reprographic Rights Organization (IRRO) and (c) for

[45] § 33(3) of the Act.
[46]https://copyright.gov.in/frmFAQ.aspx. Also see, https://copyright.gov.in/Documents/Copyright%20Societies.

Performers (Singers) Rights, it is the Indian Singers Rights Association (ISRA)."

Hence, we can see that there is no copyright society for actors in India.

Collective organisation/associations of actors in India

There are many collective body/ association of actors (including actors in films) in various regions of India. However, most collective bodies of actors in various parts of India are mostly charitable societies with the exception of CINTAA (Cine and TV Artistes Association) which is registered under the Indian Trade Union Act as an autonomous body. A study cited that the reason for such bodies opting for a society[47] rather than a union is that generally in a union, the recourse is minimum wage in terms of payment if it is registered as a union, however, if it is registered as a Society, it would be based on some kind of consensus. However, the truth is that performers are not really workers.[48]

CINTAA- Body of Actors of the Bollywood Film Industry

CINTAA is a registered autonomous body under the Trade Union Act, but, unlike such unions in the rest of the countries that we discussed in our paper, CINTAA does not engage in minimum tariff agreement. Some of the important purposes as laid down by CINTAA is that it is a body to nurture fraternity and unity

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[47] S. Nair Jayadevan., PERFORMER'S RIGHTS IN INDIA-A STUDY WITH SPECIAL REFERENCE TO THE AUDIO-VISUAL INDUSTRY, PH.D. Thesis submitted to CUSAT, Cochin, 2006, pg. 484.
[48] Dyuthi. *Id*.

amongst members and regulate working relationships with employers.[49] It is also a body which acts as a mediator between its own members and producers, studios, employers etc., and, also provides legal assistance to its members in relation to legal dispute pertaining to their work.[50] Another purpose is to provide assistance in times of unemployment, old age and death, sickness and injury, and infirmity of its members.[51]

Conclusion

An examination of the absence of a society for protection of the rights under the Indian Copyright Act, 1957 to actors and performers and to safeguard their livelihood by providing for minimal guidelines relating to remuneration, hours of rest etc. is concerning. The unequal balance of bargaining power between actors and performers that include small time artists versus producers mandates the requirement of a copyright society all the more. Best practices from United Kingdom and France can be used as a stepping stone for the need for a copyright society, especially as a well-functioning machinery with the involvement of the state is a doable exercise and falls within the purview of the Indian Copyright Act, 1947. The need for a copyright society to equate the scales between actors and performers, and producers is relevant in the ongoing COVID19 pandemic that has seen job losses and increasing insecurities surrounding the jobs of small actors and performers' post-Covid lockdowns. This is made easier in India with its effective implementation of minimum wages in the case of

[49] https://www.cintaa.net/about-us
[50] CINTAA. Ibid.
[51] CINTAA. Ibid.

skilled/unskilled/semi-skilled workers, with these measures that would come to the assistance in the future.

Protection of actors and performers that is left un-addressed and if continued to be left in its current situation in India is a reflection of the exploitative nature of the Indian Hindi movie industry, one that is amongst the highest grosser in terms of box-office collections.

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Consumer Protection Act 2019 - A Boon in Changing Dynamics of World

Savita R. Rasam*

'A Consumer is the most important visit on our premises. He is not dependent on us. We are dependent on him'
- Mahatma Gandhi.

Abstract

Consumerism promotes an adequate knowledge & safeguards the rights of consumers. Consumer Protection changes with growing consumerism & modification of 'Caveat Emptor'. Consumer protection is a manoeuvre that encourage the interest of consumers. United Nations recommended that the world Governments should develop, strengthen and implement consumer protection policy. The movement for the protection of consumer started in USA in 1927. Consumer Associations were mushroomed in first half of the 20th century. The role of consumer associations in drawing the attention of the Govt. towards problems of consumer was significant. Mr. John F. Kennedy introduced a Bill of Consumer's right. Ralph Nader was responsible for modern consumer movement. In 1960, the International Organization of Consumers' Union (IOCU) has been formed which has done an outstanding work in the field of

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Consumer Protection. In 1972, Consumer Products Safety Acts was passed in US. Indian Government passed various legislative provisions to protect the interest of consumer. The experts committee under the Chairmanship of Justice Rajinder Nath Sachar, recommended for a provision of the 'Social Reports' in 1977. In 1986, Consumer Protection Act was passed in India. The Act was also amended in 1991, 1993, 2003, 2005 & so on for making it more effective. It looks at judicial pronouncements to evaluate how the judiciary also protect the consumer's rights. Due to globalization and modernisation, Consumer Protection Act, 1986 could not provide for remedy to modern problems and was the need of time to amend the legislation. To provide protection to the interest of consumers, parliament passed the new Act i.e. Consumer Protection Act, 2019. This paper focuses on the various provisions and interpretation of Consumer Protection Act, 2019. It is argued to make effective implementation and speedy justice to the consumers at large.

Keywords: Consumerism, Consumer Protection Policy, IOCU, globalization and modernisation, speedy justice.

Introduction

Consumer protection is a subject that has been in existence since ancient times. The seeds of consumer protection have been planted and nourished and taken care of from the times of ancient India and from the times when Dharma came into existence. Earlier Dharma acted as a constitution for people and the rules, norms laid down in Dharma were followed by the people. The term consumer protection has evolved from Vedic period till date and has developed tremendously. The General Assembly of the UN adopted by consensus a set of guidelines on Consumer

Protection on 9th April 1985, which are meant to provide framework for countries to use in the deliberations and strengthen policy and legislation to protect consumers and also promote international co-operation in the field.[1] Consumer Movement was started from 1960 to 1980 in India.[2] The first attempt to bring the consumer protection within the framework of legal ambit was in the year 1986 where by a legislation was passed in the parliament specially for consumer protection.

Consumer protection is a manoeuvre that promotes the interest of buyers of goods and services. Consumer protection aims mainly at protecting consumer from unsafe or low quality goods and services, fraudulent and frivolous advertising, labelling, packing and business practices that limits competition. Consumerism promotes providing of adequate information about the goods and services that will help consumer in making right decision while purchasing goods and services. It also creates awareness amongst consumers of the effective means of getting compensation for loss or damage suffered or inconvenience caused due to supply of such defective products and services. Market is influenced by consumer choice and business activities revolve round consumer, it developed consumer sovereignty.[3] Due to changing dynamics of standards of living and increase in demand for goods and supply the consumer distress is piling up day by day. Even if the manufacturers and the end agent don't tend to indulge in any

[1] S.R. Myneni, CONSUMER PROTECTION LAW, pp 46-47, 1st ed. 2010 Asia Law House, Hyderabad.
[2] S.C. Tripathi, THE CONSUMER PROTECTION ACT, 3rd ed. 2006, Central Law Publication, Allahabad.

malpractice, the middle man and wholesalers get involved in illegal activities whereby they invent artificial scarcity and manipulate prices of goods. This affects each and every class of people in the society. Hence, in order to keep a check on all this and avoid all the hurdles and protect the consumer and the seller against false claims by consumer, the Consumer Protection Act 1986 was enacted where by different forums have been set up to redress the problems of the consumer and protect their right against illegal practices.

However, with the emerging new ways of carrying on business and in the recent digital world, the existing Act could not provide for remedy to the modern problems that were faced by the consumers against new ways of business. The emergence of global supply chains, elevation in international trade and commerce and rapid development of e-commerce has increased complexity of business and problems and has created new opportunities for consumers which has been accompanied with misleading advertising, tele-marketing, e-tailing which pose new threats to consumer protection and a new act was the need of time to be enacted. Hence, the Consumer Protection Act, 2019 was enacted and passed by the parliament on 9th August 2019 which signed by the President. The said act became applicable from 20th July, 2020.

Need for Consumer Protection Act 2019 in ICT World

The Consumer Protection Act, 2019 while being enacted the reason for the same is given in its preamble itself. It states that:

> *"An act to provide for protection of the interests of consumers and for the said purpose, to establish*

authorities for timely and effective administration and settlement of consumers' disputes and for matters connected therewith or incidental thereto."

The Consumer Protection Act, 1986 which was in existence had its drawbacks and was incapable to tackle the modern problems that everyone started facing with the change in way of business and the dynamic nature of work. The act did not provide for remedy against e-commerce activities and did not have the extensive definitions. There was a need to change the law along with introduction of new and complex ways of working. Thus, the Consumer Protection Act, 2019 is an upgraded version of the Consumer Protection Act, 1986 in which various new definitions are included, a wider approach to existing definitions, new dimensions of dispute resolution such as mediation, product liability and such various provisions are result of this new Act. Hence, all about such new schemes and its applications have been discussed in this paper.

Objectives of the Study

1. To know the applications and interpretation of the Consumer Protection Act 2019.
2. To study the protective measures for consumer as an individual and as a group as well.
3. To suggest remedial measures thereto.
4. To create awareness about the provisions of the Consumer Protection Act 2019.

Research Methodology

The researcher used doctrinal and non-doctrinal method with adopting Discussion method which was used to know the

position of the Consumer Protection Act 2019. The researcher discussed with retired Dist. Judge, Ex. President of District Consumer Forum, expert mediator & President District Commission, Sangli.

Discussion was carried out in relation to the scope of the Consumer Protection Act, 2019 the implementation of various provisions, new amendments & interpretation of provisions in the Consumer Protection Act, 2019.

International Dimension: Protection of Consumer

Protection of the consumer in the USA dates back to the Codes of antiquity. In colonial agrarian communities, the buyer was effectively shielded by his knowledge and products and often by strong community sanctions against fraudulent practices. During the early 19th century, State & local authorities enacted laws controlling the sale and manufacture of products.[4]

In 1927, the Consumer Protection movement was started in USA. Of all the nations, the United States of America stands first, in preparing the required legislation for the protection of consumer. America enacted 'The Sherman Act' in 1890. In 1906, 'Meat Inspection Act' was passed. In 1914, 'Federal Trade Commission Act' was passed to protect the unorganised and untrained consumers.[5]

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[4] *Supra note* 2 at 11
[5] *Id.* at 12

In 1960, President John F. Kennedy introduced the Magna Carta of the rights of consumer i.e. Consumer Bill of Rights. The four main rights of the consumers were focused in the Bill of Consumer's right are - right to safety, right to be informed, right to choose and right to be heard. In 1972, Consumer Products Safety Act was passed in US, in 1978, Finland passed Consumer Protection Act & in U.K., the Consumer Protection Act was enacted in 1987.

Working of Various Legislations in India before the Consumer Protection Act 1986

The British era has witnessed the placement of the traditional practices relating to consumer protection with the unified modern legal system.

Several enactments were passed by the British Government & thereafter Indian Government also gave same protection to the society with the help of these legislations. Some of the enactment, directly or indirectly, beneficial for the consumer and consumer disputes are -

1. Indian Contract Act, 1872
2. Indian Penal Code, 1860
3. Sale of Goods Act, 1930
4. Drugs & Cosmetics Act, 1940
5. Drugs & Magic Remedies Objectionable Advertisements Act, 1954
6. The Prevention of Food Adulteration Act, 1954
7. Essential Commodities Act, 1955
8. Indian Standards Institution (Certification of Marks) Act, 1956

9. Monopolies and Restrictive Trade Practices Act, 1969 etc.

In 1983, Secretary General of United Nations submitted draft guidelines to United Nations Economic & Social Council (UNESCO) for the protection of consumers. The guidelines were placed under four heads viz. objectives, general principles, guidelines & International Cooperation.[6]

With the enactment of Consumer Protection Act 1986 there were amendments in various acts such as -

Drugs & Cosmetics (Amendment) Act, Prevention of Food Adulteration (Amendment) Act, Standard of Weights & Measures (Amendment) Act, Standards of Weights & Measures Enforcement (Amendment) Act etc. were passed in the same year in the same spirit.[7]

In India, consumer justice is a part of social & economic justice as enunciated in the Indian Constitution. Some Articles relating to Fundamental Rights (Articles 12 to 35) have indirect relation with Consumer Protection.[8]

National Dimension: Protection of Consumer

In India, the Sale of Goods Act, 1930 was the exclusive source of the Consumer Protection. It is also praised as a 'Consumer's

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[6] S.S. Srivastava, THE CONSUMER PROTECTION ACT, Central Law Agency, Allahabad, (2000) p.3
[7] *Id.* at p.4
[8] S.R. Myneni,, CONSUMER PROTECTION LAW, Asia Law House, Hyderabad, (1st Edition 2010) p. 60

Charter'[9] There are various provisions in Indian penal code, 1860 which deals with offences against consumers.

The Indian Constitution provides for socio-economic justice in the preamble itself. Fundamental Rights & the Directive principles of State Policy constitute the 'Conscience of our Constitution'.[10]

Some non-governmental consumer organisations & private groups were working for the protection of consumers in India. They have created awareness of consumer rights & maintained effective contact with the Government for Consumer Protection & forced the policy makers for the enactment to protect consumers.

The Consumer Protection Act, 1986 has received wide recognition in India as poor man's legislation as it is intended to provide justice which is 'less formal, less paper work, less delay & less expense.'[11]

Consumer Protection Act, 1986 is a milestone in the history of social welfare legislation. The Act was amended in 1991, 1993, 2002, 2005 & so on. These provisions could not provide for remedy to modern problems & that is why Consumer Protection Act, 2019 was passed by Indian Parliament.

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[9] *Supra note* 9 at p. 23
[10] *Id.* at p.60
[11] *Id.* at p 25

Role of Judiciary in Protecting Rights of Consumers in India

The Judiciary has emerged as a savoir of the rights of consumers. Hon'ble Supreme Court, District forums, State Commissions & National Commission played a vital role in protection of interests of consumers. Few decisions of these authorities are as follows -

In *Morgan Stanley Mutual Fund* v. *Kartick Das*[12], the Hon'ble Supreme Court elucidated the meaning of the expression 'consumer' as anyone who consumes goods or services at the end of the chain of production.

In *Ghanta Mohan Lakshmi* v. *C.V. Ratham*,[13] where there was no sensation below the left knee on operated side. Toes had become totally cold, Gangrene was developed & left leg above knee was amputed. Negligency & deficiency in service was proved. Reimbursement of medical expenses & damages with interest was allowed by State Commission, Appeal against such order barred by limitation was dismissed.

In *Branch Manager, Central Bank of India* v. *Bhagwan Vishnoo Mahadeshwar*[14], where, in a Mini Deposit Scheme, deposits had been regularly paid by the complainant to the Agent of the Bank. Entries made in the passbook had evidence of payment. But fraud was committed by Agent & amount was not deposited in the Bank. District forum held Bank liable to pay deposited amount with interest. Appellate Authority applied Doctrine of 'Vicarious

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[12] 1994 (4) § 225
[13] IV (2003) CPJ 12, (NC)
[14] (2004) CPJ. 193 (Mah) 2004(2) CPR. 185

Liability' and held that for the misconduct of Bank Agent, the respective Bank was answerable.

In *Fiat India Ltd*. v. *Amardeep Motors Ltd*.,[15] vehicle was booked & full payment was made but vehicle was not delivered. Complaint was allowed. District Forum held opposite parties jointly liable to refund paid amount with interest. Hence, in an appeal, contention that manufacturer was not liable as amount not paid to him by dealer was not acceptable. Dealer acting as agent, & manufacturer were jointly liable. Order of Forum was upheld but interests was reduced in appeal.

In *C. Venkatachalam* v. *Ajitkumar C. Shah and others*[16] held on 29th August, 2011 it was clearly mentioned that Consumer Protection Act, 1986 is dedicated and further explained that,

The amended Act 62 of 2002 reads as under

> *"The enactment of the Consumer Protection Act, 1986 was an important milestone in the history of the consumer movement in the country. The Act was made to provide for the better protection and promotion of consumer rights through the establishment Consumer Councils and quasi-judicial machinery. Under the Act, consumer disputes redressal agencies have been set up throughout the country with the District Forum at the district level, State Commission at the State level and National*

[15] III (2005) CPJ 124 (NC)
[16] Available at https://indiankanoon.org/doc/1399474/

Commission at the National level to provide simple, inexpensive and speedy justice to the consumers with complaints against defective goods, deficient services and unfair and restrictive trade practices. The Act was also amended in the years 1991 and 1993 to make it more effective and purposeful."

In *Narender Gupta* v. *DLF Limited & 8 others*[17] held on 20 January, 2020 National Commission after hearing the appeal directing DLF Ltd. that they should present for acceptance of ownership as well as possession of the said flat along with the completion certificate of the concerned authority. Keeping in view the peculiar facts of this case, it is clarified that the Developer shall not charge any further charges like maintenance & holding charges from the date of occupation certificate till the actual date of possession.

It is also directed that DLF Ltd. refund the car parking charges collected from the complainant with 7% rate of interest from the date of deposit till the date of realization & not to insist upon any undertaking before the offer of possession. Time for compliance within four weeks from the date of receipts of a copy of this order failing which the amount shall attract interest @ 8% p.a. from the date of filling of the complaint till the date of realization. National Commission also award costs of Rs. 50,000/-.

These are few judgements which shows that judiciary also take efforts to protect the interest of consumers.

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[17] Available at https://indiankanoon.org/doc/59406388/

Comparison between Consumer Protection Act 1986 and Consumer Protection Act 2019:

Comparative Table of Old Act 1986 and New Act 2019

Consumer Protection Act 1986	**Consumer Protection Act 2019**
Chapter I Preliminary Ss 1-3	Chapter I Preliminary S-1 & 2
Chapter II Consumer Protection Councils Ss. 4-8	Chapter II Consumer Protection Councils Ss. 3-9
Chapter III Consumer Disputes Redressal Agencies Ss. 9-27	Chapter III Central Consumer Protection Authority Ss. 10-27
Chapter IV Miscellaneous Ss. 28-31	Chapter IV Consumer Dispute Redressal Commission Ss. 28-73
	Chapter V Mediation Ss. 74-81
	Chapter VI Product Liability Ss. 82-87
	Chapter VII Offences & Penalties Ss. 83-93
	Chapter VIII Miscellaneous Ss. 94-107

Source : C.P. Act 1986 & C.P. Act 2019 official copy

New Dimensions provided by the Act of 2019 in India

The Consumer Protection Act, 2019 consists of 107 sections. It has provided various new provisions, tried to strengthen the rights of consumer and provide for easy and speedy redressal of dispute. The new provisions of the Consumer Protection Act, 2019 are as follows:

1. Definitions

Various new definitions introduced in Consumer Protection Act, 2019 such as, advertisement, design, direct selling, e-commerce, electronic service provider, endorsement, establishment, express warranty, goods, harm, injury, product liability and so on.[18]

2. Central Authority

The very first change that has been noticed in the Consumer Protection Act, 2019 is that a Central Consumer Protection Authority is to be established under Section 10 of Act 2019 which was not made under the Act of 1986. The Central Authority have been empowered with various powers such as to refer the matter for investigation or to other regulator, to recall goods if found harmful, to issue directions and penalties against false and misleading advertisements and so on. The Central Authority is also bounded with certain functions which include protection, promotion and enforcement of rights of the consumer, prevent unfair trade practices, ensure no false or misleading advertisement is made. The Central Authority also includes an

[18] See §§ 2(1),(12),(13),(16),(17),(18),(19),(20),(21),(22),(23), (34) of C.P. Act, 2019 (India).

investigation wing which is headed by Director General as appointed by the Central Government.

3. Investigation Wing

The District Collector has been included to play a role in consumer protection which was absent in the Consumer Protection Act, 1986. The District Collector is given the power to inquire or investigate in any matter on complaint made to him or on reference made to him by the Central Authority or District Commission regarding violation of rights of consumer, misleading advertisement or unfair trade practices.[19] The Consumer may in writing or in electronic form can make a complaint to District Collector, District Commissioner or the Central Authority.

4. Role of Mediator

Another important aspect that has been included in the Consumer Protection Act, 2019 is that in order to avoid delay in redressal of dispute an alternative dispute resolution system has been recognised in the Act itself. The Act of 1986 did not have any reference or mention of any alternative dispute resolution system. However, in the Consumer Protection Act, 2019 there is a direct provision of referring the matter to mediation under Chapter V of the Act, 2019 which alternatively will reduce the burden on judiciary as well. The provision under Section 74 of the Act give statutory recognition to mediation and provides a mechanism for

[19] See §16 of C.P. Act, 2019 (India)

promoting mediation as a mechanism of redressal for consumer disputes.

5. Pecuniary Jurisdiction

Another major amendment in Consumer Protection Act, 2019 that is evident is the pecuniary jurisdiction of the consumer forums. The pecuniary jurisdiction has been increased to 1 Crore which is to say that the District Commission have powers to entertain matters relating to goods and services upto Rs 1 crore.[20] The State Commission will have the pecuniary jurisdiction from 1 crore upto 10 crore.[21] Lastly, the National Commission will have pecuniary jurisdiction above 10 crore.[22]

6. District Commission

The District Consumer Disputes Redressal Forum ('**DCDRF**') has been renamed as District Consumer Disputes Redressal Commission.[23]

7. Product Liability

Another new aspect that has been covered by Chapter VI the Consumer Protection Act, 2019 is that it has introduced the concept of 'Product Liability'. The act provides for provisions by which the manufacturer, seller as well as the service provider are held liable if the terms mentioned in those sections are fulfilled.

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[20] See § 34(1) of C.P. Act, 2019 (India).
[21] See § 47(1) (a) (i) & (ii) of C.P. Act, 2019 (India).
[22] See § 58(1) (a) (i) & (ii) of C.P. Act, 2019 (India)
[23] See Sub § (1) of Section 28 of C.P. Act, 2019 (India).

The liability of each of such persons, when and in what situation it would arrive has been clearly provided in the Act. This helps in pin pointing out the exact person who is liable for the damaged goods or lack of services. An action for product liability may now be brought by a complainant against a product manufacturer or a product service provider or a product seller, as the case may be, for any harm caused to him on account of a defective product.

8. E-commerce

The Consumer Protection Act, 2019 also covers all the areas of e-commerce and all the digital ways of business. The Act in its definitions section has clearly defined the term e-commerce[24] and electronic service provider.[25] The act has also brought e-commerce transactions under the provisions of direct sales.

9. Online Hearing

The Consumer Protect Act, 2019 has also made it easy for the consumers to request for a video conference hearing under section 38(6) of Consumer Protection Act, 2019 whereby it will be easy for a consumer to be present on the date of hearing even if he or she is not able to physically be present. There has been provisions made for even E-filing of the complaints under section 35(2) of Consumer Protection Act, 2019 by the consumer which helps him to get a more speedy and easy access to justice.

[24] See § 2(16) of C.P. Act, 2019 (India).
[25] See § 2(17) of C.P. Act, 2019 (India)

10. Change in Deposit

The Consumer Protection Act, 2019 has also made a change in the amount to be deposited by the opposite party before making an appeal to State Commission from District Commission. The opposite party has to now deposit 50% of the amount of the order of the District Commission before proceeding for an appeal under section 41 of Consumer Protection Act, 2019.

11. Power of State & National Commission

The Consumer Protection Act, 2019 also contains provisions in Sections 49(2) and 59(2) of the Act which empower both the State Commission and National Commission to deem any terms of the contract between the consumer and the service provider or manufacturer as the case may be, which are unfair to any consumer, to be ineffective and void. This is a new provision or power vested upon the SCDRC and the NCDRC which was not a part of the old Act, 1986.

12. Discretionary Power of National Commission

The Consumer Protection Act, 2019 also has come up with a new provision whereby a second appeal to National Consumer Dispute Redressal Commission can be preferred under section 51(3) in the circumstances where a substantial question of law is involved.

13. Administrative Control

The Consumer Protection Act, 2019 has also provided for an administrative control of the State Consumer Dispute Redressal Commission over the District Commissions and similarly

National Commission over the State Commissions. Moreover, in addition to that the Act also has provision relating to investigation against the President and the members of State and District Commission if any allegations are made against them.

14. Execution Jurisdiction

The Consumer Protection Act, 2019 has also conferred powers on the Consumer Commission as provided under Code of Civil Procedure 1908 in relation to execution with limitation as provided in Act itself.

15. Power of Review

The Consumer Protection Act, 2019 has also given powers to the District Commission and State Commission to review its order on an application made to it by any of the party or by own cognisance. This power was not granted by the earlier Act, 1986 whereby the only option that use to be left to the complainant or the other party was to approach State or National Commission which use to consume time, energy and other resources.

Recommendations

As the Consumer Protection Act, 2019 has tried to cover the new areas of today's modern ways of business but it has left out certain areas which are also a need which has been felt and seen.

1. To Develop Infrastructure

The legislation does not speak about setting up of the infrastructure, administrative staff and other related matters. This is the need of the hour to implement the Act effectively. Hence,

it is also recommended that the infrastructure, the administrative staff and all such necessary facilities be provided to the ground level so that it would be easy for everyone to implement the law properly. The administrative staff should also be provided with the technology required for e-filing, video conference meetings and online hearing of the matters which could help in speedy disposal of matter even during the times of pandemic where physical hearing is not possible.

2. Quick Disposal of Pending Cases under Act 1986

It is also observed and recommended that in order to implement the Consumer Protection Act, 2019 more purposeful, the pending cases in which the old Act i.e. Consumer Protection Act, 1986 is being used has to be speedily disposed off so that all the cases will be governed only by the new law and the scope of confusion will be reduced and removed of eventually.

3. Notification from Government is essential

It is also recommended that the notification relating to the appointment and composition of DCDRC be made so that the forum which is being provided for in the Act 2019 will come in force and start operating according to the new laws and rules.

4. Appointment of Subordinate Authority

The Act provides for grievance redressal through the means of District Collector. However, it is known fact that the District Collector is already burdened with a lot of other administrative and executive work. This might dilute the effectiveness of the working of the District Collector towards the consumer matters. Hence, it may be recommended that a subordinate authority be

appointed under the District Collector who will solely look after the consumer complaints made to Collector and report the same to the Collector.

5. Interrelation between Consumer Act & C.P.C.

The Act should empower the Consumer with certain inherent powers and as the Act has conferred powers similar to Code of Civil Procedure in relation to execution, summoning, discovery, inquiry and witness, the Act has to even prescribe the procedure to be followed when a party fails to file a written statement within the prescribed period. The Act of 2019 is very silent about the same and even if there is a provision relating to review but it is for the order and on the point of law or error. Hence, as section 151 of CPC speaks about equal opportunity to be heard and submit their side of story will not be fulfilled. On producing sufficient and reasonable grounds there should be a provision to condone the delay in filing written statement.

6. Clarity about Individual and Group

The provisions under the Act of 2019 provide for two remedies one that is a consumer or class of consumer can file a complaint with District commission for according to the jurisdiction and another is that they can approach the District Collector or Central Authority as a class. However, this creates a confusion as to which platform to go to or can the complaint be filed with both the platforms.

7. Appointment of Mediator

Another recommendation that is to be made is that a panel of mediator be appointed by the State Commission which would

look after the mediation process and that they would try to solve the disputes through mediation.

8. To create awareness among the society

Lastly, an awareness needs to be created among the general public and the society at large about the Consumer Protection Act, 2019 with its benefits and uses. People are still unaware about their rights as a consumer and the legal remedies available to them. Hence, an overall awareness needs to be created.

Conclusion

Hence, from the above discussion we can conclude that the new legislation is self-sufficient and has a broader scope as compared to the previous Act. The changes and amendments made in the pecuniary and territorial jurisdiction are welcoming change and has a positive impact among various classes of society. The provisions like mediation which are now being made a part of the new Act will be helpful in providing early and cost effective justice and would in true sense help the parties to arrive at the justice which is the aim of the law. The definitions also clarify the motto behind the Act and help in giving the clear picture and meaning of various provisions of the Act. It is also necessary to provide speedy access to justice and the disputes need to be settled and adjudicated to the earliest. To conclude, the Consumer Protection Act, 2019 will play an important role in providing justice and securing the rights of the consumer in this dynamic society which keeps on changing every day.

THE ISSUES AND CHALLENGES INVOLVING DIGITAL CURRENCY: AN APPRAISAL

Ankur Madhia[*]

Abstract

With increased exposure to the cryptocurrency and its significant growth amongst the investors has led to cryptocurrency gathered a lot of attention and created two groups. The one who are in favor of the adventure of crypto world called the 'Proselytizers' and others who are not very positive about the future of cryptocurrency called the 'Naysayers', who also highlights the perils attached with the decentralized private cryptocurrency such as Bitcoin or Dogecoin. Here the Proselytizers are basically the technology entrepreneurs or traders who have a vested interest in the success of cryptocurrency as owners of the crypto platform like Zebpay or the entrepreneurs who are the holders of large chunk of cryptocurrencies like Elon Musk. The Proselytizers usually believe that the asset value to cryptocurrency is based on its decentralization as the world needs an alternative currency and the centralized currency cannot be trusted anymore. They also want to end the hegemony of the US government, US Treasury and the Federal Reserve. On the other hand, the Naysayers do not approve of private cryptocurrency as an alternative to the centralized currency.

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Here the Naysayers are usually the long-term investors who judge assets based on valuation methodologies and they disapprove cryptocurrency and blockchain technology as both are based on complex computation and algorithms which have no tangible value and utility or any intrinsic value to the outside world. Also, private crypto currencies and blockchain technologies are not environmentally friendly and will eventually result on hampering the global environment as they use enormous energy for data mining or bitcoin mining.

Keywords:

Fiat Currency, proof of work, proof of stake, blockchain forks, HOLD (hold on for dear life), stable coins, utility tokens, decentralized investment pools and second layer protocols and distributed ledger.

Introduction

The number of digital currencies is increasing with the passage of time. The number has increased from about 2,000 in late 2017 to over 8,000 in 2021. There has been a huge change in the way we use to perceive cryptocurrency and blockchain technology from the year 2018, when the first ban on private cryptocurrency was imposed by the RBI in India.[1] Today the cryptocurrency market has broadened to include stable coins, utility tokens, non-fungible tokens (NFTs) and Central Bank digital currencies

[1] Reserve Bank of India, Master Circular, Prohibition on Dealing in Virtual Currencies (VCs), RBI/2017-18/154, (Issued on April 6th, 2018), https://rbidocs.rbi.org.in/rdocs/notification/pdfs/.

(CBDCs). There has been launch of cryptocurrency asset management firms like Grayscale Investment LLC, listing of Coinbase Global Inc. on NASDAQ, crypto based derivatives which are available on CME Group world's leading derivative marketplace, companies which provide data on crypto assets by compiling and analysing crypto market data such as Coin Metrics. Even multinational companies are exploring avenues of blockchain technology for improved and efficient day to day operations like Walmart using blockchain technology to track its food products or digital hospitals using blockchain technology to keep track of COVID-19 vaccines. Now the Forbes publishes an annual magazine called "Forbes Blockchain 50" that features MNC's who implement blockchain technology in their operations.

Still there is a significant amount of misinformation with regard to cryptocurrency and the industry experts have conflicting views about the private digital currency. Bitcoin, world's first cryptocurrency was launched in year 2009 by an unknown person or group of persons using a pseudonym name "Satoshi Nakamoto".[2] The first bitcoin transaction took place in 2009 with an objective to decentralize the currency and to make the network with which the money is transferred and made accessible to the general public. The most famous transaction done through bitcoin took place on 22nd of May, 2010 also known as "Bitcoin Pizza Day" where a software developer in order to promote transactions through bitcoins gave away 10,000 Bitcoins for two

[2] Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System,* Bitcoin, (July 10th, 2021), https://bitcoin.org/bitcoin.pdf.

pizzas.[3] Bitcoin was created to have greater transparency about the transaction performed on the platform without revealing the identity of the transferor and the transferee. Bitcoin has a secured immutable platform where the transactions cannot be reversed by the users and the data on the nodes cannot be changed or censored. Bitcoin provides an open accessibility to its network where no government can regulate the access of the currency. The methodology used in Bitcoin is such that here each transaction can be verified by a decentralized group of node computers referred as 'node' on the network. A transaction is broadcast like a news bulletin to nodes on the bitcoin network. The node selects the transactions and compile them into a block termed as "blockchain" which helps in confirming that there is no double spending. Each mining node uses enormous power to solve complex cryptographic algorithms known as proof of work which generates a unique 'Hash' which represents the transactions in that particular block. The node which solves the puzzle announces it on the network about its validation to other blocks and if other nodes confirms the validity of that block, this validated block is then added to the chain of the prior blocks terms as "Blockchain".

The Bitcoin model works on the incentive nodes get for validation of the financial transactions. The incentives are given for operation of nodes, computer equipment, electricity and time

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[3] Denny Galindo and Lisa Shalett, *Investing in Cryptocurrency*, Morgan Stanley Wealth Management Global Investment office, April 14th, 2021, https://advisor.morganstanley.com/meridian-point-group/documents/field/m/mo/moore-smith-bassham-piorkowski/Investing%20in%20Cryptocurrency.pdf.

spent in the validation of the transaction. These incentives can also be presented as a new bitcoin to the node along with some transaction fee. The total number of Bitcoins which could be mined is 21 million and once all the bitcoins are mined the nodes will get only transaction fee as a reward for validation of the transaction. Bitcoin offers privacy to the individuals as it uses cryptography which applies a private key and a public key where the private key is usually kept in the e-wallet of the owner which acts as a password whereas the public key is not linked to any recognized owner.

Methodology

The content and data for this study has been collected from secondary sources like financial articles, newspapers and various internet sources.

Has Bitcoin Failed as an Alternate to Fiat Currency?

A currency usually is expected to fulfil roles in the real world of finance to be of any material use for people. The primary role of a currency is to become a medium of exchange between two people, the original objective of bitcoin was to serve as a peer to peer payment system for people like a fiat currency. Bitcoin transactions are usually slow as compare to its counterpart like Visa and Mastercard which can handle around thousands of payments per second whereas bitcoin can only handle 10 transactions in one second. On the other hand, bitcoin is too volatile to be consider as an alternative to fiat currency as its volatility ranges from 65% annually to sometimes 71% in a

quarter. The volatility of dollar is as per DXY index data is 3.20% annually and 1.61% quarterly.[4]

Is Bitcoin an investable asset class?, needs some investigation as some believe bitcoin is a long-term store of value and it can also be considered as an investable asset class for investors to diversify their portfolio as a hedge against inflation. Often people compare bitcoin to gold and popularly bitcoin is also known as digital gold, which in majority opinion is not the case as there is no intrinsic value attached to Bitcoin and it cannot replace a currency or at least fulfill the primary role of a currency.

Ethereum Blockchain was introduced in 2015 which has its own cryptocurrency known as "Ether". Ethereum is also like Bitcoin with features such as decentralization and immutability. Ethereum provides other functionality like smart contracts which are computer applications and can be executed on the Blockchain.[5] Ethereum is an improvement over Bitcoin that uses less energy for validation of transaction and can process up to 1000 transactions per second which could go upto 20,000 in Etherum 2.0. Etherum adopts proof of stake approach instead of proof of work validation approach of Bitcoin.

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[4] Market Watch, https://www.marketwatch.com/investing/index/dxy (last visited on July 30th, 2021).

[5] Vitalik Buterin, *Ethereum White Paper – A next generation smart contract & decentralized application platform*, Blockchainlab, (August 1st, 2021), https://blockchainlab.com/pdf/Ethereum_white_paper-a_next_generation_smart_contract_and_decentralized_application_platform-vitalik-buterin.pdf

Solana Blockchain which was introduced last year in 2020 which has further added feature like proof of history for validation of transactions which complements the proof of stake process and make Solana more efficient for validation of its block and allows validation of thousands of contracts to run parallelly. Solana can validate 50,000 transactions per second and it uses programming language C/C++ or rust which is considered to be the easiest and fastest in the world. The transaction cost in Solana is about 1/40 of a penny which makes it the cheapest of all.[6]

The Difference between Cryptocurrency, Digital Coins and Digital Tokens

The word cryptocurrency does not mean digital coins and digital tokens as assumed by many of us. These two digital assets have characteristics like cryptocurrency and should be bundled together, in fact digital coins functions as a payment form and their value is determined either independently or it is derived from an existing currency. Digital coins can further be subcategorized as:

A. 'Cryptocurrency' which has its intrinsic value based on the cryptography on a decentralized platform which is public and government has no control over it.

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[6] Sharmin Mossavar-Rahmani, Matheus Dibo, Shahz Khatri, Jakub Duda, Shep Moore-Berg, Oussama Fatri & Yousara Zerouali, *Digital Assets: Beauty is not in the eye of the beholder*, GOLDMAN SACHS (June 2021), https://www.goldmansachs.com/what-we-do/consumer-and-wealth-management/private-wealth-management/intellectual-capital-f/beauty-is-not-in-the-eye-of-the-beholder-report.pdf.

B. ‘Stablecoins’ is another type of digital coin which derives its value from a fiat currency and usually known as tokens on a public blockchain.
C. ‘Central Bank Digital Currencies (CBDCs)’ are digital currencies which are issued by the central bank of a country and represents the fiat currency of the country’s bank and are controlled by the central bank. China, Sweden, Bahamas and Cambodia have launched CBDCs or pilot projects of CBDCs.

Digital Tokens on the other hand give owners whole, partial or potential ownership or the right to use/utilize a service or to perform a function. These digital tokens are usually created by smart contacts on permissioned distributed ledger or a public blockchain. There are four categories of Digital Tokens:

A. Utility Tokens, these can be exchanged for some work done as in service or for exchange of some goods, example of utility token is BAT – Basic Attention Token.
B. Security Tokens is used for ownership in tangible assets as an investment contract. Security token is considered as security as per US court decision and even Securities and Exchange Commission (SEC) considers these tokens as investment contract when money is invested in a “common enterprise with a

reasonable expectation of profits derives from the efforts of others".[7]

C. Governance Tokens, gives the right for giving opinion for policies, upgrades or issuance of tokens in a decentralized platform. Governance Token helps in forming decentralized autonomous organization (DAO) for making decision on operation of lending platform.
D. Non-Fungible Tokens (NFTs), these are unique and non-interchangeable tokens which represents ownership of rights for tangible and digital intellectual property which are implemented by smart contracts enabling uniqueness of every token.

Examining Data Related to Bitcoin:

The data related to cryptocurrency is very limited and sources are not very authentic and reliable, the first bitcoin was mined in the year 2009 and it has always remained very volatile ranging from 125% increase in year 2010-2013 from 68% decrease after 2013. The main reason for poor availability of data on Bitcoin is due to fake reporting of volumes, varying reliability of data from exchanges and use of different methods to compile data related to it. US Securities and Exchange Commission, Bitwise Asset Management highlighted that in case of Bitcoins 95% of reported volumes trading were fake or non-economic in nature.[8] In a

[7] US Securities and Exchange Commission, *Framework for 'Investment Contract' Analysis of Digital Assets*, April 3rd, 2019, https://www.sec.gov/files/dlt-framework.pdf.
[8] Lauren Yates, *Memorandum: Meeting with Bitwise Asset Management, Inc., NYSE Arca, Inc., and Vedder Price P.C.,* US Securities and Exchange

research paper by Lin William Cong et al. named "Crypto Wash Trading" highlighted that fake trades or wash trading accounts accounted for over 70% of reported volumes on unregulated exchanges. Dan Amiram et al. in a research paper named "Competition and Product Quality: Fake trading on Crypto Exchanges" highlighted fake trading on exchange amounts from 19% to 87% on any exchange.

Accepting payment through crypto mode

In United States more than 23,000 businesses accept payment through bitcoin.[9] The number of companies accepting bitcoin in exchange of their products and services is increasing with each passing day. My sports teams accept cryptocurrency for tickets and its merchandise. Telsa, Inc., is accepting Bitcoin as a mode of payment for their Electric-cars. The use of cryptocurrency for conducting business transactions comes with host of challenges but there are few advantages of accepting cryptocurrency as it provides access to new demography and creates awareness amongst the employees about this new form of payment. Accepting cryptocurrency gives access to new capital and liquidity to the company's balance sheet.

Commission, March 20, 2019, https://www.sec.gov/comments/sr-nysearca-2019-01/srnysearca201901-5164833-183434.pdf.

[9] Maddie Shepherd, *How many businesses accept Bitcoin? Full list 2021*, Fundera by Nerdwallet, December 16, 2020, https://www.fundera.com/resources/how-many-businesses-accept-bitcoin.

Use of Crypto for Payment Facilitation

Some company uses crypto currency just to make payment easier for their clients, here the company converts the payment done in crypto into fiat currency and really never touches the crypto currency which helps them in keeping their account books clear of crypto. Using crypto payments without actually updating it into the companies account books requires minimal work and serves the immediate goal of accepting payment in cryptocurrency from its customers which eventually helps in increasing the sales of a company. This hands-off[10] approach requires a third-party payment gateway which accepts the payment in cryptocurrency such as bitcoin and converts it into fiat currency for the company. Accepting payment by this approach may cost some additional charges to the company which has to be paid as a fee to the third-party vendor but it also reduces the payment risk and compliance issues of the company. Here the company is required to have due diligence about the third-party vendor as it relies on it for any fraud, cyber related issues and taxation information. Things do change in case this approach is adopted in transactions which are cross-border in nature, here the company needs to have due diligence on global licensing of the third-party vendor which keeps on changing with change in law in every jurisdiction. The company needs to keep in mind the transfer pricing planning when transactions are made across the globe with the help of a third-party vendor and how to minimize the risk which would occur due to currency fluctuation

[10] Deloitte, *Corporates using crypto, Conducting business with digital assets*, https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/corporates-using-crypto-pov.pdf .

while dealing in foreign currencies. Also, technical support which would be needed 24/7 for any error in payment gateway and refund of payment to be made in case the transaction cannot be verified.

Another way of enabling payment through cryptocurrency is hands-on[11] approach where the company enters the transactions done via cryptocurrency in its book. Here there are two ways in which the company can adopt a hands-on approach first is where a third-party vendor provides a wallet management services to the company. The company opens an account with the service provider in its own name and the third-party vendor provides tracking and valuation of the cryptocurrency to the company. Here the cryptocurrency is managed in the wallet as hot wallets which are used as current account or operational accounts and via cold wallets which serves as saving account and are used to store the cryptocurrency. These crypto wallets also keep a track of date and time of crypto-currency flow on the basis of date and time, so they can be used to convert one cryptocurrency into other so as to reduce the crypto currency fluctuation. The other way of enabling cryptocurrency is to integrate crypto into company's own system by managing its private keys. In self custody (hands-on) approach the company has to encounter more complexity and it requires better understanding of cryptocurrency. It also makes company more accountable for transactions done by its customers and requires better service support to its customers for any issue while they deal with cryptocurrency. In hands-on

[11] Deloitte, *Corporates using crypto, Conducting business with digital assets*, https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/corporates-using-crypto-pov.pdf .

approach the companies need to have an obligation that they are not enabling money laundering and have met all the legal requirements of anti-money laundering laws for that specific jurisdiction.

Tax Treatment for Crypto-Exchange

Using crypto for exchange like a fiat currency creates a lot of challenges, usually crypto is considered as an intangible asset or referred as digital gold. Use of crypto as method of payment for delivery of products may be treated as barter transaction, here the price of the crypto at the time of transaction plays an important role for taxation. Its value at the time it was received is vital rather when the actually contract was formed. So, here the company needs to establish its fair market value and must record the time at which the transaction took place. Thus, when a company get a payment in crypto currency it should track it to calculate any sales tax, indirect taxes on the transaction, VAT and service tax. Here the company requires a detailed documentation regarding the transaction and must remit any tax for the transaction done to the appropriate authority.

A. Why use Crypto at all if it brings so much Overhead Burden? One of the major problems which each company face is how to manage their capital? It could be answered in discovering the amount of money company has, where is that capital and how accessible is it?

   Crypto currency can ease this burden of capital management as when transactions are done in cryptocurrency the transaction is locked until it is settled and the usual time for settlement of a transaction done by

cryptocurrency is of few minutes. While the transaction is locked the company cannot double spend its capital which provides an operational awareness regarding the balance capital. Whereas when a transaction is completed via fiat currency there are blind spots as the settlement time for fiat currency which ranges from several hours to days. During this time period of settlement, the money is debited from one account and cannot be accessed. The other party is also unaware about the credit of money even though the same might have been transferred to its account. During this settlement period the money is inaccessible to both the parties and it also causes a short-term capital imbalance for a company as both the parties awaits confirmation of their transfer. Hence, use of cryptocurrency enhances the transparency of data which is readily available on a public network and it also enhances the speed at which a business transaction is completed.

Performance Related Challenges with Blockchain Technology

In blockchain technology each node represents a data and the data is replicated by every node in the system for validation and verification purposes. This replication of data in every node leads to performance issues which are further impacted by calculations done for encryption, decryption and hashing operations.[12]

[12] Government of India Ministry of Electronics and Information Technology (MeitY), *National Strategy on Blockchain,* Ministry of electronics and Information Technology, January 2021,

Blockchain technology also suffers from scalability and storage as bitcoin network has limited capabilities of handling very huge amount of transactions on its network in a limited time frame. The storage of data on the blockchain network is another issue as once data is stored in the nodes it cannot be modified, making it perpetual and it also suffers from replication which in fact leads to demand for heavy resources and energy for its retrieval. Blockchain technology also suffers from infrastructure challenges as it is distributed in nature, its network and resource allocation differ across the countries and depends on network cost, its maintenance and security issues. Lowering of standards in any of the mentioned points will result in performance issues in the entire network. Further blockchain technology suffers from privacy issues as the data stored in blockchain is stored at every node in the network which can be easily accessible. This issue of privacy can be sorted if the given data is stored in such a way that the privacy of an individual is not compromised and permissions are taken for data usage according to data protection laws of the particular jurisdiction or individual.

Challenges in Adopting Blockchain Technology in India

The Indian banking system requires non-repudiation by in person verification which finds no reference in the blockchain technology which work on digital signatures as its unique selling point. Schedule I of IT Act, 2000 does not provide any reference regarding transactions which can be done for transfer of immovable property, negotiable instruments and wills using

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https://www.meity.gov.in/writereaddata/files/NationalStrategyBCT_%20Jan 2021_final.pdf.

blockchain technology or digital signatures. Section 43A of IT Act, 2000 does not create a blanket for cryptocurrency[13] as it embraces the right to be forgotten[14] which is just opposite to blockchain technology where data cannot be removed and it stays on a public network which can be accessed by any one. Also, the data which is stored on public blockchain as it appears on each node will be hit by various regulations of different jurisdictions.

Risk Attached to Investment Made in Crypto:

Any form of cryptocurrency as an asset class has no guarantee attached to it as there is no support from central bank, the price movement is huge and there is no physical collateral to cryptocurrency. Encryption breaks is one of the major risks involved in the cryptocurrency as increase in power demand and use of quantum computing would ultimately lead to crack in encryption. However, the software developers hope that their cryptocurrency would last for about 20 years but it is likely that the encryption backing bitcoin will break one day and the wallets of the crypto owners will be hacked. Other major risk attached to Bitcoin is its flawed code where in August 2010, 184 billion unauthorized bitcoins were mined though the flaw, which later was discovered and got patched. Another bug which appeared in

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[13] Vinod Joseph and Deeya Ray - Argus Partner, *India: The Right to Be Forgotten – Under the Personal Data Protection Bill 2018*, Mondaq, (November 12th, 2019), https://www.mondaq.com/india/privacy-protection/860598/the-right-to-be-forgotten--under-the-personal-data-protection-bill-2018.

[14] *Everything you need to know about "Right to be forgotten"*, GDPR.eu available at https://gdpr.eu/right-to-be-forgotten/

bitcoin was duplicate transaction done in year 2018 where people were able to spend money twice.[15]

Scenario of Cryptocurrency in India

The Ministry of Electronics and Information Technology (MeitY) acknowledges blockchain technology to have potential to become futuristic application in the field of Governance, Banking and Finance, even Cyber Security. It has supported various institutional project one of which is "Distributed Centre of Excellence in Blockchain Technology" with C-DAC, IDRBT and VJTI.[16] In this project the research was focused on utilizing blockchain technology in various domains and to develop its proof of concept solution and to use them. Blockchain based property registration solution was developed and successfully implemented in Shamshabad District of Telangana State. Using blockchain based proof of existence framework can give a solution for authentication of academic certificates which is also piloted at C-DAC Advanced Computing Training School. A Center of Excellence (CoE) in Blockchain technology was established by NIC with NICSI having an objective to work as catalyst in adopting and deploying of blockchain technology in government sector. The CoE has identified various sectors were applications based on blockchain technology can be

[15] Denny Galindo and Lisa Shalett, *Investing in Cryptocurrency*, Morgan Stanley Wealth Management Global Investment office, April 14th, 2021.

[16] National Strategy on Blockchain by Government of India Ministry of Electronic and Information Technology, January 2021, https://advisor.morganstanley.com/meridian-point group/documents/field/m/mo/moore-smith-bassham-piorkowski/Investing%20in%20Cryptocurrency.pdf.

implemented such as Blood Bank, Digidhan, PDS, Land Registration, GST and Excise Management. NITI Aayog has also recognized blockchain as a future technology capable of introducing decentralization, transparency and accountability in the system. NITI Aayog has developed and executed various applications in blockchain technology in association with various Government Departments and private players. The applications are used to control land records, pharmaceutical supply, subsidies disbursement and authentication of educational certificates. Reserve Bank of India (RBI) is also working on applying blockchain technology in banking institutions. Mahindra and IBM are jointly working on supply chain management solution. SBI, Yes Bank, Axis Bank and ICICI Bank are adopting blockchain technology into their business.

Energy and Environmental Concerns Linked with Cryptocurrency

Bitcoin and other forms of cryptocurrency require a huge chunk of energy for validating its transactions. This enormous amount of energy is spent to increase the level of security in its network. As per data shared by Morgan Stanley[17] bitcoin amounts to 0.5% of world's energy consumption which is almost equal to the amount of energy Netherlands spends for its 17 million people. China who is a host to almost 65% of data miners for bitcoin aims to reduce its carbon footing up to 60% by the year 2030. A lot of

[17] Sheena Shah, James Faucelle and Betsy Graseck, *Update Bitcoin, Crypto and Digital Currencies*, Morgan Stanley, (June 11th, 2021), https://advisor.morganstanley.com/scott.altemose/documents/field/s/sc/scott-a--altemose/Update_Bitcoin%20crypto%20digital%20currencies.pdf.

regions in China where data miners host bitcoin mining from computers use coal for generation of electricity which increases the carbon emission in the state of China. Mongolia has banned mining of cryptocurrency from April 2021 in the view of high consumption of energy used in the process of validation of transaction on bitcoin public network. Scientists in China have published a paper titled "Policy Assessments for the carbon emission flows and sustainability of Bitcoin blockchain operation in China" in Nature Communications, which lays emphasis on the need for policy intervention on growing energy consumption and emission of carbon for bitcoin mining in China. This research paper mentioned above, highlights the fundamental issue with use of Proof-of-Work (PoW) which when used for validation on one hand bring attractive financial incentives for the data miners, who started working with basic mining hardware such as CPU of a general computer saw an upgradation to Graphic Processing Unit (GPU) which offered more power and better hash rates for data mining which were finally replaced by Application-Specific Integrated Circuits (ASICs) for further optimized hashing calculations.[18] This rapid hardware upgradation and competition amongst the data miners created a significant impact on capital expenditure which has to be incurred by the data miners. It also led to a significant energy consumption which is required to power up the mining hardware used for data mining process and to perform hashing calculations.

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[18] Shangrong Jiang, Yuze Li, Quanying Lu, Yongmiao Hong, Dabo Guan, Yu Xiong and Shouyang Wang, *Policy Assessments for the carbon emission flows and sustainability of Bitcoin blockchain operation in China*, Nature Communications, (April 6th, 2021), https://www.nature.com/articles/s41467-021-22256-3.

This growing energy demand for data mining has raised a significant problem for many nations as it impacts the environment and is becoming a significant cause for CO_2 emission specially for China which is in close proximity of specialized hardware and cheap electricity for data miners. China being one of the signatories to Paris Agreement needs to bring in an intervention via implementation of policy to keep a check on intensive bitcoin blockchain operations throughout its territory.

Competition Issues in Cyberspace *via* Blockchain

Competition law is applicable in blockchain technology if there is an allegation on the competitors in which they might have colluded to exchange sensitive information through use of blockchain application. Here one of the ingredients needed for applicability of competition law is to find out an agreement which exist between the competitors for participation in sharing information via blockchain application. The other ingredient for attracting competition law would be considering blockchain application as an enterprise which could become a dominant enterprise if majority of participants are using decentralized blockchain application also referred as collective dominance.[19] Other major issue is with regard to enforceability of Competition Commission of India's orders, as the access to blockchain's data is restricted and this data is encrypted on the public blockchain in nodes which have a pseudonymous character. Due to which the CCI while assessing allegations of collusion on the public

[19] Thibault Schrepel, *Is blockchain the death of Antitrust Law? The Blockchain Antitrust Paradox*, Georgetown Law Technology Review, (May, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3193576.

blockchain will not be able to identify the real-world identity of the nodes or firms. Which makes it difficult to identify which firm has colluded and how to impose a penalty on them. Further there can be jurisdictional issues for CCI as the blockchain application are spread across the globe. This jurisdictional challenge with regards to global blockchain applications can be resolved with co-operation between competition authorities in different parts of the world.[20]

Conclusion

The various challenges with regard to implementation of blockchain technology and use of cryptocurrency can be encountered by creating awareness amongst the stakeholders that may crop up in the blockchain applications and by using blockchain applications in line with laws of the various jurisdictions across the globe. The solutions can be achieved by engaging proactively with the blockchain stakeholders such as data miners, application developers and end users of blockchain technology or cryptocurrency at such a stage where the technology changes are still being made so that these stakeholders are made aware about the future concerns which may arise with the laws and regulations while dealing in cryptocurrency or blockchain technology. Still if there are some challenges which arise after due discussion with the stakeholders

[20] Rajnish Gupta, *Discussion paper on blockchain technology and competition*, Competition Commission of India, (April, 2021), http://www.cci.gov.in/sites/default/files/whats_newdocument/Blockchain.pdf.

the authorities need to understand how these challenges can be resolved with a balanced approach or a liberal view.

This research aims at encouraging blockchain stakeholders to take measures so as to avoid certain conduct which can result into potential compliance and legal issues. It is possible to code and integrate legal compliances in any of the blockchain application and cryptocurrency application which would endeavour to benefit the cryptocurrency's and blockchain's stakeholders while promoting the legal regulations in India.

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A CRITICAL APPRAISAL OF NET NEUTRALITY ISSUES AND CONCERNS IN INDIA

Mudassir Nazir*

Abstract

Since the beginning of 20th-century telephone lines is working worldwide without any concept of filtration or restrictions. When internet operators started the service of the network they followed the same principles. From last few years, the proponents raised the issue of regulating the wireless networks, especially for mobile phones which provide a number of consumers with access to Internet services. Due to recent development, the issues of network neutrality have been vigorously debated. The purpose of this paper is to identify and analyse some of the background and issues surrounding the debate of burning topic known as "network neutrality." Also, in this paper, an attempt has been made to analyse the contemporary issue of net neutrality in the context of India and discuss a framework whether any regulations should be imposed on the owners of wireless networks in the light of actual functioning of the internet today. The paper would summarize the principal arguments of the advocate and opponents of network neutrality regulations and interest of consumers.

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Keywords: Net Neutrality, Open access, freedom, Right to internet.

Introduction

In today's globalized world internet is considered to be a most important resource for development, innovation and effective medium for the exchange of information. In today's society internet is having the status of a public forum. Till date, any other network has not attained the magnitude and utility which internet has achieved. It is considered to be an essential element for development.

Functioning of Internet

When a consumer of internet facility request to have some information or particular content from the internet, the host server breaks the content into many small digital packets and each packet travels through a series of the network to gather the information requested by the consumer.[1] Finally, these packets travel over the wires owned by the consumer's broadband provider to get to the computer of the consumer, where they are reassembled into the requested message.[2] The facility of internet

[1] The Internet Lesson 4: *Breaking Messages into Packets, Journey Inside*, available at http://www.97.intel.com/en/The Journey Inside/ExploreThe Curriculum/EC_TheInternet/1Lesson4, last accesses on Feburary 21 2017.

[2] Daniel A. Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications,* 54 Arizoana Law Review, p.1029 (2012).

which we are enjoying as the right[3] is the result of various stakeholders but no uniform rule is there to control it. To load a website and its content there is requirement of an immense and complex series of electronic connections, Which includes telephone wires, cable, satellite, routers etc.[4] a consumer who is using the internet on his mobile or computer is ignorant of these invisible technical issues and the fact that a group of telephone and cable companies, the Internet Service Providers own this and their interests are in conflict with the interest of the users.[5] Even today, open and secure Internet access remains a great challenge for more than half of the world's population.[6] The point of concern is the fact that sometimes the broadband providers start controlling the vital chokepoint between consumers and internet for their interest.[7] Due to this uninterrupted position, they manipulate the flow of information in the society. For example, if justdial.com criticize the Airtel, the broadband connection of air tel could block the access of website justdial.com or slow down the speed of that website in their connection. Departure from the principle of equality/neutrality and prioritization over certain packets and contents could completely distort the internet

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[3] Art. 19 of the UNIVERSAL DECLARATION OF HUMAN RIGHTS Provides: "Everyone has the right to…seek, receive and impart information and ideas through any media and regardless of frontiers."

[4] Peter Linzer, *From the Gutenberg Bible to Net Neutrality-How Technology Makes Law and Why English Majors Need to Understand it,* 39 McGeorge Law Review, p.1 (2008).

[5] *Id*.

[6] Lulu Chang, *On the Web Right Now? You're in the Minority- Most People Still Don't Have Internet,* Digital Trends, available at http://www.digitaltrends.com/web/4-billion-people-lack-internet-access.

[7] Daniel A. Lyons, *Net Neutrality and Non-discrimination Norms in Telecommunications,* 54 Arizoana Law Review, p.1029 (2012).

market against the welfare of consumers. For regulation of internet market in the year 1997 at international level, Basic Telecommunication Agreement came into existence on the efforts of 69 WTO members. But the same treaty is not fully tested for Internet service providers[8] and its regulation continues to be a concern.

Meaning of Net Neutrality

In recent years, however, issues have been raised for non-discriminatory access of internet also referred as 'Net Neutrality'. Net neutrality is an idea which works on the principle, that all Internet traffic should be treated equally on provider's networks.[9] There is no standard and accepted the definition of Net Neutrality but the term was used for the first time by *Tim Wu in 2000,* who stated that it was best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally.[10] In other words, he describes the notion that all network traffic should be treated equally i.e. neutral.[11] From review of various literature it can be said that most authors seem to agree that any definition of net neutrality "should include the general principles that owners of the networks that compose and provide access to the Internet

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[8] Qiusi Yang, *Bridging Open Markets in the "Big Bandwidth" Era: A Blueprint for Foreign Broadband Internet Deployment,* 69 Fed. Comm. L.J. 75 (2017).

[9] Gautam Nagesh, *Obama Makes FCC's Tight Spot on Net Rules Even Tighter,* Wall Street Journal, 13 Oct. 2014

[10] Tim Wu, Network Neutrality, Broadband Discrimination, 2Journal on Telecommunication & High Tech L. 141 (2003), available at http://www.timwu.org/network_neutrality.html.

[11] Ibid.

should not control how consumers lawfully use that network; and should not be able to discriminate against content provider access to that network."[12] At its core, it can be said that 'Net Neutrality' refers to cumulative efforts for the purpose of keeping the Internet open, accessible and neutral to all users, application providers, and network carriers.[13] The purpose of net neutrality is the principle that ISPs should not be able to differentiate or restrict any content and services that pass through their network.[14] The debate over net neutrality revolves around various issues such as privacy, security, freedom to communicate, innovation and the major question, who controls the internet. Without government regulation, companies would be able to go through data of consumers and their private data can be misused.[15] On the other hand, it is being argued that from half a century internet is working properly without government interference so the same should not be disturbed.

Net Neutrality in United States

In United State initially, the Federal Communication Commission (FCC) decided not to interfere and regulate internet services, but they indirectly regulated it through consumer

[12] Daithi M. Sithigh, *Regulating the Medium: Reactions to Network Neutrality in the European Union and Canada,* 14 No. 8 Journal of Internet, p. 3 (2011).
[13] Jennifer Wong, *Net Neutrality: Preparing for the Future, 31* Journal of the National Association of Administrative Law Judiciary, p. 669 (2011).
[14] *Id*.
[15] Ken D. Kumayama, *A Right to Pseudonymity,* 51 Arizona Law Review, p. 427 (2009).

complaints related to ISPs.[16] Later in the year 2005, they adopted an Internet Policy statement. As per the policy, the consumers of the internet are entitled to access lawful content on the Internet, to run applications and services as per wishes, without harming the internet connection of any device and competition among network providers, application and services providers, and content providers.[17] The rules framed by the US thus s meant to facilitate the consumers but it has not received the status of Regulations and continuous interference and complained was reported. To overcome the issue in the year 2009, the FCC proposed regulations embodying the principles of the Internet Policy Statement, along with non-discrimination and transparency provisions.[18] The proposed regulations attained its final shape in the year 2011 and approved just three rules: transparency, no blocking, and no unreasonable discriminations.[19] However, the regulations challenged by Verizon and it was vacated on the ground that FCC does not have the authority to regulate broadband providers.[20] Keeping in mind *Verizon's* decision in July 2014 FCC proposed new rules which allow ISPs to prioritize content on the payment of considerations, it includes No Blocking, No Throttling, and No Paid

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[16] Michael Risch & Christie L. Larochelle, *Trucks, Trains, and Transformation: Net Neutrality Lessons from the First Cyberlaw Symposium,* 61 Villanova Law Review, p.585 (2016).

[17] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities: Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14, 853,14,686 (2005).

[18] Michael Risch & Christie L. Larochelle, *Trucks, Trains, and Transformation: Net Neutrality Lessons from the First Cyberlaw Symposium,* 61 Villanova Law Review, p.585 (2016).

[19] *Id*.

[20] Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

Prioritization. The rules were opposed and major negative representations were made by the public at large. Finally, in the year, 2015 FCC issued new rules which prohibit paid prioritization, blocking and throttling.

Net Neutrality in India

In the aftermath of the net neutrality debate and regulations in the US which resulted in FCC's 2015 open Internet Order, attention shifted to a similar discussion in India and other European countries also. In the Indian context, one noticeable fact is that there is a sharp rise in internet users in India every year.

Internet users in India[21]

Year	Internet Users	Total Population
2016	462,124,989	1,326,801,576
2015	354,114,747	1,311,050,527
2014	233,152,478	1,295,291,543
2013	193,204,330	1,279,498,874

It is expected that number of Internet users would reach 465 million by June 2017. Out of the total users, the 37.7% comes from rural background and 62.3% are from urban India.[22] The

[21] Available at www.internetlivestats.com/internet-users/india/.

[22] Based on the report published by the 'Internet and Mobile Association of India' jointly published by the IMRB, available at http://www.medianama.com/2017/03/223-iamai-internet-india-2016-report/,

consumers in India were using the internet without any formal regulations relating to ISPs. However, even in absence of official rules, ISPs in India mostly adhere to the principle of net neutrality.[23] The issue of net neutrality first time surfaced in India when Bharti Cellular (Airtel) Company issued a notification in December 2014 and asked for additional charges for making voice calls from the app like WhatsApp, Skype, Viber etc. from its network.[24] Following this development the Department of telecommunicating (DoT) and Telecom Regulatory Authority of India (TRAI) constituted a committee on 19th January 2015 and the committee prepare a formal consultation paper titled "Regulatory Framework for Over-the-Top (OTT) services", the main objective of consultation paper was to analyse the implications of the growth of Internet services/Apps/OTTs in India and to assess the requirement of any changes in the regulatory framework.[25] The government regulation of 2015 was released in May 2015 and it faced serious protest and backlash over so-called 'zero-rating' plans offer by local mobile

[23] Though, there have been some incidents where complained have been made for ignorance of net neutrality but its very few in number. Available at http://www.gadgetsnow.com/tech-news/What-is-net-neutrality-and-why-it-is-important/articleshow/29083935.cms.

[24] Airtel Statement says VoIP services in their current form are not tenable, Indian Express December 26 2014, available at http://indianexpress.com/article/technology/mobile-tabs/airtel-voip-packs-will-start-rs-75-for-75mb-postpaid-packs-soon/

[25] Abridged Version of TRAI's Consultation Paper (Number 2/2015) on *Regulatory Framework for Over-the Top Services/Internet Services and Net Neutrality, release date: 27th March 2015, available at* www.trai.gov.in/consultation-paper-regulatory-framework-over-top-ott-services

operators.[26] On 8th February 2016 amidst strong protest DoT issued a Regulation on the Prohibition of discriminatory tariffs for data services and a ban was imposed on differential pricing, including zero-rating (The concept of 'zero rating', is actually tactics by telephone operators in disguise manner. These are the plan that seems to implicate net neutrality but in reality, the content provider in collusion with telecom companies offer limited amounts of free data to users in exchange for meeting certain conditions, such as viewing an advertisement or downloading an application etc.) by telecom companies.[27] Later on, DoT sought Authority's recommendation on net neutrality and consultation on free data. In pursuant to reference from DoT and in continuation to the 'pre-consultation paper on net - neutrality', TRAI issued another consultation paper on 4th January 2017,[28] with the objective of the formulation of final views on policy or regulatory control in the area of net neutrality.[29] Unlike 2015 consultation in which emphasis was given to economic, security and privacy aspects of OTT services, the 2017 consultation paper focused primarily on the various aspects of net neutrality. In the Indian context, few relevant factors are required to be considered for regulating traffic management by service providers. In India, the TRAI controls

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[26] Harichandan Arakali, *Amazon, Facebook Square off over Net Neutrality in India,* International Business Times, April 2017, available at www.http://www.ibtimes.com, last accessed on Dec.2016.
[27] Arturo J. Carrillo, *Having Your Cake and Eating it Too? Zero-Rating, Net Neutrality, and International Law,* 19 Stanford Technology Law Review, p. 364 (2016).
[28] Consultation Paper on 'Net Neutrality', dated 4th January 2017, available at www.trai.gov.in/consultation-paper.
[29] *Id.*

the regulatory aspects such as determination of tariffs and quality of services and DoT deals with the allocation of spectrum mainly the licensing and allocation. Due to the big geographical area, it is suggested that licensing regime should be divided into many license service areas and different types of license. The traffic control is suggested to made keeping in mind the increasing demand of wireless network as compared to a broadband connection. The consultation paper has also identified some key issues for deliberation before finalizing regulation in the area of net neutrality:

i. Understanding various traffic management practices: the service providers while managing the safety, security, and efficiency of their network should not involve in any discriminatory techniques. The policy should ensure reasonable traffic management practices.
ii. Defining the core principles of net neutrality: the term net neutrality and its core principles should be defined keeping in mind the legal framework in India.
iii. Transparency requirements: it is suggested by the authority that end users should have access to all relevant information about the types and scope of traffic management.
iv. Monitoring framework: establishment of an appropriate framework is suggested to monitor and enforce the principles of net neutrality.
v. Policy/regulatory instruments: for giving effect to net neutrality framework in India adoption of specific policy and regulatory instrument for balancing rights

of consumers and ISPs in the form of legislation is also suggested.

The one school of thought advocating in favor of net neutrality argue that openness and neutrality are principles that have defined the Internet architecture and that have made it a fertile platform for innovation.[30] On the contrary, it is argued by another group that all consumers want free internet for the undisturbed flow of information without any censorship or restriction. But the ISPs are arguing that they are doing business and its purpose is to generate profit. Further, the proper infrastructure needed for transmission and maintenance of content.[31] It is the general fear that broadband providers will prevent consumers from having access to all available information and will use different means which may drive consumers to use and utilize only those information and content for which fee can be charged. It is essential to ensure an open Internet through the development of a set of sustainable and effective rules governing the relationship between ISPs and edge providers.[32]

At last, it can be said that there is a various individual owner in the field of the internet which is a very large puzzle and all are interconnected. Individually, no ISPs' single piece of that network puzzle has significant value but connected to a myriad of other individually owned networks, the value and potential are

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[30] *Net Neutrality: what you need to know,* Save the Internet, available at http://www.savetheinternet.com/net-neutrality

[31] Philip J. Weiser, *The Next Frontier for Network Neutrality,* 60 Admin. Law. Review, p. 273 (2008).

[32] John B. Meisel, *Development of Net Neutrality Rules: Is The Third Time A Charm?,* 41 Rutgers Computer & Technology Law Journal, p. 166 (2015).

manifold.[33] Especially in the context of India where the penetration of internet is still very low as compared to western countries it is required that any rules or regulation should not be rigid but flexible in order to promote innovation and economic growth in this sector.

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[33] David E. Missirian, *Net Neutrality: The Information Highway Which Only the Wealthy Few Will be Allowed to Travel,* 47 University of Toledo Law Review, p.327(2015-2016).

INSOLVENCY & BANKRUPTCY CODE, 2016: ISSUES AND CHALLENGES

Parineeta Goswami*

Abstract

*A new legal system was enacted in 2016 i.e. Insolvency and Bankruptcy Code, 2016 (**IBC**). This new system can make significant changes especially for Indian Promoters majority shareholders and companies to recover their debt. Companies can work properly for that Government of India remove all types of price restrictions, price control, capital issues timings through the Competition Commission of India in 1990. Because of that fundraising activity increase in India. While there is an increase in fundraising so many companies bear losses. Companies are facing losses year after year. Many companies have to take shelter in the Sick Industrial Companies Act and then referred to the Board for Industrial & Financial Reconstruction which is a quasi-judicial body. Later the Recovery of Debts due to the Banks and Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets & Enforcement of Securities Interest Act, 2002 was established to deal with the issue of recovery of debt by Banks and Financial Institutions. But they couldn't deal with the problem with the recovery of the Non-Performing Accounts. To overcome this problem IBC was enacted.*[1]

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Introduction

India did not have one law or statute to deal with the problems of Insolvency and Bankruptcy of various companies. For example, bankruptcy cases related to individuals are deal with in the Provincial Insolvency Act, 1920 and the Presidency Towns Insolvency Act, 1909. To solve the problem of recovery by the Banks and the Financial Institutions the Recovery of Debts due to the Banks and Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets & Enforcement of Securities Interest Act, 2002 was established. For corporate insolvency cases Sick Industrial Companies (Special Provisions) Act, 1985 and the Companies Act, 2013 are there.

So there are different statutes to deal with the Individual, Corporations and Banks & Financial Institutions and this creates an inconsistency in some provisions. Also, same entity legal proceedings have been running in different forums at the same time which creates chaos.

Another problem arises in respect of the time to solve the insolvency cases. Time to solve the Insolvency case in Sick Industrial Companies (Special Provisions) Act, 1985 is more than two years and sometimes when you take protection under Sick Industrial Companies (Special Provisions) Act, 1985 it takes an indefinite period for recovery and liquidation procedure. And more than three to four years taken by the Banks and the Financial Institutions the Recovery of Debts due to the Banks and

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[1]Available at https://ibbi.gov.in//uploads/legalframwork/af0143991dbbd963f47def187e86517f.pdf

Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets & Enforcement of Securities Interest Act, 2002 to solve the Insolvency case. The general view regarding the previous laws concerning Insolvency is that they are not adequate and ineffective. Because of that majority of cases got stuck in the procedure and doesn't get a resolution in time.

The main objective of the enactment of IBC is to combine the previous laws and make a new single insolvency law for Individuals, Corporate Persons, Limited Liability Partnership Firms and Partnership firms in which resolution takes place on time.

The IBC provides a fundamental legal framework for the resolution procedure of Companies, Partnership Firms and Individuals. And it is regulated by the Regulatory mechanism which includes Insolvency Bankruptcy Board of India (IBBI), Insolvency Professional Agency (IPA), Insolvency Professional (IP), Information Utility (IU) and Adjudicating Authorities (AA) i.e. National Company Law Tribunal (NCLT) and Debt Recovery Tribunal (DRT).

The IBBI was established by the Technical Committee on 1st October 2016, as per the provisions of the 'Insolvency and Bankruptcy Code, 2016. IBBI work as a regulator and regulate, administrate and support the functions of IPA, IU and IP. And where AA play the role of Arbiter or Judge who oversees the procedure, accept & reject the resolution plan for Corporate Debtor and later come to a final decision. In the case of Companies, NCLT will be the AA and in the case of Individuals and Partnership firms, DRT will be the AA. The territorial

jurisdiction of the NCLT shall be based on the registered office of the corporate debtor. The code accommodates an application to be made to the appellate court for an appeal against the order of an Adjudicating Authority. And their Appellate bodies are National Company Law Appellate Tribunal (NCLAT) and Debt Recovery Appellate (DRAT) will be adequately strengthened for achieving world-class functioning of the bankruptcy process. The Supreme Court will have appellate jurisdiction over the orders of the DRAT or the NCLAT. IPA is a body that would concede IP as individuals and build up a code of conduct and promote lucidity and best practices in administration. IU will be required to perform functions relating to putting away financial information in a handy format, publish factual information. It is a centralized electronic database that collect financial information of corporate debtors and which will be available to others. IP has authorized professionals designated by IPA who might assume the jobs of resolution professional or liquidator/bankruptcy trustee in an insolvency resolution procedure. They are the intermediaries working efficiently in Bankruptcy Process. Also, they work on claims of creditors and run the business of the corporate debtor.

The IBC is a significant change for India and its fruitful usage relies upon thorough evolution preparation. In over a long time since its origin, the Insolvency and Bankruptcy Code developed as one of the legislations which recommend the quickest procedures to handle the issue of India's developing non-performing/distressed assets. Since its usage, numerous regulations of the code have been tested and the legislature has likewise done different amendments to the law, including banishing defaulting promoters from assuming back responsibility for the organization after the insolvency process.

A great deal has been expounded on the difficulties of the Code and the discussions on whether the execution of the Code is a bane or a shelter. I am discussing some of the difficulties/ issues/challenges in this paper.

Issues in the IBC

1. Time Frame

According to Section 5(14) of IBC, the Corporate Insolvency Resolution Procedure (CIRP) for companies should be complete in one hundred eighty days and the first day of CIRP will start from the Insolvency Commencement date. One time extension of 90 days can be given to the companies to complete the CIRP within two hundred seventy days. And later in the *Insolvency and Bankruptcy Code (Amendment) Act*, 2019 the CIRP will obligatorily be finished within a time of three hundred and thirty days from the insolvency beginning date this includes an extended period also the time taken in legal proceedings. In short, CIRP should be completed within three hundred thirty days in the case of companies. Even Financial creditors said that there 43.56% of claims are stuck under the CIRP procedure.

But, the average time taken to complete the CIRP is more than three hundred seventy-four days. As per the financial stability report released by the Reserve Bank of India in July 2021 average time taken to complete the CIRP is around 433 days as of September 2020. Initially delay in the process because of some unsettled issues of interpretation and the IBC is a new ecosystem and everyone is not familiar with the procedure.

One of the problems which I see concerning the time frame is when we file an application for Insolvency in NCLT for initiating

the CIRP, NCLT may accept or reject the application in 14 days. If NCLT accepts the application then it will move forward to the next step. But, if NCLT rejects the application it gave 7 days to the applicant to rectify its application before rejecting it. Now the question arises in this that whether these 7 days for rectifying application is obligatory or not.

This problem came forward in the case of *JK Jute Mills Company Ltd. v. M/s Surendra Trading Company*[2]. In this case, NCLAT held that 14 days' time period is directive and 7 days period for rectifying the application would need to be mandatorily followed and no concession should be given in this regard. It also said that the NCLT and all the other stakeholders should work according to the prescribed time limits but in extraordinary cases, there will be an exception. Later Supreme Court confirmed the decision of NCLAT concerning 14 days period as a directive but put aside the order concerning 7 days period for rectifying the application. Supreme Court held that 7 days period would also be directive in nature because "*where a statutory functionary is asked to perform a statutory duty within the time prescribed, therefore, the same would be directory and not mandatory."*

But there is another problem, IBC is failed to removing the stuck money of many projects which are not working due to various reasons. For that conspicuous example is the Essar Steel insolvency case which was admitted on 2nd August 2017. It takes more than 2 years to settle Rs. 50,000 crore accounts entered the IBC in Essar Steel Case. At first, viewed as a grandstand for the

[2] JK Jute Mills Company Ltd. v. M/s Surendra Trading Company, Company Appeal (AT) No. 09 of 2017. Decision date- 01.05.2017.

achievement of the regulation, this code has come to typify the delays in what was a long-awaited legal change. It is mandatory in IBC that insolvent assets must be settled in 270 days. On the off chance that an indebted asset doesn't discover a purchaser within that period or if the committee of creditors, the decision making body on these assets, isn't content with the offers, the asset ought to be liquidated at the minimum value surveyed by the resolution professional dealing with the asset. As per the information given by the Insolvency and Bankruptcy Board of India, out of the 1,484 cases conceded for the CIRP, 586 have been shut till December 2018. That denotes a hit pace of about 40%.

The Supreme Court in *Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta*[3] explicitly managed the issue of whether the time taken in litigation could be prohibited from the external time limit gave in the Code and held that it could. The court said that where a resolution plan is approved by the AA then the time taken in litigation will exclude. It doesn't mean that NCLT and NCLAT become tardy in decision making. It will only happen when NCLT/NCLAT/Court take time more than 270 days and the time taken in legal proceedings cannot possibly be excluded to decide the matter.

After the financial regulator's push Visa Steel case[4] filed to NCLT in December 2017. Visa Steel is pending confirmation in the Kolkata NCLT as the promoters have challenged SBI's

[3]Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors., C.A. Nos. 9402-9405 of 2017. Decision date- 04.10.2018.
[4] State Bank Of India v Visa Steel Ltd.

entitlement to take them to the bankruptcy court on the reason that the company owed loan lenders less than 5,000 crores, the cut-off limit set by the Reserve Bank of India.

Furthermore, in the case of *Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd*.,[5] the question of whether the Limitation Act, 1963 applies to the regulations of the Code was taken into consideration. In this point, NCLAT said that the Doctrine of Limitation and Prescription can use to look into the matter where the question is whether the application in Sections 7 and 9 can be entertained or not after a long period of tie. But limitation Act, 1963 will not apply directly.

So, the administration needs to keep the IBC procedure from delaying inconclusively similar to litigation. It needs to guarantee that the CIRP is finished in 330 days, comprehensive of any litigation. The current timeframe of 270 days has been maxed out in various cases with lawyers looking to exclude the time taken for litigation. Organizations should be sent for liquidation if the resolution procedure doesn't complete in 330 days. Now after a period, it will show how well this span will function.

2. Financial Creditors

Starting with the creditors, I will focus my contention on the Financial Creditors, who assume a focal job in this process, since the key target of the Insolvency and Bankruptcy Code, 2016

[5] Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd, Company Appeal (AT) No. 47 of 2017.

(Code) is to determine the huge Non- Performing Assets numbers which startle the books of India's financial segment.[6]

I have detected an assortment of entanglements pulled in by the consortium, principally, their Internal Approval process, the delegates sent by the banks during Committee of Creditors meetings are not given sufficient power to make choices during the meetings which are taken later by the bank's experts in the association. This underestimates the decisions of the Committee of Creditors taken in meetings. As the Resolution Professionals simply tell the members on the development regarding the CIRP and these decisions are affected later on which is finalized by the appropriate authority that requests a ton of time, ruining the spirit of the Code. Now and then it hampers the whole process which incorporates basic choices concerning keeping activities of Corporate Debtors as a going concern.

Next, moving to the subject of securities held by the creditors, the priority of charges is generally uncertain. This is the most questionable subject since the whole dynamic, i.e., approval of a plan to stay away from liquidation relies upon it. The principal charge holders don't wish to share the proceeds of the plan to second charge holders. There is even no separation between the secured and unsecured financial creditors for the distribution of proceeds. In liquidation, the primary charge holders don't surrender their charge as there is no lucidity in regards to the need

[6] NPA Problem: India Ranked 5th in Bad loans in the World, EUs 4 Tumbling Economies top list, BUSINESS TODAY, available at https://www.businesstoday.in/current/policy/npa-problemindia-ranking-bad-loans-economies-with-huge-npa-bankrecapitalisation/story/266898.html

for charges; this further stretches the process and muddles the issue. Numerous resolution plans are presently being disputed by operational creditors, due to very less amount given to them in resolution plans. While they are qualified to get a portion of the liquidation amount, in many cases, the liquidation amount is low and inadequate to pay even financial creditors and according to them, they have been challenging resolutions. While some of them have figured out how to constrain the issue, the majority of the operational creditors in the Micro Small and Medium-sized Enterprises space can't do likewise, and consequently, gatherings of operational creditors are coming together to litigate.

3. Challenges Faced by The Resolution Professionals

Moving to the most significant pillar, which is the Resolution Professionals. Resolution professionals have to perform two important obligations. First, to run the Corporation as a going concern. And second to provide a resolution plan by consulting with the Committee of creditors.

The main issue concerning Resolution Professional is that - what is the expertise of Resolution Professional. Primarily company secretaries, lawyers, chartered accountants are the Resolution Professionals. But they charge excessive amounts and also they have little experience.

The obstructions faced by them are endless. Throughout a CIRP, the Resolution Professional has obligations. For example, assuming control over the administration of the Corporate Debtors as of the delegate of creditors, keeping the activities running as a going concern, recognizing exchanges of fake nature, guaranteeing various compliances of several

administrative authorities, the rundown is perpetual. Even though the professionals have approached to safeguard the framework however they are being made the person in question and are the most terrible victims in the process.

While playing out these obligations, Resolution Professionals often adapt to the outcomes which incorporate extortion and wrong or fictional complaints from different stakeholders, for example, industrial labours and the promoter group, prosecution threat by different authorities such as income tax for not recording or submit returns in any event, for prior years. No protection is given to Resolution Professionals against bogus FIRs filed by such stakeholders. Resolution Professionals received hostile conduct from existing employees while collecting data. Still, they collect data, information and reports from prior administration to finish the compliances of the Code. The difficulties extend from no confirmation of payment, even the instalments made out of their pocket for smooth activities of the CIRP. The Corporate Debtor leaves aside their compensation and goes to the degree of danger of litigations recorded against him. The Committee of Creditors doesn't give the amount of assurance that is a need for the safeguarding of assets.

4. Expansion Of Infrastructure Required in NCLT

An extension of infrastructure is an absolute necessity to keep the process running easily but for the NCLT, the most significant issue is the number of pending cases. The successful execution of this dynamic, time-bound enactment requires expanding the quantity or number of Benches, or components to decrease the workload on the tribunals, which as of now get over engaged with

different phases of the entire CIRP rather than operating to guarantee timely approval of the resolutions plans.

Total fourteen NCLT is working in India right now and two are to start working. According to the Judge roster available at the NCLT website 27 members share the workload of sixty judicial and technical members. Burdens of Jaipur, Chandigarh, Guwahati and Cuttack benches have to be taken by Delhi and Kolkata bench.

According to data available on the IBBI website only 8% of 2,278 cases of Insolvency was filed in NCLT up to April 2020. Pending cases got increased from 19,844 to 21,250 till 31st July 2020. And out of this lot 12,438 cases were related to bankruptcy law.

This is happening because NCLT is overburdened with cases with limited capacity to dispose of the growing number of IBC cases. These benches are lacking to handle the number of cases that are presently filed for the resolution process. Also, NCLT has to deal with cases from different regulations. This has put NCLT under huge tension.

5. Cross Border Insolvency Regulations

Cross-border insolvency directs the treatment of financially troubled debtors where such debtors have assets or creditors in more than one nation.[7] Lately, the quantity of cross-border insolvency cases has expanded fundamentally. The expanding

[7] B.L.R.C. FINAL REPORT (2015).

recurrence of cross-border bankruptcies mirrors the ongoing development of worldwide trade and investment. In any case, national insolvency laws are often unprepared to manage instances of a cross-border nature and they have all things considered not staying up with the current pattern.

Fraud or Misrepresentation by indebted debtors, specifically by covering assets or moving them to foreign jurisdictions, is another expanding issue, in terms of both its rate of recurrence and its extent. There is likewise an absence of correspondence and harmonization among courts and administrators from concerned jurisdictions. These insufficiencies bring out insufficient and uncoordinated legitimate methodologies, which hamper the salvage of financially pained organizations.

Such insufficient and uncoordinated lawful methodologies, not likely to support a reasonable and effective organization of cross-border insolvencies, obstruct the security of the assets of the insolvent debtor and influence the value maximisation of those assets. Such methodologies are just unusual and tedious in their application, yet in addition, need transparency and vital devices to address the issues. Every one of these components unfavourably influences the estimation of the assets of financially disturbed organizations and obstructs their salvage. In addition, the lack of consistency in the cross-border insolvency processes stops the capital flow and is a hindrance to cross-border investment. The association of insolvency procedures with an international component isn't a simple or clear issue. Answers for the problems of cross-border insolvency are dependent on various unpredictable and interrelated inquiries to which the courts and law making bodies in various jurisdictions have given different answers.

Cross-border insolvency issues are not restricted to the failure of significant international organizations. It also includes those cases where

- Domestic companies have Foreign branches or subsidiaries; or
- Foreign Companies have Domestic branches or subsidiaries.

In the first scenario if property situated in a foreign country gives security for debt by thinking to utilise the domestic asset to pay the debt to the unsecured creditors. But the current legitimate system neglects to give any broad answer for the difficulty which emerges in specific cases with connection to the utilization of abroad assets of the defaulters in the procedures.

It is practically going to be more than 5 years for the enactment of the IBC and Courts have an important task to properly legally interpret the provisions concerning cross-border insolvency. The Courts have to build up the correct statute for managing insolvency in India. Also, when administrators adopt the Model Law of another nation they have to see the issues faced by the companies because of that Model law in their respective nations.

6. The Real Rescuers Resolution Applicants

At last, I might want to talk about the Resolution Applicants, the very important pillar of the IBBI also we can say they are genuine rescuers of the code.

According to the provisions of IBC, any person can be a resolution applicant and present a resolution plan to a resolution professional. In the case of *Sree Metaliks Ltd. v. SREI Equipment*

Finance Ltd.,[8] the NCLT has held that in IBC nothing is mention regarding who can or can't be a resolution applicant. So they may consist of a promoter of a corporate debtor.

But in the case of *Sanjeev Shriya v. State Bank of India,*[9] the person who submits the resolution plan is already involved in fraud of the organization. And because of nothing mention about the eligibility of who can submit the resolution plan, this person takes the benefit. And submit a resolution plan according to his needs. Because of that Section 29A was inserted in the *Insolvency and Bankruptcy Code (Amendment) Act,* 2018. Section 29A talks about the ineligibility of the resolution applicant to submit a resolution plan. Be that as it may, the insertion of Section 29A prompted another issue. Because of its 'wide' nature, the disqualifications could keep honest candidates from taking interest on specialized grounds, thereby making the chance of liquidation instead of resolution more probable.

In *RBL Bank Ltd. v. MBL Infrastructure Ltd.,*[10] the NCLT saw that it can't be the intention of the governing body to preclude the promoters as a class yet to rather bar those classes of persons who may influence the validity of the resolution process given their forerunners.

Managing this issue, the Committee perceived the need to smooth out the process to guarantee that only those parties who legitimately contributed to the default of the company are

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[8] Sree Metaliks Ltd. v. SREI Equipment Finance Ltd., 2017 S.C.C. Online N.C.L.T. 6812.
[9] Sanjeev Shriya v. State Bank of India, (2018) 2 All L.J. 769.
[10] C.A. (I.B) No. 543/KB/2017 arising out of C.P (IB)/170/KB/2017.

forestalled. This provision was denying certified persons who could help the restoration of the company from doing as such. The Committee had suggested the deletion of the words "if such person, or some other person acting together or in concert with such person" in the principal line of section 29A to explain that the disqualification applied only to resolution candidate and 'connected persons'. Be that as it may, this recommendation has not been incorporated in the Ordinance or the Amendment Act.

However, the Resolution Applicants are not resistant to the numerous issues which test the Code right now. It starts with the presentation by the Resolution Applicants, they are interrogated and grilled by the Committee of Creditors and not welcome like they ought to be. Further, any likely acquirer of a business would demand that it assumes control over the debtor liberated from all encumbrances and charges and appeals for waivers of earlier contingent liabilities and obligations as a reasonable need. However, in all cases, the equivalent has been disliked by the creditors/National Company Law Tribunal. They are relied upon to assume control over the assets and business as is the place premise with all connections and encumbrances is.

The law itself should be changed such that once a Corporate Debtor is under the Code, all the connections and contingent liabilities of past business ought to be cleared to look for a viable resolution. The business needs to understand that there are opportunities on both sides of the table by the presence of this group.

Concluding Observations

It is by all appearances that Insolvency Bankruptcy Code is exhaustive legislation with a quick and explicit methodology for

managing the issue of insolvency. The time-bound nature of the Insolvency Bankruptcy Code is a win-win situation as the assets of the Companies are put at the correct spot in time, regardless of whether it is by instalment to creditors or by winding up. The Company doesn't need to continue running in losses for a perpetual timeframe making a mishap in the entire economy and influencing the creditors. It is very much sought after that the implementation of the Code be as viable true to form and satisfy its administrative expectation.

Numerous issues can be settled by altering the regulations, yet others require changes in the law. This should be done immediately. Inability to solve large cases in a specified time frame because of the inadequacies in law and regulations could disturb the fruitful excursion of the Insolvency Bankruptcy Code.

The administrative authorities need to focus on these practical matters also, which are causing problems and it will considerably help the resolution process in light of a legitimate concern for all stakeholders.

The Code specifies a fixed timeframe to guarantee ideal resolution for corporate debtors, to assist all stakeholders. Legal interpretation has, overall, promoted this goal by mandating that different pieces of this timeframe should be followed and mandating that the external time limit gave in section 12 can't be extended. But in certain cases, certain periods might not be included from the calculation of the complete timeframes for the insolvency resolution process, which also include time taken in litigation.

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THIRD WORLD AND UNDERDEVELOPMENT: NOTES ON CONTESTING THEORIES

Mayengbam Nandakishwor Singh*

Abstract

The landscape of political economy across the world has never been static. The world, after the Second World War, was under the shadow of cold war for decades. Countries around the world have been broadly classified into diametric groups. The third world is one notable nomenclature given to a group of countries categorised largely based on certain tangible and intangible criteria. The third countries were under the colonial powers and they are relatively underdeveloped. Post the relative triumph of democracy and right to self-determination, third world countries are aspiring for development. With the increasing trend of globalization, economies around the world get integrated and the third world countries are bound to tie up with the first world. However, the relation between the first world and third world is surreptitiously not on equal terms. Having realized the precarious equation, the consciousness among these countries have risen. Today, third world countries are profusely demanding for the restructuration of the world system, particularly in the economic realm. While development is a loaded concept, economic development is unequivocally in the forefront of any discourse on development. Several contrasting theories have been expounded dealing with the role of capitalism in bringing economic development. This paper examines the divergent perspectives of contesting theories about the

correlation between capitalism and underdevelopment in the third world. It further explores the challenges that hamper the developmental process in the third world. The methodology applied in this research paper is qualitative coupled with a theoretical analysis.

Key Words: Wealth; Exploitation; Freedom; Technology; Capitalism

World Classification and Characteristics of the Third World

In the aftermath of the Second World War, new typologies have been devised to classify the countries of the world. This nomenclature, though not consistent all through, becomes so fashionable for a clear understanding of the world politics. The 'First world' countries are generally conceived to be the 'western liberal countries' which essentially follow capitalist economic models. United States, Western Europe, and Japan exemplify the first world. These countries are not only advanced in technology; they are also economically developed. These countries mostly practised colonialism and they pursue neo-imperialism in the contemporary times. As they mostly claim to set up democratic governments, they are conveniently labelled as 'democratic block' during the cold war period. The 'Second World' countries are essentially socialist countries and ideologically these countries are anti-colonialism. From the economic point of view, they do not adopt full-fledged capitalist model and they are partly prosperous and partly poor. Politically, many of these countries tend to follow authoritarian regimes. The erstwhile Soviet Union, and Eastern Europe are categorised as 'socialist bock' which represent the second world. Today, this category is increasingly getting blurred.

The 'Third World' countries refer to those countries which are newly independent and which are economically and technologically backward. Countries in Asia, Africa and Latin America which got independence from the clutch of colonial powers are classified as the third world. They are keen to acquire political and economic development on par with the first world. Currently, the 'Fourth World' countries are those oil rich countries and whose economies are heavily based on oil. These are oil producing countries and they lack indigenous technological capability. The Arab nations clearly represent the fourth world and they usually depend on the first world for technology.[1] Interestingly, Mao Tse Tung, the helmsman, categorised the world into three. 'While United States and former Soviet Union belonged to the first world, Japan and Europe were part of the second world. Third world refers to all the underdeveloped countries'[2]

Among these four typologies of the world, discourse on the third world has been predominant, more so after the collapse of the USSR. It is a commonly known fact that the term 'Third World' was first employed by French demographer Alfred Sauvy in 1952. Reasons for the discourse on third world being recurrent can be examined by dissecting the unique nature of third world. First, most of these countries were under the colonial rule. They

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[1] It is also argued that 'fourth world countries are those countries which are the poorest or the richest of the third world.' See, Keith Smalley & Douglas Wood, 'What is the Fourth World? *Teaching Geography*, Vol. 2, No. 3 (January, 1977), p. 136.

[2] Henry Kissinger, *On China*. (England: Penguin Books, 2012), p. 303.

were the severest victims of colonialism and they secured political freedom, mostly after the Second World War. In this case, the colonial master happened to be the countries belonging to the first world countries. This means the emergence of the third world countries is concomitant with the 'process of decolonization.' Hence, third world countries are opposed to any form of colonialism or imperialism. Second, third world countries do not constitute another military or ideological 'third bloc.' Even during the cold war, most third world countries do not openly claim to belong either to American bloc or Soviet bloc. Rather, many of these countries are part of the NAM and they seek to establish independent political and economic policies. They figure out that being part of the either antagonistic bloc will undermine their independent foreign policy.[3] They intend to voice openly on international affairs.

Moreover, third world countries have enormous social and economic problems. Since they are economically underdeveloped, they are fettered with humongous problems like hunger, poverty, illiteracy, population explosion, ethnic conflict and so on. Many of these countries face political instability and ethnic violence bigoted by multifarious issues. Many third world countries are grappling with the challenges of nation building. Also, these countries are highly heterogeneous in many aspects. They adopt different political system, they practise different

[3] For instance, Nehru considered 'Non-Aligned as a tool to expand India's influence in the world.' See Andrew B. Kennedy, 'Nehru's Foreign Policy: Realism & Idealism Conjoined' in David M. Malone, C. Raja Mohan & Srinath Raghavan (eds.), *The Oxford Handbook of Indian Foreign Policy* (New Delhi: Oxford University Press, 2015), p. 97.

cultural ethos, and they champion divergent political ideologies. And third world countries are in the forefront to support certain universal principles such as, maintaining world peace, peaceful settlement of conflicts, peaceful coexistence, disarmament, and right to self-determination. Today, some of the third countries experience phenomenal economic growth and they are making miraculous strides in the field of technology.

Exploitation of the Third World and the Competing Theories

Apart from several intrinsic factors, one of the commonly held reasons for the economic backwardness of the third world countries is the brutish economic exploitation by the colonial powers. In this context, first world countries are the colonial masters and third world countries are the colonised countries. Since the first world countries are imperialist, they colonised the third world and exploited them. According to this view, the third world countries are exploited for extracting raw materials, natural resources, cheap labour and vast markets.[4] The relation shared between the first world and the third world is arguably exploitative in nature. However, this exploitation based argument is highly contested by the liberal theorist—past and present. Liberal school of thought rejects the socialist view that colonialism is nothing but exploitation.

[4] Similar line of argument can find its echoes in the post-colonial Indian writers in a slightly different context and timeframe. For Instance, Shashi Tharoor has the audacity to argue that Indian economy, which was once a world economic power, was brutally devastated by the imperialist British rule in India. See, Shashi Tharoor, *An Era of Darkness* (New Delhi: Aleph, 2016).

It is worthwhile to explore the two competing theories about the relation between the first world and the third world. From the liberal point of view, strictly speaking, exploitation does not take place when developed countries go to the underdeveloped countries and tap natural resources. There is no doubt that the first world countries are economically developed and technologically well-equipped. They can accumulate wealth around the world and there is nothing wrong when they extract natural resources. It is because they do not tap natural resources just for themselves. While extracting resources, they invest a lot and expend their technology into manufacturing goods. They convert the raw materials into valuable commodities and they utilise the untapped natural resources for the benefit of all. When the developed countries extract raw materials and convert them into valuable commodities, it is beneficial to all. In fact, the Third world also gain manifold benefits from the first world. The developed countries create jobs and services for the local people. More importantly, they also share technological know-how with the third world. As a matter of fact, liberal thinkers openly champion the idea of 'trickle-down theory.' Milton Friedman boldly defends liberal capitalism by refuting the charge that capitalism produces considerable inequality of income and wealth. 'Liberalism is a doctrine of free man and capitalism offers individuals to develop and improve their capacities. Rather it is the non-capitalist societies that tend to have wider inequalities.'[5]

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[5] Milton Friedman, *Capitalism and Freedom* (London: The University of Chicago Press, 1982), pp. 139-141.

For a hard-core liberal, the world market is open for competition and third world countries can compete with the first world. There is no reason why the third world should depend on the developed first world for their development. Robert Nozick's refutation of Marx's theory of exploitation can be one illustration in this context. For Nozick, 'exploitation does not take place and in a capitalist society, risks and losses are not shared between capitalist and workers. It is the capitalist who bear the risk in business venture and those who do not share the risk are entitled to the reward or profit.'[6] Looking from the Nozickean point of view, the argument that the capitalist countries exploit the backward countries is refutable. In fact, it is Adam Smith who, unlike Marx, earlier defended capitalism to the core on the ground that 'capitalism helps individual become affluent, humanised and unalienated.'[7]

On the contrary, the persistent stand of the socialist school is that the underdeveloped third world always shares exploitative relation with the first world. The sole purpose of the developed first world countries to colonise the poor third world countries is for exploitation. The First world countries extracting raw materials and other natural resources for their development. They accumulate wealth at the expense of the third world countries. They conduct their mode of exploitation in multiple dimensions. They extract the natural resources, they hire the cheap local labour, and finally they sell the finished products in the world market with higher price. They also convert the third world

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[6] Robert Nozick, *Anarchy, State, And Utopia* (New York: Basic Books, 1974), p.
[7] E. G. West, *Adam Smith* (Indiana: Liberty Fund, 1976), pp. 111-2.

markets as the dumping grounds for the obsolete products. In this way, they drain the economy of the underdeveloped countries. In fact, Karl Marx explored the process of modern colonisation in *Capital* though he did not propound a full-fledged theory on modern imperialism.[8] Marx argued that 'the capitalist regimes having conquered the economic power in national domain, Western Europe, expanded their control over the areas or regions which had different economic systems. Though there was resistance from the natives against the capitalist colonisers, the capitalists were backed by the power of mother country. They then forcefully imposed the capitalist mode of production in the colonies and this process was legitimised by capitalist ideologues.'[9] Interestingly, Marx also praised the 'civilizing role' of western capitalism in connection with what is labelled as 'Asiatic society'[10].

In fact, it was Lenin who had developed the most advanced theory of capitalist imperialism. For Lenin, 'the more capitalist develops, more competition, more need for raw materials and more hunt for raw materials throughout the world.' Following the colonial policy, the world gets divided among capitalist countries.[11] For the socialist school of thought, capitalism not

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[8] For Marx, 'capitalism leads to colonisation which involves the brutality towards the colonies.' See, Joseph Choonara, *A Reader's Guide to Marx's Capital* (London: Bookmarks Publications, 2017), p. 186.
[9] Eugene Kamenka, *The Portable Karl Marx* (New York: Penguin Books, 1983), p. 494.
[10] Ronaldo Munck, *Marx 2020 After the Crisis* (London: Zen Books, 2016), p. 54.
[11] V. I. Lenin, *Imperialism The Highest Stage of Capitalism* (London: Lawrence & Wishart, 1933), pp. 70-6.

only inherits the exploitative nature, it also faces legitimacy crisis. Jurgen Habarmas rigorously argues that 'advanced capitalist creates disturbance to ecological balance, violation of personality system and strain on international relations.'[12]

In the contemporary times, it is alleged that major international financial institutions facilitate the capitalist countries. Joseph Stiglitz clearly laments how IMF policies are detrimental to the developing countries. For Stiglitz, 'the IMF structural adjustment policies produce many riots and hunger in many countries. Even when the policies of IMF manage to bring growth for a while, often disproportionate benefits go to the economically better off and the poor countries face greater poverty.'[13] Moreover, the prevailing economic system also favour the developed first world. So, the solution often suggested for the third world countries is to take control over their raw materials and to establish close cooperation among themselves. The modalities of cooperation, however, require great deal of meticulous policy planning and effective implementation.

It is also arguably observed that the relation between third world and second world have been more or less cordial. It is because, socialist countries are opposed to liberal capitalist west and therefore, they support the causes of the third world countries. Ideologically, the second world is opposed to the capitalist imperialism. The former Soviet Union behaved to be benign

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[12] Jurgen Habermas, *Legitimacy Crisis*. London: Heinemann, 1976), pp. 25-41.

[13] Stiglitz, Joseph. *Globalization and Its Discontents* (New York: Penguin, 2012), p. XIV.

towards the poor third world counties. For instance, India has been the long beneficiaries of former Soviet Union in the field of technology though India had never aligned with it openly. However, their relations become more obscure after the disintegration of the USSR. Today the nomenclature of 'second world' is quite opaque.

Binary Theories on Development and Underdevelopment

Third world countries are those underdeveloped and developing countries which attained newly independence. World system theory which explodes the roots of the underdevelopment of the third world is spearheaded by Immanuel Wallerstein. According to the world system theory, the world can be divided into three categories. 'Core countries' are those which are highly industrialised and capitalist developed countries. 'Periphery countries' are those which are underdeveloped and less industrialised countries. And 'Semi-Periphery countries' are the countries which are partly developed and partly underdeveloped and which fall between core and periphery. The relation among these categories of countries are unequal and unjust. For Wallerstein, 'the core trades with periphery and gains the flow of surplus value or real profits because of the high monopoly of market and this process is unequal exchange.'[14] At the same time, the semi-periphery countries also exploit the periphery countries and gain advantages from the core countries. However, this categorisation is not static, and this is dynamic. This means a core country can become a semi-periphery and vice versa. For

[14] Immanuel Wallerstein, *World-Systems Analysis* (London: Duke University Press, 2004), pp. 17-18.

instance, countries like Spain and Portugal are no more considered to be core today.

What the world system theory advances is the point that the world system is a capitalist system. It espouses the idea that capitalism emerged as the result of the crisis within feudalism in Europe for the first time. The trading class or those class engaged in business enterprises revolted against the feudal system and they went around the world for trade. This is how the capitalist system was developed. This theory also predicts that the capitalist system will not be stable in the future. One reason is that there is imbalance between demand and supply in a capitalist system. Industries and factories keep manufacturing goods and commodifying things. As the result, there will be the problems of the overproduction of goods, lowering of price, decline in profit and mass unemployment. For Immanuel Wallerstein, 'capitalist world system has a constant crisis as there are fundamental contradiction within. Capitalist world economy is in a terminal crisis and what system will emerge as a replacement is uncertain. The possibility of socialist system, which will be the outcome of long struggle, replacing the capitalist world system though it is not imminent cannot be ruled out.'[15] It can be also clearly noticed that this theory has its inadequacies and 'such stratification of the global political economy does not capture the complete

[15] Immanuel Wallerstein, "The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis." *Comparative Studies in Society & History* 16, No. 4 (Sept 1974), pp. 414-15. And, Immanuel Wallerstein, "Globalisation or the Age of Transition?" *International Sociology* 15, No. 2 (June 2000), p. 265.

unevenness of the actual development in the world. The world system approach is basically economic determinism.'[16]

Andre Gunder Frank is one towering exponent of 'dependency theory.' As per the dependency theory, certain core countries accumulate enough wealth and capital not only to sustain their development, but also to perpetuate their exploitation over the underdeveloped and developing periphery countries. The periphery countries seek money and other assistances for bringing development from the rich capitalist countries. This process of periphery countries depending on the core countries for their development is dependency. Poor countries borrow money for their development and their economy is largely dependent on the core countries. But the nagging issue is that development is never brought on par with the core countries. In fact, underdevelopment in the periphery is generated by the development of core countries. A. G. Frank boldly argues that 'underdevelopment of Latin America is the outcome of its participation in the world capitalist development and the underdevelopment in the region was and still is generated by the development of capitalism itself.'[17] For the dependency theory, 'the persistence of underdevelopment in the underdeveloped countries is because of the 'looting and plundering' by the advanced capitalist countries.'[18]

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[16] Anthony Payne, *The Global Politics of Unequal Development*. New York: Palgrave Macmillan, 2005), p. 10.
[17] Andre Gunder Frank, "The Development of Underdevelopment". *Monthly Review* 18, No. 4 (September, 1966), pp. 8-9.
[18] Tom Bottomore, *A Dictionary of Marxist Thought* (England: Blackwell Reference, 1983), p. 115.

For long, it is assumed that underdevelopment is due to certain traditional cultural practices in the poor countries. This means traditional methods of agriculture, traditional technology and lack of the spirit of entrepreneurship are seen to be hindrances to development. But Perez Jr clearly explains that 'underdevelopment cannot be considered as a natural phenomenon. It is the outcome of the expansion of the capitalism of core countries around the world. The core countries are draining all the resources of the poor countries in several ways. Moreover, underdevelopment in the poor countries cannot be examined from the national context alone.'[19] It must be largely examined in the international context. This means underdevelopment is conditioned by the external factors, and even the lack of entrepreneurial skill is sustained by external factors. According to dependency theory, the fundamental cause of underdevelopment in the third world is the expansion of liberal capitalism.

Many liberal theorists however debunk the argument that underdevelopment in the third world is directly connected with the development in the advanced capitalist countries. In the recent times, Francis Fukuyama strongly explodes the inadequacies of dependency theory by arguing that 'two factor are responsible for the underdevelopment in the third world countries, especially in Latin America: (a) their inability to try capitalist seriously and (b) culture, custom, religion and social

[19] Louis A. Perez, "Dependency." *The Journal of American History* 77, No. 1 (June, 1990), p. 135.

structure of the region.'[20] For Fukuyama, 'the assumption that wealth of rich countries is directly linked to the poverty of the poor countries is wrong. In fact, third countries have advantages in the economic development as they can purchase latest advanced technology from the west without having to create themselves and be competitive in the open free market with new infrastructures. Even the multinational corporations provide service, market, capital and technology to sustain the local economy. Further, Fukuyama argues the East Asian economy boom in the post war period by opening to foreign markets and linking with multinational corporations.'[21] Thus, liberals strongly refute dependency theory.

Aspirations of the Third World Countries and Development

The typology made for countries in the world are loosely based on some criteria such as, economic growth, rate of industrialisation, life expectancy and level of poverty. Third world countries definitely have certain goals to ensure development in all levels. It is highly held notion that the wealth of the world is not equally distributed and it is the goal of the third world that equal distribution of wealth must be actualised. It is the first world that disproportionately possess global wealth. With more than 75% estimated world population living in the underdeveloped countries, it is more rationale to demand for equal distribution of wealth. One possible way in this regard is through restructuring the existing world economic system that

[20] Francis Fukuyama, *The End of History and The Last Man*. New York: Free Press, 2006), pp. 100-3
[21] Ibid.

will facilitate all. Along with the sharing of technology, establishing a model of trade among countries in equal terms is the goal. For the overall development, what is required for the third world countries is acquire updated technology. Third world countries need innovation and technology in all spheres. As a matter of fact, third world hugely depends on the developed countries for technology and industrialisation. Lack of innovation and technology is one cause of the underdevelopment, and it is the aspiration of the third world to bridge the technological gap. Technological underdevelopment and economic underdevelopment are interconnected. For instance, as there are massive technological advancements in the field of agriculture, sticking to the traditional mode of agriculture becomes non-competitive.

It is a vexed debate that the existing world economy system is not fair as it tends to favour the developed capitalist countries. The third world demands for a 'New International Economic Order' (NIEO) to mitigate this evil.[22] As the present economic system is not favourable to all countries, it produces more economic gaps among the countries. Under this system, all the powerful financial institutions are under the control of capitalist countries. These institutions also facilitate the capitalist countries to open free access to the markets of third world countries. According to the proposed NIEO, regulations of MNCs though domestic laws,

[22] As Linus A. Hoskins argues that the argument behind 'the demand for NIEO is that a new international monetary order orchestrated by north America and western Europe through institutions such as IMF and World Bank produce deleterious situations affecting poor third world countries.' See for details, Linus A. Hoskins, 'The New International Economic Order: A Bibliographic Essay' *Third World Quarterly*, July, Vol. 3, No. 3 (1981), pp. 508-9.

trade on mutually agreed terms, full scale control of natural resources, and reformation of financial institutions are entailed. As Greene rightly points out that the 'purpose of NIEO is to eliminate the widening gap between the developed and developing countries and bring economic development beneficial to all.'[23]

Colonialism in the classical sense no more exists today, but a new form of colonialism in the form of neo-colonialism is in practice. Unlike the earlier form of colonialism, this new incarnation of colonialism is exercised through economic and monetary control, not necessarily through political domination. Eric Hobsbawm rightly argues that 'the resurgence of colonialism, at the end of 19th century, in the form of neo imperialism took place as the result of competition between western countries for raw materials and commodities found in the third world countries.'[24] One penetrating agent of neo-colonialism is the MNCs which not only extract natural resource, but also decimate the local business enterprises. Another practice of neo colonialism is through the system of lending loans to the poor countries. Taking loans from the financial institutions requires the poor countries to fulfil certain conditions like the liberalisation of economy, devaluation of currency etc. In many cases, poor countries fall into debt trap and their economies do not take off after utilizing the loan.

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[23] Bernard W Greene, "Towards a Definition of the Term Third World." *Boston College Third World Law Journal* 1, Issue 1 (Winter 1980), p. 19.
[24] Eric Hobsbawm, "First World and Third World after the Cold War." *CEPAL REVIEW 67* (April 1999), p. 8.

Moreover, the developed countries also surreptitiously destabilise the democratically elected governments in many of the third countries. According to Noam Chomsky, 'US planners consider nationalistic regimes in the third world countries which are responsive as the main threat to the interest of USA'—extracting raw materials.[25] It is argued that 'CIA engages in replacing popular governments with puppet governments. United States intelligence service CIA carries covert political actions and United States intervention in the internal affairs of others countries has become normal practice.'[26] The point is that even if many countries in the third world are politically independent, their economy is dependent on the developed economies. In consequence, the political independence of these dependent countries also gets compromised in the long run. So, end of the neo-colonialism is another goal of third world. One feasible route to achieve these elusive goals would be the implementation of concrete global 'south-south cooperation.' But it is also warned by Samir Amin that 'as the imperialist power, after the demise of the Soviet Union, returned to their brutal nature, rebuilding the united front of the South against the collective imperialism of the triad (USA, Japan and Europe) is a daunting task for the third world countries at present.'[27]

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[25] Noam Chomsky, 'After the Cold War: US Foreign Policy in the Middle East." *Cultural Critique*, Autumn, no. 19 (1991), p. 17.
[26] Eric Hobsbawm, "First World and Third World after the Cold War." *CEPAL REVIEW 67* (April 1999), p. 11.
[27] Samir Amin, "Beyond Liberal Globalization: A Better or Worse World?" *Monthly Review*, 58, Issue 7 (December 2006), p.12.

Issues Shadowing the Third World and Challenges

Ambivalent views cloud the advantages and disadvantages of globalisation rendering to the third world. Meaningful inference on this question can be derived only to the country specific as globalisation affects differently to different third countries. On the surface, it also safe to say that globalisation cannot be altogether perceived as antithetical to the development process in the third world countries. As Joseph Stiglitz rightly expresses that 'globalisation has brought huge benefits to everyone, but the problem lies in the way how globalisation is managed.'[28] Interestingly, Anthony Giddens argues that 'today globalisation is increasingly decentred as it is not under the control of any group of countries. The trend of 'reverse colonization' which means non-western countries influencing the development in the developed west is fast catching up.'[29] Nevertheless, the challenges encountered by the third world on the face of globalisation cannot be reduced to any simplistic top down observations.

Under development in the third world is the result of the combination of various tangible and intangible factors. Third world countries have been infected by numerous inherent problems. Mass scale poverty is one observable ailment which plagues the third world countries. Many of these countries are overpopulated and they put proper family planning in abeyance.

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[28] Joseph Stiglitz, *Globalization and Its Discontents* (New York: Penguin, 2012), p. 214.
[29] Anthony Giddens, 'Globalisation.' In *Development and Underdevelopment*, edited by Mitchell A. Seligson & John T Passe-Smith. New Delhi: Viva Books, 2010), p. 376.

Problems of starvation and malnourishment are rampant in these countries. The rate of child labour, human trafficking, social crimes are relatively high in the world countries. Since most of the third world countries are impoverished, access to modern health care facility is often found to be below desirable level. Rapid population explosion is the common cause for congestion of human space and high level environmental pollution. As the result, third world has become the hotbed of several lethal diseases and many of health hazards.

According to some reports, many newly developed pharmaceutical drugs and medicine are illegally tested on the poverty stricken people. Repercussions of such trials are not properly scrutinised. For instance, some research centres in India carry a system of informed consent clinical trials where often uneducated and poor women are allured to participate through attractive monetary offers.[30] Besides, terrorism is one evil that constantly afflicts the third world countries. The factors that beget terrorism in these countries are both internal and external. The cases of religious fundamentalism based terrorism is often visible in these countries. There is also a constant fight for political secessionism in many regions of third world countries. Demand for separation and secession which is rooted in the claim of the denial of legitimate rights certainly gives birth to terrorism. Bekir Cinar is right that 'terrorism has (a) historical and political roots, (b) economic and social roots, (c) ideological and religious

[30] Jessika Van Kammen, "Informed Consent in Clinical Trials." *Issues in Medical Ethics* 7, 3 (July-Sept 2000), p. 85.

roots.'[31] It can be asserted that terrorism curtails any development process.

Many third world countries are inundated by the curse of political instability. Not all countries have stable political system and hence the development process is not properly streamlined. Not every country of the third world has managed to build up the idea of nationalism and many of them are still grappling with nation building process. Political instability in these countries are largely due to the absence of visionary leadership, colonial legacy, heterogeneous ethnicity, mass illiteracy, abject poverty, and lack of robust socio-economic reformations. Furthermore, political instability is also engineered by United States in many cases. As Chomsky and Herman argued that there are several instances where USA subverts popular governments and sets up 'client fascist states' in the third world to protect its economic interest. In the name of democracy and human rights, 'USA is responsible for the spread of neo-fascism and state terrorism in large parts of third world.'[32] For most people in Latin America, 'the US government is one of the biggest sponsors of terrorism.'[33] In many cases, the democratic exercise of electing people's government is out of practice. And, third world countries also tend to depend heavily on the developed countries for aids, technology, and policy programmes. While getting aids from the developed countries, several countries fail to devise their own

[31] Bekir Cinar, "The Root Causes of Terrorism." *METU Studies in Development* 36 (June 2009), p. 96.
[32] Noam Chomsky & Edward S Herman. *The Washington Connection and Third World Fascism*, Vol. 1 (Chicago: Haymarket Books, 2014).
[33] Noam Chomsky, *Hegemony or Survival*. London: Penguin Books, 2003), p. 108.

means of development. As a matter of fact, the development model executed in the developed countries are not necessarily applicable to the third world countries.

A most challenging task at hand is about pursuing the economic model suitable to the respective third world countries. Two binary economic models of development continue to dominate around the world. The overwhelming liberal free market system which is characterised by globalisation, liberalisation and privatisation is widely prevailing in the advanced capitalist countries. The socialist model which propels the state interventionist policies, large scale nationalisation and state planning is followed by communist leaning countries. Voices about the need to develop indigenous mode of economic development as an alternative are echoed now and then. According to this wave of thinking, underdevelopment is a country specific and elimination of the causes call for specific diagnosis appropriate to the respective country. The experiment of 'Ujamaa' in Tanzania undertaken by Julius Nyerere, regardless of its ultimate fiasco, is one glaring example. 'Infused with some socialist ideas, Ujamaa as a social and economic ideology or policy with the emphasis on collective community production focuses on rural development through collective organisation.'[34] But any such experimentation has not been evolved in other third world countries.

[34] Jannik Boesen & Tony Moody. *Ujamaa–Socialism from Above*. Uppsala: Scandinavian Institute of African Studies, 1977), p. 11.

Concluding Remarks

All in all, the ubiquitous phenomenon of underdevelopment in the third world is the subject of much debate. The discourse on underdevelopment in these countries largely circles around the genesis of the perpetual impoverishment. Two most towering ideologies—liberalism and socialism—advance two diametric strands of arguments on the question of underdevelopment. From the point of socialist stand, underdevelopment in these countries are not natural. It is the advanced capitalist nations which beget underdevelopment. The liberal school rejects the view that developed countries are responsible for the underdevelopment in these countries. For liberals, causes of underdevelopment in these countries are intrinsic.[35] This ideological abyss continues to grow even further. For instance, debt trap is one means employed by capitalist countries to subvert the economic sovereignty of poor countries according to socialist perspective. Joseph Stiglitz however argues that 'third world countries often face the problem of debt and struggle for the repayment of loans basically because they borrow too much and there is lack of solid bankruptcy laws.'[36] The fact is that large number of third world countries are at the crossroads. Switching to liberal economic model does not guarantee that they will be developed on par with the first world countries. It is because following the liberal model requires them to maintain close ties with the advanced countries which again

[35] For instance, somebody like V. S. Naipaul scorns the rampant conditions of poverty in India. Naipaul strongly advocates that 'the poverty in India is the reflection of the poverty of mind of people in India.' See, V. S. Naipaul, *India: A Wounded Civilization* (London: Picador, 2002), p. 159.

[36] Joseph Stiglitz, *Making Globalization Work* (London: Penguin Books, 2007), pp. 212-3.

calls for several stringent conditions to be met. Also, adoption of the socialist model has not transformed the poor conditions of these countries satisfactorily. This is amply indicated by the experiences in several countries which obdurately promote socialist model. At the same time, the third world countries are not in the position to evolve with an ingenious alternative model in order for them to be self-sufficient and self-reliant. Hence, large third world countries continue to rest on the quicksand between the prevailing developmental models.

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NATIONAL EDUCATION POLICY AND INCLUSIVE EDUCATION FOR DISABLED

Archa Vashishtha*

"Disability only becomes a tragedy when society fails to provide things needed to lead one's daily life".

- Judith Heurmann

Introduction

One of the most essential thing that is needed to lead daily life is education, in fact in today's knowledge driven world we can say that education is as important as water or food. Education is *sine qua non* for an "equitable and just society", as well as for "promoting national development". It helps in achieving "full human potential" and is "key to economic growth, social justice and equality, scientific advancement, national integration and cultural preservation".[1]

The importance of education can never be understated especially in today's world when the knowledge space is constantly changing with introduction of new technologies. The value of education increases multi-fold in case of especially abled children. The need to reassess and reframe our education system to make it more inclusive was being felt from a long time. NEP is a step forward towards this long felt need. One of the main focus area of NEP 2020 is inclusive education. The concept of

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[1]National Education Policy 2020, para 0.1.

inclusive education is based on the principle that every child has the right to quality education.

There is no denying to the fact that the task of mainstreaming our especially abled children can be achieved only by making our education system more inclusive and making every one realise the need and capabilities of these children.

The Right to persons with Disability Act 2016 defines inclusive education as:

"Inclusive education means a system of education wherein students with and without disability learn together and the system of teaching and learning is suitably adapted to meet the learning needs of different types of students with disabilities"[2]

Inclusive education thus requires education institutions to be cautious of the needs of Person with Disabilities (PwD). Disability has been recognised as one of the most significant factor affecting global access to education as policy makers usually miss-out on the needs of these children which make them drop out of the formal education system. No education or inadequate education ultimately leads to social exclusion forcing persons with disabilities (PwD) and children from socio economic disadvantaged groups to live in long-term poverty.[3] For the purpose of this research we will confine to ourself to the

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[2] Right to Persons with Disability Act 2016 (India), § 2(m).

[3]Vanessa Torres Hernandez, "*Making Good on the Promise of International Law: The Convention on the Rights of Persons with Disabilities and Inclusive Education in China and India*", 17(2) PACIFIC RIM LAW AND POLICY JOURNAL (2008) at p. 498.

issues of inclusive education of PwD as these children along with equal opportunities also requires enhanced infrastructure, sensitised and well trained teachers to fit to their needs.

International community has always given inclusive education its due importance. Almost every convention dealing with education or human rights does talk about inclusive education. Before delving into NEP, we will first look at what international treaties and conventions have said about inclusive education, so that we can analyse whether it has been able to meet the international standards. After which this paper discusses about the history and development of the concept of inclusive education in India so that we can have a better understanding of where we stood before the coming of NEP 2020.

International Community and Inclusive Education

The availability of large number of documents dealing with education is clearly evidencing the fact that education is the asset we need to invest onto more. Most of the international documents dealing with education recognize the need and importance of inclusive education as well, clearly highlighting how important inclusive education is for the development of any country.

The UNESCO Convention against Discrimination in Education, 1960 provides inclusive definition of discrimination, which means that discrimination of other types may also be covered in the definition. The Convention explained the term “education” to denote education of every type and every level. It includes three things – (i) “access to education”, (ii) the “standard and quality

of education", and (iii) the "conditions under which it is given".[4] Thus it can be clearly stated that the convention does not only recognise access to education as important but the infrastructure is also important. This Convention was entered into force on May 22, 1962. As of date, there are 106 parties to it. India being not a party to the Convention is not bound by it. However, many of its provisions can also be found in other conventions to which India is a party.

The UN Committee on Economic, Social and Cultural Rights while making General Comment on Article 13 of the ICESCR affirmed that "education is both a human right in itself and an indispensable means of realizing other human rights."[5] The Committee also called the right to education as "empowerment right", by which marginalized people including PwD could "lift themselves out of poverty and obtain the means to participate fully in their communities".

The Committee very beautifully summed up the core obligations of State Parties under Article 13: "to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in Article 13 (1); to provide primary education for all …; to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without

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[4]Convention Against Discrimination in Education, 1960 art.1(2)

[5] Office of the High Commissioner for Human Rights, "*CESCR General Comment No. 13: The Right to Education* (Article 13)", 8 December 1999, Document E/C.12/1999/10.

interference from the State or third parties, subject to conformity with minimum educational standards".[6]

With a view to eliminate "ignorance" and "illiteracy" in the world and to facilitate "access to scientific and technical knowledge and modern teaching methods", the Convention on Rights of the Child, 1989 obligates State parties to promote international cooperation.[7] State Parties are also obligated to direct the education of the child towards the full development of his "personality, talents and mental and physical abilities"; respect for "human rights and fundamental freedoms"; respect for his "cultural identity, language and values"; "preparation of the child for responsible life in a free society"; and "respect for the natural environment".[8]

The Report of Office of the United Nations High Commissioner for Human Rights on "Thematic Study on the Right of Persons with Disabilities to Education" states:

> *"Inclusive education is essential to achieving universality of the right to education, including for persons with disabilities. Only inclusive education systems can provide both quality of education and social development for persons with disabilities. Inclusive education implies more than placing students with disabilities in mainstream schools; it means making them feel welcome, respected and*

[6] *Id*., para 57.
[7] Art. 28(3), Convention on the Rights of the Child, 1989.
[8] *Id*., Art. 29.

valued. Inclusive education is built on values that enhance a person's ability to achieve their goals and embrace diversity as an opportunity to learn".[9]

The Salmanca Declaration and Framework for Action on Special Needs Education 1994 also focuses on inclusive education and states:

"Regular schools with inclusive orientation are the most effective means of combating discriminatory altitudes, building on inclusive society and achieving education for all, moreover they provide effective education to the majority of children and improve the efficiency and ultimately the cost effectiveness of the entire education system"[10]

Article 24 of the Convention on Rights of the Children with Disabilities deals with education and obliges state party to ensure inclusive education for all. In this regard the convention also contains a non-rejection clause i.e. Article 24(2) (a) which makes sure that no student is rejected from general education on the basis of disability and is furthered by the reasonable accommodation clause incorporated in Article 24 (2) (c).

As far as *reasonable accommodation* as aforesaid is concerned, it should not only be free of cost but also entail no additional

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[9]Office of the UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, "*Thematic Study on the Right of Persons with Disabilities to Education*", 18 December 2013, para 68, A/HRC/25/29 available at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx

[10] http://oaji.net/articles/2016/488-1456304078.pdf

costs for PwD. The Committee on the Rights of Persons with Disabilities explained *accommodation* to include (i) change in the location of classes; (ii) to provide in-class communication of different forms; (iii) to enlarge print, materials/subjects in signs, or providing in alternative format, handouts; and (iv) to provide students with a writer or a language interpreter or to allow students to use assistive technology. Further, non-material accommodations should also be considered which include e.g. providing more time to a student, bringing down background noise level, using a method of evaluation which is alternative and introducing alternative curriculum.[11]

It also becomes pertinent to discuss here about some specific disabilities, which have gathered the attention of the international community. According to World Health Organisation (WHO), around 2.2 billion people in the world are visually impaired or blind. Out of them, vision impairment of one billion people could have been prevented or is yet to be addressed. The vision impairment includes mild, moderate or severe distance vision impairment. The WHO also reports that majority of people who have got vision impairment are 50 years plus in age.[12] Not all of them can be put in the category of PwD as per the domestic laws of countries.

The Contracting Parties to the Visually Impaired Persons (VIP) Treaty were *mindful* of the challenges being faced by the VIPs to

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[11]*Id*., paras 24, 30.
[12]WORLD HEALTH ORGANIZATION, "*Blindness and Vision Impairment*" available athttps://www.who.int/en/news-room/fact-sheets/detail/blindness-and-visual-impairment.

the enjoyment of their "freedom of expression", "right to education" and to conduct "research". They also recognized that there was a shortage of published works in accessible format copies for VIPs. Further, as there was no system of "cross-border exchange of accessible format copies", every State was making its own efforts individually to make the accessible format copies which were ultimately resulting into the duplication of efforts.

Regarding cross-border exchange of these copies, the VIP Treaty makes provision for the sharing of information on a voluntary basis so that *authorized entities* in different Contracting Parties can identify one another. The authorized entities may include universities. There is no need for the universities to seek the permission of the copyright owner before converting their copyrighted materials in the accessible formats. The universities in all the State Parties may not only convert the materials into accessible formats but also make the cross-border exchanges without any hurdle. This is how they can generate a huge depository of the accessible format copies for the benefits of VIPs. For this purpose, the International Bureau of World Intellectual Property Organization (WIPO) established an information access point.

It is noteworthy that Contracting Parties shall adhere to three step test as laid down in Berne Convention on Literary and Artistic Works, 1886.[13] Agreement on Trade-Related Aspects of

[13]Art. 9(2), BERNE CONVENTION ON LITERARY AND ARTISTIC WORKS, 1886.

Intellectual Property Rights (TRIPs Agreement), 1995[14] and WIPO Copyright Treaty, 1996.[15] The three step test is that (i) reproduction of works is permitted only in "certain special cases", (ii) "normal exploitation of the work" is not conflicted by such reproduction, and (iii) "legitimate interests of the author" are not prejudiced unreasonably. It is to be ensured that published works may be converted in accessible format copies only for the benefits of the VIPs. The works so converted should not fall in the ordinary course of the business.

It will be appropriate to refer to the role played by Accessible Books Consortium (ABC) in converting the published work in accessible format. In June 2014, the ABC was launched; it is basically an alliance of *inter alia* "WIPO"; the "World Blind Union"; the "DAISY Consortium"; the "International Federation of Library Associations and Institutions"; the "International Author's Forum"; the "International Federation of Reproduction Rights Organizations"; and the "International Publishers Association". The ABC is doing commendable work by creating accessible format copies and also assisting the States in this regard.

These are but just few provisions that shows how devoted international community is on the issue of inclusive education. Almost every treaty or convention dealing with human rights or right to education in general talk about inclusive education and provides measures that the states should adopt to ensure the same.

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[14]Art. 13, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), 1995.
[15]Art. 10, WIPO COPYRIGHT TREATY, 1996.

The VIP Treaty is setting an example as to how we should work towards inclusive education as the treaty does not only talk about inclusion but also how it will be successful.

India and Inclusive Education

The Indian Constitution has always starved to provide adequate protection to every citizen of India. As far as inclusive education is concerned we can find it embedded in Article 15 of the constitution which allows for making special provisions for socially and educationally backward classes in matter relating to admission in private educational institutions though it is silent regarding PwD but it is a great weapon for providing education to the underprivileged. Apart from this Article 21A has been inserted in the Indian Constitution by 86th Amendment making education a fundamental right for children between 6 to 14 years of age. Recognising the right of children to free and compulsory education Indian Parliament passed the Right to Education Act 2009. Apart from these Article 45 of the Constitution of India also directs the states to ensure that free and compulsory education is provided to children below 14 years of age.

The Right to Education Act (RTE) is a great step forward by the Indian government for achieving its International obligation and make education reach the masses. This Act make it obligatory for the states to ensure that every child gets basic education and mandates even private institution to reserve seats for weaker section making sure that good education is not meant only for classes.

Though the RTE makes it obligatory for the state to ensure that child gets admission in the neighbourhood school. It is further

clarified that under RTE Act, there is no limitation on the choice of the child that he would seek admission only in that school which is situated in his *neighbourhood*. The child may also take admission in a school which is away from his *neighbourhood*.[16] Regarding "neighbourhood school", a clarification has been given as under:

> *"The idea of neighbourhood schools can be traced to the National System of Education as elaborated in the Kothari Commission report, whereby the neighbourhood school is meant to be a common space, where all children cutting across caste, class, gender lines learn together in the best inclusive manner. It is therefore meant to be a site for inclusion, so that the school becomes a common space for education".*[17]

If we talk particularly about inclusive education, the concept came into India in 1950s which is based on medical model of disability. After which the government of India also launched an Integrated Education for Disable Children scheme in 1974 looking at the success of various experiments in the field internationally. The National Education Policy 1986 recognised

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[16]Ministry of Education, Government of India, "*The Right of Children to Free and Compulsory Education Act, 2009:* Clarification on Provisions" available at https://mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/RTE_Section_wise_rationale_rev_0.pdf.

[17]*Id.*

the needs to integrate children with special needs with other children.[18]

Thereafter came the Rehabilitation Council of India Act 1992 which recognised the need of every child with disability to be taught by a qualified teacher. The Persons with Disabilities Act further stressed on providing free education to children in proper environment till they achieve 18 years of age and also provided certain measures to remove the barriers in achieving the same like providing transport facilities, removing architectural barriers, modification of the examination system as per the requirement of these children.

Another step taken by the Indian government to ensure education for all is Sarva Shikha Abhiyan. This scheme adopts zero rejection policy and focuses on early detection, and functional and formal assessment of disability to promote inclusive education. It also focuses on strengthening of special schools and removal of architectural barriers to ensure education for all.

There are special schools meant for PwD all over India, some of them meant exclusively for certain type of disabilities like blind school dealing with visually impaired persons etc. Though, there is no provision as such to mainstream government school education for the persons with disabilities. The Right of Persons with Disabilities Act, 2016 puts a duty on states and local governments to make sure that all the educational institutions

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[18] Khagendra Kumar & Kumar Sanjeev, *Inclusive Education in India,* ELECTRONIC JOURNAL OF INDIA, Vol.2(2), 1-15 available at https://corescholar.libraries.wright.edu/cgi/viewcontent.cgi?article=1086&context=ejie.

provide for inclusive education and admit them without discrimination. Further it specifies certain measures that the government should take to ensure inclusive education like increasing the number of teacher training institution, to train professionals and staff to promote inclusive education etc.

Different educational institutions are following different ways to promote inclusive education. Generally, the classes of PwD are being conducted on the ground floor. In a university like University of Delhi, there is an Equal Opportunity Cell for the PwD students of the entire University. Any PwD student may approach that Cell for any problem he/she is facing. The University Departments work in coordination with the Cell and implement their policies which have been made for the benefits of PwD students. Their fee is also negligible.

Other legislation effecting Right to Education also contains provisions with regard to PwD. Section 31B of the Copyright Act provides for the grant of compulsory licence for the benefit of PwD. It enables persons who work for the benefit of PwD for profit or business to apply to the Appellate Board for the grant of compulsory licence to publish any copyrighted work in accessible formats for the benefit of PwD. The Appellate Board after following due process may grant compulsory license to the applicant and if required, may also extend the term of license.

Section 52 (1) (zb) is a fair dealing provision which allows any person or organization to produce accessible format copies to facilitate the PwD to have access to those copies. It allows “the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format” by (i) “any person to facilitate PwD to access to works” including sharing with them

such accessible format copies for "private or personal use, educational purpose or research;" or (ii) "any organisation working for the benefit" of the PwD in case "the normal format prevents the enjoyment of such works" by PwD.

The Marrakesh VIP Treaty is for the benefits of "blind, visually impaired and print disabled" persons whereas the relevant provisions of Indian Copyright Act, 1957 are for the benefits of all PwD. These provisions help PwD to get published materials in accessible format copies which ultimately assist them to realize their right to education in its true sense.

In India the judiciary has also played a vital role in protecting the rights of its citizens. The Supreme Court made very interesting observation in *Jeeja Ghosh & Anr* v. *Union of India & Ors*[19] in reference to PwD. The Court observed as follows:

"to most disabled persons, the society they live in is a closed door which has been locked and the key to which has been thrown away by the others". The Court referred to Helen Keller who said that "some people see a closed door and turn away. Others see a closed door, try the knob and if it doesn't open, they turn away. Still others see a closed door, try the knob and if it doesn't work, they find a key and if the key doesn't fit, they turn way. A rare few see a closed door, try the knob, if it doesn't open and they find a key and if it doesn't fit, they make one!" The Court concluded by saying that "these rare persons we have to find

[19] Writ Petition (C) No. 98 of 2012 decided on 12 May, 2016.

out". It is noteworthy that PwD can be made rare PwD as aforesaid by imparting "inclusive education" to them.

National Education Policy 2020

The National Education Policy 2020 (NEP 2020) was approved by the Central Government on 29 July 2020. Prior to this, two National Education Policies were adopted in 1968 and 1986 respectively. The National Policy on Education, 1986 was further modified in 1992. The focus of implementation of earlier policies on education was less on "quality education" and more on "access and equity". The NEP 2020 has taken over the unfinished agenda of NEP 1986 which was duly modified in 1992. The best thing which happened between NEP 1986 and NEP 2020 was the enactment of RTE 2009 which made the beginning of achieving the goal of "universal elementary education".[20]

NEP has recognised education as the greatest tool for achieving "social justice and equality" focused on "equitable and inclusive education".[21] NEP specifies that the aim of education system of India should be to ensure that "no children loses the opportunity learn and excel because of circumstances of birth and background."

One feature of NEP 2020 that requires applaud is that it has broadened the list of target groups which needs to be referred to whenever we discuss about inclusive education. The policy

[20]National Education Policy 2020, para 0.11.
[21] National Education Policy 2020, Para 6.1.

classifies Socio Economically disadvantaged groups (SEDGs) as follows:

"Socio-Economically Disadvantaged Groups (SEDGs) can be broadly categorized based on gender identities (particularly female and transgender individuals), socio-cultural identities (such as Scheduled Castes, Scheduled Tribes, OBCs, and minorities), geographical identities (such as students from villages, small towns, and aspirational districts), disabilities (including learning disabilities), and socio-economic conditions (such as migrant communities, low income households, children in vulnerable situations, victims of or children of victims of trafficking, orphans including child beggars in urban areas, and the urban poor). "[22]

The policy equally recognises the needs of each of these groups to be properly represented for which education is one of the major criteria and for this purpose lays downs various schemes to ensure that the education of these SECGs is not hampered in any circumstances apart from creating funds, the policy aims to establish educational institutions with all the facilities to ensure that the drop-out rates reduce to considerable extent.

In order to achieve these goals, the policy aims to broaden the scope of school education through multiple pathways that provide either formal or non-formal education. To this end the

[22] National Educational Policy 2020, Para 6.2.

aims to strengthen the National Institute of Open Schooling and state run open schools to accommodate the needs of SECGs.[23]

Another major step taken by the NEP with respect to PwD is standardization of sign language across the country and development of curriculum in relation to the same.[24] This becomes really important if we wish to mainstream our hearing impaired children and want them to have their voice globally. Though practically it may be difficult to standardise signs as in various languages we have so many words depicting the same meaning.

Another kind of disability that founds a space in the NEP is learning disabilities. The policy highlights the urgent need to provide special educators at the middle school level specially to teach children with learning disabilities.[25] Though, it is pertinent to mention here that we find no reference to intellectual disability or other forms of cognitive disabilities like downs syndrome etc. in the policy.

Apart from this the policy also aims to ensure that the teachers are particularly trained to provide inclusive education particularly to the PwD. The Rehabilitation Council of India (RCI) has been given the responsibility to ensure that adequate number of special educators are available throughout the country.[26] Apart from RCI, NCERT and NCTE has also been

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[23] National Education Policy 2020, Para 3.5.
[24] National Education Policy 2020, Para 4.22.
[25] National Education Policy 2020, Para 5.21.
[26] National Education Policy 2020, Para 5.21.

given the responsibility to develop the guidelines for education of PwD.[27]

The policy recognises the importance of higher education and lays down provisions for "Equity and Inclusion in Higher education" under chapter14. It recognises that the reasons for exclusion are to great extent similar both at the school and higher education level and thus the same approach should be adopted to ensure inclusivity in both barring few exceptions like lack of knowledge relating to Higher Education, cost, process of admission, geographical constraints etc. and thus additional actions are required at HE level.

Another landmark feature of NEP is its focus on technology. Technology no doubt can play a vital role in providing inclusive education and keeping this in mind NEP has also focused on the use of technology at every level while at the time of training or for the purpose of providing access but has not discussed about any measure as to how these technologies will reach the masses. The use of technology requires appropriate infrastructure which NEP has not taken care of. This has become more apparent in the present Covid times where parents have committed suicide because of their inability to provide children with mobile phone to attend online Classes and vice versa. [28]

The NEP has also focused on Indian multi linguistic culture and has provided for three education formula to propagate and

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[27] National Education Policy, Para 4.43.

[28] https://www.hindustantimes.com/india-news/tripura-man-ends-life-after-failing-to-buy-smartphone-for-daughter-s-online-classes/story-DdXexxwrxS104pWmicMI1O.html.

develop the diverse Indian languages. The choice of three languages will depend on the states, regions and wishes of the children. Though while we talk about accessibility the focus on providing material for these languages is nowhere found. Moreover, there is no discussion as to how this increased curriculum of an additional language will be balanced.

If we go through the NEP as a whole, we find that the focus of the policy is on privatisation without looking into the fact that there is great need to develop government run educational institution to ensure equity and inclusive education and make education more accessible. The policy has treated private players at par with public institutions and have also given them a lot of privileges. It has always been observed that the general tendency of private educational institution administration is to avoid giving admission to PwD students because of lack of infrastructure and manpower. Further, they do not want to spend money to develop necessary infrastructure and take responsibility for them. This unfortunate approach results in depriving PwD of their statutory and fundamental rights.

Conclusion

Today, many educational institutions, particularly government institutions are sensitized towards PwD students and try to provide barrier free environment to them. There are still many institutions which do not have facilities for such students. They still feel spending money for the purpose of PwD is a waste of resources as these students are very few in numbers. In private institutions, PwD fail to get admission because of high fee structure. Such institutions therefore do the least minimum to show the government that they are complying with the rules. The

grim reality at ground level is that the mindset of the educational institution management has not been changed and they are not very serious about inclusive education. Profit motive is their first priority and anything done by them for PwD is out of fear and not wilful. This has already been observed by judiciary in many cases including those discussed above. The international conventions no doubt has created a positive environment for PwD and recognized their rights including the right to education, but progress made at national level is not very good. Millions of PwD are still being denied the right to education. Apart from that, a large number of PwD are getting inferior quality education in different settings. Though most of the international and national legislations have emphasized on inclusive education, it is still a dream for many students with disabilities.

To sum up, NEP 2020 is a promising education policy of the 21st Century and aims to transform India into a knowledge society. It ensures that no child irrespective of his/her background should be left behind. It focuses on "equity and inclusion" and takes care of children from SEDGs. The policy does make an effort to fulfil our international obligations and does take care of the peculiar situations of India as well. It talks about every possible area that is required to be looked into to make education inclusive for PwD from infrastructure to teachers and from material in accessible format to well-equipped educational institutions the policy has tried to cover it all. Though, the outcome of the NEP will depend on its implementation. It must be ensured that PwD students get accessible format copies in all languages in which the education is imparted. It is expected that with NEP 2020 in place, the PwD will be able to realise their right to education in a more realistic manner.

Though, like every policy NEP also seems to have missed on few points and ignored the implementation process of at least few of the goals it aims to achieve as discussed above. As Winston Churchill quoted “Criticism is easy, Achievement is difficult”, we all as academicians and scholars can work together to fulfil the goals of the policy, and bring a change in the society.

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LIVE AND LET LIVE: ANIMAL RIGHTS JURISPRUDENCE IN THE LIGHT OF KARNAIL SINGH V. STATE OF HARYANA

Suparna Bandyopadhyay*

Abstract

The term life does not ordinarily mean to breathe or survive but also to have fearless existence in a prey-predator world. Technically humans are considered to be one of the most intelligent beings and are expected to have compassion for other sentient beings. The Indian Constitution in Fundamental Duty chapter prescribes "compassion for living creatures" as a fundamental duty of man. There are several judgments that bring to forefront issues relating to, stray dogs, trespassing cattle, birds in cages, bull races, animal sacrifices, poaching etc. This judgment has conferred personhood on animals.[1] It has also asserted that humans are their guardians and custodians. Animal right is an a priori concept and hence, like human rights, animal right is also inalienable. However, when humans have not been able to completely secure human rights for themselves, then it is surprising that the matter of animal rights is relegated to oblivion. Hence, the condition of animals may get even worse if it is not taken into consideration- morally, culturally and

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[1] Karnail Singh v. State of Haryana, 2019 SCC Online P & H 704.

emotionally. Live and let live is a forgotten mantra. It is the time to revive it and apply it.

Key words: Prey-predator world, animal right, inalienable, sentient beings and personhood.

Introduction

The greatness of a nation can be judged by seeing the way how they treat animals.

- Mahatma Gandhi

India was given a "c" under the Animal Protection Index (API)[2] and is a moderate performer under the sanctioning cruelty category.[3] Though India has several animal protection laws, many of the laws focus on protecting cows on religious purpose. India's legislation falls short of international standards in many areas, such as killing of healthy stray dogs. However, in the instances of animal cruelty very less actions has been taken. Instances like *Jallikattu*,[4] killing of pregnant elephant in Kerala[5],

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[2]VOICELESS, THE ANIMAL PROTECTION INSTITUTE https://vaci.voiceless.org.au/countries/india/#:~:text=India%20was%20given%20a%20%E2%80%9CC,protecting%20cows%20for%20religious%20purposes.

[3] *Id.*

[4] Jallikattu is a traditional event in which a bull, such as the Pulikulam or kangayam breeds, is released into a crowd of people, and multiple human participants attempt to grab the large hump on the bull's back with both arms and hang on to it while the bull attempts to escape. Participants hold the hump for as long as possible, attempting to bring the bull to a stop. In some cases, participants must ride long enough to remove flags on the bull's horns

[5] ANI, Kerala: Pregnant elephant dies after consuming pineapple stuffed with crackers, THE ECONOMIC TIMES.

killing of stray dogs,[6] abusing cows for extracting milk[7] and sacrificing animals before deity are some examples of prevalent abuse of animals in India. Even though these animal abuses are criminalized in India,[8] but the wrong-doers somehow escapes legal punishments. Nevertheless, in the recent times the awareness regarding animal rights in India has grown exponentially. In this backdrop it is important to have stringent laws and strict implementation of the same for the protection of animal rights in India.

A discussion on animal rights requires an understanding of the term animal. Animals are generally known as living organisms that feed on organic matter, typically having specialised sense organs and nervous systems and are able to respond to a stimuli. Thus, an animal is a living creature such as dogs, cats, rabbits, lion, bird, fish, insect and also human beings. However, ordinarily all living creatures other than human beings are referred to as animals. But killing them is sadly not considered murder. Animals also have soul, which can feel pain, happiness, love, fear, anger, pleasure and above all helplessness, which is similar to humans but their expressions, goes unnoticed. Hence, understanding and protecting animals is important which needs active participation of all for upholding animal's rights.

The word animal is derived from a Latin word '*animalis'* meaning having breath or soul. Animals like cats or dogs can be

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[6] Salonee Mistry, Mysterious sharp rise in Kharadi dog cruelty cases, PUNE MIRROR.
[7] *Id.*
[8] *Id.*

seen breathing. Hence, now animal includes creatures that can be seen breathing.

Among various meanings, values and significations animals portray various meanings, values and different social and textual form. A study of the legal and jurisprudential meaning of animal remains elusive to some extent.

Jurisprudential Meaning of Animal

In jurisprudence animals do not appear as they appear in literary works. The letter of law has very strict and sober significations, rigorous and stringent specifications and long-established judgments. Jurisprudence's understanding of animals is very technical and purpose oriented. A horse, sheep or pigeon may be considered cattle for the purpose of tort of cattle trespass, but a cow may not be cattle for the purpose of dairy industry regulation. Porcupine may be considered 'wild' animal for property law. Thus, there is no uniformity and the understanding is not pragmatic rather contextual. Hence, the understanding is useless outside of the 'cases' and problems. Thus, in jurisprudence the meaning of the term animal is as interpreted by judges or legislators. Therefore, the right attributed to the animal also becomes contextual.

However, 'animal rights' have tended to rise above these technicalities and contextualities. It offers an engagement with a critique of the human nature as a centre of an ethical universe and a movement of moral reform carried out in the name of the 'animal'. These concerns are transported to juridical institutions. One of these contested forms of contest is the subject matter of right. For animal rights discourse who is or who can be the

subject matter of rights is strongly contested and there is a corresponding question of legal personality largely they are left unaddressed. Jurisprudence, therefore rarely addresses the subject matter of animal rights.

Within these predicaments it is moralising discourses relating to animal rights in juridical languages that have different interpretations for "rights" or nature.

Amidst these uncertainties and predicament, the case of *Karnail Singh v. State of Haryana* assumes significance.

As per the western philosophies Aristotle said, animals live for their own sake, but simultaneously Aristotle agreed that nature made all animals for the sake of humans.[9] Immanuel Kant agreed with Aristotle that only the rational beings have moral value and humans are free to use the other animals however pleases.

Charles Darwin in his theory of evolution (1809-1882) concluded that, animals were our ancestors *and there is no fundamental difference between man and the higher animals in their mental faculties which results as they deserves legal protection.*[10] *Wildlife existed not only before* Homo erectus, but also before human civilizations *and their legal system. However, the longevity of species does not give them rights that they deserve in this artificial human world because they don't have the corresponding duty to do.*

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[9] ARISTOTLE, POLITICS, p. 280-300, (2019) (e-book).

[10] Darwin, Charles Robert, https://www.oxfordnb.com/iew/10.1093/ref:odnb/9780198614128.001.0001/Odnb-9780198614128.

The Stoics, believed in the philosophy of personal ethics as informed by the system of logic, it insisted that animals were slaves and accordingly they always treated them as a contemptible and were rarely to be noticed. These ideas strongly got embedded in Christianity and were later encoded into Roman law. Christianity believed it was a natural law of the universe that animals should be preyed on and eaten by others.[11] God created animals for the sake of human beings and human were therefore entitled to use them in any way they want because animals lack the very soul, the logic and the ability to reason.

In ancient Rome, hundreds of captured wildlife was slaughtered in a day just for the entertainment of the masses.[12] Roman jurist, Hermogenianus wrote- *Hominum causa omne jus constitum* which means "All laws were established for men's sake".[13] In the era of Shakespeare, bearbaiting was an accepted entertainment.[14]

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[11] **Genesis 1:26 to 28:**
"Then God said, Let us make man in our image, according to our likeness; let them have dominion over the fish of the sea, over the birds of the air, and over the cattle, over all the earth and over every creeping thing that creeps on the earth. So God created man in His own image; in the image of God He created him; male and female He created them. Then God blessed them, and God said to them, be fruitful and multiply; fill the earth and subdue it; have dominion over the fish of the sea, over the birds of the air, and over every living thing that moves on the earth."

[12] J.M.C. TOYNBEE, ANIMALS IN ROMAN LIFE AND ART, p. 17, (1973).

[13] Steven M. Wise, Britannica, animal rights, https://www.britannica.com/animal-rights.

[14] LIZA PICARD, ELIZABETH'S LONDON: EVERYDAY LIFE IN ELIZABETHAN LONDON, p. 219-21 (2004). Some of the bears at the Queen's Palace in Whitehall had unique names George Stone, Harry Hunks, Harry of Tame, and Sackcrson. *Id*. at 220. In Shakespeare's The Merry Wives of Windsor, Sackerson is referred to specifically. *Id* Cockfighting, bullbaiting,

Traditional bullfights culminating in the death of the bull have been a longstanding part of Spain's culture, and a constant topic of debate.

As per the eastern philosophies Hinduism worshipped and respected animals not only in *avatars* but also as the *vahanas* of deities which symbolized strength, courage, wisdom, wealth etc. Early Vedic texts such as the *Rigveda* (10.87.16) condemn taking lives of men, cattle and horses, and it prays to god Agni to punish those who kill.[15] Many castes became 'untouchables' who were cow-slaughters or beef-eaters and were banned from entering temples. The respect for animal rights is also traced in Jainism and Buddhism along with Hinduism which is based on the doctrine of *ahimsa* and *karma*.[16] These philosophies states, animals contain a soul just like humans; because a part of God resides in all living things, which forms the atman, when sentient beings die, they can either be reincarnated as a human or as an animal. These beliefs have resulted in the practice of vegetarianism to an extent of veganism; Jains and Mahayan Buddhism strictly prohibit the killing of animals. Jains even to the greatest extent avoid harming insects while Buddhists practice life of 'release' in which animals that are destined for

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and a sport involving trained dogs attacking a monkey riding a small horse were also common. *Id*. at 219-21.

[15] KRISHNA, NANDITHA, SACRED ANIMALS OF INDIA, p. 15-33 (2014).

[16] GRANT, CATHARINE, THE NO-NONSENSE GUIDE TO ANIMAL RIGHTS. NEW INTERNATIONALIST. p. 24 (2006).

slaughter are purchased and released to the wild.[17] Despite the influence of these 'isms' meat-eating was common in ancient India along with the modern India. This belief encouraged emperor Ashoka the Mauryan king to convert into Buddhism for the remainder of his reign, the emperor issued edicts to have compassion for all beings, even our national emblem; Ashoka Pillar depicts number of animals and their existence in human life.[18] These commandments included the provision of medical treatment for animals, bans animal sacrifice, the castration of roosters, and hunting of species. According to Islamism baiting animals for entertainment or gambling is prohibited but the Islamic faith allows eating animals only when they are slaughtered by as per the '*halal'* principles.[19]

The early days of British rule in India were days of plunder of natural resources. *Around 1860, Britain emerged as the world leader in deforestation, devastating its own woods and the forests in Ireland, South Africa and Northeastern United States to draw timber for shipbuilding, iron-smelting and farming.*[20]

The destruction of forests was used by the British to symbolize political victory. By 1860 the experimentation of animals started in British India when Britain began introducing new drugs to the

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[17] E. Szűcs; R. Geers; E. N. Sossidou; D. M. Broom, *Animal Welfare in Different Human Cultures, Traditions and Religious Faiths, 25 (11) AJAS*, p. 900, 506-1599 (2012).
[18] AMULYA CHANDRA SEN (ed.) ASOKA'S EDICTS AND OTHERS, THE INDO-ASIAN CULTURE (1960).
[19] SUSAN J. ARMSTRONG; RICHARD G. BOTZLER, THE ANIMAL ETHICS READER, p. 235–237, (2003).
[20] Nagendra Prasad, *Green India and Environmental Legislation, Essence – IJERC*, Vol. VIII: No. 1 p. 46-50, (2017).

colony. Even before the age of experimentation, number of animals was slaughtered for rituals, often their skins were peeled off. Whereas, domesticated animals were worshipped. Swayed by the suffering of Indian strays and distressed animals, Colesworthey Grant (1813)[21] founded the first Indian Society for the Prevention of Cruelty to Animals (SPCA) in 1861 in Calcutta which was later extended to all over India during 1890–91.

Laws Regarding Animal Protection

Legislation relating to animals has ancient origin; some of the earliest laws on animals were carved in stone- the hieroglyphics of the 18th century BC, Roman Law code depicts respect for dogs as they are the guardian of our home, Codex of Hammurabi announced it illegal to overwork animals.[22] India is one of the 17 mega bio-diverse country in the world. With only 2.4 percent of the earth's land area, it accounts for 7-8 percent of the world's recorded species. India is a home to 96,000 species of animals, 47,000 species of plants and nearly half the world's aquatic plants.[23]

With respect to the above analysis one can trace that the necessity for laws relating to animal- safeguard were never felt before because people continually exploited or wounded animals without even knowing; that their actions were actually called

[21] Colesworthey Grant (1813-1880) was an English artist, writer and pioneer activist against cruelty to animals in India.
[22] MARGARET E. COOPER, AN INTRODUCTION TO ANIMAL LAW, (preface), (Elsevier, 1987).
[23] UNDP, India Biodiversity Awards, 2018.

'cruelty'. Ritual slaughtering or serving animals as food was never considered cruelty. Rather it was the advent of Britishers and the emergence of trade; modernization, experimentation and slavery which gave new definitions of cruelty. Earlier Humans were governed by the laws of Dharma and customary practices. Prior to the Constitution of India, the Shore Nuisance (Bombay and Kolaba) Act of 1853, was one of the oldest law concerning marine water pollution, it authorized the collector of land revenue in Bombay to order for the removal of any nuisance below the high-water mark in Bombay harbours. In 1857, an attempt was made to regulate the pollution produced by the oriental Gas Company by imposing fines on the Company and giving a right of compensation to anyone whose water was 'fouled' by the company's discharges. The Indian Penal Code (IPC) 1860 is the official criminal code of India. It covers all substantive aspects of criminal law. Section 428 and 429 of the IPC provides punishment for all acts of cruelty such as killing, poisoning, maiming or rendering useless of animals.[24] But the punishment was very less. The Indian Easements Act, 1882 protected riparian

[24] § 428 of the Indian Penal Code, 1860, states that, "Mischief by killing or maiming animal of the value of ten rupees.-Whoever commits mischief by killing, poisoning, maiming or rendering useless any animal or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both." and
§ 429 states that, "Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees.- Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both".

owners against 'unreasonable' pollution by upstream users. The Fisheries Act, 1897 penalized the fish killing by poisoning or defiling the water and also using of explosives in the water surface. The Bengal Smoke Nuisance Act, 1905 was also enacted in early 90's to protect our environment.

Article 48-A[25] of the Constitution of India and the fundamental duties under the Constitution poses a duty on state to protect and safeguard the forests and wildlife of the country. Various powers, authorities and duties were assigned to the centre, state and *panchayats* under the scheme of wildlife protection laws. Similarly, the fundamental duties oblige a citizen to protect the natural habitat which is inclusive of animals.[26]

Other legislations were also enacted thereafter like, The Indian Motor Vehicle Act, 1914, followed by The Indian Forest Act, 1927. Both the Acts were the products of Colonial rule; it authorized the state (British Government) to exploit the nature and forest products. The Factories Act, 1948 required all the factories to make effective arrangements for waste disposals and also empowered State Governments to frame rules by implementing this directive. The Mines and Minerals (Regulation and Development) Act, 1957, The Industries

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[25] Art. 48A of the Constitution states- Protection and improvement of environment and safeguarding of forests and wild life. The State shall Endeavour to protect and improve the environment and to safeguard the forests and wild life of the country

[26] Art. 51-A (g) of the Constitution states-"It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures." And Art. 51-A (h) states, it shall be the duty of every citizen to develop the scientific temper, humanism and the spirit of inquiry and reform.

(Development and Regulation) Act, 1951 indirectly gave license to the Englishmen to exploit earth our natural habitat and air respectively in the name of growth.

After independence, The Merchant Shipping Act, 1958, was enacted to ease the trade by waterways which again increased the concern of oil spill and its dangerous impact on aquatic and marine life. The Forest (Conservation) Act, 1980 protected the forest as well as the forest produce. In 1981, the Air (Prevention and Control of Pollution) Act was passed. It was another indirect legislation towards the rights of animals towards pollution free air. In 1986 as a result of the Bhopal gas tragedy, the Parliament passed the Environment Protection Act. This was an "umbrella" legislation which was designed to provide a framework for Central Government's activities and its coordination with the State authorities. It was also an 'enabling' law, which articulated the essential legislative policy on executives, to frame necessary rules and regulations. There exist several animal welfare legislations in India such as the Prevention of Cruelty to Animals Act, 1960 and the Wildlife Protection Act, 1972 at the Central level and cattle protection and cow slaughter prohibition legislations at the State level for the same. Other than the specific statutes further protections for animals lie under tort law like trespass.

The Wildlife Protection Act, 1972 is a specific legislation for wildlife but the present definition of animal not only extends to wildlife but also domesticated and stray animals. The Prevention of Cruelty to Animals Act, 1960 was another attempt to prevent cruelty, but the enactment is in vain because there have been incidents of killing of cows, dogs, elephants; with fire crackers

'just for fun'. As per various government reports there are plenty of elephants killed in almost all the Deccan states.[27]

These above legislations began in implementation when the countries met globally in *two international conferences on Environment and development- one at Stockholm in 1972 and another at Rio de Janerio in 1992; both conferences have influenced environmental policies in most countries, including India. Many countries and international agencies have accepted the polluter pays principle, precautionary principle and the concept of inter-generational equity as guidelines for designing environmental policies. Other than the policies, India has specific convention for environment like* CITES/Washington Convention, Ramsar convention, Bonn Convention, World Heritage Convention etc. As a signatory to the United Nations Convention on Biological Diversity held at Rio de Janerio in 1992, "*to provide for conservation of Biological Diversity, sustainable use of its components and fair and equitable sharing of benefits arising out of the use of biological resources and knowledge*", the Biological Diversity Act, 2002 was enacted by India to regulate access to, and use of, its biological resources.

One of the main problems with the enactments is that the wildlife is only protected in reserves, botanical gardens, sanctuaries and zoos. Once animals- aves, mammals or even a fish escapes their original habitat they are prone to cruelty and life risks. To an extent humans believe that they have a right to kill animal in self-defence also. The enactments nowhere monitor territorial

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[27] Arjun Raghunath, *416 Wild Elephants Died In Kerala Since 2015*, (June 05 2020), DECCAN HERLAND.

jurisdictions and human conducts towards the animals. Even the law of torts holds the person liable from whose possession and negligence an animal escapes but the law is unclear onto the demarcation that which animal can be regarded as domestic or which can be regarded wild.

Judicial Approach Towards Animal Welfare

Time and again laws seem inadequate in application and implementation which led the judicial intervention for upholding the emerging rights of animal jurisprudence. The Supreme Court in *Sardar Syedna Taher Saifuddin Sahib v. State of Bombay*[28] expressly states-

> *"There may be religious practices of sacrifice of human beings or sacrifice of animals in a way deleterious to the well-being of the community at large. It is open to the State to intervene, by legislation, to restrict or to regulate to the extent of completely stopping such deleterious practices."*[29]

Various theories, beliefs, religious and personal practices ensure that the world is carnivorous as well as herbivorous. The nature has created us and the nature only can consume us, hence, we all are prey-predator and by virtue of this, human being cannot claim to be above all by claiming lives. The right to life under Article 21 of the Constitution of India ensures that the right to life includes right to nutritional food for India's improvised

[28] 1962 AIR 853.
[29] *Id.*

millions.[30] But nowhere expressly it mentions that nutritional food should include 'meat.'

a) An Analysis of the judgment of Karnail Singh v. State of Haryana

The Supreme Court of India in the present case tried to establish that the rights of animals are *at par* with humans. The Court in this unprecedented judgment declared that animals (including those from the avian and aquatic species), are legal entities and the citizens throughout the State are persons *in loco parentis* (in place of a parent), who has the basic or fundamental duty to protect animals and ensure their welfare. Every species has an inherent right to live and get protection of law. Whose rights and privacy are to be respected and protected from unlawful attacks? This pronouncement made the state of Haryana, the second state to grant animals a legal personality under law. The Uttarakhand High Court, in 2018, was the first court which made a similar declaration in the case of *Narayan Dutt Bhatt v. Union of India*[31] where the court conferred personhood to the animals. The court agreed that animals are also person in the eyes of law.

b) Background of The Case

The present case is a revision petition instituted against the judgment in 01.02.2013 rendered by the Additional Session Judge, whereby the conviction imposed upon the petitioner was reduced to 6 month from 2 year. In 2004, when a secret

[30] People's Union for Civil Liberties v. Union of India & Others (PUCL), AIR 1997 SC 568.
[31] 2018 SCC OnLine Utt 645, decided on 04-07-2018.

information was received by ASI Azad Singh and other police officers regarding the export of the cows to the state of Uttar Pradesh in truck. Further information was also received regarding the truck which was at Meerut and a police picket was laid down near Yamuna Bridge before Haryana-Uttar Pradesh boundary, from where the cows were recovered from a truck and the truck driver along with the conductor was apprehended. An opinion on that case was given in 2013, then a revised petition was submitted to the court, where the court opined that animals do possess the legal personality like the Corporations, Hindu idols, Holy Scriptures, rivers etc. and their protection is the need of the hour because they are entitled to justice.[32]

The judgment dealt with the jurisprudential aspect of animal rights and judge in the case directed a state agency to enforce a number of very specific standards for the transportation of animals. The animals should be healthy, comfortable, well nourished, safe and are able to express innate behaviour without pain, fear and distress.

c) Law Involved and The Ruling

After being concerned about the protection of animals and the environment, the Court through the case at hand interpreted the laws with an eco-centric perspective by shifting its view from anthropo-centric perspective. In total there was transportation of 29 cows in two trucks from one province to another in violation of restrictions on the export of cows for meat slaughter which

[32] Saumya Giri, *Case Analysis of Karnail Singh v. State of Haryana, IJLSI* vol. 2 issue 2, (2020), p. 365.

attracts the offence under Section 4-b[33] and Section 8[34] of The Punjab Prohibition of Cow Slaughter Act, 1955. The prosecution inspected witnesses and scrutinized the statements of the accused which was recorded under Section 313[35] of the Code of Criminal Procedure, 1973. The petitioners were convicted and sentenced to undergo imprisonment with fine under Section 4-b and Section 8 of The Punjab Prohibition of Cow Slaughter Act, 1955. An

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[33] § 4- Exceptions as to section 3- prohibition on cow slaughter:-(1) Nothing in section 3 shall apply to the slaughter of a cow:- (b) Which is suffering from any contagious or infections disease notified as such by the Government.

[34] § 8. Penalty :-(1) Whoever contravenes or attempts to contravene or abets the contravention of the provisions of section 3 shall be guilty of an offence punishable with rigorous imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees or with both. (2) Whoever fails to lodge the information in the manner and within the time stated in subsection (2) of section 4 shall be guilty of an offence punishable with simple imprisonment for a term which any may extend to one year or with fine which may extend to two hundred rupees or with both. (3) Burden of proof:-In any trial for an offence punishable under subsection on (1) or sub-section (2) the burden of proving that the slaughtered cow belonged

[35] § 313 states Power to examine the accused.

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court- (a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary; (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

appeal was made by the petitioner which was dismissed but the punishment was reduced from two years to six months. The learned counsel for the state ardently supported the prosecution case as it was discovered that petitioners were not in possession of any export permit. It was also submitted that the cows were packed in a cruel and a brutal manner without following the rules as lay down under Rule 94 of Haryana Motor Vehicles Rules, 1993.[36]

On 31st May 2019, the Hon'ble High Court of Punjab and Haryana in *Karnail Singh Case*[37] affirmed that the animals in the entire animal kingdom include aquatic and avian species, as legal entities. All the citizens of the Haryana were declared persons *in loco parentis i.e.,* in place of a parent, which will enable them to act as their guardian not as an abuser. The court also reiterated the Nonhuman Right Project's (NhRP) difference of opinion where legal personhood should not be restricted to human beings only. Before giving the concluding statement regarding the status of animals as the legal entity, a detailed guideline to be precise, 28 mandatory guidelines were enforced for animal welfare. Few of the guidelines which were included are- direction for not exceeding the load while driving vehicle, not to harness any animal for drawing vehicle at the high temperature, there should be ban on instruments like spike sticks, fluorescent reflectors, transporting animals as per Rule 56 of the Transport of Animals Rules, 1978[38] along with Rule 93 of the Haryana Motor Vehicles

[36] Haryana Motor Vehicle Rules, 1993 (India).
[37] *Supra* note 1
[38] Transport of Animals Rules, 1978 (India).

rules, 1993,[39] Right of Way given to the non-mechanical device Issue certificate of the unladen weight of the vehicle by Municipality to avoid abuse to animals etc.

d) Basis of the Ruling

This particular decision relies on decision of *Animal Welfare Board of India v. A. Nagaraja & Ors,*[40] famously known as Jallikattu case. In this case Supreme Court has dealt with the grave cruelty towards animals in the name of custom and culture. The word Jallikattu is derived from the words like, '*calli*' and '*kattu*' which signifies 'coins' and 'package' respectively. It is a traditional, cultural and ritualistic sport which involves the daring stance of men struggling to have claim over a bundle of coin tied to the horn of a raging bull. That act is synonymous to valor and pride (and occasionally for the purpose of getting a bride), because, what brings more masculinity and pride, than being able to pull a stunt before a raging bull, jeopardizing one's own as well as the cattle's life, in the name of culture! For doing the act, humans tame the bulls by forcefully feeding them homemade liquor, rubbing chilies in their eyes, ears and mouth. Often their tails were bitten, twisted and testicles were also pinched to make them furious.

The Hon'ble Supreme Court stated *in Narayan Dutt Bhatt v. Union of India*[41]:

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[39] Haryana Motor Vehicle Rules, 1993 (India).
[40] CIVIL APPEAL NO. 5387 OF 2014 (the Jallikattu case).
[41] 2018 SCC OnLine Utt 645, decided on 04-07-2018.

> *"Every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition which includes all forms of life, including animal life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. So far as animals are concerned, in our view "life" means something more than mere survival or existence or instrumental value for human beings, but to lead a life with some intrinsic worth, honour and dignity."*

Justice Rajiv Sharma, who also presided over the matter in the High Court of Punjab and Haryana, has conferred personhood to animals along with the Hindu idols. This means they are capable of holding property and being able to be taxed through its Shebaits or *pujaris* who are entrusted with the possession and management of the property, undoubtedly corporation are treated as juristic person but along with it even registered trade union and friendly societies, pious Scriptures, and rivers are also persons.[42] The Court acknowledged that the concept of legal personhood has evolved with scientific discovery, evolving standards of morality, and human experience not only includes all humans, but also non-humans. The court rightly recognized that it is a moral duty and legal obligation under the doctrine of *Parens Patriae* that confers the state to act as parent for those

[42] PATRICK JOHN FITZGERALD, SALMOND ON JURISPRUDENCE, p. 305 (12th Ed. 1966).

who are not able to take care of themselves, such as children or disabled individuals, so herein a similar principle has been applied by the court to protect the rights of animals and that the courts are distinctively positioned to transform animals' legal status depending on changing morality and existing legal principles. Furthermore, it is our fundamental duty under Article 51-A (g) and (h) of the Constitution of India which says, it shall be the duty of every citizen to develop the scientific temper, humanism and the spirit of inquiry and reform. Particular emphasis has been made to the expression 'humanism' which has a number of meanings, but increasingly designates as an inclusive sensibility for our species. Humanism also means to understand benevolence, compassion, mercy, etc. Citizens should, therefore, develop a spirit of compassion and humanism which is reflected in the Preamble as well as under Section 3 and 11 of the Prevention of Cruelty Act, 1960. The responsibility to protect animal rights is also mentioned under the Directive Principle of State Policy which binds the state towards the protection of animal rights which is solely and sadly varies from state to state. On deletion of Article 19(1) (f) from the Indian Constitution, right to property is no more a fundamental right in India; this gives Parliament more a leeway to pass laws protecting the rights of animals. Right to hold on to a property which includes animals also, is now only a legal right not a fundamental right.

In case of violation or non-compliance these articles are not justifiable *i.e.,* without any legal sanction; instead these are subject to trial in a court of law, wherein these courts interpret the law through an eco-centric lens. The eco-centric principles have also been applied in *T.N. Godavarman Thirumulpad v.*

Union of India,[43] where the Supreme Court in order to preserve the ecological balance and right to life of animals in the region of wet evergreen forests of Tirap and Changlang in the state of Arunachal Pradesh, ordered to close all sawmills, veneer mills, plywood mills within a distance of 100 kms from the boundary of Assam.

In *Centre for Environmental Law, World Wide Fund-India v. Union of India,*[44] Supreme Court while highlighting the importance of protecting Asiatic lion said the necessity to view sustainable development should be from the prism of interest of flora and fauna. Court further elaborated that,

> *"Eco-centrism is nature-centered, where humans are part of nature and non-humans have intrinsic value. In other words, human interest does not take automatic precedence and humans have obligations to non-humans independently of human interest. Eco-centrism is, therefore, life-centered, nature-centered where nature includes both humans and non-humans."*

As per the court in *Karnail Singh's* judgment[45], animals do realize Pain and suffering as they are biological traits. Pain, in particular, informs an animal which specific stimuli, it needs to avoid and an animal has pain receptors and a memory that allows it to remember what caused the pain. Professor of Animal

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[43] (1997) 2 SCC 267.
[44] (1998) 6 SCC 483.
[45] *Supra* note 1, para 40.

Welfare, D.M. Broom of the University of Cambridge in his articles appearing in chapter fourteen of the book Animal Welfare and the Law, Cambridge University Press (1989) says: "Behavioural responses to pain vary majorly from one species to another, but it is reasonable to suppose that the pain felt by all of these animals is similar to the feeling that is felt by humans."[46]

Animals not only can feel pain and sufferings but also have emotions.[47] Animals like elephant, dogs, cats etc, can express emotions visibly. In case of the death of their loved one's animals refuse to eat sometimes, become ill or to an extent lose weight. According to Jeffrey Kluger, of Time magazine, "It's well established that elephants appear to mourn in the death of their counterparts. They linger over a family member's body with what looks like sorrow, and African elephants have a burial ritual too by covering their dead relatives' bodies with leaves and dirt. Elephants show respect when they come across the bones of dead elephants, examining them closely, with particular attention to the skull and tusks."[48] Similarly, great apes remain close to a dead troop mate for days. Even in Africa and Asia there are stories that elephant herds and tigers take revenge on targeted human colonies or hunters for shooting members of their families, stolen their food, or attempted to kill them.[49] Few animals are even remarkably intelligent like dolphins, whales, primates, and elephants. Dolphins not only have big brains, but also possess

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[46] *Supra* note 1, para 40.
[47] BARBARA J. KING, HOW ANIMALS GRIEVE, p. 8 (prologue), (2013).
[48] DAVID R. BOYD, THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD, p. 11, (2017).
[49] *Id.*

abilities such as sonar or echolocation, with which they send out sound waves that bounce back as echoes, providing extensive information about their surroundings. Echolocation enables dolphins to 'see' through solid objects, For example, dolphins can tell if another dolphin, or a human, is pregnant, by using their sonar to identify two distinguished heartbeats.[50] On the top of all, few animals have huge muscular power and few of them have the capability of verbal language like humans have for communicate like cockatoo, parrots etc.

International Approach to Human Welfare

There are two types of animal lovers- one is concerned about the animal's welfare and the second is concerned about the animal's right. Welfare centric approach acknowledges their present condition which focuses on their well-being. Whereas, the right guarantee approach is a reformative movement. It acknowledges that animals were deprived of their rights and looked down upon by humans and humans' wishes to ameliorate their conditions. There has been slow transformation in approach from 'anthropo-centric' one to more 'nature's right-centric' in international environmental law, animal welfare law etc. Further, environmentalist identified three stages for the development of international environment law-

[50] *Id.*

Firstly, human's self-interest as a reason for environmental protection for instance, ensuring the health of whaling industry rather than conserving or protecting the whale species at large.[51]

Secondly, for the sake of international equity *i.e.,* the sustainable development, seeing beyond the requirement of the present generation to meet the needs of future generation of human beings.[52]

Thirdly, nature's own right *i.e.,* every form of life is unique, warranting respect regardless of its utility to man.[53]

Eating meat or torturing animals can never be a human's fundamental right because we have given ourselves the right to life and personal liberty which includes right to pollution free environment which again includes air, water and ecology. Killing animals disturb the very balance of nature which is an indirect threat to humanity itself.

Conclusion

Every country has their own national animal or bird as an emblem and each nation use them to represent a symbol of their pride and prestige. Modern day's corporate houses use the name of animals and birds for their brands. Apart from being considered gods, animals have been depicted in our zodiac signs in Indian astrology also. In the Vedanta studies, *Atharva Veda* has considered men as *paradhya pasu* (highest animal) while others

[51] *Supra* note 1, para 57.1.
[52] *Supra* note 1, para 57.4.
[53] *Supra* note 1, para 57.6.

are *anu-pasu* that is those who follow them[54] and *paradhya pasu* worship *pashu-pati* meaning the lord of animals which is a form of lord shiva.

From religious, cultural, psychological, social, political and economical value, animals have always been treated subservient to men in the form of property. There has been a paradigm shift on the treatment of animals from being worshipped to being served in our plates and also being tortured to an extent of death for the purpose of mere entertainment. The judiciary along with the animal right movements, vegan movement, environmentalist, activists; fight for those who cannot fight for themselves. Surprisingly courts in Argentina and Colombia have granted habeas corpus to apes[55] and a bear.[56]

The concept of Rights and duties are interrelated, human's invention of right is used to moderate human social interaction which came with the civilization. Whenever, there is a concept of right, duty follows. Likewise, if a human has a right to life and personal liberty he is duty bound of not causing pollution or kill anybody arbitrarily. There is a silent agreement between humans after the laws are framed where animals cannot partake in any agreement. In order to live; the predator kills the prey. They

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[54] RAJDEVA NARAYAN, ECOLOGICAL CRISES AND HINDU RELIGIOUS THOUGHTS, ECOLOGY AND RELIGION, p 33 (2003).

[55] ARGENTINA: Tercer Juzgado de Garantías Mendoza, case no. P-72.254/15, 3 November 2016 - *Chimpanzee Cecilia.*

[56] COLOMBIAN Supreme Court of Justice, AHC4806-2017, Radicación n.o 17001-22-13-000-2017-00468-02, 26 July 2017 - *bear Chucho*. This decision was overturned by the Constitutional Court with a public hearing on 8 August 2019.

cannot understand the duties required of them either that would allow them to receive the protection that rights would offer them.

As per the law of nature or the law of jungle, we all form a part of food chain and in order to survive, the predator feeds on the prey which is not cruelty at all but when you go against of nature and tries to harm the basic balance thereof then you commit cruelty.

Humans are blessed because we possess high intellect, logic, rationality, reasonability, values, morality we must have compassion for those who cannot stand for themselves. *India adopted the socialist pattern in 1954 as a framework for social and economic policies. This framework articulates that public policy decisions must enable the society to maximize social gain and not private profit. This framework also envisages a catalytic role for the State in the social and economic transformation of the country. The Constitution of India provides a number of Directive* Principles of State Policy, Five year Plans, fundamental duty, all thrives to promote sustainable development. Not only the State but also the entertainment industry has done best with good content which has taught the upcoming generation to love animals, not to harm them by any means. For example, *in the movie jungle* book- story of moogli had shown the soft and companion quality of animals but movies like, the tale of Little Red Riding Hood has frightened children and changed their perspective on wolves that induces fear and emotional trauma. In 1942, Disney studios released Bambi, which put deer in a different emotional light than just being the target of sport hunters. In 1975, Steven Spielberg released 'Jaws to world' it acclaimed artistic and financial success. Ill-fatedly, the movie created such a significant and negative image of sharks in the

public's mind that today it is hard to obtain the political support necessary to conserve endangered species of shark from human killings.[57]

Hence, the non-human kingdom is often misunderstood because of their claws, canine/sharp teeth, huge trunk, roars etc. they are helpless, fearful and in much need of our assistance so that all can have a peaceful co-existence with zero hatred.

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[57] Michelle Coffey, *How 'Jaws' Went Viral in the 1970s*, MARKET WATCH, 11 June, 2015.

A STUDY OF THE RIGHTS OF CHILD WITH DISABILITIES IN INDIA IN THE LIGHT OF PERSONS WITH DISABILITIES ACT, 2016

Sagnika Das*

Abstract

Special care and assistance is the basic human right of a child. It is the duty and obligation of Governmental machineries as well as of every prudent human being of the society to give that fair amount of care and assistance to a child. But these duties and obligations are magnified many fold in case of a child with disability as they are doubly vulnerable not only as a child but also due to disability and more exposed to the chances of being attacked or discriminated in comparison to any other child per se. Therefore, there is need to have some special affirmative legislation which shall protect and promote the rights of the children with disabilities. The Universal Declaration of Human Rights under Article 1 as well as the Constitution of India under Article 21 proclaims that every human being are born equal and everyone has equal right to live with dignity. This expression includes the child with disability too. However, unfortunately it is evident that there exists lack of knowledge and inclusive policies to give proper assistance to the children with disabilities.

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Promulgation of Persons with Disabilities Act, 2016 has not received the expected response largely due to discrimination against them in the society which amounts to violate their inalienable basic human rights.

Key Words: Human Rights, Child Rights, Disability, Discrimination and Vulnerability.

Introduction

A child is a human being between the various stages of birth and puberty or below the legal age of majority set by a particular country. The legal definition of a child usually refers to as a minor. Hence it can be said that a child is a human being from the time of birth to the age of eighteen years. It is because of their tender age and lack of physical experiences, which makes them weak and vulnerable by nature and if that child is with disabilities then they are more exposed to the chances of being abused. Therefore, they need special care and protection of law and for this purpose there are several international and national instruments proclaiming the rights of child which includes the children with disabilities.

The Universal Declaration of Human Rights under Article 25 states that every child is entitled to special care and assistance. The Declaration of the Rights of Child adopted by the General Assembly on November 20, 1959 as well as the Convention on the Rights of the Child (CRC), 1989 together proclaims certain basic and inalienable human rights of child. Those rights are as follows-

1. Right to life,
2. Right to acquire Nationality,

3. Right to freedom of expression, thought, conscience and religion,
4. Right to freedom of association and freedom of peaceful assembly,
5. Right to education,
6. Right to social security,
7. Right to standard of living adequate for the physical, mental, spiritual and social development of the child,
8. Right to protection of the law against arbitrary or unlawful interference with his or her privacy, family, home or correspondence. All these rights mentioned above are inclusive in nature and they include the child with disabilities too. The child with disabilities also has the equal right to live freely without any discrimination, violation. They also have the right to get protection of law, to get proper and adequate education and at the same time it is the duty of the Government of a country and the people at large to protect and promote the same for the children as a whole without any discrimination.

However, at the present day scenario all the rights ensured to the children seems to be the proclamation only in *abstracto* rather being in *concreto*. Children are being subjected to violation and exploitation throughout the world and among them the plight of the child with disabilities is reaching a level which needs to be curbed. Their issues should be looked upon with due care and a proper legislative, executive and judicial machinery is the need of the hour for their protection.

Data Relating to Children with Disabilities

The United Nations Convention on the Rights of Child (CRC) has been recognized as the most widely adopted Human Rights treaty as over 190 countries have ratified to it. However, mere acceptance of these rights is not enough to uphold the rights of children with disabilities. Issues like child marriage, child labour, lack of access to education, child soldiers, lack of access to clean water and sanitation, female genital mutilation, lack of access to proper health care are the vices of the present day world and the children are the prominent victims.

The plight of the children with disabilities increases due to lack of awareness and education of the people in general. More than 1 billion people *i.e* 15% of the world's population suffer from disability and out of them 90-150 million people are children.[1] Throughout Africa, less than 10% of the children with disability have access to primary education. In Bangladesh 30% people with disabilities have completed primary school, whereas 48% people without disabilities have completed primary education. 75% children with disabilities in Afghanistan are out of the light of education.[2] According to the Census of 2011 in India, 2.21% people[3] [2.40% Male and 2.01% Female] of the total population are suffering from disability and out of them 20.42 lakhs are

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[1] *Children with Disabilities*, THEIR WORLD, https://theirworld.org/children-with-disabilities.
[2] *Id.*
[3] *Disabled Persons in India: A Statistical Profile*, http://mospi.nic.in/sites/default/files/publication_reports/Disabled_persons_in_India_2016.pdf.

children.[4] Due to non-accessibility of education, these children remain dependent onto their family members being deprived of their basic inalienable civil, political, economic, social and cultural rights leading towards a gross Human Rights violation. These children around the world require special assistance of the Government and local authorities on primary basis to curb the social menace.

There are only around 2500 special schools[5] in India which are well equipped to deal with the students with disabilities and all the schools are not Government aided. Most of the schools are run by NGOs and private institutions.[6] The number of the schools shows that the lack of intentions and initiatives of the Government to promote awareness relating to disability which needs to be changed to ensure social justice. Though the guideline has been made relating to the admission of children with disabilities in all the schools, still they are denied admission. The obstacles are not only limited to primary education, even in the higher education system in India, academicians with disability face higher range of issues. Though University Grant Commission (UGC) has given guideline relating to admission of all irrespective any discrimination, yet the institutions are reluctant to take admission of the students with disabilities.

It is found through a field work undertaken by the University of North Bengal in 2017 at the District of Coochbehar of West

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[4] *Id.*

[5] *Special needs education in India*, ANGLOINFO https://www.angloinfo.com/how-to/india/family/schooling-education/special-education.

[6] *Id.*

Bengal that there are no special schools for children with disability of any kind. If any child with disability wants to take admission in school they needed to study in the common schools for all where they used to be subjected to discrimination. Through the census of 2011 it is found that most of the disabled children are located at the rural areas and for this reason it becomes difficult for the families to take the children to school due to lack of accessible conveyance and economical backwardness. This shows the clear picture of the whole country where the children with disability gets deprived of the basic Human Right to Education.

International Instruments for the Protection of the Rights of Child with Disabilities

The statistical data show that there are huge number of people living in the world including children with disabilities needing special assistance and care. It is noteworthy to state that Persons with Disabilities include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[7]

In order to promote and protect the rights and dignity of persons with disabilities General Assembly of the United Nations established an Ad hoc committee on December 19, 2001 for the preparation of a comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities. The committee adopted a

[7]The Convention on the Rights of Persons with Disabilities, Art. 1.

draft text of a convention which was forwarded to the General Assembly for adoption and finally in 2006 the General Assembly adopted by consensus the Convention on the Rights of Persons with Disabilities which came into force in May 3, 2008 after its ratification by 20 States. On February 2016, the Convention had 161 State parties.[8]

Apart from this the people with disabilities including children have equal right to live with dignity and right to livelihood proclaimed by some other International Instruments. The Convention on the Rights of Child (CRC), 1989 proclaimed that every child including the child with disabilities has right to life, acquire nationality, education, social security; freedom of expression, thought, conscience so on and so forth.

There are some Optional Protocols to the Convention on the Rights of the Child which are as follows-

1. Optional Protocol on the Involvement of Children in Armed Conflict, 1977 states that the Parties to the conflict shall take all feasible measures in order to protect the children below fifteen years old from any kind of hostilities and they shall refrain from recruiting them into armed forces. Thus this protocol gives protection to the children with disabilities too under its umbrella.

2. Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 2002 defines these

[8] H.O. AGARWAL, INTERNATIONAL LAW AND HUMAN RIGHTS 882-883 (21st edn, 2016).

particular offences separately and sets criteria for the treatment of violation under domestic laws of the State parties. Under this protocol the children with disabilities are also protected and the State parties are bound to take actions in case of violation of their rights.

3. Optional Protocol on the Rights of the Child on a Communication Procedure, 2014 empowers individual children or their representatives of the ratifying States to submit communications in writing regarding specific violation of the Rights of the Child mentioned in CRC and its two protocols. The children with disabilities are also entitled to communicate their complaints regarding their violation of rights under this protocol.[9]

These are the basic inclusive international instruments which talk about the rights of the children of the world as a whole.

Apart from the Convention on the Rights of Child, there are some ample numbers of International Instruments which talk about Human Rights in an inclusive manner and include the Child Rights too. The United Nations Charter, 1945; the Universal Declaration of Human Rights, 1948 and the International Covenants of Civil and Political Rights and Economic, Social and Cultural Rights (ICCPR and ICESCR), 1966 uphold the inalienable civil, political, economic, social and cultural rights of Children of the world.

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[9] H.O. AGARWAL, INTERNATIONAL LAW AND HUMAN RIGHTS 856-859 (Central Law Publications, Allahabad, 21st ed, 2016).

There is a specific Convention for the rights of Persons with Disabilities too in which the rights of children with disabilities are also included. The United Nations General Assembly on December 13. 2006 adopted by consensus the Convention on the Rights of Persons with Disabilities, 2006 which came into force on May 03, 2008 after its ratification by States.

Rights of Children with Disabilities in India

The Indian Legal System upholds not only the rights of the persons (including children) with Disabilities which are inalienable in nature and available to all human beings but also protects other rights which are provided to them by way of some Affirmative legislation. It is essential to check the rights proclaimed under that Constitution of India and other legislations which meet the international obligation of protecting and promoting the rights of the disabled persons (including children).

The Constitution of India

The Constitution of India applies to every person of India irrespective of any person's disability or health issues. It secures to all its Citizens (including the disabled) a right of Justice, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity.[10] It further enjoins that the Government must not discriminate against any citizen of India on the ground of religion, race, caste, sex or place of birth, which includes the disabled persons too.[11] Moreover, it states that no

[10] The Preamble of the Constitution of India.
[11] The Const. of India, Art. 15 (1).

person shall be subjected to any restriction on any of the above grounds to access any shop, public restaurants, hotels, bathing ghats, any place of public entertainment and so on.[12] The expression "any person" as mentioned in the above provision is an inclusive term which includes the persons with disabilities (including children).

Article 16 of the Constitution of India provides that every citizen shall have equal rights on the matters relating to employment or appointment to any office under the State. Article 17 states that no person including the disabled can be treated as untouchable and in case of doing so it will be a punishable offence. Article 21 of the Constitution of India states that every person of India has Right to Life and Personal Liberty. Trafficking in human being including forced labour is prohibited under the Constitution of India which includes the disabled persons.[13] Thus it is evident from the abovementioned provisions that all the Fundamental Rights proclaimed under part III of the Constitution of India are applicable to the persons with disabilities. It is also evident that Indian Constitution is meeting all the International obligations proclaimed for the protection of the persons with disabilities (including children). Apart from this, the Government of India has enacted the Persons with Disabilities Act, 2016 by way as affirmative legislation to protect their rights.

[12]The Const. of India, Art. 15 (2).
[13]The Const. of India, Art. 23.

Health Laws

Article 47 of the Constitution of India imposes upon the Government a primary duty to raise the level of nutrition and standard of living of its people and make improvement of the public health which includes the persons with disabilities too. The Mental Health Act, 1987 talks about the improvement of the mental health of all persons including that of any person with disabilities.

Educational Laws

The right to education is a right available to every person in India. Article 29 of the Constitution of India states that no Citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on any ground of religion, race, caste or language. This provision includes any child or person with disabilities.

Article 21A, 38, 39, 41 and 45 of the Constitution of India talk about Right to Education which has been extended to all persons including the persons with disabilities. The basic purpose of this State obligation is to provide educational facilities to make every person and to build capacity for living with human dignity. Moreover, education can make the life of a physically challenged person useful and make them a pivotal human resource for the humanity as a whole. On receiving proper education any physically challenged child or adult can take themselves to a level where they would not be considered as a matter of pity and grace but as a contributor to the society as a whole. Yet these ideals at ideological level proved inadequate and to facilitate the disabled children as well as learners of any age, the Government

of India had passed a specific legislation named as the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 with the objective to secure the rights of the person with disabilities in India. The Act defines Disability as- blindness, low vision, leprosy, hearing impairment, locomotor disability, mental retardation or illness.[14] However, this Act had several gaps and lacunae and was repealed in 2016 by the Rights of persons with Disabilities Act, 2016 which defines Disability under three heads-

[1] "person with benchmark disability" means a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority;[15]

[2] "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others;[16]

[3] "person with disability having high support needs" means a person with benchmark disability certified under clause (a) of sub-section (2) of section 58 who needs high support.[17]

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[14]The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1996), §. 2 (i).
[15] The Rights of persons with Disabilities Act, 2016 (Act 49 of 2016), §. 2 (r).
[16]The Rights of persons with Disabilities Act, 2016 (Act 49 of 2016), §. 2 (s).
[17]The Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016), §. 2 (t).

The new definition of the persons with disability is inclusive in nature and gives very specific parameters to identify disability of a person. It is an Affirmative legislation which provides for the reservation of any person with disability for Education, Government Jobs. It also provides for reservation for the disabled persons for allocation of land, poverty alleviation schemes etc. It further states that every child [including the child with disability] between the age of 6 to 18 has Right to Education and every Government Funded or Aided schools have the duty to promote and protect this fundamental right of every child.

The Rights of Children Under

The Rights of Persons with Disabilities Act, 2016

The Rights of the Persons with Disabilities Act, 2016 is enacted to give effect to the United Nations Convention on the Rights of the Persons with Disabilities, 2006 which lays down the following principles for the empowerment of persons with disabilities-

a) Respect for inherent dignity, individual autonomy including the freedom of making one's own choice;
b) Right to equality and non-discrimination, and equal opportunity;
c) Full and effective participation in the social activities;
d) Mutual respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
e) Equality between man and women, and
f) Respect for the evolving capacities of children with disabilities and respect for right of children with disabilities to preserve their identities.

The above mentioned objectives of the Convention shows that the children with disabilities have equal right to dignity, freedom of speech and expression, right to life and personal liberty, right to education and all other rights which are inalienable for all human beings. It is noteworthy to state that, even before 2016, India had an enactment ensuring certain rights to the persons with disabilities which was titled as the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which was repealed by the Government in order to ratify the International Convention of 2006 and enacted the new Act fulfilling all the essential criteria mentioned therein.

Section 9 of the said Act states that no child with disability shall be separated from his or her parents on the ground of disability except according to the procedure established by law and in such cases where the parents are unable to take care of a child with disability, the competent Court has the power to place the child with his or her near relations and failing that within the community in a family setting and in exceptional cases in shelter home run by the Government.

Chapter III of the Act, under Section 16 imposes duty on the Government and the local authorities to endeavour that all educational institution funded or recognized by them provide inclusive education to the children with disabilities and towards that end shall-

a) Admit them without discrimination and provide education and opportunities for sports and recreation activities equally with others;
b) Make building, campus and various facilities accessible,

c) Provide reasonable accommodation according to the requirements of the individuals,
d) Provide necessary support for the academic and social development of the children with disabilities consistent with the goal of full inclusion;
e) Provide transportation facilities to the children with disabilities and also to the attendant of the children with disabilities having high support needs.

In order to fulfil the purpose of Section 16, the appropriate Government and the local authorities have to take the following measures-

a) To conduct survey of school going children in every five years for identifying children with disabilities, ascertaining their special needs;
b) To establish adequate number of teacher training institutions,
c) To train and employ teachers, including teachers with disability who are qualified in sign language and Braille and also teachers who are trained in teaching children with intellectual disability;
d) To train professionals and staffs to support inclusive education at all levels of school education;
e) To establish adequate number of resource centres to support educational institutions at all levels of school education;
f) To promote the use of alternative modes of communication like Braille and sign language to supplement the use of one's own speech to fulfil the daily communication needs of persons with speech, communication or language disabilities;

g) To provide books, other learning facilities and appropriate assistive devices to students with benchmark disability;
h) To promote research to improve learning and to provide any other measure, as may be required.[18]

Chapter VI of the Act gives special provisions for the persons with bench mark disabilities and sates that every child with benchmark disability between the age of six to eighteen years shall have the right to free education in a neighbouring school or in a special school of his/her choice. It is further stated that the appropriate Government and local authorities are under obligation to ensure that every child with benchmark disability has access to free education in an appropriate environment till the child attains the age of eighteen years.[19]

Under Section 32 of the Act, it is stated that all the Government institutions of higher education and other higher education institutions receiving aid from the Government shall reserve not less than five per cent (5%) seats for persons with benchmark disabilities and their upper age for admission in institutions of higher education is subject to five years 'relaxation.

The Act empowers the Central Government to designate persons, having requisite qualifications and experience, as certifying authority, who shall be competent to issue the certificate of disability[20] and any person with specified disability, may apply,

[18] The Rights of Persons with Disabilities Act, (Act 49 of 2016), §. 17.
[19]The Rights of Persons with Disabilities Act, (Act 49 of 2016), §. 31.
[20]The Rights of Persons with Disabilities Act, (Act 49 of 2016), §. 57.

in such manner as may be prescribed by the Central Government.[21] On receipt of the application by the applicant, the certifying authority shall assess the disability of the concerned person in accordance with relevant guidelines notified under section 56.[22] It is further stated that the certificate issued under this section shall be valid across the country.[23]

The Rights of the Persons with Disabilities Act, 2016 enumerates certain number of offences against the persons with disabilities including the children with disabilities. Under section 92 of the Act, it is stated that whoever-

a) Intentionally insults or intimidates with intent to humiliate a person with disability (including children) in any place within public view;
b) Assaults or uses force to any person with disability (including children) with intent to dishonour him or outrage the modesty of a woman with disability;
c) Being in a position to dominate the will of a child or woman with disability and uses that position to exploit his or her sexuality;
d) Voluntarily injures damages or interferes with the use of any limb or sense or any supporting device of a person with disability; shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

[21]The Rights of Persons with Disabilities Act, (Act 49 of 2016), §. 58.
[22]*Id.*
[23]*Id.*

Thus the Act identifies any violence committed against any person with disabilities a criminal offence which is punishable under the Act.

Position of Children with Disability under the New Education Policy (NEP), 2020

The Government of India has introduced the New Education Policy (NEP) on July 29, 2020 which replaces the National Policy on Education, 1986. This policy intends to develop human beings capable of rational thought and action, possessing compassion and empathy, sound ethical values and creative imagination. The guiding principles behind this education system is to recognize the unique capabilities of each student, to achieve foundational literacy and numeracy by all the students by grade 3, not to make a hard segregation between Arts and Science and most importantly establishing an education system on the basis of equity and inclusion.

This new policy intends to build a strong base of Early Childhood Care and Education (ECCE) on the basis of the structure 5+3+3+4. This policy upholds the basic principle of inclusion which intends to include all children with disability (mental and physical). In order to do so, the policy talks about the special eligibility test and trainings for the teachers in schools. Teachers will be trained on different matters relating to how to deal with the children with disability. Section 6 of the NEP, 2020 upholds the motto of inclusive and equitable education. It intends to include the socio-economically disadvantaged group. In order to so do it intends to declare certain places as Special Education Zones (SEZs) so that special care can be taken in those places for the backward students.

Overall the new policy seems to be more inclusive of children with disability. However, the effectiveness of the same can only be fathomed after the implementation of the NEP, 2020.

Conclusion and Suggestion

A close scrutiny of the provisions of the national and international legal framework shows that it intends to protect the rights of the persons with disabilities including children and also provides some special measure by way of affirmative action for both children and adults with disabilities. However, there exists some implementational hazards and lack of awareness of people while implementing the provisions of this Act. Enacting legislation only by way of affirmative action cannot wholly serve the purpose, as there is need of acceptance and understanding by the common people about the plight and difficulties of the persons (especially children) with disabilities. The affirmative action cannot be of any use if it is offered to the people with disabilities by way of grace.

Another important aspect is that the term 'Disability' should be removed from the legislations and the term 'specially abled' should be made in vogue while referring the persons with disabilities. As referring a person as 'disabled' gives the initial negative impression that the person or child is not able to do certain things. Whereas, in reality there are numerous instances around the world where the persons with disabilities have achieved enormous fame in life in comparison to any other abled person. There are ample number of famous people who were disabled but as the same time they were specially abled to do certain extraordinary things *viz.* Stephen Hawking (famous scientist of the 20th century), Frabklin Delano Roosevelt

(president of the United States during the period of 1933-1945), Ludwig Van Beethoven (the greatest composer in history who was deaf),Stevie Wonder (the famous piano artist), Helen Keller (great author, political activist and teacher), Frida Kahlo (famous Mexican painter), Marla Runyan (US Olympic Gold Medalist) so on and so forth. Hence it can be said that the issue is not only about the lack of legal framework or the intention of the Government. Initiatives must be taken by the family members as well as by the society members to come ahead and make social awareness about the persons with disabilities.

To conclude it will be appropriate to say that in an inclusive society, every human being should be accepted as an entity with dignity and their basic inalienable human rights should not be subjected to violation only on the basis of their vulnerability. Some special measures ought to be taken for the upliftment of backward classes of the society who are in need of special assistance and among those backward classes of the society, the people with disabilities; specially the children with disabilities deserve special care as the children form the foundation of the future of the society and exclusion of a particular group of children cannot lead the society to a healthy and favourable future.

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BOOK REVIEW

ANALYSING THE RELEVANCE OF NICCOLO MACHIAVELLI ON INTERNATIONAL LAW IN LIGHT OF DAVID ROTH-ISIGKEIT'S "NICCOLO MACHIAVELLI'S INTERNATIONAL LEGAL THOUGHT: CULTURE, CONTINGENCY, CONSTRUCTION"; SYSTEM, ORDER, AND INTERNATIONAL LAW: THE EARLY HISTORY OF INTERNATIONAL LEGAL THOUGHT FROM MACHIAVELLI TO HEGEL EDITED BY STEFAN KADELBACH, THOMAS KLEINLEIN AND DAVID ROTH ISIGKEIT, OXFORD UNIVERSITY PRESS (2017)

Tathagat Sharma*

Introduction

Prof. Harvey Mansfield describes Niccolo Machiavelli as 'an atheist and an immoral cynic', a reputation brought to him for his most (in)famous treatise 'The Prince'.[1]

The author looks at the legacy of Niccolo Machiavelli in development of International Legal Thought, international law, and, even though not explicitly stated, but a look at the evolution of the realist school of jurisprudence and historical materialism

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[1] Harvey Mansfield, *Niccolo Machiavelli: Italian Statesman and Writer*, Encyclopedia Britannica, https://www.britannica.com/biography/Niccolo-Machiavelli/The-Prince

under political science and international relations. The life and works of Machiavelli have been so diverse, and his understanding so debatable that in the words of multiple scholars and statesman he has been described as creator of 'handbook of gangsters' by Bertrand Russell, as a 'doctor of villainy' by Fredrick the Great, as 'a sincere republican' by John Pocock, and as a 'balanced pluralist' by Isaiah Berlin.[2]

Even though the author has followed numeral sub-chapterisation, the chapter can further be divided into three subparts based on its context and for the purpose of better understanding. In Part I and II the author takes a liner approach, introducing us to the world Niccolo Machiavelli was born in, taking us through the political scenario that existed at the time and how it shaped the theory and thought process that Machiavelli developed subsequently. In Part III, IV and V the author introduces the Machiavellian jurisprudence in relation to the mechanism of a state from a purely municipal point of view. In this the techniques of government are introduced with its constituents of laws, religion and morality, and the role each of these play in effective functioning of a state. The concept of law is discussed from the Prince's perspective and the perspective of the governed. The discussion on Morality and Normativity are discussed with relation to Governance, Statecraft and maintenance of international relations (effectively relations with the State's

[2] David Roth Isigkeit, "Niccolo Machiavelli's International Legal Thought: Cultue, Contingency, Construction", SYSTEM, ORDER, AND INTERNATIONAL LAW: THE EARLY HISTORY OF INTERNATIONAL LEGAL THOUGHT FROM MACHIAVELLI TO HEGEL 19 (ed. Stefan Kadelbach, Thomas Kleinlein & David Roth Isigkeit Oxford University Press 2017)

Neighbours). Part VI, VII, and VIII take on the mettle of Machiavelli's international legal thought, introducing us to Imperialism and Machiavelli's thoughts on it, International Law and how Machiavelli indirectly prophesized and prescribed it within his writing and at last the question whether Machiavelli's philosophy can be considered as part of International Legal Thought as we know it today.

For a long time before and after his death, Machiavelli's name wasn't acknowledged as a principled philosopher of statecraft[3], rather it was associated with treachery, deception, and violence, partly because of misunderstood interpretations of his works. 'Machiavellian' was never considered a praise for Sovereigns or political leaders, so much so that his works were listed under the 'Index of Forbidden books'[4].

Analysis

The author premises his arguments around the socio-political conditions prevalent in Florence during the lifespan of Niccolo Machiavelli. The approach succeeds in reasonably describing the evolution of Machiavelli's realism developed using his experiences of statecraft in Florence and Italy of late 15th and early 16th century. To describe Machiavelli's experience in the

[3] Guglielmo Ferrero, *Machiavelli and Machiavellism*, Foreign Affairs (April 1939), at: https://www.foreignaffairs.com/articles/1939-04-01/machiavelli-and-machiavellism.

[4] 'Index Librorum Prohibitorum' in Italian, the list was first drawn in 1564 by the Roman Catholic Church as a list of writings dangerous to faith and morals of Catholics, at: https://www.britannica.com/topic/Index-Librorum-Prohibitorum.

briefest possible wording, it would be appropriate to quote that, "Machiavelli was born in a flourishing, peaceful and stable Florence, when the city was the economic and political centre of Italian Renaissance. His youth was spent in a Florence ravaged with war, neglect, and excesses of the King. And his old age was spent in exile."[5]. Thus, it was only natural for Machiavelli to introspect 'what went wrong with the politics of Florence'. Stability was the central objective of Machiavellian polity; the means were justified as long as the end was realized. However, this is the chief hypothesis that the author has written his paper around. Realists and subsequent schools of thought can't seem to agree upon a single end goal to Machiavellian state, for some it is accumulation of the biggest purse[6], for others it ranges from total domination to unification of Italian states under the banner of Florence, free from Papal domination in governance.[7]

For Machiavelli laws are tool of 'social struggle', simply the means of quelling internal disorder, in that an Aristotelian Connotation is given to laws. On an international plane[8], laws perform the balancing act of societal forces, attaching a fear of

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[5] Isigkeit, supra note 2, at 20

[6] Views of Maurizio Viroli, FROM POLITICS TO REASON OF STATE (1992); Understandably so, because during the Machiavellian Era, Mercenary forces were roaming the Italian Peninsula.

[7] Can imply the separation of Governance from Religion, see: Niccolo Machiavelli, THE PRINCE READERS' GUIDE, Ch. 11 (Penguin Random House 1996)

[8] In context: Machiavelli throughout his writings has restricted the international plane primarily to Italian States, and surrounding Kingdoms of Spain, France, Austria and Russia, See: Niccolo Machiavelli, Stanford Encyclopedia of Philosophy, (Part. 3 Power, Virtue and Fortune), at: https://plato.stanford.edu/entries/machiavelli/#PrinAnalPowe

definite consequence to disobedience. The author has vehemently argued that Machiavelli meant for the Prince (Rulers) to sincerely obey the law that they set, quoting Chapter XVIII of the Prince. The argument is praiseworthy, but for the fact that Machiavelli himself has in the very same Chapter prompted that 'no law, be it their own creation should impose any constraints over the capacity of the ruler to act…… the prince should be prepared to act immorally if it becomes necessary'.[9] It has been argued by realist scholars including Hobbes[10], Rousseau and Hans Morgenthau that Machiavellian approach wasn't to act immorally but to safeguard the 'Ruler's rights' against that of usurpers. Many of the modern scholars have also agreed that a lot of Machiavellian interpretation is lost in translation, primarily because the language that he used has evolved for our understanding, and different reader might give different interpretation to his works.[11] This particular argument is acceptable, in so far as the author argues that an external normative perspective is necessary to observe the overreaching service that Law does to stability of a state.[12]

Niccolo Machiavelli had quiet contrary conception of International Realm, specifically with respect to his domestic

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[9] Viroli, supra note 7, Ch. 15

[10] Ronald Beiner, *Machiavelli, Hobbes, and Rousseau on Civil Religion*, THE REVIEW OF POLITICS 55 (4) (Cambridge University Press) 617, at 624

[11] Daniel Cardenas Canales, *Rule of Law and Domination: Among the reason for the Strength and Force of reason in the Prince by Machiavelli*, VOX JURIS Vol. 32, 49-56 (2016) (The Article itself is an official translation from Italian to English)

[12] Enzo Cannizzaro, *A Machiavellian Moment? The UN Security Council and Rule of Law*, INTERNATIONAL ORGANIZATIONAL LAW REVIEW, LEIDEN 189, at 201 (2006)

policy on state and laws. For him anything 'International' was either a target of imperial ambition or a source of threat.[13] His worldview was much aligned to Hobbesian view of constant conflict in terms of international realm and associated laws, then it did in domestic affairs. Machiavelli's years as diplomat for Florentina Republic, and his subsequent advisory role at Vatican formed the core of his ideology on International Law.[14] To put it simply, Machiavellian thought on International Law and Diplomatic agreements can be summed up in a single sentence i.e., "International Law is not maintained by checks and balances, but by two sovereigns who had more to lose than gain if they put their threats into action" (emphasis added).[15] For him diplomatic means provide temporary stability as long as your competitors believe that you will stick to your word[16]. Thus, it becomes amply clear that the fate of international law in Machiavellian terms is interictally interconnected to the fear and ambition of Sovereigns committing to it. For Machiavelli, a moral domestic policy turns to immoral survival strategy in the context of international politics. The author has argued that Machiavelli offers a reasoned perspective on 'just war' as a necessity to preservation and advancement of state[17], the argument revolves around the

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[13] Isigkeit, *supra* note 2, at 31

[14] Anthony d' Amato, *International Law from Machiavellian Perspective*, Faculty Working Papers, (NORTH-WESTERN UNIVERSITY SCHOOL OF LAW SCHOLARLY COMMONS 2010), at: https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1091&context=facultyworkingpapers (accessed on: 20th July 2021)

[15] Mortimer Sellers, *Niccolo Machiavelli: Father of Modern Constitutionalism*, RATIO JURIS Vol. 28, pp. 216-227 (2015)

[16] The Pacta Sunt Servanda of their times, Isigkeit, *supra* note 2, at 34

[17] *Id*, p. 34

conception that Machiavelli has tried to explain a transition from a perpetual 'State of War' to a perpetual 'State of peace', wherein the powerful state has to take pre-emptive steps to ensure 'State of peace'. The argument, even though reasoned, can be negated via the views that subsequent scholars have expressed in relation to Machiavelli's conception of International Law and Laws of war. Koskenniemi[18] for one has suggested that it is no mere accident that Machiavelli doesn't talk about justice during or after war, for him the question doesn't arise because the result of war foreshadow an effect on domestic stability, which is the ultimate end justified by any means for him.[19]

Conclusion

The author has used a chronological sequence of explanation to the thoughts and ideology of Niccolo Machiavelli. Starting with his life, times, surroundings, the author has tried to link his conceptions of domestic polity to international sphere, trying to explain his relevance to International Legal Thought in general, and International Law in particular. In an attempt to explain the position that Machiavelli proselytized with respect to the status of municipal and international law. The author has reasoned that Machiavelli forms an integral part of international legal thought because his study highlights the emancipation of international law from 'mere critical reading of history to rise of consensual normativity'. That the galvanising factors for domestic stability

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[18] See: Paul Wrange, *The Prince and Discourse- commenting and advising on International Law*, NORDIC COSMOPOLITANISM: ESSAYS FOR MARTTI KOSKENNIEMI. (Jan Klabbers ed. Publication, Leiden)
[19] *Id.* at p. 6

via municipal laws is completely absent in international sphere in relation to corresponding international law. The argument is strong in context of the time period that Machiavelli was grounded in, but the argument of the author interpreting the Machiavellian conception holds little to no significance in the globalized world that we find ourselves in. Majority of the arguments are speculative in nature with no real significance to practicality in contemporary times, for example, some of the basic assumptions that Machiavelli made and are discussed by the author are in relation to 'the world being in constant warfare', 'quest for glory', 'statecraft being defined by the ambitions and fears of individual monarchs', 'significance of international law as a reassuring factor' etc. [20]

However, what must be acknowledged is the fact that Machiavellian thought holds significance not in its practical aspects but the theoretical conception. The central theme for international law, or any law for that matter still remains Stability and peace. The Machiavellian prophecy of ideology, religion and laws unifying people still holds true. And for what it's worth, countries are making a sharp shift towards separation of religion and governance, albeit with certain exceptions.[21]

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[20] Hans Gunter Brauch, *The Three Worldviews of Hobbes, Grotius and Kant,* FOUNDATION OF MODERN THINKING ON PEACE AND SECURITY (Hexagon Series, Free University of Berlin) at: http://hexagon-series.org/pdf/Hague/Brauch_Worldviews.pdf (accessed on 20th July 2021)

[21] JAMES SCOTT, LAW, STATE AND INTERNATIONAL COMMUNITY, CH. XIX NICCOLO MACHIAVELLI, 278-296, at 285 (Columbia University Press 1939)

Niccolo Machiavelli was not a lawyer, he was a politician, a diplomat, and a political scientist. His conceptions of law were grounded in what works best from a governance point of view. The supremacy of law was not a high priority on his wishlist of statecraft, if at all it was there. But nonetheless, he remains as relevant today as he was 500 years ago, because, even though the world has changed, but Machiavellian conceptions of Human Behaviour at Micro level and the behaviour of States at Macro level remains the same, albeit with more refinement. The aggression of USA in Iran, Afghanistan, Syria etc. as well as the more recent Chinese adventures in the South China Sea, or the Russian viewpoint of the Western world in general present a glaring study of Machiavellian worldview. His perception of international law being an instrument of the 'lion and fox game' may as well hold significance, that Powerful states mould the law in their favour and the law always favours the one commanding political and military might, and however vehemently we may wish for his perspective on International Law to be false, it remains of some relevance to the modern times, with examples of ICC being labelled as a Court of African Nations, or USA flouting the verdict in Nicaragua Case, or the US Threats to ICC at Hague against the investigation in Afghanistan or the Chinese noncompliance of ITLOS Verdict on South China Sea.

In that context the work of the author is exemplary in the sense that he has tried explaining the Machiavellian theory in context of International Law, ferociously defending himself from a Realist point of view, however the claim that the scholarly contribution of the article are far reaching in context as a unique case study for the first time on Machiavelli with respect to International Law are farfetched, numerous article reviewed for this writeup analysed common, if not entirely the same issues.

Further the major shortcoming of the ‘Article under review’ can be pointed out in the form of a lack of explanatory approach in context of modern world, no examples have been cited to draw parallels between what the author has tried to convey and what is happening in contemporary times, the criticism is validated further when the author has made no attempt in justifying his approach by citing even the historical examples to better explain the context, for example the Franco-Sardinian Wars, or Florentine- Papal Conflicts could have been used as examples of events Machiavelli formed his worldview around. That being said, it can reasonably be assumed that for the sake of brevity and focussing on the topic at hand, the author could have chosen to avoid such conjectures.

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