

VBCL LAW REVIEW

Volume - VI - 2021

ISSN No. 2456-0480



Published by

Vaikunta Baliga College of Law

KUNJIBETTU, UDUPI - 576 102 KARNATAKA

VBCL Law Review 2021

Volume - VI - 2021

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Subscription, inquiries should be sent to:

The Librarian
Vaikunta Baliga College of Law
Kunjibettu - 576 102, Udupi
Karnataka
Tel: 0820-2520373

Printed at:
Bharath Press
Kalsanka, Udupi - 576 102

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EDITORIAL

Dear Readers,

The new year brings a mix of continuity and change. The beginning of 2022 shows some green signals in the wake of hardships experienced in the year 2021. The world has undergone thrice the ill effects of the coronavirus pandemic which has made diversified and intense impacts on all walks of life. The beginning of the new year brought some good hopes in the overall activities that is apparently visible through out. The unprecedented impact of the pandemic has accelerated the digitalisation of economic activity across the globe and is exemplified by new modes of work. However, education sector need special attention. Educational institutions from the primary to higher levels have remained closed for over a year which has caused significant learning loss. Comprehensive development in the economic and social sectors can be achieved only through quality education. Vaikunta Baliga College of Law is committed to impart quality legal education to law aspirants.

This time, we have come up with the sixth issue of our flagship journal, VBCL Law Review. We have tried to include various topics of the law ranging from Analyses of Child Marriage Bill, E – Courts, Comparative analysis of the Right to Education, Child labour and Education, Changing Patent System in the United States, the psychological analysis of the Child Rapists, Right to Privacy, Right to Self –Determination, Laws Governing Food Industry in India, Regulatory Mechanism for Nanocosmeceuticals Market in India, Treaty making Provisions in the Constitution, Domestic Violence, Contagion of Covid-19 viruses in Child

Protection Homes, Surrogacy Regulation, Media Trial, Climate Justice, Sick Industrial companies and Challenges in the Higher Education Sector. I hope, this sixth issue will provide you with some insights into these areas.

It is humanly impossible to predict what 2022 might hold for the world and its residents. Doesn't matter. Let's hope for the best and strive to spread the message of universal brotherhood because we have already witnessed that human achievements are nothing before the natural forces.

I wish a bright, happy and fulfilling year ahead for all readers.

With Regards,
Prof.(Dr.)Nirmala Kumari. K
Principal.

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THE PROHIBITION OF CHILD MARRIAGE (AMENDMENT) BILL 2021 – A CRITICAL ANALYSIS

Dr. Prakash Kanive* & Dr. Devaiah NG**

ABSTRACT

Prohibition of Child Marriage (Amendment) Bill 2021 was introduced in Lok Sabha on December 21, 2021, for raising the age of marriage for women from existing 18 to 21 years. But Lok Sabha resolved to refer it to the Parliamentary Standing Committee for the further scrutiny, after the protest by the opposition party. Government's concern for the gender equality, health, and education of Indian women are the objectives of bill. The proposed amendment bill in turn amends certain personal laws relating to marriage. Child marriage under Prohibition of Child Marriage Act 2006 is one where either of the parties to the marriage has not attained the prescribed minimum age of marriage. The child who may approach the court for getting her marriage annulled within two years after attains the age of majority i.e., 20 years. The bill amending this provision allows the party to approach the court and file petition for annulment of marriage before they complete five years after attains the age of majority i.e., 23 years of age. The Amendment Act shall come in to force for filing the petition and getting their marriage annulled within two years from the date on which President assents the bill. The bill has the overriding effect on all other laws which are contrary to proposed age of marriage for females. It will have its effects notwithstanding any other custom, tradition, and religious practice in this regard

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Keywords: *Child marriage, gender equality, maternal mortality, age of marriage, Amendment Bill.*

INTRODUCTION

There is a move to rise the age of marriage for girls from 18 to 21 years. Because government is concerned of health, gender equality, and education of Indian women. One of the means to save them from gender equality, deprivation of education and malnutrition is raising of marriageable age¹. But it has become a contentious issue, as religious activists and conservatives registered their resistance by opposing the raise of age marriage for women. As per Indian Majority Act 1875 individual attains the age of majority on completion of 18 years of age and it is gender neutral², distinct from minimum age of marriage. Proposal of rising age of marriage can be given effect by amending Prohibition of Child Marriage Act 2006 and in turn all other personal laws viz., Hindu Marriage Act 1955, Muslim Personal Laws (Shariat) Application Act 1937, Christian Marriage Act 1872, Parsi Marriage and Divorce Act 1936 etc. Thus, in the backdrop of supporters and adversary of the Prohibition of Child Marriage (Amendment) Bill 2021 attempt has been made in this article to analyse and evaluate the impact of implementation of bill when it becomes law.

BACKGROUND OF THE STUDY

It has been evident that during early Vedic period women were civilised and given good education and enjoyed high status at par with men. However, the status of women started deteriorating with the advent of Sutra period (600-300 BC)³. In the regime of Pallavas, Pandyas and Imperial Cholas the status of woman was high, but education imparted to women was different from education given to men⁴. Even during Vijayanagar regime, based on education women were respected by offering honourable position in the society and some of them were well-known poets⁵. It was at the later stage there was a deep-rooted

1 Sangeeta Nair, Cabinet approves proposal to raise legal marriage age of women from 18 to 21 years <https://www.jagranjosh.com/current-affairs/cabinet-approves-proposal-to-raise-marriage-age-of-women-to-21-years-1639639019-1> (Jan 5, 2022, 9.50 pm).

2 Sec. 3, INDIAN MAJORITY ACT 1875

3 NEELUMUPADYAYA, *Women in India Past and Present* 23 (Allahabad) 1990.

4 PREMALATHA, *National and Women's Movement in South India 1917-1947* 17, (New Delhi), 2003.

5 RMAPPAVENKATA, *Outlines of South Indian History with Special Reference to Karnataka*, 186 (New Delhi), 1975.

belief that women were fit only for household work confining to the kitchen related activities⁶. Subsequently women started participating in national and political movement. Their success and sacrifices laid the strong foundation for political awareness among themselves, and which paved the way for women's movement seeking equal rights for both men and women⁷.

Girls who survived the cruel custom of feticide and infanticide got married at the very young age of five to ten years as they had no opportunity for physical and mental growth. Parents argued that it was convenient for young girls to get adjusted to new family environment after the marriage. But awareness as to importance of marriage, marital responsibility was altogether absent. Most often her companion after the marriage was her husband who was much older than her and few elderly women in new house. Thus, the girl child undergoes series of trauma as child wife, child mother, at times child widow coupled with abnormal deliveries, prolonged illness, debility etc. till her death. The practice of child marriage was responsible for high rate of infant mortality and maternal mortality⁸.

Raja Ram Mohan Roy, a socio-religious reformer, educationist, and a politician sets in motion for the emancipation of women who stood in between threshold of new and old and interpreted the East in the light of West. Raja Ram Mohan Roy was the first person to champion the cause of women⁹. Thus the 19th century Associations like Bramha Samaj and Arya Samaj espoused the cause of child marriage. They felt the necessity of special law to safeguard the life of child wife from the harassment of her husband. It was for the first time at the instance of Ishwarchandra Vidyasagar legal measures were taken in 1860, where Indian Penal Code initially prohibited the consummation of marriage if the girl was below ten years age¹⁰. Later reformers like Keshav Chandra Sen and Behramji Malabari believed that ten years of age to consent and marry was very low for

6 Kalaivani R, Child Marriage Restraint Act 1929- A historical review- International Journal of Humanities and Social science Invention, ISSN Print 2319-7714 Jan 2015 p 14-18

7 SEXENA, Women's Political Participation in India, 76(Jaipur), 1999.

8 FULLER, The Wrongs of Indian Womanhood36 (New York).

9 Swetha Sengar, How Raja Ram Mohan Roy was among the pioneers of Indian Feminist Movement <https://www.indiatimes.com/news/india/how-raja-ram-mohan-roy-was-among-the-pioneers-of-indian-feminist-movement-345890.html> (Jan 12, 2022, 10 pm)

10 Tahir Mohmmad, Marriage Age In India and Abroad- A Comparative Conspectus, 22 Journal of Indian Law Institute (1986), p. 45- 46.

girls. Hence, they introduced a new procedure of marriage where the consent of the bridegroom and bride was made compulsory¹¹. It was the first measure towards recognition of girl child's individuality and contract of marriage between the parents cease to continue. This novel marriage system also recognises the marriage between boy and girl irrespective of cast, creed, and religion. On this occasion Sen also made an appeal to medical doctors to find out the marriage age in medical perspective. Thus, he launched a propaganda against the practice of child marriage. Based on medical reports and opinion of learned reformers The Bramho Act 1872 was passed, later it was known as Native Marriage Act, which fixed the age of marriage for girls 14 years and for boys 18 years. The Native Marriage Act strictly prohibited bigamy, polygamy, and infant marriages¹².

Amidst of above historical development, we come across PhulmaniDasi's case, where a 11-year girl child was given in marriage to an adult husband. He raped her and consequently she died. Later it was treated as marital rape, and he was convicted on the charges of rape in 1890. The death of PulmaniDasi prompted the lady doctors to submit an appeal to the then British government (Queen Victoria) to take suitable legislative measures to prevent child marriage in India¹³. As result a committee consisting learned and influential persons were constituted to investigate the issue. Based on committee recommendation the Age of Consent Bill 1891 was passed, which prohibited the consummation of marriage with the wife who was below 12 years of age¹⁴.

INTERNATIONAL LAW

The unique International Agency UNICIF has been established by UN General Assembly with the sacred object of advocating, protecting, and promoting the children's right and interest regarding child marriage as violation of human rights.¹⁵

11 S.P. SEN, *Social Contents, and Indian Religious Movements* 272(Calcutta), 1978,

12 https://www.indianetzone.com/37/brahmo_marriage_act.htm Jan 15, 3 pm

13 *Indian Social Reformer* Vol 9, 1889, p 250

14 Charles H Heimsath, *The Origin and Enactment of Indian Age of Consent Bill 1891* <https://www.cambridge.org/core/journals/journal-of-asian-studies/article/abs/origin-and-enactment-of-the-indian-age-of-consent-bill-1891/B785B4538F8> Jan 14, 2020, 5 pm

15 UNICIF Mission Statement, <https://www.unicef.org/about-us/mission-statement>, Jan 10, 2020, 6 pm

International Treaty Committee constituted for the Elimination of Discrimination Against Women (CEDA) also appealed to international community to abolish the laws which are framed on the assumption that the women have better physical and mental growth and maturity than men because this stereotype approach encourages to promote child marriages.¹⁶ According to recommendation of committee the minimum age of marriage for men and women must be set at 18 years. It made the remarks that “the difference in age of marriage for husband and wife has no basis in law as spouses entering into the marriage are by all means equals and their partnership must also be of that equals.”¹⁷

THE CHILD MARRIAGE RESTRAINT ACT 1929

The issue of age of marriage for girls was referred to Shastri Committee to re-examine. Based on the recommendation of this committee Child Marriage Restraint Act 1929 was passed, it was popularly known as Sharda Act, as it was introduced by Sri Rai Sahib Harbilas Sharda before the then Imperial Legislative Assembly. As its very title indicates the purpose of the enactment was to restrain the child marriages viz., where one of the contracting parties to the marriage was below prescribed age of marriage. On the date of enactment age of marriage for girls was fixed to 14 years and for boys it was 18 years¹⁸. Subsequently age of marriage for girls was raised to 15 years by amending the Act in the year 1949 and violation of these amended provisions were made punishable.

The issue of raising the age of marriage was taken up for discussion on this context to check the population growth in the country. Such increase in the minimum age of marriage lowered the fertility rate as it later the span of married life. It also secures responsible parenthood and better health to both mother and child.

Again the 1929 Act was subjected to amendment in 1978 where legal age of marriage was increased from 15 to 18 years for girls and 18 to 21 years for boys. As per these amended provisions of law a boy above 18 years and below 21 years of age marries a girl below 18 years was considered as an offender and subject

16 Supra note 17

17 Age of Marriage different for men and women, <https://www.insightsonindia.com/2019/08/22/age-of-marriage-different-for-men-and-women/>, Jan 15, 2022, 19 pm

18 Kalaivani R, Child Marriage Restraint Act 1929 – Historical Review, International Journal of Humanities and Social Sciences Invention ISSN (print):2319-7714 p 14,18

punishment of simple imprisonment of maximum 15 days or with fine of maximum 1000/- or with both. A boy who was above 21 years contracts to marry a girl child was subject to simple imprisonment for three months with appropriate amount of fine. The Child Marriage Restraint (Amendment) Act 1978 prescribes the punishment for solemnising marriage in contravention of provision of the Act. However, these penal provisions do not invalidate the fact of marriage, nor they apply to child being party to the marriage. Though abettors were the kingpins behind the arrangement of marriage they are not treated as principal abettors and law was lukewarm in this regard. The Act further provided that no women being offenders should be subjected to punishment with the imprisonment in this regard¹⁹.

RATIONALE BEHIND DIFFERENT AGE OF MARRIAGE

There is no sound reasoning behind the law which fixed the different age of marriage for men and women. Most of the codified laws are consisting of religious and customary practices in the society. Even Law Commission Consultation Paper disclosed that different age of marriage for men and women contributes to the stereotype approach that wives should be younger than their husbands. But women's' activist criticised saying even law permitted to perpetuate stereotype that women are more matured physically and mentally than men of same age hence, they can get married sooner²⁰.

THE PROHIBITION OF CHILD MARRIAGE ACT 2006

The Child Marriage Restraint Act 1929 was not very effective in prevention of child marriages even after several amendments, because it was not implemented with the real concern for the women folk, hence, it failed to achieve its objectives. Eventually the government replaces the existing Child Marriage Restraint Act 1929 with the new legislation The Prohibition of Child Marriage Act 2006. It was with clear object of complete prohibition of solemnisation of child marriages²¹. It provides for identification and protection of victims of child marriage with the necessary relief and appropriate rehabilitation. Under the new

19 Ibid p 17

20 Apurva Vishwanath, Esha Roy, The Logic and Debate around Minimum Age of Marriage for Women <https://indianexpress.com/article/explained/pm-modi-74th-independence-day-women-empowerment-marriage-age-6555937/> Jan 19, 2022, 9 pm

21 Objectives of Prohibition of Child Marriage Act 2006 <https://www.indiafilings.com/learn/prohibition-of-child-marriage-act/> Jan 5, 2022, 10 pm

legislation child marriage means marriage between the girl who has not completed the age of 18 years and boy who has not attained age of 21 years²².

Unlike the earlier legislations the present 2006 Act identifies almost all areas of offence and specifies the punishments. Any person is found performing, conducting, abetting, or directing a child marriage will be subject to rigorous imprisonment for the period of 2 years and fine which may extend to 1,00,000²³. If a person permits or promote child marriage will also be liable for rigorous imprisonment for a period of 2 years and fine which may extend up to 2,00,000²⁴. If an adult male contracts the child marriage is also punishable with rigorous imprisonment for two years and fine which may extend to 1 lakh²⁵.

Besides, the Act provides for maintenance of child wife. She is entitled to claim and get the maintenance from her husband if he is a major. On the other hand, if husband is a minor his parents are liable to pay maintenance to girl child. Validity of marriage is voidable at the option of respective parties²⁶. A girl child can obtain decree of nullity within two years after she attains 18 years of age²⁷. Further it is clarified that if the consent of the girl child is obtained by coercion, fraud or if she is enticed away from her lawful guardian solely for the purpose of human trafficking and use her for any other immoral purposes the marriage would be void²⁸. The Act also provides for appointment of Child Marriage Prevention Officer to prevent solemnisation of child marriage and spreading of awareness as to evil consequences of child marriage²⁹.

NEED FOR RELOOKING AT LAW

Though there are existing laws which mandated the age of marriage and criminalised the sexual intercourse with the minor child, practice of child marriage is prevalent in India. While hearing the PIL filed by *Advocate Ashwini Kumar Upadyaya*³⁰, Delhi High court sought the response of Government

22 Sec. 2 (a), PROHIBITION OF CHILD MARRIAGE ACT 2006

23 Ibid Sec. 10

24 Ibid Sec. 11

25 Ibid Sec. 9

26 Ibid Sec. 4

27 Ibid Sec. 3

28 Ibid Sec 12

29 Ibid Sec 16, 17

30 <https://www.scobserver.in/cases/ashwini-kumar-upadhyay-union-of-india-uniform-marriage-age-case-background/>, matter is still pending before the court.

regarding introduction of uniform age of marriage. The petitioner Advocate Upadhyaya challenged the law which fixed the different age of marriage on the ground of discrimination. He contended before the Delhi High Court saying this different age of marriage is violative of fundamental right which guaranteed right to equality among men and women³¹ and right to live with human dignity respectively. Early pregnancy, continued ill health and consequential debility of health of tender child violates her right to live with human dignity³²

FOLLOWING TWO RULINGS OF SUPREME COURT ARE IN SUPPORT OF THE ABOVE PETITIONER'S CLAIM.

In *National Legal Services Authority v. Union of India*³³ the Supreme Court while recognising the status of transgenders as third gender observed that “Justice shall be delivered with the assumption that all humans have equal value and therefore they should be treated as equal as well as equal laws”

In *Joseph Shine v. Union of India (2019)*³⁴ the Supreme Court while decriminalising the adultery observed that “a law that treats women differently based on gender stereotypes is an affront to women’s dignity”

INDIAN PENAL CODE 1860

Exception 2 of Sec. 375 of Indian Penal Code 1860 provides that the husband can have intercourse or indulge in sexual activity with his wife who is above 15 years of age without her consent it doesn't amount to rape. This marital rape exception clause to Section 375 of Indian Penal Code contradicts with the provisions of Prohibition of Child Marriage Act 2006 and it also discriminates between the married and unmarried girl child who is below 18 years of age.

PROTECTION OF CHILDREN FROM SEXUAL OFFENCE ACT 2012 (POCSO)

This legislation is enacted to provide protection to children from all kinds of sexual abuses. Unlike IPC, POCSO Act extends protection from sexual offences to both boy and girl child equally. Further, unlike IPC, POCSO Act doesn't provide any exception to have sexual intercourse with the girl child even after the

31 Art. 14, INDIAN CONSTITUTION

32 Ibid Art. 21

33 AIR 2014, SC 1863

34 <https://lawtimesjournal.in/joseph-shine-vs-union-of-india/>

marriage³⁵. Any child below the age of 18 years is treated as child whether child is married or unmarried. To remove the confusion whether IPC shall prevail or POCSO Act the Criminal Law (Amendment) Act 2013 amends Sec. 42 of POCSO Act. The Amended Sec. 42A provides that POCSO shall be applied in addition to any other existing law, not in derogation of other laws. In the event of inconsistency, it is only POCSO Act will prevail over other laws. But still many courts gave the exceptions under IPC preferences in sexual offence cases against child in child marriages. For instance, in *Yubusbai Shaik v. State of Gujarat*³⁶ and *Mujamail Abdul Sattar Mabsuri v. State of Gujarat*³⁷. To bring an end to these inconsistencies between these two Acts at the instance of Supreme Court in *Independent Thought v. Union of India* (2017) exception 2 of Sec. 375 of IPC has been amended, which states that “If wife is not less than 18 years of age the sexual intercourse would not amount to rape. In the instant case Justice Madan Lokur remarks that “A child remains a child whether she is a street child or surrendered child or an abandoned child or an adopted child.” Similarly, a child remains a child whether she is married or unmarried, divorced or separated or widowed child³⁸. Shakespeare’s eternal view was reminded that “a rose by any other name would smell as sweet- so also with the status of girl child, despite any prefixes”³⁹

CONTRADICTIONS AMONG DIFFERENT LAWS

The Prohibition of Child Marriage Act , 2006

Under the Prohibition of Child Marriage Act 2006 marriage age is 18 years for girls and 21 years for boys. If a girl married before 18 years, she could sue for decree of nullity within 2 years after she attains the age of majority⁴⁰. If she doesn’t claim for nullity, child marriage becomes the regular marriage.

35 Sakshi v. Union of India, 2004 5 SCC 518

36 Law related to Child marriages in India, <http://blog.ipleaders.in/laws-related-child-marriages-india/> Jan 15, 2022, 9 am

37 ibid

38 Sree Ramya, Child’s Marital Rape, <https://lawtimesjournal.in/independent-thought-vs-union-of-india-2/> Jan 20, 2020, 3 pm

39 Sex with minor wife, despite consent, is rape: Apex Court <https://www.theindianpanorama.news/india/sex-minor-wife-despite-consent-rape-apex-court/> Jan 12, 2020, 4pm

40 Supra note 23

Hindu Marriage Act, 1955

Hindu Marriage Act 1955 provides for punishment to parties to a child marriage only, even they did not give their consent for the so-called marriage⁴¹. Surprisingly there are no provisions which prescribes punishment for parents and other people who permitted, promoted, and assisted the solemnisation of child marriage. The girl child can get her marriage annulled provided she got married before she attains the age of 15 years, and she challenges the validity of marriage before she is turning 18 years⁴². Obviously, there are no express provisions as such to prohibit the child marriage

Status in Muslim Law

Indian Muslim law is not codified hence, its application is based on interpretation given by religious scholars. There is no bar on child marriage in Muslim law, a Muslim guardian has a right to get their child married. However, the married couple have got the 'option of puberty,' where they can repudiate the marriage after they attain the age of puberty. Further, they are permitted to repudiate the marriage before they are turning 18 years, provided their marriage has not been consummated. Thus, the age of marriage under Muslim law is age of puberty which is 15 years. However, marriage before the age of 7 years is void ab initio even if it is arranged by lawful guardian⁴³.

The Indian Christian Marriage Act, 1872 (ICMA)

The Act requires 14 days preliminary public notice is to be given through church authorities before the date of marriage if it is contracted between two minors. After expiry of said period, the parties can go on with marriage even without the consent of parents⁴⁴.

Parsi Marriage and Divorce Act 1936 states that bridegroom and bride must be 21 and 18 years respectively, if marriage between the two below the said age becomes invalid⁴⁵

41 Sec. 18 HINDU MARRIAGE ACT 1955

42 Ibid, Sec. 12

43 Law on Child Marriage in India, <https://blog.ipleaders.in/laws-child-marriage-india>, Jan 20, 2020, 4 pm

44 Sec. 12,13 INDIAN CHRISTIAN MARRIAGE ACT 1872

45 Sec. 3(1)(c), PARSİ MARRIAGE AND DIVORCE ACT 1936

Indian Jewish Law is not codified law, according to its provision age of marriage is age of puberty which is fixed at the age 12 years⁴⁶

JUDICIAL RESPONSE

Time and again the judicial rulings have highlighted the superseding effect of secular law over personal law. Nevertheless, there are inconsistencies among the judgements of various High Courts. In *Lajja v. State*⁴⁷ the Delhi High Court held that Prohibition of Child Marriage Act 2006 shall override personal laws. The same stand was taken by Karnataka High Court in *Seema Beegum v. State*⁴⁸ in 2013. However, the Gujarat High Court in *Yusuf Ibrahim Mohammed Lokhat v. State of Gujarat* held that “according to personal law of Muslims the girl no sooner she attains the puberty or completes 15 years, whichever is earlier, is competent to get married without the consent of her parents.”⁴⁹ Thus, according to views of learned judges while deciding each of underage marriage the personal laws should be taken as primary source. The Madras High Court held in 2015 that Prohibition of Child Marriage Act applies to all religion and community and application of this law is not against Muslim law.⁵⁰ So far there are no judgement of Supreme Court to settle on this point of law. Thus, the state of irregularity and ambiguity yet to be resolved.

PREVALENCE OF CHILD MARRIAGE IN INDIA

Prime Minister of India while addressing the nation on 74th Independence Day (2020) celebration said, “we have formed a committee to ensure that the daughters are no longer suffering from malnutrition, and they are married off at right age. As soon as the report is submitted, appropriate decision will be taken about the age of marriage of daughters.”⁵¹ The proposal of the government is to raise the age of marriage for girls from the present age of 18 years to 21 years as in case of boys.

46 Supra note no.40

47 <https://indiankanoon.org/doc/41067986/>, July 27, 2012, Jan 6, 2022, 6 pm

48 <https://indiankanoon.org/doc/132012620/>, Feb 26, 2013, Jan 5, 2022, 5 pm

49 <https://indiankanoon.org/doc/70679078/>, Dec 2, 2014, Jan 5, 2022, 6 pm

50 Whether Child Marriage Act will prevail over personal Law of party? <https://www.lawweb.in/2015/09/whether-child-marriage-act-will-prevail.html>, Jan 8, 2022, 6 pm

51 Independence Day 2020; <https://news.abplive.com/news/india/independence-day-2020-full-text-of-pm-modis-speech-to-nation-from-the-ramparts-of-red-fort-1313291>, Jan 12, 2022, 11 am

As per data provided in latest National Family Health Survey4 (NFHS 4) most of the women in almost all states in India are getting married after 21 years. However, it doesn't indicate that child marriages are not happening in India. The survey report says that about 26.8% of married women aged between 20-24 years were married before they attained 18 years of age. According to research findings of Prof. Dipa Sinha of Ambedkar University prevention of child marriage can substantially reduce the maternal mortality ratio and infant mortality ratio. As per NFHS 4 report the maternal mortality rate is 145 for 1 00 000 deliveries, and infant mortality rate is 30 for every 1000 child births, they die before they complete one year. This data is highest among BRICKS nations. More than half of the women of reproductive age (15-49) are suffering from anaemia. It has been observed that consistently for the last 20 years rate of anaemia among Indian women is very high. As per findings of Purnima Menon, Senior Research Fellow at the International Food Policy Research Institute New Delhi, limited access to education, poverty and weak economic prospects are the main reasons for the child marriages. If the main causes of early marriages are not addressed, a law will not be enough to delay marriage among girls.” 20% of women from poorest strata of population got married at much younger age than their peers from the affluent families. The average age of marriage of girls with no schooling is 17.6 years, it is much less than the age of girls who completed 12 the standard. As per the report of National Commission for Protection of Child Rights about 40% of girls who are of age group 15-18 years do not go to school, about 65% of these girls are engaged in some work for very low remuneration. This is where many argue that mere change of official age of marriage may result in discrimination against girls from the poorer family, low educated and girls from marginalised families.⁵²

THE PROHIBITION OF CHILD MARRIAGE (AMENDMENT) BILL 2021

The bill was introduced in Lok Sabha on Dec 21, 2021, the house voted to send the bill to the Parliamentary Standing Committee for the further scrutiny after the protest by the opposition party. The bill seeks to raise the marriageable age from 18 to 21 years for women to bring it at par with the age of men⁵³

52 Nushaiba Iqbal, How Marriage age and Women's Health are linked, <https://indianexpress.com/article/explained/marriage-mimum-age-women-health-6571340>, Jan 8, 2022, 6 pm

53 Prohibition of Child Marriage (Amendment) Bill 2021, <https://prsindia.org/billtrack/the-prohibition-of-child-marriage-amendment-bill-2021>

The Union Cabinet approves the proposed bill on Dec 15, 2021, after reviewing the proposal by special committee headed by Jaya Jaitly, Member of Parliament, and the President Samanta Party, and the committee was also consisting of Dr. VK Paul member of Niti Ayog, Secretaries of Women and Child Development, Health, and Education Ministries of Legislative Department. This committee was setup in June 2020 to examine various matters pertaining to age of motherhood, lowering the maternal mortality ratio improving the nutrition and other related issues. The Committee was also assigned to look at the feasibility of increasing the age of marriage and its impact on women and child health and how to increase access to education for women. The committee submitted its recommendation after holding extensive consultations with experts and young adults especially young women from 16 universities across the country, 15 NGOs were engaged to reach out young adults in far flung areas and marginalised communities.⁵⁴

RECOMMENDATIONS OF THE COMMITTEE⁵⁵

Besides raising the age of marriage of women to 21 years, the committee strongly recommends for introduction of formal sex education at the school and college levels. The government should ensure increased access to schools and colleges including arrangements for their transportation particularly students from mofussil areas. Recommendation also includes to provide training in polytechnic colleges for skill development, business training, and livelihood enhancement to the women for effective implementation child marriage prohibition law. Further it recommended that the government must undertake massive awareness camp on increased age of marriage and thereby encourage social acceptance of new legislation rather than resorting to coercive measures.

The bill was introduced in Lok Sabha by Union Women and Child Development Minister Ms. Smrithi Irani. She said that “the age of marriage should be uniformly applicable to all religions, cast, creed overriding any custom or law that seeks to discriminate against women.” The Minister said the bill also seeks to override all existing laws including any custom, usage or practice governing the practice in relation to marriage.

54 Task force on age of marriage for women, <https://www.civildaily.com/news/task-force-on-age-of-marriage-for-women-submits-its-report/>, Jan 22, 2022, 6 pm

55 Ibid

Opposition parties criticised and opposed the bill saying there were no prior information regarding introduction of bill to the members of the house as it was included in the legislative agenda at the last minutes. Eventually the Union Minister herself conceded to the demand of opposition and urged the chair to refer it to the parliamentary panel for detailed scrutiny

PROPOSED CHANGES⁵⁶

The bill seeks to increase the marriageable age of women to 21 years to secure gender equality in the marriageable age of men and women by amending the definition of child in the Prohibition of Child Marriage Act, to mean a male or a female who has not completed 21 years of age

The law also seeks to increase the window for a child to file a petition to declare a child marriage as void. Under existing law though child marriages are illegal are not void but voidable. A child marriage can be declared null and void by a court when party to the marriage files a petition under Prohibition of Child Marriage Act 2006. Void marriage as opposed to a divorce in legal terms, would be as if the marriage had never taken place in the first place. The bill proposes to extend this window for both man and women for 5 years after attaining majority. Since age of majority is 18 for both, this would mean that either the man or women can file a petition to declare the child marriage void before they turn 23 or until two years after reaching the new minimum age of marriage. Introduction of 'notwithstanding' clause is a significant change because this provides for equal application of Prohibition of Child Marriage Act 2006 across religion notwithstanding any custom

The bill envisages that in most of the cases women are put in a disadvantages position as they are not able to continue their higher education, particularly professional carrier, no space to attain psychological attainment and skill sets. The bill is expected to decrease the rate of maternal and infant mortality ratio and enrich nutrition and improve sex ratio. The bill includes the grace period of two years from the date it receives the presidential assent. It seeks to amend other personal laws viz., Hindu Marriage Act 1955, Hindu Minority and Guardianship Act 1956, Foreign Marriage Act 1969, Indian Christian Marriage Act 1872, Parsi Marriage and Divorce Act 1936, Muslim Personal Law (Shariat) Application Act 1937 and Special Marriage Act 1954

⁵⁶ Prohibition of child Marriage (Amendment) Bill 2021, <https://www.iasabhiyan.com/personal-laws-in-marriage/> Jan 26, 2022, 11 pm

CRITICISMS AGAINST THE BILL

From the conservative corner there was a scathing criticism against the proposal saying when an 18-year-old girl can vote, obtain driving license, and own the property why can't she get married? And they question the importance of Beti Bacho Programme. Smrithi Irani countered the criticism saying it gives equality to men and women in matrimony, and she said, research report reveals that 21 lakh child marriages had to be stopped and many underage girls were found pregnant.⁵⁷

Child and Women's activists and Population and Family Planning experts have not been in favour of bill, they say that such legislation would push a large portion of population into illegal marriage. They have contended that even with the legal age of marriage for women being kept as 18 years child marriage continued in India and if at all a decrease in child marriage is found, it was not because of existing laws but because of increase in girls' education, employment opportunities. According to them the proposed law would end up being coercive and negatively impact marginalised communities such as SCs, STs making them law breakers⁵⁸

Government decision to raise the age of marriage as against the age of majority is viewed as states paternalistic approach in individual personal affairs. Application of child marriage law across the religion and faith triggers the debate on limitations on personal laws.

The proposed law is violative of Art. 25 of the Constitution which guarantees the freedom of conscience, free profession, and propagation of religion. Further the raise in the marriage will push many marriages to the edge of illegality and marginalise vulnerable sections.

CONCLUSION

Bill is of the view that child marriage is highly pernicious practice in the society. Despite of Prohibition of Child Marriage Act 2006 it has been continuing, so there is an urgent need of tackling it by introducing reforms.

57 Raising the age of marriage for women, <https://www.indiatvnews.com/news/india/raising-women-marriage-age-from-18-to-21-assadudin-owaisi-12-tweet-pointer-for-centre-750070>, Jan 20, 2022, 6 pm

58 Raising of legal Age of Marriage for women: Criticism, <https://indianexpress.com/article/explained/raising-legal-age-for-marriage-for-women-law-reasons-criticism-7675447/>, Jan 30, 2022, 11 pm

Hence, it is proposed to bring a law which raises the age of marriage for girls from 18 to 21 years and which has the overriding effects over the contrary provisions of personal laws.

India is also party to UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW 1979) which mandates for elimination of child marriage and recommends for uniform age of marriage for men and women. Hence, raising of age of marriage for girls will bring conformity with the convention.

Proposal may be acceptable to boys and girls who have achieved financial independence and living in progressive society opting for live in relationship etc. But majority of people living in mofussil India are deprived of education, employment, and capacity to take independent decision. Most of them follow their own outdated religious customs and practices don't accept girls as equal to boys. Girl child who survives feticide and infanticide are given away in marriage at very early age as they are treated as liability to the family citing dowry demand and security issues etc. Approach of patriarchy is visible behind every decision of child marriage.

It is to be noted that age of majority is 18 years. Once a person attains the age of majority he can vote, obtain driving licence, own property, enter contract etc. But this bar on marriage before 21 years may encourage premarital sex which is taboo in our society. This may lead to elopement and criminal litigation on the personal matters, patriarchal violence, criminalising inter-caste marriages etc. Because of conservative approach of people love marriages are despised and results in social boycott and honour killings etc.

Hence, mere raise in age of marriage of girls will not ensure the greater access to education, employment, and economic security. The need of the hour is sustained effort in achieving the gender equality by providing them education, safe workspaces, due share in family property.

Any law which is conflicting with the social norms will not succeed. For instance, despite Prohibition of Child Marriage Act is in force child marriages are happening. Though Dowry Prohibition Act is in existence social evil dowry practice is continuing. Further bill is silent as to its novel enforcement mechanism. Unless enforcement mechanism is strengthened, and effective implementation is ensured along with massive awareness campaign as to its significance it is of no use.

A BOOST TO GREATER EFFICIENCY IN JUDICIAL SYSTEM. - E-COURTS

Dr. Nirmala.Kumari K`

ABSTRACT

In a democracy people are very much aware of their rights and keen to fight for the protection of their rights. When there is an infringement of their right it is normal that people resort to the judiciary. But all is not well in the judiciary. The judicial system is suffering from so many draw backs. The judiciary is crumbling under the weight of pending cases. Indian Judiciary is in urgent need of re-engineering its processes, optimize the use of its human resources and bring about change management In the view of the above background, the present article proposes to deal briefly with the emergence of e-courts, its gradual developments, traces the demerits and records the benefits of e-courts and examines development of the system responding to the challenges thrown up by the COVID-19 crisis,.

Key words: Indian Judiciary, E- courts. Covid -19, Virtual Courts

INTRODUCTION

In a democracy people are very much aware of their rights and keen to fight for the protection of their rights. When there is an infringement of their right it is normal that people resort to the judiciary. People repose much faith in the judiciary, and they knock the doors of justice. In India judicial system has one

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integrated court system to deliver to administer state and union laws. At the top of the court structure in India is the Supreme Court, followed by the State High Courts that may serve one or more states. Below these High Courts are subordinate courts that comprise the District Courts that mete out justice at the district level and other courts.

The Indian judicial system has been patterned on the adversarial system of conducting proceedings in court rather than the inquisitorial system. This adversarial system works in a way by which both sides in a case presents its arguments to an unbiased judge who then issues an order or verdict based on the merits of the case. Another important feature of our judicial system is that it gives the Supreme Court and the High Courts the power of judicial review, as also in the American judicial system. This means that the actions of the executive and legislature are subject to the examination of the judiciary who can nullify their actions if considered unconstitutional. So, the laws framed by the legislature and the rules enacted by the executive have to comply with the Indian Constitution.

But all is not well in the judiciary. The judicial system is suffering from so many draw backs. The judiciary is crumbling under the weight of pending cases. There are about 73,000 cases pending before the Supreme Court and about 44 million in all the courts of India. Cases that have been in the courts for more than 30 years, as of January 2021¹. Another major problem with Indian Judiciary is lack of proper interpretation of laws. It has lengthy procedure which delays justice and people have to wait for a long period for justice. Moreover, as procedure is time taking, it is very expensive and everyone cannot afford so much in order to get justice.² With proper reformation, Indian judicial system can be made more effective.

In the view of the above background, the present article proposes to deal briefly with the emergence of e-courts, its gradual developments, traces the demerits and records the benefits of e-courts and examines how the court administration reacted to various challenges thrown up by the COVID-19 crisis.

1 <https://www.moneycontrol.com/news/trends/features/44-million-pending-court-cases-how-did-we-get-here-7792511.html>- 44 million pending court cases: How did we get here?- Sandipan Deb December 05, 2021

2 Madabhushi Sridhar-Alternative Dispute Resolution-Negotiation and Mediation-Lexis Nexis-Butterworths Wadwa Nagpur(2010) p 93

E COURTS – AN ENDEAVOR TO MAKE WORK CULTURE MORE EFFICIENT.

Indian Judiciary is in urgent need of re-engineering its processes, optimize the use of its human resources and bring about change management by harnessing the potentiality of the available Information and Communication Technology (ICT) to its fullest extent.³ E-Court is a part of that endeavor of Judiciary to make the work culture more efficient. It is done through information and communication and technology. Enablement of judiciary is being pursued vigorously across the world. In India, Information and communication and technology enablement higher judiciary started in early nineties and covering the Supreme Court and all the 21 High courts.⁴

The Indian judiciary comprises of nearly 15,000 courts situated in approximately 2,500 court complexes throughout the country.⁵ In the Indian Judiciary, effort for computerization of some of its processes has been going on since 1990⁶. From 2001-03, 700 city courts in four metros were computerized and during 2003-04, computerization of another 900 courts were undertaken.⁷ As a Mission Mode Project, it was proposed to implement ICT in Indian judiciary in three phases over a period of five years. The objectives of the project were⁸

- To help judicial administration of the courts in streamlining their day-to-day activities
- To assist judicial administration in reducing the pendency of cases.

3 eCourts - The Renaissance in Indian Judiciary. <http://kamrupjudiciary.gov.in/documents/ecourts.pdf> visited on 10 February 2022

4 <https://informaticsweb.nic.in/article/e-courts-mission-mode-project-journey-so-far#:~:text=ICT%20enablement%20of%20judiciary%20is,all%20the%2021%20High%20Courts.> e-Courts Mission Mode Project: The Journey so Far-accessed on 12 February 2022

5 <https://www.meity.gov.in/content/e-courts>-Accessed on 12 February 2022

6 <https://www.lawctopus.com/academike/use-technology-judicial-process-alternative-dispute-resolution/> Use of Technology in Judicial Process and Alternative Dispute Resolution November 13, 2015, Accessed on 12 February 2022

7 E-Era of Jurisdiction:Empowering Traditional Courts Using Various Artificial Intelligence Tools-Balam Singh Dafauti-School of Computer Science & IT, Uttarakhand Open University, Haldwani. Uttarkhand, India - Asian Journal of Computer Science and Technology-ISSN: 2249-0701 Vol.7 No.2, 2018, pp.57-61-accessed from <https://www.trp.org.in/wp-content/uploads/2018/07/AJCST-Vol.7-No.2-Jul-Sep-2018-pp.-57-61.pdf>

8 Supra note at 5

- To provide transparency of information to the litigants
- To provide access to legal and judicial databases to the judges.

The key service levels to be achieved by e-courts are: -

1. Registration of cases by auto generated unique case number.
2. Copies of Judgments, judgments will be made available through web.
3. Preparation and delivery of decrees: decree should be made available to the concerned parties by email, wherever applicable.
4. Generation of automated causerlists.
5. Generation of automated court diaries.
6. Availability of case status: online case status right from filing of case till it gets disposed.
7. Generation of daily orders.
8. Website for each court.

One more major aspect to be covered under e-Courts project is Videoconferencing technique through which courts will be connected to the Jail by ISDN (Integrated Services Digital Network) lines and at both ends a camera unit and a display unit will be provided with recording facility at the court's end. Undertrials produced at the Jail end. The Judge, Lawyers and witnesses etc. remain present in the court and regular trial is conducted. The judicial remand of the under-trial can also be extended without physically producing him in the court.

The benefits of Video conferencing may be listed as the following

- Thenotorious criminals can be tried without risks-It is easier for the police now to make the accused appear in the video,earlier he had to be brought from the custody to the court means,his safety, security, his chances of running away from custody , everything had to be taken care of by the police.
- Much time and energy used to be spent on security travelling of those accused. Now all these disadvantageswill be solved.

- Trial can be expedited with use of this facility: with this method the judges may call for the trial of the accused day by day, to expedite the trials.
- Cost and manpower in producing under-trials only for remand extension can be saved.
- Multiple trials of an accused lodged in one jail is possible in different states. Evidence of witnesses unable to come to court can also be recorded.

IMPEDIMENTS IN THE SYSTEM

It is noted here that, ICT enablement of the higher Judiciary has already been started covering the Hon'ble Supreme Court and all the High Court's wherein the e-Court implementation has reached a significant level of maturity. But there are few factors which may hinder the development of E courts revolution in an expected extent. It may be due to several factors.

1. It is expensive. The key modules in e-Courts project includes Laptops and Laser Printers, training to Judges and court staffs, Internet connectivity to the Judges, Connectivity at the court complexes, Videoconferencing, site preparation, Hardware, Networking, Application Software, Technical manpower, Upgradation of the ICT Infrastructure etc. All these process needs more electronic operates hence it is expensive.
2. Lack of well-developed legal system:e-courts can succeed only in well-developed legal system; we need better understanding of the legislations related to e court systems. Anyway, thanks to recent two important legislations –Information Technology Act and Right to Information Act.2000.The objective of The Information Technology Act,2000⁹ as defined therein is as under:-”to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as “electronic methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Banker's

9 (No. 21 OF 2000)New Delhi, enacted on the 9th June, 2000/Jyaistha 19, 1922 (Saka)

Book Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.”Sec.2(1)(v) of the Act defines “information” includes data, text, images, sound, voice, codes, computer programmes,software and databases or micro film or computer generated micro fiche. But if in some area of laws where the traditional system only fits e-courts may face failure. So this Act though needs more support,to fulfill the requirement to certain extent.

3. Technical Knowledge: Hon'ble Supreme Court of India. Department of Justice is providing key support for project monitoring and evaluation. All High Courts have appointed Central Project Coordinators for managing the implementation of the project.¹⁰ But the support will be extended during initial stages then the respective High Courts only have to bear the continued costs and the technology. So, there is the susceptibility that if once there is a small break down in the e-system, it may cause much inconvenience because of lack of technology among the judicial officers involved in the system.
4. Inertia to welcome new system: As it is new to all the judicial officers and the staff, it takes time for the people to adjust themselves for the new system. This system that is e-court for its success requires the involvement of all the people in the system i.e judicial officers, Lawyers, police officials as well people. We find there are many senior judicial officers and senior advocates are not trained well in using computers, or they have computer phobia. In such situation, making all the courts in the system to get converted in to e-system may not get required momentum.

E-COURTS AND COVID-19: ADOPTING SOLUTIONS FOR JUDICIAL EFFICIENCY

In India, the COVID-19 predicament spread, when the attention was already on strengthening the setting up of E-courts and the digitization of justice and court administration. But the abrupt and unprecedented occurrence of COVID-19 crisis has provided a greater impetus in bringing about a rapid transformation in the manner of court administration in the country. As physical appearances by

10 <http://dlsajanjgir.cg.gov.in/janjgirdistrictcourt/files/About%20eCourts%20Project.pdf>-e-Courts Mission Mode Project: The Journey so Far- CLM Reddy, Senior Technical Director-clmr@nic.in-

lawyers and litigants were discouraged in courts due to the strict safety protocols of the COVID-19 crisis, greater use of technology, already put in place, came in handy in justice and court administration.

In fact, it would also be pertinent to mention here that much before the advent of the COVID-19 crisis, E-courts had also become quite common and were already playing an important role in avoiding unnecessary congestion in the courts by giving opportunities to stakeholders to interact online with courts. It became indispensable requirement and became more of a necessity under the safety protocols of the COVID-19 crisis.

However, virtual courts have become a step beyond E-courts. As the name recommends Virtual courts are the courts that utilize a distant working framework with the assistance of different programming and apparatuses. Its main aim is to wipe out the necessity of human presence in the court so that the settling of cases doesn't get postponed because of the inaccessibility of the defendant or the plaintiff or the court staff.¹¹ While E-courts are aidsto virtual courts, they help the working of virtual courts. Now E-courts involve not only filing of cases online, but also includes, avenues for online interaction between the judges and advocates, online proceedings, online examination and cross examination of witnesses and finally passing of online judgements. Thus the judicial administration has taken a quicker leap from the existing stage of E-courts and jump to the next level, i.e., E-judiciary. In fact, as a direct consequence of the COVID-19 crisis, after E-courts we are now finding a new response to transformation from E-courts to E-judiciary as a preferred mode of justice administration in courts at various levels.

CONCLUSION

Fast and fair trial has always been a long awaited and anticipated boon for the citizens in India. It was very difficult for a person to undergo trial in the slow running machinery of the judiciary. Hence there was a need to expedite the trials, and E Courts could prove to be a landmark in the life of the people and transform their anticipations into reality.

11 <https://www.legalserviceindia.com/legal/article-5803-e-courts-pressing-priority-in-covid-19-situation.html>- E-Courts: Pressing Priority In Covid -19 Situation-By Prachi.sharma- accessed on 14-Feb-22

Modern technology has enabled courts to enhance the quality and effectiveness of the administration of justice. Technology has facilitated advances in speed,

accessibility and connectivity which enable the dispensation of justice to take place in diverse settings and situations without compromising the core legal principles of adjudication. The Indian judiciary has incorporated Information and Communication Technology systems through the e-Courts Integrated Mission Mode Project (e-Courts Project) as part of the National E Governance Plan. The strong infrastructure in place has reduced traditional hinderances and legal uncertainty surrounding the use of virtual courts.

With the growth of Information and Communication technology in India, and the recent advent of Covid 19 pandemic, with the Judges and court staffs being serious and more concerned in today's working environments, nothing seems to be impossible and the goal of the eCourts project has become possible. With this new system of trial and administrative works, the litigants will be immensely benefited. It will save both time and money to get quick justice and prompt disposal of cases.



AN ANALYSIS OF TREATY MAKING PROVISIONS UNDER INDIAN CONSTITUTION

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ABSTRACT

Treaties are essential tool for economic development of a State. The state should make necessary provisions for entering into treaties and agreements with foreign powers, so that, state sovereignty can be protected. Different nomenclature was provided to these treaties. Vienna Convention on the Law of Treaties, 1969 is the base for these international treaties. It is necessary to understand what the treaty are making provisions under the constitution of India. Starting from preamble, DPSP provisions Article 51 (b) (c) and (d) which provides for the, maintain just and honourable relations between nations cultivates respect for international law and treaty obligations. Articles 53, 73, 245, 246, 253, 265 of the Constitution of India which relates to treaty-making provisions are discussed in this article. Further this article discusses the procedure of ratifying the treaties in the parliament and the formalities to be observed and interpretations provisions.

Key Words: Constitution of India, International treaty, Parliament, Legislature, Vienna Convention on the Law of Treaties, 1969.

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INTRODUCTION

Treaties are described as contracts between nations. They acquire a prominent place in international relationship. As instruments of international law, they establish obligations with which international law requires the parties to comply at national level as well as international level¹. Entering into treaties and agreements with foreign powers is one of the attributes of State sovereignty. No State can lag itself from the rest of the world whether it may be in the matter of foreign relations, trade, environment, communications, ecology or finance². The power to make treaty or agreements with other nations has international as well as internal dimensions. In international law, nations are assumed to know where the treaty making power resides and also the internal limitations on that power. As regards the internal aspects of a treaty or agreement, the constitutional limitations on the treaty making power come into operation³.

Joanna Harrington in his article analysed that the treaties are the main important source of law. These treaties may be reached through agreements between states after months negotiations down government corridors and through diplomatic route, new legal rules are formed on diverse subjects like defence⁴, criminal law⁵, trade and investment⁶, the environment⁷, and human

- 1 Mr. Narendra Kadoliya, A Paradigm Shift in The Role of Domestic Courts in Implementing International Treaty Provisions: An Indian Perspective, Manupatra, <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=29c6ccdf-f94e-42e5-8bdd-64f58d2a962c&txtsearch=Subject:%20Miscellaneous>, visited on 04-01-2019
- 2 National Commission to Review the Working of The Constitution, A Consultation Paper on, Treaty-Making Power Under Our Constitution, [http://legalaffairs.gov.in/sites/default/files/Treaty-making %20power%20under%20our%20Constitution.pdf](http://legalaffairs.gov.in/sites/default/files/Treaty-making%20power%20under%20our%20Constitution.pdf), visited on 04-01-2019.
- 3 Prem Varma, Position relating to treaties under the Constitution of India, Journal of the Indian Law Institute Volume 17:1 (1975) [http://14.139.60.114:8080/jspui/bitstream/123456789/16410/1/026_Position%20Relating%20to%20Treaties%20under%20the%20Constitution%20of%20India%20\(113-130\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/16410/1/026_Position%20Relating%20to%20Treaties%20under%20the%20Constitution%20of%20India%20(113-130).pdf), visited on 04-02-2019.
- 4 For example, Agreement between India and china on establishment of a working mechanism for consultation on Indo-China border affairs on January 17, 2012 and agreement between India and Pakistan on reducing the risk from accidents relating to nuclear weapons on February 21, 2007.
- 5 For example, Extradition agreement between India and Morocco on November 13, 2018, extradition treaty between India and Malawi on November 05, 2018, agreement between India and France on the prevention of the illicit consumption of and reduction of illicit traffic in narcotics drugs, psychotropic substances and chemical precursors and related offences on March 10, 2018.
- 6 For example, Treaty between India and Belarus on investment, on September 24, 2018, agreement between India and Zambia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income on April 11, 2018.
- 7 For example, Agreement between India and Peru on cooperation in new and renewable energy, on May 11, 2018.

rights. In some cases, these treaties will generate new domestic law and policy⁸. In India, focus of treaties are basically oriented towards subjects like Science and technology, transport, social security, Health, Education etc.

TREATY MAKING PROVISIONS UNDER THE CONSTITUTION OF INDIA

The preamble of the Indian Constitution declares that India is a sovereign, socialist, Secular and democratic state. Sovereignty is with respect to internal as well as external matters. External sovereign is external independence. As regards external sovereignty, it has been said that “in consequence of its external independence, a State can, unless restricted by treaty, manage its international affairs according to its discretion; in particular, it can enter into alliances and check other treaties, send and receive diplomatic envoys, acquire and cede territory, make war and peace”.⁹

Other than preamble a few provisions of the Indian Constitution deals with international treaty making provisions. The Directive Principle of State Policy Article 51 (b) (c) and (d) which provides for the, maintain just and honourable relations between nations cultivates respect for international law and treaty obligations in dealings of organised people with one another and also encourage settlement of international disputes by arbitration¹⁰. This Article cannot be enforceable before the court of law¹¹. It only points out what should be the policy of our nation in international level.

In the treaty-making provisions British India had been following British Practice¹². During British regime India did not enjoy full external sovereignty, because the Secretary of the State for India who was a member of the British

8 Joanna Harrington, redressing the democratic deficit in treaty law making: re-establishing a role for parliament, McGill Law Journal, page no. 465 & 467.

9 L.Oppenheim, International Law, Ed., H. Lauterpacht, Longmans, Green & Co., publication, 8th Edition, Vol. I, p. 209

10 Article 51 of the Constitution provides for the promotion of international peace and security: The State shall endeavour to-

- (a) Promote international peace and security
- (b) Maintain just and honourable relations between nations;
- (c) Foster respect for international law and treaty obligations in dealings of organised people with one another and
- (d) Encourage settlement of international disputes by arbitration.

11 Article 37 of Directive Principles of State Policy.

12 This British practice can be analysed in the words of Privy Council in its notable decision in Attorney General for Canada v/s Attorney General for Ontario.

Cabinet responsible to the British Parliament have full control on internal and external affairs of India. “the implementation of treaties and agreements with other countries” was a federal subject under Item 3 of List I of Schedule VII under the Government of India Act, 1935¹³, although this power was restricted by Section 106 of the Government of India Act¹⁴ which laid down that in the exercise of the above power, the Federal legislature could not make any law for any Province or Federal State without the consent of the Governor¹⁵. But after independence India as a sovereign state has entered into several international treaties. After the commencement of the Constitution, a few cases have arisen where the Supreme Court had to interpret Entries 14 and 15 of List I of the

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- 13 Item 3 of List I of Schedule VII under the Government of India Act 1935, provides that: External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty’s dominions outside India, <https://www.legislation.gov.uk/ukpga/Geo5and1Edw8/26/2/schedule/SEVENTH/enacted>, visited on 16-12-2020.
- 14 Section 106 of THE GOVERNMENT OF INDIA ACT 1935 provides:provisions as to legislation for giving effect to International agreements. Section 106(1) The Federal Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to make any law for any Province except with the previous consent of the Governor, or for a Federated State except with the previous consent of the ruler thereof.
- (2) So much of any law as is valid only by virtue of any such entry as aforesaid may be repealed by the Federal Legislature and may, on the treaty or agreement in question ceasing to have effect, be repealed as respects any Province or State by a law of that Province or State.
- (3) Nothing in this section applies in relation to any law which the Federal Legislature has power to make for a Province or, as the case may be, a Federated State, by virtue of any other entry in the Federal or the Concurrent Legislative List as well as by virtue of the said entry.https://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf, visited on 27-12-2020.
- 15 Wali Ullah, The Treaty-Making Power under the Constitution of India, cite as: (1971) 2 SCC (Jour) 20, <https://www.ebc-india.com/lawyer/articles/71v2a5.htm>, visited on 16-12-2020.

Seventh Schedule and article 73¹⁶ and 253¹⁷. In *Maganbhai Ishwarbhai Patel v/s Union of India*¹⁸ in this case Justice J.C. Shah said: “The effect of Article 253 is that if a treaty, agreement or convention with a foreign state deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power: thereby power is conferred upon the Parliament which it may not otherwise possess. But it does not seek to circumscribe the extent of the power conferred by Article 73. If, in consequence of the exercise of executive power, rights of the citizens or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation: where there is no such restriction, infringement of the right or modification of the laws, the Executive is competent to exercise the power.”¹⁹ Therefore, the position of treaty making power can be summarised as under (1) (2) (3).

INTERNATIONAL TREATY MAKING PROVISIONS AND INTERPRETATION OF THOSE TREATIES UNDER THE INDIAN CONSTITUTION

Every state has its own international legal personality which provides it with a capacity to enter into obligations with other States. It is the basic principle of the

16 Article 73 of the Indian Constitution provides that: (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend —

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in subclause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

17 Article 253 provides that: “Legislation for giving effect to international agreements” Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

18 (1970) 3 SCC 400; AIR 1969 S.C. 783

19 A.G. Noorani, *Treaties & States*, Frontline, Volume 29, Issue 02, Jan 28, print edition: February 10, 2012, India’s National Magazine, Hindu Publishers, <https://frontline.thehindu.com/static/html/fl2902/stories/20120210290204300.htm>, visited on 16-12-2020.

international law that states need to carry out its obligations under international treaties²⁰. The treaty practices under international law are governed by Vienna Convention on the Law of Treaties 1969. India is not a party to this convention but still follows its principles in practice. The Vienna Convention refers to ‘treaty’ in its generic sense and defines as “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.²¹

Different nomenclature can be used for the term treaty i.e Agreement, Convention, Protocol, Memorandum of Understanding, Memorandum of Cooperation, Memorandum of Association, Charter, Covenant, Pact, and Statute. There are fewer formal agreements sometimes through “exchange of notes” “letter of intents”, or “exchange of letters”. Irrespective of its nomenclature all the treaty agreements provide rights and obligations between the parties.

Parties to a treaty may agree for its entry into force either on the date of signature, or may make entry into force subject to ratification. In the former scenario, the treaty will become effective immediately on signing. Where, entry into force of a treaty is subject to ratification, signing would only reflect the intent of the country concerned to be bound to its provisions, and will have the binding effect only on ratification²².

Article 6 of the Vienna Convention on the Treaties also expressly provides that every state possesses capacity to conclude treaties²³. But International law does not prescribe a particular method of entering into treaties. These questions are best left to the domestic polity and constitutional structure of individual countries²⁴.

20 "Pacta sunt Servanda", Doctrine “provides that every treaty in force is binding upon the parties to it and must be performed in good faith. This principle is incorporated in Article 26 and Article 27 of the Vienna Convention, 1980 which lays down that every treaty in force is binding upon the parties to it and must be performed in good faith and a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.

21 Ministry of External Affairs, New Delhi, No. 312/As(MD)/17, Revision of Standard Operating Procedures (SOPs) with respect to MOUs/Agreements with foreign countries.

22 Ibid

23 Vienna Convention on the law of treaties, concluded at Vienna on 23 May 1969, <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>, visited on 23-12-2020.

24 Sudhanshu Roy, Reconsidering Treaty-Making in India: An Argument for Reform Through the Prism of International Investment Agreements, Indian Journal of International Law, July-December 2014, Vol 54, No. 3&4, Page no.321.

Article 253 provides that the legislative power to give effect to international agreements which provides that parliament has power to make any law for the whole or any part of the territory of Indian for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body²⁵. Indian Constitution is a federal in nature. There is a division of power between central and states. Parliament cannot make a law with respect to state matters. Article 253 is an exception to this division of power where Parliament can also make law with respect to matters falls under state list. Under this article it was squabbled on behalf of the union of India that the implementation of a treaty was an executive act and that it could be effected without any legislation²⁶. Through this Court opined that if the implementation of a treaty or agreement involves the interpretation of an award or the ascertainment of disputed boundaries with the foreign state, no legislation is required. But legislation is required (not mere ordinary legislation but an amendment of the constitution) if it involves the alienation or cession of any part of the territory of India²⁷.

Article 246 of the Indian constitution deals with the distribution of legislative power between the Union and the States. Article 246(1) provides that the Parliament has exclusive power to make laws with respect to the matters enumerated in List I of the Seventh Schedule (Union List). Article 246(2) provides concurrent powers to parliament and State Legislatures to legislate with respect to matters in List III (Concurrent List), Article 246(3) empowers the State Legislatures to legislate on subjects in List II (State List).

Indian Constitution does not expressly provide the negotiation and concluding the treaties by the president. It is implicit in another article which extends the executive power of the union to all matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the government of India by virtue of any treaty or agreement²⁸. As Parliament has power to make laws regarding “entering into treaties and agreements with foreign countries”, it is taken for

25 Dr. KAILASH RAI, The Constitutional Law of India, 762 Central Law Publications, Allahabad, 2015)

26 In Re Berubari Union (1)(1960) 3 SCR 250

27 Supra Note No. 3, visited on 21-06-2019.

28 Article 73, 77, 246 and 248 and entries 13, 14 of the Union List contained in the Seventh schedule of the INDIAN CONSTITUTION. See Appendix ‘A’.

granted that the President has authority in the matter of conclusion of treaties²⁹. It does not mean that President is vested with the absolute power to make laws³⁰. Article 53 (1) of the Indian Constitution deals with the executive power of the union are specifically vested with the President and also further provides that President can exercise such executive power directly or through the officer's subordinate to him in accordance with the Constitution.

In India there is no legislation for regulating the procedure for entering into treaties and its implementation it is left open to the executive to sign and ratify international treaties. In the absence of the parliamentary legislation Article 73 of the Indian Constitution empowers the executive to make decisions on which the Parliament has the power to make laws.

However, at the same time sub clause (1) (a) of Article 73 extends the executive power of the Union to all matters with respect to which the Parliament has power to make laws. In *Ram Jawaya Kapur v/s State of Punjab*³¹ it was held that the Parliament has not made any law for regulating the procedure for entering into treaties nor with respect to their implementation till date. Therefore, the exercise of such executive power continues by virtue of Article 73(1) (a) of the Constitution³².

Here it is clear that the, Parliament is competent to make a law laying down the manner and procedure according to which treaties and agreements shall be entered into by the Executive as also the manner in which they shall be implemented. Under our Constitution, treaty-making power is not vested with the Executive or the President-as has been done in some other Constitutions.

What is the validity of the treaties if it is ratified by the executive? In such situation Parliament may choose to amend the Constitution and then pass the legislation. In case if Parliament refuse to legislate the treaty cannot be invoked before any court of law in India. In this respect Article 46 of the Vienna

29 J.S Bains, Constitutional Law Aspects of Treaties, The Indian Journal of Political Science, Vol 22, No. 1/2(January-March, April-June 1961), Published by Indian Political Science Association.

30 Article 53 and Article 73 both are read together.

31 AIR 1955 SC 549, at para 8.

32 Supra Note No. 13.

Convention of the law of treaties³³ Article 46. Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. also provides the provision relating to non-compliance with municipal with municipal laws where state cannot plead a breach of its constitutional provisions as to the making of treaties as a valid excuse for condemning an agreement. Violation will be regarded as manifest if it would be objectively evident to any state conducting itself in the matter in accordance with its internal law of fundamental importance³⁴.

Thus, international treaties can be legally enforceable within the municipal sphere of India only when Parliament enacts an enabling legislation incorporating under domestic legislation incorporating it under the domestic system³⁵.

CONSENT OF LEGISLATURE FOR TREATIES

In India, a treaty entered into by the executive requires legislative approval. International treaties cannot be enforceable upon ratification only by the executive power of the government because Indian Constitution follows the dualistic doctrine with respect to international law. Therefore, international treaties do not automatically form part of national law. They must be appropriately incorporated into the legal system by a legislation made by the Parliament. The ratification by the Parliament will ensure that international agreements and treaties with far reaching implications are subjected to a closer legislative scrutiny and a wider political and public discussion. But in the absence

33 Article 46. Provisions of internal law regarding competence to conclude treaties:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

34 Ayushi Agrawal, Invalidation and termination of treaties, Manupatra, <http://www.manupatrafast.com/articles/ArticleSearch.aspx?c=1>, visited on 01-01-2021.

35 Dr. Anita M. Jalisatgi, The Status of International Treaties under the Constitution of India, KLE Law Journal.

of a specific provision stipulating the procedure for the negotiation and ratification of treaties, the exercise of this power has by and large remained a preserve of the executive, which has tended to interpret Article 73 to mean that its authority extends over the subjects included in the union list³⁶.

If it is a question of effect of treaties on Indian Domestic Law can be analysed from the decision of the Supreme Court in *Maganbhai* case where India is still following this British practice in the matter of treaty making even after the advent of the constitution.

Making of treaties is different from the implementation or performance. This can be best illustrated in *Attorney General (Canada) v/s Attorney General (Ontario)*³⁷, a case which troubled the power of the federal government of Canada to implement international obligations on subject matters allocated to Canadian provinces. The Privy Council on appeal held that the federal Government had no power to legislate for matters that were reserved for the provinces. The Court observed:

“It will be essential to keep in mind the distinction between the formation, and the performance, of the obligation constituted by a treaty, using the word as comprising any agreement between two or more sovereign states. Within the British Empire there is a well- established rule that the making of a treaty is an Executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, and requires legislative action. . . .”³⁸.

Thus, in India International treaty making is the executive act it is concluded with the approval of the Union cabinet. If the performance of treaty obligations involves alteration of the existing domestic law or requires new enactment then legislative action is required.

In all international law issues the Legal and Treaty Division of Ministry of External Affairs (MEA) renders legal opinion and scrutinizes international instruments for consistency with international law and with India’s international rights and obligations. In international conferences, and in bilateral negotiations this division forms part of Indian delegations in the capacity as legal advisers. The division participates in the drafting of Indian legislation including amendments

36 Ibid.

37 1937 A.C 326 [AG(Canada) v/s AG (Ontario)]

38 Supra Note No. 18 Page No. 324

when required for implementing the treaty obligations. After treaties are forwarded to the Legal Treaties Division for depository functions and safekeeping³⁹.

FORMALITIES TREATY MAKING

Drafting and Negotiation

Ministry of External Affairs is the nodal agency for the preparation of drafts, consultations and negotiations of international treaty making activities. In case of bilateral treaties, administrative Ministry, in consultation with other stakeholders, prepares a draft text of the treaty and submits the same with the approval of the ministers concerned to the Ministry of External Affairs (Legal and Treaties Division) for vetting before it is sent to the other country for consideration, through diplomatic channels. Except in security related matters in all bilateral treaties negotiation modern means of communication including emails, video conferencing and teleconference should be used by the stakeholders⁴⁰.

Approvals:

The administrative ministry processes for necessary approval from the ministers concerned and after the External Affairs Minister is also obtained. Then it moves for Cabinet approval. The cabinet approval is crucial for all treaties according to the Second Schedule to the Government of India (Transaction of Business) Rules, 1961 to be signed with any foreign agency/country. These instructions are also applicable to all subordinate/attached offices including statutory bodies and authorities of Ministries/Departments and the various Commissions under the Constitution. This is not applicable to Cultural and Science and Technology agreements not impacting the national security or our relations with other countries which are duly approved by the Minister-in-charge of the Department and the Minister of External Affairs and requisite inter-Ministerial consultations. And also, Foreign Aid Agreements and Commercial Agreements, which are duly approved by the Minister-in-charge of the

39 Revision of Standard Operating Procedures (SOPs) with respect to MOUs/Agreements with foreign countries, No. 312/AS (MD)17, Dated 02-04-2018, Ministry of External Affairs, New Delhi, <https://www.mea.gov.in/images/Revised-SOPs-with-forwarding-letter-02042018.pdf>, visited on 02-01-2021.

40 The Ministries/Departments may submit the proposal under Rule 12 of the Government of India (Transaction of Business) Rules, 1961 only if there is an extreme urgency or unforeseen contingency.

concerned Department. In case of any doubts with respect to approval of the Cabinet required for concluding the agreement/MOU, then the matter may be referred to Cabinet Secretariat for decision by the Administrative Ministry.⁴⁰ Cabinet notes seeking approval for signing of MOUs are to be prepared sufficiently in advance of the proposed visit so as to preclude the need to seek approval under Rule 12. If MOUs requiring prior approval of the cabinet are signed after obtaining approval under Rule 12, they are required to be submitted for ex post facto approval of the Cabinet or for information as the case may be within one month of the signing of such MOU. In case of any delay, the note should detail the specific reason and justification in submitting the note before the cabinet after the prescribed time period. While seeking the approval for new MOU the ministries also enclose the list and status of the existing MOUs. After obtaining the necessary approval, the text of treaty/agreement may formally be signed and concluded with foreign governments.

Ratification:

The treaty requires ratification, where a treaty does not provide for its entry into force upon its signature. Ratification is done by obtaining the instrument of Ratification under the signature and seal of the President of India. Ratification is undertaken only after the relevant domestic laws have been amended or enabling the appropriate legislation on the subject. Cabinet Note is submitted by the concerned administrative ministry with three copies of signed treaty in Hindi and in English languages. The Legal Treaty Division of MEA prepares the instrument of ratification and processed for the signature of the president.

In case of a bilateral treaty, it becomes effective on the exchange of instruments of ratification or through notification, as the case may be, which will be affected through diplomatic channels⁴¹.

Amendment of a Treaty:

The treaties normally contain the provisions of amendment in their final clause stipulating procedure for their amendment. By mutual written consent parties may at any time agree for amendment of the treaty. A state party may, at any time, propose an amendment, which on negotiations may be approved or rejected in whole or in part by the parties. The parties may agree for the entry

41 Supra Note No 34

into force of an amendment either through the same procedure as applicable for the entry into force of the treaty or a different one.

Review of Treaties:

Most of the bilateral treaties contain a clause for the periodical review of the activities undertaken under the Agreements/MOU. The review is done by concerned Ministries from time to time and shall send report at the end of each year to the concerned territorial Division of MEA apprising about the implementation activities undertaken, and the status of the treaty i.e whether its validity is continuing or has expire. If expires whether it is to be renewed or there is no necessity of renewal⁴².

CONCLUSION

The fundamental provision of Indian Constitution is that the State is itself the creator of Constitution. Hence in domestic jurisdiction constitution is supreme. The ultimate touchstone of constitutionality is the constitution and even judiciary is having very limited power in the matters of the constitution.

The constitution gives plenary law-making power to the union legislature. Parliament has exclusive power to make laws in respect to the entries in the union list. So according to the Indian Constitutional scheme, making of the international treaties is an executive act. Treaty is concluded with the approval of the union cabinet; it is not placed before the Parliament for discussion and approval. Where the performance of treaty obligations entails alternation of the existing domestic law or requires new enactment it would accordingly require legislative action.

Some of the Fundamental Constitutional principles are that

1. The Sovereignty of the Republic of India is essentially a matter of constitutional arrangement which provides structured government with powers granted under express constitutional limitations.
2. The Executive does not possess any “hip-pocket” of unaccountable powers, and has no carte blanche even at the international plane.

42 Ibid

3. The executive act, whether within the domestic jurisdiction, or at the international plane, must conform to the constitutional provisions governing its competence.
4. The direct sequel to the above propositions is that the Central Government cannot enter into a treaty which, directly or indirectly, violates the Fundamental Rights or the Basic Structure of the Constitution; and if it does so, that treaty must be held domestically inoperative to the extent it violates the restraints.

In the interest of the international co-operation some Constitutional articles like 53, 73, 245, 246, 253, 265 provides the provisions regarding international treaties. According to Article 363 which restrict the interference by courts in disputes arising out of certain treaties, agreements, etc.



WHY DOES CLIMATE JUSTICE MATTER

Dr. Sheena Thomas*

ABSTRACT

Climate justice is connected with an agenda for human rights and international development. It shares the benefits and burdens associated with climate stabilisation, as well as concerns about the impacts of climate change. Climate justice also involves considering relative roles and responsibilities for causing the problem of global warming and for associated action. Climate change is more than an environmental issue, it is a justice issue. Addressing it is a shared responsibility. Yet it is obvious that the world's poorest countries and most vulnerable people will bear the impact of climate change. Failure to act will render the environments of millions of children and their families even more hazardous. Many poor people already live in fragile climates, where food and clean water are rare and shelter inadequate – climate change will aggravate this instability.

Climate injustice refers to the apparent unwillingness of governments of these countries to take action on climate change, despite the scientific knowledge of its causes and impacts. Responsibility for climate impacts is a core value of climate justice. As a large emerging economy, India faces big challenges relating to energy and climate change. On the one side, the country has millions of people without access to electricity and an economy demanding more energy to power growth. Climate-related harms became more wide spread and disproportionate.

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Social justice has been at the forefront of climate change debates ever since it became a major political issue. Our tendency is in the direction of the use of green technology. It is crucial for our community to ensure that the development in all streams goes hand in hand with social justice. The people are searching for the possibilities, i.e., for remedy through legal action. The resource literacy of common man may enable and assist the administration, and judiciary to contain for climate injustice. This paper is an attempt to depict the social impact of climate change and also to emphasise the possible measures to combat climate injustice through resource literacy indeed. It involves considering relative roles and responsibilities for causing the problem of global warming and for related action.

Key words: Climate justice, vulnerable people, social impact, scientific knowledge.

INTRODUCTION

The current impulse towards the use of green technology as a miracle solution eclipses the need to focus on social justice. It is very disastrous and crucial for a common man to fight social injustice. Global warming in an unequal and unjust world must sink in. Visibly, one cannot speak of saving humanity while most vulnerable humans are being hit worst by climate change. In practice what happens is that there is a tendency of tolerating injustices in the social, political and economic world. No easy route we find here to claim social justice as part of climate action. Like all other developmental tasks, the struggle for climate justice is an unending one. Climate justice has become part of an equation displaying green industries will create millions of new jobs and fresh opportunities for growth.

Key decisions about the rules governing future carbon markets are now under serious consideration of the Conference of Parties in October/November 2021 in Glasgow. Resources and commitment to climate action also now need to compete with global responses to the Covid-19 pandemic. It is vital that climate considerations guide decision-making and priority-setting.

Unless we get the world on a path to rapid and deep decarbonisation, climate injustices will multiply exponentially. At the same time, unless responses to the crisis are underpinned by a sense of fairness and equity, they will encounter rejection, further delaying action. Climate justice is connected with an agenda for

human rights and international development. It shares the benefits and burdens associated with climate stabilisation, as well as concerns about the impacts of climate change.¹ Climate justice also involves considering relative roles and responsibilities for causing the problem of global warming and for associated action.² Climate change is more than an environmental issue, it is a justice issue. Addressing it is a shared responsibility. Yet it is obvious that the world's poorest countries and most vulnerable people will bear the impact of climate change. Failure to act will render the environments of millions of children and their families even more hazardous.³ Many poor people already live in fragile climates, where food and clean water are rare and shelter inadequate – climate change will aggravate this instability.

RESEARCH PROBLEM

Climate injustice refers to the apparent unwillingness of governments of these countries to take action on climate change, despite the scientific knowledge of its causes and impacts. Responsibility for climate impacts is a core value of climate justice. As a large emerging economy, India faces giant encounters relating to energy and climate change. On the one side, the country has millions of people without access to electricity and an economy demanding more energy to power growth. Climate-related harms became more wide spread and disproportionate. Social justice has been at the pole position of climate change debates ever since it became a major political issue. Our tendency is in the direction of the use of green technology. It is crucial for our community to ensure that the development in all streams goes hand in hand with social justice. The people are searching for the possibilities, i.e., for remedy through legal action. The resource literacy of common man may enable and assist the administration, and judiciary to contain for climate injustice. This paper is an attempt to depict the social impact of climate change and also to emphasise the possible measures to combat climate injustice through resource literacy indeed. It involves considering relative roles

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- 1 Peter Newell & Shilpi Srivastava, Towards Transformative Climate: Key Challenges and Future Directions For Research, Institute Of Development Studies, Working Paper Volume 2020 Number 540
https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15497/Wp540_Towards_Transformative_Climate_Justice.pdf?sequence=1 last visited Oct.30, 2021.
 - 2 Mary Robinson, The Geography of Climate Justice: An Introductory Resource to the Geography of Climate Justice, https://www.mrfcj.org/pdf/Geography_of_Climate_Justice_Introductory_Resource.pdf last, last visited Oct 30, 2021.
 - 3 Climate Justice, WACC Global, <https://waccglobal.org/climate-justice/> last visited Oct 30, 2021.

and responsibilities for causing the problem of global warming and for related action.

Indigenous Peoples are losing forests that have sustained their way of life for generations, and are increasingly finding that local knowledges are not sufficient or no longer relevant to the challenges of adaptation to climate change. City residents don't know if their water is safe to drink. Farmers are struggling to protect their crops from an onslaught of climate impacts –droughts, floods, fires and rising seas – that they had little hand in creating.⁴ Governments are trying to tackle these challenges, but many lack the knowledge, capacity or funds to advance just, sustainable solutions. In thinking about the role of the law as a vehicle for protecting human rights' violations associated with climate change, we have to recognise the implication of states in the generation of climate change which may profoundly affect their willingness and ability to confront those violations.⁵ Methodology adopted in this article is doctrinal and based on the online data sources and review reports by various internationally authorised agencies working in the area of climate justice.

CONCEPTUALISING CLIMATE JUSTICE

The term 'climate justice' was first coined in 1989.⁶ Contemporary climate justice debates are building on a number of different (and sometimes conflicting) areas, including environmental justice, basic human rights, and fairness in the formation and implementation of international regimes. A commonly cited historical event is the United Nations Conference on the Human Environment in Stockholm (1972) since its Preamble defines the environment as essential to human wellbeing and the enjoyment of basic human rights.

The move towards justice in the international regime on climate change was evident in the UN Framework Convention on Climate Change (UNFCCC) in 1992, through its adoption of a 'polluter pays' principle and also by the inclusion

4 Our Challenge, World Resources Institute (2020), <https://www.wri.org/equitable-development>, last visited Oct 30, 2021.

5 STEPHEN HUMFREYS AND MARY ROBINSON, HUMAN RIGHTS AND CLIMATE CHANGE, CAMBRIDGE UNIVERSITY PRESS, 2010, https://books.google.co.in/books?id=I8ZvBCmrEpwC&redir_esc=y, last visited Oct 30, 2021. Mary, supra note 2, at 6.

6 Articles 3(1) and 4(1) of CBDR-RC are about the allocation of rights and responsibilities between governments. It recognises that all states have an obligation to avoid dangerous climate change, but also that the responsibility to address them is not equal across countries. Mary, supra note, at 25.

of the principle of 'common but differentiated responsibilities and respective capabilities' (CBDR-RC).⁷ As per this principle, the authorities are supposed to recognise differential vulnerability and impacts of climate change across different countries and social groups, and the responsibility of the main emitters to provide funding to support those that are most vulnerable and have the fewest resources and least capacity to adapt. Thus, while justice concerns have arguably been core to the negotiations, the definition of what climate justice means, and the implementation of justice principles have in large part been left to the international policy processes surrounding climate action.⁸

The second major domain of climate justice discussions emerged over the 1990s among civil society and advocacy groups, centred on concepts such as the climate debts of countries of the global North towards those in the global South.⁹ Nations signed the Kyoto Protocol to the Framework Convention on Climate Change in 1997, However, the Kyoto Protocol was the wrong solution at the right time-not simply inadequate in its scope, but carrying high opportunity costs that derailed global efforts at achieving stable atmospheric concentrations of greenhouse gases (GHGs).¹⁰ The concern is not simply that the Protocol failed in even its minimal effort at reducing global emissions. The real crime of Kyoto is that it has subjected the world to an ineffective path-dependent model for solving climate change.¹¹

The concept of climate justice admits that because the world's richest countries have sponsored most to the problem, they have a greater obligation to take action and to do so more quickly. However, many apprehend that whatever

7 Stellina Jolly & Abhishek Trivedi, Principles of CBDR-RC: Its Interpretation and Implementation Through NDCs in the Context of Sustainable Development, Vol 11, Issue 3, WASH. J. ENVTL. L. & POL'Y 309 (2021) <https://digitalcommons.law.uw.edu/wjelp/vol11/iss3/3>, last visited Oct 30, 2021.

8 Kolstad C. Et.Al, Social, Economic and Ethical Concepts and Methods. In: Climate Change 2014: Mitigation of Climate Change..Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [EDENHOFER ET.AL.,(eds.)].Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, https://www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_chapter3.pdf. Last visited Oct 30, 2021.

9 Pradip Swarnakar, Climate Change, Civil Society and Social Movement in India, 253, Oxford Press Scholarship Online, <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780199498734.001.0001/oso-9780199498734-chapter-15>, last visited Oct 30, 2021.

10 Amanda Rosen, The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change, *Politics & Policy*, Volume 43, No. 1 (2015): 30-58. <https://onlinelibrary.wiley.com/doi/full/10.1111/polp.12105>, last visited Oct 30, 2021.

11 Id. at .32.

international agreement is reached between governments, it shall multiple the already unjust burdens on the poor and vulnerable. A rapidly growing number of social movements and civil society organizations across the world are mobilizing around this climate justice agenda.

Climate Justice Discussions are continuing frequently through the annual meetings of the Conference of the Parties (COP). There can be no debate of rights, risks and responsibility for climate change that does not employ, consciously or not, ideas about justice. This includes the complexity of climate change, the difficulty of assigning blame and the different principles for sharing burdens of climate action, and our collective (though unevenly distributed) complicity in causing it. The complex characteristics of the problem make it difficult to assess the future paths of carbon emissions.

Climate justice is known in a flock of ways, and reflects the fact that the causes and effects of climate change, as well as efforts to confront it, raise ethical, equity and rights issues. However, the mechanisms for delivering it are weak and under-developed. The tasks covered by climate justice, at what scales, how it can be measured, and which are the best means to deliver it are all heavily contested. It is moderately easier to identify injustices than to define and act upon more abstract notions of what justice looks like. The differences in the understanding of climate justice matter because they have serious consequences for those countries, regions and communities on the front line of the impacts of climate change and increasingly seem in efforts to accelerate decarbonisation.

The climate justice movement should not just be a movement that seeks to lower carbon footprints so that the world of privileged people is preserved.¹² Climate change problem is not only limited to nature. This problem has a human dimension. When humans are involved, justice matters. The marginalised and disadvantaged communities will be grossly impacted by global warming and related impacts. This movement has the opportunity to connect layers of sedimentary injustices to current risks and threats. Climate justice has to begin with the postulate that there is nothing normal about the climate conditions of today, which were shaped extremely by capitalism and other systems of power. It focuses on correcting decades of structural inactions and compels people to work with and protect communities bearing the effect of devastating earthquakes,

12 <https://www.carbonbrief.org/experts-why-does-climate-justice-matter>, BLOG (Oct 20, 2021 , 6.30 PM).

serious and disproportionate exposures to toxic substances, chronic illness, heavy floods and more. There are multiple issues such as economic insecurity, food insecurity, physical and mental hazards, and infrastructure, (housing quality, affordability, roads, and transportation), climate restoration and several others. We cannot address climate justice without attending these issues. That is why climate justice matters. The climate crisis severely threatens real lives and livelihoods. It is a real, clear and present danger to the realisation of basic human rights. People deserve to live free of fear and full of confidence that the infrastructure will not fail. They expect also that the places and people that have suffered open-handed environmental injustices for decades will be reasonably resourced and also well-equipped to live in our new climate reality.

SCOPE AND SIGNIFICANCE OF CLIMATE INJUSTICE-RESPONSIBILITY FOR CLIMATE IMPACTS

Climate change is already affecting people differently across the globe.¹³ The intensity of extreme events increased significantly. The vulnerabilities such as desertification, deforestation, sea level rise, loss of forest quality, reduced freshwater availability, cyclones, costal erosion, impact on food security, etc. Floods severely affected costal populations and infrastructure with long-lasting socio-economic developmental impacts.

Human influence on the climate system refers to human drives activities that lead to changes in the climate system due to worries of the earth's energy budget. Human influence results from emissions of greenhouse gases, aerosols, and ozone-depleting substances and land-use change, such as urbanisation. The increase of CO₂, Methane (CH₄), and Nitrous Oxide (N₂O) in the atmosphere over the industrial area is the result of human activities. Human influence is the chief driver of many ups and downs observed across the atmosphere, ocean, cryosphere and biosphere. Recent climate science assesses new scientific evidence relevant for a world whose climate system is rapidly changing, crushingly, due to human influence. Large scale climate changes represent a commitment for slow-responding element of the climate system. This results in continued worldwide increase in ocean heat content, sea level rise and deep ocean acidification.

13. IPCC Fourth Assessment Report: Climate Change 2007, <https://www.ipcc.ch/report/ar4/syr/>, last visited Oct 30, 2021.

In contexts of high inequality, low levels of literacy and an absence of accountability to and within communities, scope for corruption, misinformation and appropriation of forest land is rampant. Interventions have been largely piecemeal and insufficient in the absence of broader insights. By recognising the indigenous and marginalised people in accessing local, customary rights, governments often claim to involve communities in decision-making. However, the ways in which such involvement – without being part of a wider political project – may pose new risks and exclusions, and make local people responsible for the most hard decisions and trade-offs.

To avoid the worst effects of climate change, we have to work with the institutions, policy processes, and economies.¹⁴ We have to secure the best outcomes possible, while simultaneously advocating for and building alternatives that address deeper structural concerns. Addressing structural root causes such as historical injustices, land rights, political participation, and governance are ways to achieve climate justice goals in the long term.¹⁵ Towards this end, transformative climate justice is a useful concept to focus on the need to disrupt power relations and shift decision-making processes which lock in and reproduce climate injustices.

ATTRIBUTES OF CLIMATE JUSTICE

Climate justice has a diverse attributes which is reflected in current debates.

1. Procedural climate justice
2. Distributive climate justice
3. Recognition climate justice
4. Intergenerational climate justice

This aspect of climate justice is fundamentally about processes for making decisions about impacts of and responses to climate change that are fair, accountable, and transparent. Just procedures are important to regulate the distribution of goods and having the transparent and accountable decisionmaking processes in place. Basic to this are issues of public participation, due process, and representative justice. This can include access to information,

14 Peter, Supra note 1,

15 John S. Dryzek, Et AL, *Climate Change and Society: Approaches and Responses*, Oxford Handbook of Climate Change and Society, 2011, <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199566600.001.0001>, last visited Oct 30, 2021.

meaningful participation in decision-making, lack of bias on the part of decision makers, and access to legal procedures for achieving redress. Thus, questions of who gets to use what resources in a carbon constrained world raise issue of climate justice in the form of responsibility and entitlement. In practice, recognition justice means identifying vulnerable people whose vulnerability may be worsened as a result of a process such as a low carbon transition.

Regarding procedural climate justice, though some important work has been done, there is scope for significant interventions aimed at researching and improving the participation of least developed countries in the climate negotiations around issues of climate justice, relating to ongoing discussions on loss and damage, as well as climate finance. The process of participation, consultation and good governance matter ever more as market-based mechanisms to tackle climate change are developed through Paris Agreement's Sustainable Development Mechanism. Procedural justice through consultation process overlooked the importance of land in indigenous people's identity. Even before the consultation process started, land had already been divided among oil industry proponents. In this sense, the two components of procedural injustice, i.e., misrecognition and marginalisation underpins the issues with distributive justice. Indigenous population never had a say on project placements. Though these people are granted a space at negotiable tables in consultation process, their ability to influence the decision-making process is limited. The environmental impact assessment and the right to be consulted involve defined rules for participation, consultation and specific legal questions in spaces where indigenous peoples have specific interest. However, these procedural innovations have not made a difference for two reasons. First reason is that always the authorities fail to provide substantive information concerning what might happen if the project fails. Second reason is that the authorities always look for written submissions about the affected parties' concern and interests, thereby, deep consultation is avoided. This makes sense to plead that due process has not translated into full procedural justice.

In climate justice struggles, justice to future generations is a central mobilising claim, holding the current generation of decision makers and polluters to account now for failing to act and imposing on future generation's risks and dangers for which they are not responsible. Climate justice targets on the responsibilities of one generation to future generations. For victims, a voice and attaining legal

recognition is just a starting point. Almost many countries already have extensive bodies of environmental and human rights laws that go unenforced. We need to consider the law as just one among many strategies and tools that will help to achieve change and contain and reverse those actions which continue to inflict human right abuses on the poor.

Civil society organisations have actively mobilised marginalised community and trained them. This approach helped in raising public awareness about the laws and recourse to legal remedies and also in strengthening community monitoring system in cases of non-compliance.¹⁶ The Centre for Policy Research-NAMATI Environmental Justice Program trains and supports a network of community paralegals or grassroots legal advocates who work with communities affected by pollution, water contamination and other environmental challenges. NAMATI in India has trained a network of grass-root paralegal advocates to work with marginalized communities who are affected by water and land grabs. They use the legal empowerment approach to make communities aware of laws and regulations that can help secure much needed remedies for these problems that often arise out of non-compliance or violation of environmental regulations.¹⁷ This network is providing legal knowledge to communities around the world to help them defend their land, environmental, and other civil rights against abuse by commercial and political aggressors.

FINDINGS AND SUGGESTIONS

There are many hurdles for the poor to ensure access to climate justice. These include low-level of legal literacy, financial resources to bring and sustain cases or to settle them in the event of losing a case, distrust of the legal system and high standard of scientific proof that are required in common law practice to prove beyond doubt the relationship between cause and effect. This reflects a problem as to whether it is easy to create technical solutions to the task of corporate responsibility for human right violations. The real issue is whether the political will exists to put them in pace? Transformative justice aimed at, can only be achieved by unique procedural innovations that accept the special status of vulnerable as a matter of justice and not as an exercise of political bargaining to resolve a dispute. Our community have the right to achieve climate justice by:

16 <https://namati.org/wp-content/uploads/2020/02/Environment-Justice-Stories-on-Community-Paralegal-Work-in-India.pdf> , last visited Oct 30, 2021.

17 Id, at. 112.

1. Acknowledging the harm
2. Demanding accountability
3. Addressing power and privilege
4. Prioritising equity
5. Transforming systems
6. Intergenerational justice

CONCLUSION

Major drawback of the current human rights framework is its claims-based approach to enforcement. The point requiring attention is expanding the scope of states' duties beyond conventional notions of territory and jurisdiction. Though the scientific consensus is sufficiently vigorous to anticipate extreme negative consequences for poor and marginalised communities, unchecked climate change will lead to widespread deterioration in the means of survival and ultimately death for an increasing number of the world's poor. Outside the legal system, young people around the world are channelling the power of human rights language to demand stronger action from governments and highlight the seriousness of intergenerational climate injustice.

We have deliberately locked future generations into a life of limited rights and opportunities, when it is within our power to leave them a world where the full range of human rights can be enjoyed by everyone. A challenge to jurists is to expand rules of legal standing to enable future generations' claims. Human rights principles have potential to underwrite to this challenge, even if they are situated outside the conventional human rights framework. Human rights jurisprudence provide a language for us to articulate the nature of harms facing future generations, surrounding a broad range of influences from fundamental needs through to economic, social and cultural rights. It has a potential to facilitate a better balancing of benefits and burdens across generations. To deal with climate change-related human rights issues, we must work to address intergenerational climate injustice in parallel with urgent action on current threats, recognizing that the best way to protect the rights of future generations is to take strong action now. A negotiation strategy ahead of Conference of Parties 26 in 2021 would grapple with the problem of combating climate change and initiate concrete steps toward climate justice.

AN ANALYSIS OF POLICY CONTOUR RELATED TO CHILD LABOUR AND EDUCATION OF CHILDREN

Dr. Roopa S*

ABSTRACT

Right to Education and Child Labor are intertwined with each other. The right to education is guaranteed under Part III of our Constitution as a fundamental right. The Constitution of India has recognised the importance of the welfare of children and their development at the time of its drafting and included within itself many provisions for their upliftment and protection of interests. The Right to Education is guaranteed under the Constitution to protect children and to keep them at bay from employment. The incidence of child labour has resulted in absence of schooling. Apart from Constitution, children are protected from exploitation and employment in hazardous places through various legislations. The judiciary has been playing a significant role in the implementation of these laws to protect children and ensure their development.

In the context of the relationship between the right to education and child labour, it is imperative to analyse the policy framework towards each of these aspects to understand their development individually over the years and the prominence it holds in the present-day situation. Policies provide logical framework to achieve the set objectives. It lays down priorities and guides resource allocation. Holistic or life-cycle approach should be adopted to meet the

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needs and issues of children. It should be addressed through constitutional, statutory, legislative and policy framework of the state. The Constitution mandates the government to take measures for the protection of children. Thus, in India various governmental policies are in place which aims at over-all welfare of the children including education, health, nutrition and other matters.

This research paper seeks to analyse the policy framework in India for ensuring right to education and prevention of child labour. It also makes an attempt to examine the efficacy of the policy and the extent to which they are made effective through the legislations.

Key Words - Child Labour, Education, Policy, Constitution

INTRODUCTION

Right to Education and Child Labor are intertwined with each other. The right to education is guaranteed under Part III of our Constitution as a fundamental right. The Constitution of India has recognised the importance of the welfare of children and their development at the time of its drafting and included within itself many provisions for their upliftment and protection of interests. The Right to Education is guaranteed under the Constitution to protect children and to keep them at bay from employment. The incidence of child labour has resulted in absence of schooling. Apart from Constitution, children are protected from exploitation and employment in hazardous places through various legislations. The judiciary has been playing a significant role in the implementation of these laws to protect children and ensure their development.

In the context of the relationship between the right to education and child labour, it is imperative to analyse the policy framework towards each of these aspects to understand their development individually over the years and the prominence it holds in the present-day situation. Policies provide logical framework to achieve the set objectives. It lays down priorities and guides resource allocation. Holistic or life-cycle approach should be adopted to meet the needs and issues of children. It should be addressed through constitutional, statutory, legislative and policy framework of the state. The Constitution mandates the government to take measures for the protection of children. Thus, in India various governmental policies are in place which aims at over-all welfare of the children including education, health, nutrition and other matters.

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POLICY FRAMEWORK ON CHILD LABOUR

The policy is a system that provides a reasonable framework for the achievement of intended objectives. Several policies, plans and programmes relating to children have been initiated by the government for their benefit and well-being. Some of the major policies relating to children in India are as follows:

A. National Policy for Children, 1974

The states shall provide adequate services to children, following birth and throughout childhood so as to ensure their full physical, mental and social development. The Salient features of the policy comprise providing comprehensive health programme, nutrition services to remove deficiencies in the diet of children, free and compulsory education up to 14 years of age and non-formal education facilities. The states shall provide equality of opportunity to all children, protect children against neglect, cruelty and exploitation and lastly special programmes may be undertaken to encourage differently abled children. This was the first ever policy that made an attempt to strategize welfare measures for children. Now there are new policies in place which conforms to the standards laid down by the International Conventions.¹

B. National Policy on Child Labour, 1987

This Policy aims at rehabilitation of children working in hazardous occupations and processes through special schools and finally mainstreaming them into the formal schooling system. The policy contains the action plan for tackling the problem of child labour which is categorised into three folds: legislative action plan, focus on convergence strategy of central government and project-based plan of action.²

The Action Plan of National Policy on Child Labour for tackling the problem of Child Labour envisages as follows:

- 1 "National Policy for Children 1974", Government of India Department of Social Welfare, Delhi, August 22, 1974, available at http://www.forces.org.in/publications/national_policy_for_children_1974.pdf (accessed on 18/04/2021)
- 2 Child Labour Policies, available at <https://labour.gov.in/childlabour/child-labour-policies>, (accessed on 28/04/2021)

a) Legislative Action Plan

In pursuance of the policy, the Government enacted the Child Labour (Prohibition & Regulation) Act, 1986 which prohibits the employment of children below the age of 14 years in certain employments and regulates the conditions of work of children in certain other employments. The Union of India monitors the enforcement of the legislation from time to time through special drives and awareness programmes. It provides for identification, rescue and rehabilitation of child labourers by the way of repatriation. It has also identified bridge education with the ultimate objective of mainstreaming them into the formal system of education. Provision is also made for pre-vocational training to the rescued children.

b) The Convergence Strategy of Ministry of Labour for Eradication of Child Labour

There should be focus and convergence of general development programmes for the benefit of children wherever possible. A Core Group on the convergence of various welfare schemes of the Government has been constituted in the Ministry of Labour & Employment to ensure that the families of the children under employment are given priority for their upliftment. Considering poverty and illiteracy as root causes for child labour, the government is following educational rehabilitation of the children which has to be supplemented with economic rehabilitation of their families so that they are not compelled by the economic circumstance to send their children to work.

The Ministry of Labour is taking various pro-active measures towards schemes of different Ministries:

- i. Ministry of Women and Child Development for supplementing the efforts of this Ministry in providing food and shelter to the children withdrawn from work through their schemes of Shelter Homes, etc.
- ii. Ministry of Human Resource Development for providing Mid-day meal to the NCLP (National Child Labour Project) school children, teachers training, supply of books, etc under Sarva Shiksha Abhiyan and mainstreaming of NCLP children into the formal education system.
- iii. Convergence with Ministries of Rural Development, Urban Housing & Poverty Alleviation and Panchyathi Raj for covering these children under

their various income and employment generation schemes to ensure economic rehabilitation.

- iv. In each State, one officer from the State Department of Labour has been nominated as Anti Human Trafficking Unit (AHTU) to act as link officer for co-ordinating with the Ministry of HRD in that state for the prevention of trafficking of children. CBI is the nodal anti-trafficking agency.
- v. Convergence with Ministry of Railways for generating awareness and restricting trafficking of children.
- vi. Furthermore, the Ministry is converging in implementing a pilot project against Child Labour to contribute to the prevention and elimination of hazardous child labour, including trafficking and migration of children for labour.

c) Project-based Action Plan of Action

This aims at the launching of projects for the welfare of working children in areas of high concentration of child labour. Pertaining to educational rehabilitation, the Government has been implementing the National Child Labour Project Scheme (NCLP) which was started in 1988 to rehabilitate child labourers in pursuance of the National Child Labour Policy. It is a central government scheme set up at the district level under the chairmanship of the Collector/District Magistrate for overseeing the implementation of the project. Under the scheme, the children are withdrawn from the hazardous occupations and processes based on the survey conducted and then put into special schools and ultimately enrolled in the formal schools. Ministry of Human Resource Development urged that the NCLP schools should serve as special training centres for enrolled children or dropped out children following the provisions of Section 4³ of the Right to Education Act, 2009 and Rule 5 of the Right of Children for Free and Compulsory Education (RTE) Rules, 2010.⁴

3 “Where a child above six years of age has not been admitted in any school or though admitted, could not complete his or her elementary education, then, he or she shall be admitted in a class appropriate to his or her age; Provided that where a child is directly admitted in a class appropriate to his or her age, then, he or she shall, in order to be at par with others, have a right to receive special training, in such manner, and within such time-limits, as may be prescribed; Provided further that a child so admitted to elementary education shall be entitled to free education till completion of elementary education even after fourteen years.”

4 Forum of Karnataka Retired Education Officers, Bengaluru, Karnataka Right of Children to Free and Compulsory Education Rules 2010, available at <http://righttoeducation.in/sites/default/files/draft-rules-karnataka-III.pdf>(accessed on 19/04/2021)

In addition, efforts are also made to target the families of these children so as to cover them under various developmental and income/employment generating programmes of the Government so as to raise the economic standard of the family. To ensure the proper implementation and monitoring of this scheme and to create awareness about the menace of child labour, the State Resource Centre (SRC) has been formed in every state and union territory which will coordinate and monitor the scheme through the PENCiL portal under the chairmanship of State Labour Secretary. Furthermore, the government has simplified the guidelines for implementation of the NCLP Scheme and expanded the coverage of the Scheme in all districts having high incidence of child labour. Ministry of Labour and Employment has issued instructions to State Governments for surveying child labour in districts wherein there is a possibility of incidence of child labour.⁵

C. National Health Policy, 2002

The first formal National Health Policy was formulated in 1983 which after the subsequent revision has resulted in the National Health Policy 2002. The main objective of the policy is to achieve an acceptable standard of good health for the Indian population, decentralising the public health system by upgrading infrastructure in existing institutions, ensuring more equitable access to health service across India.⁶ School children are covered for promotion of health seeking behaviour. It is regarded as the most cost-effective intervention where health awareness is extended to family and further to future generation. The policy envisages giving priority to school health programmes that disseminate information relating to health and family life. The policy identified child labour and sub-standard working conditions as causes for occupational linked ailments.⁷

D. National Charter for Children, 2003

This charter intends to secure for every child its inherent right to be a child and enjoy a healthy and happy childhood, to address the root causes that negate the healthy growth and development of children. It is to awaken the conscience of the community in the wider societal context to protect children from all forms of abuse while strengthening the family, society and the nation.⁸

⁵ supra at 3

⁶ National Health Policy, 2002 available at https://nhm.gov.in/images/pdf/guidelines/nrhm-guidelines/national_nealth_policy_2002.pdf, (accessed on 28/04/2021)

⁷ ibid

⁸ National Charter for Children, 2003 available at <http://www.jeywin.com/wp-content/uploads/2009/12/National-Charter-for-Children-2003.pdf>, (accessed on 28/04/2021)

E. National Plan of Action for Children, 2005

This ensures that all rights of children up to the age of 18 years are secured. The National Policy for Children, 1974 is the policy framework of this plan and the UN Convention on the Rights of the Child (UNCRC) is the guiding instrument for implementing all rights for all children up to the age of 18 years. Universalization of early childhood care and development, quality education for all children, addressing and upholding the rights of children in difficult circumstances; securing for all children legal and social protection from all kinds of abuse, exploitation and neglect and complete abolition of child labour are few amongst the twelve key areas which are given prominence relating to child labour and education.⁹

F. National Policy for Children, 2013

This Policy recognises that any person below the age of 18 years is a child and that a long term, sustainable, multi-sectoral, integrated and inclusive approach is necessary for the overall development and protection of the children. This policy guides and informs all laws, policies, programmes and plans affecting children. It further holds that survival, health, nutrition, development, education, protection and participation are the undeniable rights of every child and the key priorities of this policy.¹⁰

POLICY FRAMEWORK ON EDUCATION OF CHILDREN

In order to achieve the goal of Universal Elementary Education, the Constitution through Directive Principles of State Policy provided: “All states shall make an endeavour to provide within 10 years of commencement of Constitution free and compulsory education to children till they reach the age of 14 years.” In order to facilitate the UEE, National Council of Education Research and Training (NCERT), National Institute of Education, Planning and Administration (NIEPA) and many other institutes were formed in the 1960s. To ensure the implementation of the UEE program, the government drew National Policy on Education, 1986. Policies relating to education since the time of independence in India are as follows:

9 National Plan of Action for Children, 2005 available at <https://www.childlineindia.org/uploads/files/knowledge-center/National-Plan-of-Action-for-Children-2005.pdf>, (accessed on 28/04/2021)

10 National Policy for Children, 2013 available at https://wcd.nic.in/sites/default/files/npcenglish08072013_0.pdf, (accessed on 28/04/2021)

A. National Policy on Education, 1968

During the Post-independence period, problems of educational reconstruction were reviewed by several Commissions and Committees. The government was convinced that education is essential for the economic and cultural development of the nation. It stressed on the need for radical construction of the education system. The policy drew attention towards the need for continuous efforts to expand educational opportunity and also intensive efforts to raise the quality of education at all stages. It laid greater emphasis on the development of science and technology, cultivation of moral and social values and closer relation between education and the life of the people. It was to be followed by five-yearly reviews to review the progress and also to work out new policies and programmes.¹¹

B. National Policy on Education, 1986

The Policy was in furtherance of Constitutional goals of socialism, secularism and democracy enshrined in the Constitution. This policy implies that to a certain level all students irrespective of caste, creed, location or sex must have access to education of comparable quality. It introduced decentralisation of education, common school curriculum, Open University and distance education. Sufficient funds were made available for education and universalization of education in the country.¹² However, these policies were not successful in achieving the set goals. Therefore, the policy was modified in 1992.

C. National Policy of Education, 1986 Revised Programme of Action, 1992

This policy consists of a brief introduction to the holistic nature of child development concerning early childhood care and education. The National Policy on Education was modified in 1992. The main objective of Programme of Action, 1992 was to establish a national system of education for all students irrespective of caste, creed, sex and religion so as to have access to education of comparable quality.¹³

11 National Policy on Education, 1968 available at https://www.education.gov.in/sites/upload_files/mhrd/files/document-reports/NPE-1968.pdf, (accessed on 28/04/2021)

12 National Policy on Education, 1986 available at http://psscive.ac.in/assets/documents/Policy_1986_eng.pdf, (accessed on 28/04/2021)

13 National Policy on Education 1986, Programme of Action 1992, available at https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/npe.pdf, (accessed on 28/04/2021)

Ramamurthy Committee was set up to review and make recommendations to the National Policy on Education (NPE). The Committee submitted its report in 1990 and eventually, the Central Advisory Board of Education (CABE) set up another Committee to consider the modifications in NPE based on the report of the Ramamurthy Committee and submitted its report in 1992. The Programme of Action, 1992 came into existence as a consequence of the report submitted by the Committee in 1992.¹⁴

The policy focussed on creating an Action Plan to implement early childhood care and education, elementary education, education of SC/ST, minorities and other backward sections. It envisaged that the revised plan should implement free and compulsory education to all children up to 14 years of age before the commencement of the 21st century. It led to the opening of new primary schools in un-served habitations and a new scheme of voluntary schools was launched to cater to the needs of children in neglected, hilly, tribal and difficult areas where there is no provision for schooling. It also established NFE (Non-Formal Education) Centres for catering to the needs of children who are not able to or who cannot attend formal school.¹⁵ Along with which it increased the teacher-pupil ratio and also introduced the scheme of 'Operation Blackboard' to provide minimum essential facilities to all primary schools in the country. Micro-planning is a process of designing 'a family-wise and child wise plan of action' which was adopted to ensure every child especially girls and SC/ST children regularly attend and participate in school or NFE Centre and continues his/her education at a suitable place and completes at least 8 years of schooling or its equivalent at the NFE.¹⁶ The policy makers were aware of the fact that a large number of out of school children were unable to access education and hence a systematic programme of non-formal education for such children was initiated. It also requires employers of working children to provide rest and nutrition as well as to make arrangements for part-time education of good quality along with provision for punitive action on failing to provide the same.¹⁷

14 National Policy on Education, 1986 (as modified in 1992) available at https://www.education.gov.in/sites/upload_files/mhrd/files/document-reports/NPE86-mod92.pdf, (accessed on 28/04/2021)

15 National Policy on Education 1986, Programme of Action 1992, available at National Policy on Education 1986, (accessed on 18/05/2021)

16 Id.

17 ibid

D. Sarva Shiksha Abhiyan

It was introduced in 2001 to implement Universal Elementary Education in a time-bound manner, as mandated by the 86th amendment of the Constitution of India. The amendment declared free and compulsory education to the children of 6-14 years age group as a fundamental right.¹⁸

Its objective is universal access and retention, bridging of gender and social gaps in education and enhancement of learning levels of children. Some of the components envisaged under the scheme to assure access and retention of children are school and social mapping, opening of new primary schools, conversion of Education Guarantee Scheme Centres (EGSC) to schools and special training for age-appropriate admission. Kasturba Gandhi Balika Vidyalaya (KGBV), an innovation fund for equity was set up to bridge the gender gap in literary levels and to enable children to join elementary education.¹⁹ The objective is achieved through the convergence of programmes and interventions of other ministries/departments.

E. National Education Policy, 2020

With an aim to have an education system in India second to none by the year 2040, the National Education Policy 2020 came into existence. It proposes revision and revamping of the educational structure in all aspects. It provides that quality education must be provided to all students particularly to the historically marginalised, disadvantaged and under-represented groups. It lays greater emphasis on the development of the creative potential of each individual. The purpose of this is to develop good human beings capable of rational thought and action, possessing compassion and empathy, courage and resilience, scientific temper and creative imagination, with sound ethical moorings and values. It aims at producing engaged, productive, and contributing citizens for building an equitable, inclusive, and plural society as envisaged by our Constitution.²⁰ It envisages providing quality early childhood development, care and education by 2030 by moving every child till the age of 5 years to a 'Preparatory Class' or 'Balavatika'.²¹ The 75th round household survey by NSSO in 2017-18 indicates

18 Sarva Shiksha Abhiyan, 2001 available at <https://darpg.gov.in/sites/default/files/Sarva%20Siksha%20Abhiyan.pdf>, (accessed on 28/04/2021)

19 ibid

20 National Education Policy, 2020 available at https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf, (accessed on 28/04/2021)

21 supraat p.4

that the number of out of school children between the age group of 6-17 years is 3.22 Crores. The policy has taken two initiatives to prevent children from dropping out and also to bring back the children who have dropped out of school. The first step is to provide effective and sufficient infrastructure, re-establish the credibility of government schools, and provide safe and practical conveyances or hostels especially for girl children. It also established alternative and innovative education centres to ensure that the children are brought back into mainstream education.²² Secondly the students and their learning levels should be carefully tracked to achieve universal participation.²³

ASSESSMENT OF POLICY FRAMEWORK ON CHILD LABOUR AND EDUCATION

There is an undeniable relationship between education and child labour. The Action Plan of National Policy on Child Labour, 1987 for tackling the problem of child labour made provision for convergence strategy wherein Ministry of Labour is expected to co-ordinate with various other ministries such as Women & Child Development, Human Resource Development, Rural Development, Urban Housing, Panchayathi Raj and other governmental departments. Considering poverty and illiteracy as root causes for child labour, the government considered it quintessential to supplement educational rehabilitation of the children with economic rehabilitation of their families so that they are not compelled by the economic circumstance to send their children to work. The National Policy for Children, 2013 recognised that any person below the age of 18 years is a child and that a long term, sustainable, multi-sectoral, integrated and inclusive approach is necessary for the overall development and protection of the children. Although the policies have time and again stressed upon the need for convergence and treating a person below the age of 18 years as child, both have not found the spotlight in reality. The Ministry of Labour has also developed an online portal PENCiL (Platform for Effective Enforcement for No Child Labour) which aims to provide a mechanism for both the enforcement of the legislative provisions and the effective implementation of the NCLP. However, there is no updating of data and monitoring of the same.

The first ever policy measure of the government for free and compulsory education and facilities for informal education was made through National Policy

22 supraat p.6

23 ibid

for Children in 1974. The National Policy on Education, 1968 drew attention towards the need for continuous efforts to expand educational opportunity and also intensive efforts to raise the quality of education at all stages. Revised Programme of Action, 1992 of National Policy of Education, 1986 envisaged free and compulsory education to all children up to 14 years of age before the commencement of the 21st century, child-wise action plan, voluntary schools and Non-Formal Education Centres for catering to the needs of children who are not able to or who cannot attend formal school. According to Sarva Shiksha Abhiyan, UEE could be achieved through the convergence of programmes and interventions of other ministries/departments. The National Education Policy, 2020 has taken initiatives to prevent children from dropping out and also to bring back the children who have dropped out of school by providing necessary infrastructure in schools and establishing alternative and innovative education centres.

CONCLUSION

On an evaluation of the policy framework related to child labour and education, one can easily infer that the government has ever since made efforts to abolish child labour and provide education. It is high time that the policies are implemented and made effective through the legislations. The age of child should be uniform across all legislations to mean a person below the age of 18 years and completely prohibit the employment of children. Education should be made free and compulsory to all children until they attain the age of 18 years. Technical and vocational education should be made accessible to all. Efforts should be made by the government to provide establish sufficient number of schools and provide necessary infrastructure in terms of quality teachers and adequate infrastructure. The NCLP should be implemented so that the rescued child labourers receive appropriate education. Economic rehabilitation of parents of rescued child labourers should be effectuated through convergence of various governmental departments and ministries. Poverty should not be taken as an excuse to tolerate child labour. Schools provide safety net to the children by protecting them from all kinds of abuse. The government should take measures to eliminate child labour, provide education and thus ensure fundamental right to education to all children.



EMPOWERMENT OF WOMEN THROUGH TECHNOLOGY - A CRITICAL STUDY

K.S. Jayakumar* & Prof (Dr.) C. Basavaraju**

“There is no tool for development more effective than empowerment of women”-
KOFIANNAN

ABSTRACT

This paper examines the need for promotion women empowerment strategies through technology and focuses on the broader opportunities opening for women through technology. India is ranked in the global player of the 21st century. It is advancing economically and technologically. Women around the world experience poverty at higher rates than men because of certain custom and cultural norms. In many developing countries, women are confined to traditional roles and have limited access to capital, training and technology that could enrich their lives. Such inequality has broad consequences that affect not just women, but the entire community in impoverished regions. Empowering women and ensuring their health and safety correlates directly with ensuring food security for the whole community. The health and financial stability of mothers, in particular, has a huge influence on the welfare and nutrition of children. The International Centre for Research on Women (ICRW) has studied the ways in which the improved economic status of women positively affects children, families and societies.

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Keywords: Information and Communication Technologies (ICTs) and Development, Information and Technology Act 2005, Technological Initiatives, Role of Government and Private Sectors and Challenges of ICT use for women's empowerment.

INTRODUCTION

Kofi Annan, a famous Ghanaian diplomat Quotes that “There is no toll for development more effective than empowerment of women.”¹

Swami Vivekananda, a great Indian Philosopher Quoted that “There is no chance for welfare of the world unless the condition of Women is improved. It is not possible for a bird to fly on only one wing”. Thus, in order to achieve the status of a developed country, India needs to transform its colossal force into an effective human resource and this is possible only through the empowerment of women. Women empowerment strives for certain basic and fundamental rights for women broadly termed as women rights. They roughly include, the right to bodily integrity and autonomy: to hold public office, to have equal rights in family law to work; to fair wages or equal pay: to education and many more. In India, the Ministry of Human Resource development (MHRD-1985) and the National Commission for Women (NCW) have been worked to safeguard the rights and legal entitlement of women. Information technology is one of the most vivid areas in the world today. Technology offers countless opportunities to maxima efficiency. It is one of the most powerful weapons for development of any field. Global Fund for Women's Technology initiative aims to help and the gender technology gap and empower women and girls to create innovative solutions to advance equality in their communities. This article aims at exploring the role of technology in empowering women. It puts a spot light oh different ways Information Technology has benefitted women.

ICT AND DEVELOPMENT

The role of Information and Communication Technologies (ICT) as a tool for development has attracted the sustained attention of the United Nations over recent years. Strategic Partnerships have been developed with donors, the private sector and civil society, and working groups and task forces have been

¹ <http://conceptresearchfoundation.com/2015/10/13/empowerment-of-women-a-special-study-on-sexual-harassment-of-women-at-work-place-and-laws-relating-to-such-offence>.

established to enhance inter-agency collaboration throughout the United Nations System.

In 2000, the Economic and Social Council adopted a Ministerial Declaration on the role of information technology in the context of knowledge based economy². In 2001, the Secretary General established a high level information and communication Technologies Task Force to provide overall leadership to the United Nations on the formulation of Strategies to put ICT at the Service of development³

The Millennium Declaration adopted in 2000 underscored the urgency of ensuring that the benefits of new technologies, especially ICT, are made available to all. To achieve this goal, a United Nations World Summit on the Information Society (WSIS) was planned in two phases. The first phase, the Geneva Summit in December 2003, aimed to develop political will and to establish the foundations for an Information Society for all. In total, 175 Governments endorsed the Declaration of principles⁴ and plan of Action at the first phase.⁵

The Second phase of WSIS is planned for November 2005 in Tunis. Information and Communication Technologies comprise a complex and heterogeneous set of goods, applications and services used to produce, process, distribute and transform information. The ICT sector consists of segments as diverse as telecommunication, television and radio broadcasting, computer hardware, software and services and electronic media (for example, the Internet and electronic mail)⁶

Information and communication needs can be met by more traditional means, such as print media and fixed telephone lines, or by satellite technology, mobile phones and the Internet. Traditional technologies continue to be important for large numbers of people around the world, particularly in rural areas. However, new technologies have a vast potential for empowerment which needs to be fully exploited.⁷ The InfoDev report indicates that to harness ICT more effectively for development and poverty reduction, ICT more effectively for

2 United Nations Economic and Social Council 2000, para 6.

3 United Nations Information and Communication Technologies (UNICT) Task Force, 2002, Para. 2

4 United Nations, 2003 a.

5 United Nations, 2003 c.

6 Gillian Marcelle, 2000,

7 Concepcion Gracia Ramilo and Pivilanueva, 2001 para. 6,

development and poverty reduction, ICT must be mainstreamed as tools for border strategies and programmes for building opportunity and empowering the poor. The report further states that the ICT for development agenda should identify the broader changes required in developing countries, the role of ICT can have in effecting these changes, and to be more selective and strategic about the attention and resources devoted to the dissemination of these technologies.⁸

INFORMATION AND TECHNOLOGY ACT – 2005

The inevitable course of action is to convene a gender perspective on technology” the concern raised in this expression is applicable to all walks of life. As has been experienced the world over women has limited access to technologies in India. However, there are now enough experiences to show that when women are trained they show remarkable understanding and control in using technologies effectively.

a) Importance of Information Technology for women empowerment:⁹

Social Empowerment:

- New knowledge and information
- Awareness and understanding of issues
- Skills, abilities, and competence
- Support, Friendship and inspiration
- Participating in group activities with women

Political Empowerment:

- Participating in Policy making
- Taking action to change your life or your community
- Networking and lobbying
- Changing stereo types about rural women

⁸ Kerry S. McNamara para 3.

⁹ SUREKHA K. AND VANAJA.A. EMPOWERMENT OF WOMEN THROUGH TECHNOLOGY KARNATAKA LAW JOURNAL PUBLICATION (872-874)2017

Psychological Empowerment:

- Self – confidence and self – esteem
- Feeling more valued and respected
- Motivation interest and enthusiasm
- Freedom to do thing or express yourself

Technical Empowerment:

- Knowledge about ICTs.
- Skills and competence in using new ICTs
- Awareness and understanding about ICTS.
- Access to high quality technology.
- Confidence to use and speak about ICTs.

Economic Empowerment:

- Women’s Control over income
- Relative contribution to family support.
- Employment opportunities.

b) Role of Communication Technology:

Information technology is the common denominator that links people, irrespective of caste, class, sex, religion, race or political alignments, this is why it becomes even more important to evaluate and assess the role of communication technology in empowering women, particularly from the point of view of access and utilization, gender equality presupposes elimination of all kinds of bias against women and communication technology intervention can accelerate the pace of equality through gender sensitization nutritional awareness and causes, prevention and treatment of disease can be disseminated for and wide via communication technology most villages are still without roads usable by cart, not do they have a stable electricity supply.

i) Communication Technology and Education for women:

In the last 30 years communication technologies have been used in a number of educational and developmental applications while many of the projects have been promising in the long run they have been uneven in performance and impact, Despite the vast range of experiences, there is little conviction in the education sector that communication technologies can be designed to effectively address the problems of education. The former secretary for Human Resource Development was presently surprised when teachers demanded the extensive use of video for training.

Annual Report of Human Resource Department Government of India-1990. The National Policy on education 1986 observed that modern communication technologies have the potential to bypass several stages and special schemes to provide primary teacher's training through video and television.

ii) Women and Technical Education:

Distance Education has come to stay in this country it holds great promise for the future with emphasis on quick training and communication of information. Department of Women and child development has made a modest start with small experiments in educating people at the grass roots level on procedures for obtaining loans from the Rashtriya Mahila Yojana (RMY) for microenterprises. The distance mode has also been used for nutrition education and organization of women's groups under the Indira Mahila Yojana (IMY) on an experimental basis.

IV. Technological Initiatives:¹⁰

- Improved access to and control of technology for women and girls, especially in remote and marginalized areas.
- Creative technology based solutions to key gender equality issues like violence, health, and economic and political empowerment.
- More safe online spaces for women and girls, and women's rights organising.
- More women and girls playing leadership roles in designing and shaping technology, especially to advance women's rights.

10 KAVYA M, WOMEN EMPOWERMENT: THE ROLE OF TECHNOLOGY KARNATAKA LAW JOURNAL PUBLICATION, BENGALURU, PG 1005 & 1007.

- Stronger, more inclusive national and global women's movements, collaborating regularly to share resources and develop common advocacy strategies.

Initiatives should promote:

a) Online Learning (e-learning) and Mobile Learning (m-learning):

e-learning and m-learning opportunities can empower woman with broader, more flexible access to both informal and formal education. Through use of desktop, laptop and tablet computers, MP3 players, and mobile phones will help transforming the delivery and reception of knowledge by offering a more collaborative, contextualized and interactive learning experience.

b) Online Banking (e-Banking) and Mobile Banking (m-Banking)

Through online and mobile banking, poor women, and even illiterate women, can access affordable, secure banking services which help them to better manage their family's income, facilitate financial transformations related their businesses, and encourage them to save for their children's futures. Further, through digital and mobile technologies, women can save the time, transport expenses and /or lost income they would normally incur in transit to banks, e – Banking and m-Banking can also be used by women borrowers and lenders to more easily receive and repay their micro loans.

c) Online Health (e-Health) & Mobile Health (m-Health):

Access to digital and mobile technologies and the Internet grants women and girls, particularly those in isolated, rural areas, timely, easy access to healthcare as well as vital information related to their health. These tools also have the power to expand training opportunities for health care professionals and their ability to diagnose diseases and track patient's progress, keeping more women & girls in good health. Mobile potential is huge and when it's cracked, it will be transformational.

V. Role of Government and Private Sectors:

1. Government:

Yashaswini Nagara Hagu Grameena Abhivruddi Parishat in association with Karnataka State Women's Development Corporation¹¹ has launched e-mail project to women's drawn form over 20 villages in 11 districts of the state. Then, each trained women who is called village service provider, will be given a laptop printer, UPS, soil testing kit, LCD Projector, digital camera, e-mail dual language software and educational CDs, Internet connection, IRCTC currency for booking rail and air tickets at a cost of Rs. 1,80,000. nationalized banks will support these women by providing loans. Apart from loans, the government will give Rs. 10,000 us subsidy to each woman under the "AsareProgramme". Personality development courses Yoga classes are the added benefits, many women with their new born are attending the training camp and the organizers have set up a crèche and appointed women to take care of the children.

Gyandoot: Gyandoot is an e-government project started by the state government of MP (India) that won the prestigious Stockholm challenges in award in 2000. The project provides a network of computers connecting the rural areas and fulfilling the everyday, information related needs of the rural areas and fulfilling the everyday, information related needs of the rural people.

*Data motion foundation in collaboration with the UNESCO has set up a community media centre in a Madarasa in extremely backward seelampur –Zaffrabad in New Delhi. The Project aims to empower girls with the basic computer skills for their better future.

2. Private Sector:¹²

Project Shakti launched by HindustanUnilever Promotes internet penetration among rural Women. The Project now provides services to 135000 Villages, across 15 states and has developed 45000 women entrepreneurs. Project Shiksha of Microsoft and Internet Bus of Google are also contributing to increase internet awareness.

11 Karnataka State Women's Development Corporation 202.138. 105. 9/kswdc/home.htm

12 Role of information technology in a women empowerment dr. Bima

www.Zenithresearch.org.in/images/stories/pdf/.../18-EIJMMS-Vol.2- Issue 1.pdf.

a) **NASSCOM:** National Association of Software and Service Companies Provide mentoring and empowering Women managers across junior, middle and senior level from the IT industry Through Various workshops, activities and training sessions.

* SwayamKrishiSangam (SKS) is using ICT's Such as smart cards and hand held devices to improve microfinance projects to empower poor women.

* Community radio in Andhra Pradesh has become Popular due to development of ManaRadio, a community radio station run by members of the women's Self-Help Groups (SHGs) in orvakal Village, Kurnool district, Andhra Pradesh. Realizing the role that community Media can play in development, empowerment and the right to information.

VI. Challenges of ICT use for Women's Empowerment:

Women face enormous challenges to use ICT for their own empowerment using and benefitting from ICT requires education, training affordable access to the technology. Information relevant to the user and a great amount of support. Access to affordable services and availability of infrastructure is, without doubt, a major requirement if ICT are to be used for women's empowerment, Availability of electricity, transport, and security may also influence the use of ICT. Radio and television, as the widest form of communication, provide one way of solving information dissemination. In addition to being used as an effective ICT means for development, radio and television could be better medium that can be used as a means of re – socializing the population about the benefits of ICT for development.

Radio & Television Programmes can be developed to educate women on various development issues, including the several of ICT, thus increasing awareness and knowledge of ICTs uses when possible, such programmes should be developed and conducted by women and their content should reflect a gender perspective. Even when in fracture is available, affordable access is concern in most developing countries. Universal access policies aimed at developing solutions that provide community access at affordable prices. Expansion of public telephone & ICT access points are examples of these solution. Telecenters,¹³ however, does not guarantee affordable access because most

13 MITTER.S., TELEWORKING AND TELE TRADE IN INDIA ,ECONOMIC AND POLITICAL WEEKLY, 35, 26,2241-2252.

telecenters are run as business ventures. That need to be sustained and therefore change for services according to their costs. Lack of local and community related content in local languages continues to be a major barrier to women's use of ICT for their empowerment. Multimedia can be developed to provide information both in spoken and written language. The challenge is to develop content that is relevant & useful to communities in their own language.¹⁴

CONCLUSION:

“Connected women gain more strength, Disconnected, we will always stay behind.” Says Kapilaben Vankar, a lady farmer and member of the self-employed women's Association. Empowering women socially, economically, educationally, politically and legally is going to be a mighty task. The overall impact of ICT on women's empowerment as revealed through this research as reflected in intended and unintended outcomes is to some extent positive and heartening. It is relevant to understand here that information & communication technology is not a solution in itself and can't solve all the problems women experience, but it could alleviate the gap by bringing new information resources and communication channels for marginalized communities like women. The analysis has revealed that the majority of women, whether in employment or not, did perceive a positive impact in terms of ability to gain economic empowerment. What looks to be less emphasized by women is the ability to use ICT as a tool for societal and community development, and to some extent, as networking and socialization apparatus.



14 GOTHASKAR, TELEWORKING AND GENDER, Economic and Political weekly, 35, 26, 2293-2298

AN ANALYSIS OF THE PSYCHOLOGY OF CHILD RAPIST

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ABSTRACT

Rape is considered as a heinous crime. In India, it is the fourth most common crime against girls. Females suffer a lot in the form of a double-edged sword as at one end many rapes are still not reported in India. Section 375 of the Indian Penal Code (IPC) made punishable the act of sex by a man with a woman if it is done against her will or without her consent. The act of sex is also considered as a rape when it is done with her consent by putting her or any person in whom she is interested in fear of death or of hurt. It is also considered in the category of rape when it is done (with or without her consent) with minor girls. Rape is increasingly gaining visibility as a major public health concern. Across India, fear of rape is a constant companion as girls may have to confront it at each and every corner, road and public place at any hour. By keeping this view into consideration, the present paper focuses over Raping a minor is it a psychological problem. It is purely based on doctrinal work. It was found that there are many issues like lack of public safety, psychological ill etc. are blamed for the rape in India. Besides, most of the rape victims reported that they face stigma, disgrace and suffer serious guilt-pangs if they register for protest.

KEYWORDS: *Psychological, rape, crime, Victims, Sex, Mental health.*

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INTRODUCTION

Child rape can happen in context and there is a rapid increase of child rape cases in India, which stands first in the world's population of child. One prominent issue is that most of the child rape cases go unreported in India. Children can be raped in organized pedophile rings, in making of child sexual abuse images and films, or in one-on-one settings by a parent or other relative, family friend, church leader, babysitter or in fewer cases, strangers .It is a heartbreaking truth that children may be made available by their own parents for rape by other adults. Offenders are usually male though by no means exclusively and one study specifically about child rape found that non related but known perpetrators such as family friends, comprise the largest group of offenders.

The effects and aftermath of rape are very disparaging. Rape is especially stigmatizing in cultures with strong customs with and taboos regarding sex and sexuality. For example, a rape victim especially one who was previously a virgin) may be viewed by society as being "damaged." Victims in these cultures may suffer isolation, be disowned by friends and family, be prohibited from marrying, and be divorced if already married, or even killed. This phenomenon is known as secondary victimization.

DEFINITION OF RAPE

Rape has been defined under Section 375 of the IPC (Indian Penal Code, 1860), which states that rape is said to have been committed when a man has sexual intercourse with a woman.¹

1. Against her will;
2. Without her express consent;
3. By obtaining her consent by force, or threatening to kill or hurt her or someone she cares about;
4. By making her believe that the man has been lawfully married to her;
5. By obtaining her consent during unsoundness of her mind, when she was intoxicated, or by providing any other substances that might affect her decision-making ability;

1. Indian rape laws in a nutshell Accessed at <https://blog.ipleaders.in/indian-rape-laws-nutshell/>
Accessed on 26.10.2021 at 12.30PM

6. With or without her consent if she is under 16 years old, and 14 years old in case of Manipur.

This clause also states that mere penetration is sufficient to constitute sexual intercourse, which can be treated as rape.

VICTIMIZATION

Rape laws in India were not that developed however after the criminal amendment of 2012, there have been various changes that have been incorporated. There were no separate laws for Rape victims who were below age of eighteen. The Code of Criminal procedure only mentioned that below eighteen years no consent can be given and any sexual intercourse with or without consent can be classified as rape. Prior to POCSO there were narrow definitions of Rape and lack of the sensitivity of law to the special vulnerability of adolescents in situation of sexual violence have prevented many young victims from obtaining or even seeking justice. In child rape cases there is age based unequal power relationship that exists. There are various factors that influence the behavior of child; one of them is lack of communication. Studies have shown that the parents face difficulties in communicating with children in sexual matters and the kind of reaction or action made or taken by the parents in response to the reports of non-consensual sex suffered by their daughters or sons. There are kinds of victims, primary and secondary victim. The primary victims are the ones who sufferers or the ones against whom the crime has been committed. The secondary victims are those who are in such in a relationship with the victim that by virtue of the relationship they have with the victim they undergo a trauma.²

Effects of Rape on the victim:

Mental

The child psychology is completely different from that of others. For half of the time one doesn't know what is wrong with them. Say, a child of five years won't realize that all the act of Rape is something that is inherently bad or immoral. The mental response in such cases is related to the age of the Child. The older the child is the difficult does the thought process of the child becomes. A 13 year old is more prone to getting into stress and depression than a five year

2. Child rape victimization and investigation Accessed at https://www.academia.edu/6417063/child_rape_and_Pocso Accessed on 26.10 2021 at 1.05PM

old. However there are stages of victim's response to sexual assault shock, denial and integration. In the first stage the victim is in phase of mental stress, fear. The second is the stage of denial when the victim tends to put the entire rape scene behind her and moves forward. The third is when the victim finally accepts that has happened to her and realizes that as misfortune.

Rape is followed by fear, stigmatization effect. She thinks that she will be looked down if she reveals this before people. However in child Rape the victim generally speaks about the incident to the mother or a person who is a closed one. There is a less sense of stigma that it carries along. However because of the repeated talks about the incident and other things reminding them of the incident, they tend to withdraw from society, city, neighborhood and retreatism. In the longer run, however they are not able to forget the incident and it influences them for a long term influencing their behavior pattern and attitude towards others in general. Reports from certain foundations working on Child rape cases have shown that women who have been sexually abused as child have never been able to trust men to a greater extent and somehow have the feeling that every relationship they built has a price attached to it. This thinking was common to the victims of incest.

Social

A victim of child rape has many people who stand with her, support her however with growing age she becomes the actual victim. She starts facing discrimination on many social fronts say for example marriage. There is a very little scope of her getting married to someone who is already informed about the rape and the misfortune of the lady as a child. There are rejections of marriage proposal of such women who have been sexually abused when they were small. This becomes traumatic for them. They tend to visit their past again because of the attitude that has been shown to them by society in general. The stigma of the society comes into picture after several years of the incident and there is a sense of helplessness that tends to result in withdrawal. Even after the marriage the inter personal relationship they have is stressed.³

Economic

Several expenses relating to medical expenses, counseling expenses are required. There are cases in which the victim is murdered after death in such cases

3. Ibid

the funeral or burial is required. The family of the victim handles the expenses of the case, as in the travelling expenses. In addition to this if the family of the accused or the accused himself stalks the victim, there are chances of shifting the place of residence, which in itself generates cost. The parent of the Minor has to look up from time to time into the legal matters and also restoring the peace of the minor, which needs time all of this might affect the employment of the parents, which in turn would lead to economic deterioration in terms of income of the family. The effects of victimization hit particularly hard on the poor, the young, the powerless, the disabled, and the socially isolated.

POCSO ACT, 2012

The POCSO Act was formulated to effectively address the grave and inhuman crimes of sexual abuse and sexual exploitation of children. The Protection of Children from Sexual Offences Act, 2012 received the President's assent on 19th June 2012 and was notified in the Gazette of India on 20th June 2012. The Act is due to come into force shortly, along with the rules being framed under the Act.⁴

The Act defines a child, as a person below eighteen years of age, the welfare and well being of child is the base aspect of the Act. It aims to ensure social, emotional, intellectual and a healthy intellectual of child. Sexual abuse is defined in various forms including penetrative and non-penetrative assault. It also includes pornography, sexual harassment. All of the above is termed as "Aggravated" when the offence is committed by anyone in the position of trust like family member, police, teacher or any other person under whom trust is deposited. The Act also prescribes punishment for trafficking of children with intention of sexual purposes. Under this Act, abatement is also made punishable. The punishment is of rigorous imprisonment for life and fine. With consonance with International Child Protection Standards, the reporting of such cases is made necessary. A person having any information about such a case, should mandatorily report about the same, there exists a legal duty on such person. If a person doesn't report about the same he shall be awarded with Imprisonment for a period of six months and fine. If any false information is provided with respect of such case in order to defame any person inclusive of the child could be punished. The act also provides a model framework in which the police officer is

4. Child rape victimization and investigation Accessed at <http://pib.nic.in/newsite/efeatures.aspx?relid=86150>; Accessed on 26.10.2021 at 1.30PM

supposed to behave on knowledge of such a case, say obtaining emergency medical treatment, informing the Child Welfare Committee within stipulated 24 hours period and so on. The act is designed in such a way that the suitability of victim is of prime concern, for example the medical examination of the child is carried in a way to reduce distress. Presence of parents is allowed, where the victim is female, a doctor which us of same gender is provided. Special Courts for trial are there. It is of outmost important that later in life the victim is not met with odd situations in future with respect to the case, i.e Identity of the Victim is not disclosed. Looking at the child psychology, at time of testifying the presence of parents have been allowed. Video conferencing for the child is also there.

There is compensation that is to be decided by these Special Courts so that the child's medical treatment and rehabilitation is there. Further this act is gender neutral in the sense that it covers both male and female child. Along with it not only females but males too can be charged under the act. The act assures that at time of investigation and at the time of trial the victim is treated in such a way that they are not re-victimized.⁵

PROTECTION OF CHILDREN UNDER CONSTITUTION PROVISIONS

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

Article 15. (3) Nothing in this article shall prevent the State from making any special provision for women and children.

Article 21A. 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.

Article 24. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Article 39. The State shall, in particular, direct its policy towards securing

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy

5. Status of children in India Inc, Enakshi Ganguly Thukral, p157.

manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 45 The State shall Endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.⁶

PROTECTION OF CHILDREN UNDER INTERNATIONAL CONVENTION

Child protection has existed for a long time, much before the 1989 Convention on the Rights of the Child. States began implementing such protection through international treaties (declarations, conventions, etc.), through statements directly about children or through indirect means by protecting families and mothers.

In 1923, the League of Nations began preparing a declaration on the rights of the child. Member States ratified this first declaration in 1924, which contains only five articles. This statement is limited, but it highlights the most important rights of the child. Article 1: the right to normal development, from a material and spiritual perspective. Article 2: the right to food, to access to health care, and to help for orphans and the disabled. Article 3: priority access to relief in times of distress. Article 4: protection against all exploitation. Article 5: access to education in a respectful and welcoming environment.

In 1959, the United Nations created a second declaration on the rights of the child, which puts forward ten important principles, including: the enjoyment of all the rights provided in the declaration without discrimination; special protection under the law so that children can develop healthily and normally in physical, mental, moral, spiritual and social terms, under conditions of freedom and dignity; the right to grow up under the protection and responsibility of their parents; protection of their health and the right to food; protection for disabled children; the notion of the best interests of the child and the right to education; the opportunity to receive emergency care in case of distress; protection against all forms of neglect, cruelty and exploitation; the right to a name and a nationality at birth; non-discrimination based on race, colour, sex, religion, political or non-political opinion, etc.

6 Provision related to Children in Constitution of India Available at file:///C:/Users/Administer/Downloads/act4.pdf Accessed on 28.10.2021 at 6.21PM.

However, despite the importance of these two declarations, and the reference that they make to key rights for children, their legal value is limited because their addressees are not required to abide by them and are committing no offence when they do not comply.

Finally, the UN Member States decided to establish an agreement on behalf of children that would be respected and binding on the signatory States. In 1989, the Member States announced the creation of the International Convention on the Rights of the Child, which has been signed by 193 states. It is considered one of the most ratified conventions in the world and contains civil and political, as well as cultural, social and economic rights.

This Convention contains 54 articles that explain and specifically point out all the rights of children, including the right to life, food, protection, education, and the protection of disabled children, etc. The second part of the Convention contains the compliance and implementation mechanisms of the Convention by the Committee on the Rights of the Child. The Committee is composed of 18 independent experts who monitor the implementation of the Convention by the signatory states. They also monitor the implementation of two optional protocols to the Convention.

In May 2000, the United Nations General Assembly adopted and opened for signature two protocols to the International Convention on the Rights of the Child concerning the sale of children, child prostitution and child pornography, as well as the involvement of children in armed conflict. These protocols entered into force on 18 January 2002.

On 19 December 2011, the UN General Assembly adopted the Third Optional Protocol to this Convention, establishing an individual complaints procedure for violations of children's rights. This Optional Protocol was accepted unanimously by the United Nations Human Rights Council on 17 June 2011. The Protocol entered into force three months after its tenth ratification.

The State is primarily accountable for the protection of children's rights, but it is not the only party, since other national and international organizations are also responsible. Everyone must participate in this protection when there is a violation of these rights. As an example, our organisation, Humanium, often receives emails from civilians who contact us to inform us about an unacceptable video on Facebook or YouTube showing a violation of children's rights.

Therefore, everyone – including you yourself – is responsible for protecting children around them.

While we may not have been able to eliminate discrimination, put an end to war, eradicate hunger in the world, or stop other violations of human rights and children's rights, we must do all we can to protect our children. They are our future and we hope that they can carry out all that we have not been able to achieve: to spread the spirit of love and peace in the world.⁷

FINDINGS AND OBSERVATIONS

1. The investigation procedure in Child Rape cases is slightly different with respect to other Rape cases.
2. The POCSO Act, 2012 is effective in both pre-trial and the trial procedure by providing protection to the victim and saving them from re-victimization.
3. Parents, relatives of the Victim, generally file the F.I.R. in such cases and in certain cases the informant is the Neighbor.
4. The police officers are aware of the rights and duties prescribed especially for them under POCSO Act, 2012.
5. Police face lot of difficulties from the side of the victim during the investigation majorly from the victims families and even the evidences are tampered at larger rate .
6. Clear abuse of power by the police during the course of registering a FIR .

CONCLUSION

The offence of Rape is grave in itself, when it comes to Child Rape it is one of the shameful treatment that could be ever met to any kid. The age when the kids are supposed to grow develop, learn to perceive the world in a completely different way at that very age they learn the very aspect of betrayal, distrust and all emotions of hatred. Victimology is an important aspect of crime. We often tend to ignore the entire concept of restorative justice in our criminal justice system. There might be provision for compensation under Sec. 357A of The Code of Criminal procedure.

7. Children's Rights and International Protection Available at <https://www.humanium.org/en/childrens-rights-and-international-protection/> Accessed on 30.10.2021 at 11.32PM

The Indian Government introduced POCSO, which is a victim centric legislation and aims at providing support to the victims of Child Abuse. It is very wide in all aspects. The government is taking incentive to make criminal law inclined victim centric by introducing such supplementary legislations.



DOMESTIC VIOLENCE AGAINST WOMEN IN INDIA- AN OVERVIEW

Mr. Sadashivappa M.S* & Dr. M.S. Benjamin**

ABSTRACT

Domestic violence is a Human Rights issue and impediment to growth of a Nation. Domestic violence is widely prevalent but remained largely invisible in the public domain. The history of suppression of Women in India is very long though we have general legislations like Indian Penal Code-1860, Dowry prohibition Act-1961 and other legislations did not provide remedy for issues relating to Domestic Violence and the same has been responsible for enactment of special legislations for protection and promotion of the status of Women. The Protection of Women from Domestic Violence Act-2005, enacted by Parliament in accordance with the obligation imposed under various International Conventions and also keeping in view the rights guaranteed under Articles 13, 14, 15, 21, 39, 51-A(e) and various other provisions of the Constitution of India. The said Act defines the term Domestic Violence involves a pattern of psychological, physical, sexual, financial and emotional abuse. Acts of Assault, threats, humiliation and intimidation are also considered acts of violence. This Act provides four fold support that is residence orders, custody orders, protection

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orders and defendant's money supply. Act also lays down the role and duties of 'Protection Officer's, public officials whose role is to ensure that victims have access to legal aid, emergency facilities, courts, shelters, rehabilitation centers and hospitals. During the Covid-19, Pandemics, Domestic violence cases are drastically increased due to stress, anxiety, job insecurity, financial issues, family burden, alcoholism and other factors. The present article mainly focuses on legislative and Constitutional development for the protection of the Women from Domestic Violence including digital violence, inter-parental violence, issues relating to Notional income, agenda of sustainable development goals, U.N.O. on violence against women and role of Judiciary in order to protect the rights of Women and Children.

KEYWORDS: *Domestic violence, Human rights violations, Sustainable development goals*

INTRODUCTION

Domestic violence is a human rights issue and serious problem for development. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. The phenomenon of violence against women within the family in India is complex and deeply embedded. Women are always subject to violence not only from husbands but also from members of the family. During the Vedic period, women enjoyed a fair amount of freedom and equality. The Vedic period can be termed as the period of feminine glory and also of masculine sagacity and liberalism. In the post-Vedic period, the status of women suffered a setback when various restrictions were put on women's rights and privileges. In British period the status of women drastically changed due to western impact on the socio-cultural life of India. Covid-19 related lockdown made the situation even worse. During the lockdown period women in India filed more domestic violence complaints than recorded in a similar period in the previous years. This increase in cases of domestic violence is not only restricted to India but also the whole world. Women in India are usually less privileged than men in terms of access to material resources. Systematic discrimination and neglect towards female leads to declining sex ratio of women compare to men. In many cases, women are lack of the social and economic support structures that would enable them to effectively resist domestic violence or to leave abusive relationships. To mitigate this situation 'The Protection of Women from Domestic Violence' Act-2005, is passed by the Parliament. This

legislation will act as a deterrent to the occurrences of domestic violence and assures the families peaceful co-existence among their members. In case of domestic violence every women in a domestic relationship shall have the right to reside in the shared household, and that she cannot be excluded or evicted from it except through legal process.

Violence is an act of aggression that crosses the boundary of another person's autonomy and identity. Domestic violence manifests as verbal, physical or psychological abuse often in forms that are more subtle than the violence elsewhere in society. Violence among members of family or household; these cases, one person dominates the will of the other person by using force or emotional coercion, any person may be the victim of such violence but usually women become the victims of such violence. The expression domestic violence includes physical abuse, sexual abuse, verbal abuse, emotional abuse, digital abuse and economic abuse. Article-I of the Declaration on the Elimination of Violence Against Women and the Platform for Action from the Fourth World Conference on Women, both define violence as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

Domestic violence defined under section 3 of the D.V Act among others, takes in economic abuse also. The definition of economic abuse under the explanation 1 to section 3(4) of the Act clearly and unequivocally demonstrates the entitlement of the aggrieved person to claim maintenance from the opposite party.¹ All these factors render the issue of domestic violence very different from other forms of violence, because of the women's weak and vulnerable position inside their home. It also explodes the myth that women are subjected to harassment and violence on the streets and at their workplace while the home is the safest 'heaven'.²

HISTORICAL BACKGROUND OF VIOLENCE AGAINST WOMEN

History is the study of the past human activities. Human society is composed of Males and Females and the society is stratified on the basis of sex. Every

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- 1 CHOUDHARI., Protection of Women from Domestic Violence Act-2005, Premier Publishing Company,(2014)P-217.
 - 2 MAMTA RAO , Law Relating to Women and Children, Eastern publishing company, 4th edition-2018, at-233.

human being is born free but the Women's freedom has always been restricted in the name of Custom, Religion, Honor, Family welfare and Social Status. With the development in civilization and with coming into existence institution of marriage the subject of cruelty changed drastically and one spouse, be it male or female, started perpetuating cruelty upon the other spouse but as there was no forum to redress this grievance, so the instances of cruelty remained confined to four walls of the house. Women were exploited at earlier stages in the name of religion and other social evils.

In Indian society, the position and status of Women has been continuously changing in the course of time. In Vedic period the position of Women was glorious on account of freedom and equality. The great Women like Apala, Visvara, Yamini, Gargi and Ghosa stole the lime light and became front runners in the Society. The wife has been called the root for prosperity, enjoyment and Dharma in Mahabharata.³ During the post Vedic period, the women had suffered drastic hardships and restrictions as propounded by Manu. The women position was further degraded during the medieval period with invasions of India by Alexander and the Huns, consequently, women were placed behind the veil due to security threats. In medieval period social evils, like child marriage, sati, female infanticide, dowry, Devdasi and polygamy had also spread widely in the country. Notably in the British period the position of Women had drastically changed due to western impact on the Indian Society.⁴ During the legendary period husband was considered to be next to God and wife was kept as a door mate to be used by men as and when desired. The concept of 'Pati-Parmeshwar'(husband is god) propounded by Hindu Shatras held the field at that time but with the modernization of civilization the concept went under carpet. A woman of modern times is entitled to insist that her husband treat her with human dignity and self-respect befitting to the status of a wife and her life with the husband is peaceful and happy.⁵ The Women has been bounded as a mysterious creature as well as a devoted mother and self-sacrificing wife during various periods of time. Indian woman has passed through various phases from the ages to which history can take us back to now. She enjoyed respectable status in some of the earliest ages and often suffered and crushed under the wheel of decline.

3 Dr. S.C. TRIPATHI, Women and Criminal Law, Central Law Publication, Second Ed-2014, p-1.

4 Id-at p-2.

5 A.S.ARORA,,Laws on Cruelty Against Husband, Kamal Publishers New Delhi-2012,p-1.

In the Vedic period, there were high ideals of womanhood. This position deteriorated in later Vedic civilization. A daughter began to be regarded as a cause. All moral and social rules framed by male dominant society ignored their Identity, Individuality and Integrity. Evil and inhuman practices came to be inflicted upon them in the name of custom. Such as, Sati system, Child marriage, dowry system etc., violence against women is an obstacle to the achievement of the objectives of equality, development and peace. Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms.⁶ The orthodox and conservative thinking of society is one reason for behind considering women physically and emotionally weaker than men. In India around two-thirds of married women are victims of domestic abuse. Various causes lead to domestic violence in India such as, arguing with partner, neglecting children, refuse to have sex with the partner, not cooking properly or on-time, without informing going outside, alcoholism, neglect to take care of family members and suspicion of sexual involvement.

LEGAL AND CONSTITUTIONAL PROVISIONS FOR THE PROTECTION OF WOMEN

In India earlier legislations have given protection to women against torture, cruelty and harassment under the provisions of section-498-A,⁷ 304-B⁸ of Indian Penal Code-1860 and Dowry Prohibition Act-1961, Commission Sati (Prevention) Act-1987, Immoral Traffic (Prevention) Act-1956, Indecent Representation of Women (Prohibition) Act-1986, the Medical Termination of Pregnancy Act-1971 and So on. The laws themselves become failure though not fully and it becomes necessity for enacting the special legislations, such as Protection of Women from Domestic Violence Act-2005. Chapter XXA of Indian Penal Code-1860 inserted for punishing husband and his relatives for subjecting a woman to cruelty.⁹ Similarly section-113A¹⁰ and 113B¹¹ of Indian Evidence Act-1872, provided for the burden of proof of innocence was shifted to accused in case of abatement of suicide by married woman within seven years of

6 P.K.DAS, Protection of Women from Domestic Violence, Universal Law Publishing Company, 3rd Edition-2009, page-236

7 Section-498-A, States that if a husband or relative of husband of a woman subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and also liable to fine.

8 Meaning of Dowry Death and punishment thereof :

9 CRIMINAL LAW (SECOND AMENDMENT) ACT, 1983.

10 Presumption as to abatement of suicide by a married woman.

11 Presumption as to Dowry death.

marriage. Under section-198A of Criminal Procedure Code-1973, Court can take cognizance of the offence upon police report or upon complaint by party or women's parents, brother, sister etc.,

The Constitution of India is a living document, law of the land and changes according to the needs of the society. Under the various provisions of the Constitution women are protected. Articles 14 and 16 of the Constitution intend to remove social and economic inequality to make equal opportunities available. Article-14, guarantees equal treatment to persons who are equally situated. Article-15(3) empowers the State to make special provision for the advancement of weaker sections of the Society that is women and children. In various cases courts have upheld the validity of special measures in legislation or executive orders favoring women. Article-21 protects the Right to life and Personal liberty of persons it includes right to live with human dignity it means that there shall not be any violence against women. Article- 39, states that State to direct its policy towards securing that the citizen, men and women, equally have the right to an adequate means of livelihood. It is the duty of every citizen of India to renounce practices derogatory to the dignity of women.¹² Various other provisions of the Constitution of India also provides various protective measures for the empowerment of Women.

The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under sections 498-A of the Indian Penal Code-1860. The civil law does not, however address this phenomenon in its entirety. It is therefore, proposed to enact a law keeping in view the rights guaranteed under Articles-14,15 and 21 of the Constitution of India, to provide for a remedy under the civil law which is intended to protect the occurrence of domestic violence in the Society.¹³

The Protection of Women from Domestic Violence Act-2005 contains the following features. It is a Comprehensive legislation it covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared Household and are related by Consanguinity, marriage or

12 Article-51-A(e) of the CONSTITUTION 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; to renounce practices derogatory to the dignity of women;

13 Dr. S.C. TRIPATHI, Women and Criminal Law, Central Law Publisher, 2nd Edition-2014,page-138.

through a relationship in the nature of marriage or adoption. In addition, relationship with family members living together as a Joint family are also included. Even those Women who are Sisters, Widows, Mothers or singly Woman, living with the abuser are entitled to legal protection under the present enactment.¹⁴ The said act also provides right of women to secure housing, powers of magistrate to pass protection orders, appointment of protection officer and also expand the term domestic violence as domestic violence include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered this definition.

VARIOUS INTERNATIONAL CONVENTIONS FOR THE PROTECTION OF WOMEN AGAINST DOMESTIC VIOLENCE

The Prohibition against Sex discrimination was first articulated in the United Nations Charter of 1945 and later reiterated in the Universal Declaration of Human Rights-1948, which enshrines the rights and freedoms of all human beings. The United Nations organization developed its policy on domestic violence in -1981. Pursuant to the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All forms of Discrimination against Women came into force. However this convention did not in unequivocal terms include violence against women or domestic violence, and therefore, in 1992, a Committee on Convention on the Elimination of All forms of Discrimination against Women was promulgated in 1992. The World Conference on Human Rights (1993) at Vienna, which was one of the main turning points in Women's right, declared that human rights of Women and of the girl child are inalienable, integral and indivisible part of Universal Human Rights. The full and equal participation of Women in Political, Civil, Economic and Cultural lift at the National, Regional and International levels, and the eradication of all forms of discrimination on grounds of Sex are priority objectives of the International Community. In 1993, United Nations Declaration defines the term domestic violence as 'an act of gender-based violence that results in or is likely to result in, Physical, Sexual or Mental harm or suffering to Women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.'¹⁵ In 1995, at the Fourth World

¹⁴ *Ibid*

¹⁵ U.N. Declaration on the Elimination of Violence against Women, New-York, U.N-1993.

Conference on Women in Beijing, China, the topic of domestic violence was taken into account.

The Preamble to the Declaration on the Elimination of Violence against Women states that 'violence against women constitutes a violation of the right and fundamental freedoms of women.'¹⁶ Various Human Rights Conventions emphasize on Development, Dignity and Non-Discrimination and also United Nations Sustainable Development Goals reiterated the Gender equality, protection of Planet and People for future. Further the Declaration on the Elimination of Violence Against Women, 1993 states that; "any act of gender-based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".¹⁷ There are various conventions, conferences and declarations which protect the Women from violence such as Universal Declaration of Human Rights-1948, The United Nations Convention on the Elimination of Discrimination against Women, 1967, The United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979, United Nations World Conference on Human Rights-1993, Convention against Torture and other Cruel, Inhuman or Degrading Treatment/Punishment-1984, etc., Thus, International and Regional human rights conferences directed the States to take reasonable steps to prevent violence on women and ensure that victim was given adequate compensation.

INTER-PARENTAL VIOLENCE

The most common type of domestic violence is inter-parental violence, which refers to violence occurring between parents. Exposure to inter-parental violence has a major impact on the functioning of Children and Families. Furthermore exposure to inter-parental violence is associated with higher levels of emotional, physical and sexual abuse of children. Young people are exposed to violence regularly in their homes and communities. Such exposure can cause them significant physical, mental and emotional harm and affects their adulthood. In case of Inter-Parental violence within the family increases the risk of subsequent violent delinquent behavior. An early experience of maltreatment and inter-

16 General Assembly Resolution No;48/104, 1993.

17 Article -1. Of Declaration on the Elimination of Violence against Women and the platform for Action from the Fourth World Conference on Women.

parental violence within the family leads to the perpetration of violence in adolescence. Parental attachment and rejection are closely related to family conflict and parental violence.

DIGITAL FORM OF VIOLENCE

Domestic Violence includes the various forms of violence including digital form of violence. Many forms of online abuse have taken place during the Covid-19, pandemic as life has shifted to Online and people spend more time on digital devices. This abuse has impacted on the mental well-being of Victims. Online and Social media have become new and powerful vehicles for misogynistic threat and harassment which can result in the silencing of Women. Violence against Women in Online Sphere may be in the form of Cyber harassment, revenge porn and threats or rape, sexual assault or murder. In digital violence perpetrators may be Partners or Ex-Partners, Colleagues, Schoolmates or as is often the case, Anonymous individuals. It is a barrier to Women's participation in public life.

WOMEN AND NOTIONAL INCOME

Man and Woman are two halves of humanity. Neither can reach its highest creative excellence without the cooperation of the other. The Women contribution to the National economy by rendering service to the family is immense and invaluable, if the family is safe the Society will be safe, ultimately it leads to National growth. The term Domestic Violence includes economic abuse also. The Societies attitude towards Women is also one of the cause for Domestic Violence. Traditionally, Women are treated as Dependent, Non-Earner, Inferior and Burden, that is the reason they use to abuse economically, though, She used to work without rest and pay for the welfare of the family, because she was a House-wife. Unpaid domestic works are done by Women without recognition and these works cannot be computed in terms of money. The Supreme Court of India has recognized the Notional Income of Women in *LathaWadhwa*,¹⁸ *Arun Kumar Agarwal*¹⁹ and Various other cases while awarding compensation to dependents in accident cases by considering the work of Women at Home and in the Society by changing the name House wife as Home Maker. In the Society the gratuitous work of Women is equal to her husband. State has to take steps to

18 *LathaWadhwa V. State of Bihar*, (2001) 8 SCC-197.

19 *Arun Kumar Agarwal V. National Insurance Co. Ltd.*, (2010) 9 SCC-218.

recognize her work by providing Social Security and Social Welfare Schemes, by ensuring economic stability with a view to prevent Violence against Women.

JUDICIAL APPROACH TOWARDS THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE

In India the Judiciary being a final interpreter of the Constitution and Highest Judicial Authority plays an important role for the protection of Rights of the Citizens of the Country because the Judiciary has power to issue suitable directions to the respective States and Central Governments for the effective implementation of the law relating to Vulnerable Sections of the Society. Woman is also considered as a Vulnerable and Weaker sections of the Society. Supreme Court in its various judgments has protected the interests of the Women. There are some important cases as follows;

In *Maroti lande v. Sau. Gangubai Maroti lande*²⁰, where the Court was of the view that deprivation to the benefit of a matrimonial home amounts economic abuse and it generates a continuous cause of action.

In *Ritesh Ratilal Jain and others V. Sandhya RiteshJain and others*²¹ Court has held that where the husband had left the Respondent-wife to her parent's house as he wanted to desert her. It was the case of respondent-wife that no provision was made for her maintenance and she has no source of income therefore it was held that the act of husband amounted to economic abuse because economic abuse is also comes under the definition of the Domestic Violence.

In *Darbar Singh V. State of Chhattisgarh*²² where appellant husband was convicted under section-498-A of I.P.C. since, the wife of appellant had committed suicide due to harassment done by appellant, the incident had occurred almost nine years back and the appellant was in the custody for one year and fifty days. He also suffered agony of the trial and long pendency of the appeal. Considering the facts and circumstances of the case it appeared that no fruitful purpose would be served by sending appellant back to jail. Therefore to meet the ends of the justice the Court while upholding the conviction of the

20 2012 CriLJ 79

21 2013 CriLJ 3909 (Bom)

22 2013 CriLJ 1612 (Chhattisgarh)

appellant under section-498-A of I.P.C. restricted the jail sentence awarded him to the period already undergone by him besides enhancing the fine.

In *V.D. Bhanot V. Savitha Bhanot*²³ the Apex Court upheld the Delhi High Court view that even a Wife who had shared a Household before the Domestic Violence Act, came into force would be entitled to the protection of the Domestic Violence Act, hence the Domestic Violence Act entitles the aggrieved person to file an application under the Act, even for the acts which have been committed prior to the commencement of Domestic Violence Act-2005.

In *Preetam Singh V. State of U.P.*²⁴ Court held that a wife even if she was driven out of her matrimonial home prior to the commencement of the 2005 Act, if continues to be deprived of all or any economic or financial resources to which she is entitled under any law or custom, is entitled to move an application under Section-12 of the Act. The aggrieved person who had been in domestic relationship with the respondent at any point of time even prior to coming into force of the Act and was subjected to domestic violence, is entitled to invoke the remedial measures provided for under the Act.

In *Rupali Devi V. State of Uttar Pradesh and Others*²⁵ Supreme Court holding the view that definition of 'domestic violence' in 2005 Act contemplates harm or injuries that endanger the health, safety, life, limb or well-being, whether mental or physical, as well as emotional abuse. Said definition certainly has a close connection with Section-498-A of the Penal Code, undoubtedly, encompass both mental as well as the physical well-being of the wife. Even the silence of the wife may have an underlying element of an emotional distress and mental agony. Finally Court held that the Courts at the place where the wife takes shelter after leaving or driven away from the matrimonial home on account of acts of cruelty committed by the husband or his relatives, would, dependent on the factual situation, also have jurisdiction to entertain a complaint alleging commission of offences under Section-498-A of the Penal Code.

*Nutan Gowtham V. Prakash Gowtham*²⁶ in this case he filed a Divorce petition which was granted ex-parte. Trial court also directed responded husband to admit minor son to boarding school according to son was admitted in school

23 (2012) 3 SCC 183.

24 2013 CriLJ 22 (All)

25 (2019)5 SCC 384.

26 (2019)4SCC 734.

maintenance was also granted as per the court order appellant wife permitted to take custody of son during summer vacation of 2018 and leave him in boarding school once school reopens as soon as inclined to continue in boarding school the court held that child cannot be compelled to admitted in particular school against his or her wishes by giving these kind of judgment's the supreme court uphold the rights and interests of both women and children.

In *Shyamlal Devda and others V. Parimala*²⁷ Supreme Court held that the petition Under Domestic Violence Act-2005, can be filed in a Court where 'person aggrieved' permanently or temporarily resides or carries on business or is employed. Section 18 of the Domestic Violence Act relates to protection order. In terms of section-18 of the Act, intention of the legislature is to provide more protection to woman. Section-20 of the Act empowers the court to order for monetary relief to the 'Aggrieved party'. When acts of domestic violence is alleged, before issuing notice, the Court has to be prima facie satisfied that there have been instances of domestic violence. In the present case, the respondent is residing with her parents within the territorial limits of Metropolitan Magistrate Court, Bengaluru. in view of Section 27(1)(a) of the Act, the Metropolitan Magistrate court, Bengaluru has the jurisdiction to entertain the compliant and take cognizance of the offence.

In *Satish Chandra Ahuja V. Sneha Ahuja*²⁸ the Supreme Court has enlarged the scope of Matrimonial home for the purposes of the Protection of Women from Domestic Violence Act-2005, as wife is also entitled to claim a right to residence in a shared household belonging to relatives of the husband.

All these decisions are related to domestic violence as mentioned earlier judgments of the Supreme Court holding that the wife would have the right of maintenance which would partake even if the right to residential home.

CONCLUSION

Domestic violence is not only visible but it is a part and parcel of life of women in India. Violence starts with her from the day her mother conceives her existence in the womb and since then every phase of her life, she has to fight for her survival in this society. A woman who has been foundation stone of family and society in general who gives birth to life, nurtures life, shapes it and

27 AIR-2020 S.C.762.

28 (2021)1 SCC 414.

transmitter of tradition and culture from generation to generation. She is subjected to Domestic Violence irrespective of her age, race, caste, religion, social, economic and political status. The silent sufferings of a woman are making her easy prey to the male domination which is supported by prevalent patriarchal society. Thus domestic violence not only hampers women but also impedes the growth of the country. Therefore effective implementation of laws and education of women, eradication of suppression, women empowerment and sensitization of domestic violence issues are needed for the protection of women from violence. Our Civilization lacks humane feeling. We are humans who are insufficiently humane. We must realize that and seek to find a new spirit. We have lost sight of this ideal because we are solely occupied with thoughts of men instead of remembering that our goodness and compassion should extend to all Creatures. The long-standing failure to protect and promote human rights and fundamental freedoms in the case of violence against women is a matter of concern to all States. It should be addressed and combat these violence against women for the purpose of peaceful existence in a society and growth of a Nation. No Law, Custom, Tradition, Culture or Religious consideration should be invoked to excuse discrimination against Women. Developing a holistic and multidisciplinary approach to the challenging task of promoting families, communities and States that are free from violence against Women is necessary.



CRITICAL ANALYSIS OF 'SURROGACY' IN THE LIGHT OF SURROGACY (REGULATION) BILL 2020

Smt. Shagufta*

ABSTRACT

The desire to beget a genetic child is hidden in every human being irrespective of his/her economic, social, religious, territorial, physical, or mental status. In a culturally driven country like India, procreation plays a major role in every woman's life proving her womanhood and fulfilling the purpose of Marriage. The necessity of natural conception is so deep-rooted in Indian Society that 'infertility' is considered as a taboo diluting the marital life. Breakthrough in the field of reproductive science and medical advancement through Assisted Reproductive Technology (here-in-after referred to as 'ART' for brief) has paved the way for substituted reproduction as a remedy to childlessness. Surrogacy is an option wherein the infertile intending couple can take the assistance of a surrogate and beget their genetic tie. Though Surrogacy is a boon, it is also considered to be immoral or unethical on the notion of commodification of babies. Many countries have banned surrogacy terming it as illegal and few nations have permitted with strict regulations. India is still struggling to lay Law on this niche area.

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One such case which triggered ethical debate about Surrogacy in India is of Baby Manji (2008). First case of its kind in India dealing with ethical and legal issues relating to substituted reproduction known as 'Surrogacy'. This case opened Pandora box of issues w.r.t custody, nationality, parentage, surrogacy laws, welfare of surrogate child, welfare of surrogate mother, baby selling racket. The fertility tourism's voyage from 2002 to 2010 came to an end when India passed the Surrogacy(Regulation) Bill 2010 prohibiting inter-country surrogacy arrangements to foreign couples. Further to tackle issues like baby selling, womb-for-hire, maligning motherhood; India banned Commercial Surrogacy in 2015. As per the Surrogacy (Regulation) Bill 2020, only Altruistic Surrogacy through close relative is allowed. This Bill has infringed bodily autonomy of infertile woman (intending mother/surrogate), right to livelihood (Surrogate) and has failed to address some of the key issues highlighted in this paper.

Keywords: Surrogacy, Ethical, Bodily Autonomy, Supreme Court, Constitution of India.

INTRODUCTION

'Men and women of full age without any limitation due to race, nationality or religion have a right to marry and found a family¹'. The significance of consummation in a marriage gets fulfilled once the couple begets their offspring. In India, worthiness of a woman is measured by her capability to conceive/bear/rear a child during her wedlock which shall also prove the masculinity and sexual potency of her husband. The ability to procreate an offspring is one of the most cherished and valuable gifts of Almighty given to any individual. It is presumed that marital bond gets stronger and deeper after the birth of a child binding the couple as parents emotionally, socially, physically, and psychologically. Both Maternity and Paternity are vital for the overall development of a child.

Alas, many couples aspiring to become parents cannot fulfil their desire due to medical complications known as 'infertility'. Infertility is a reproductive inability to conceive naturally even after 1yr of unprotected coitus. In India, as per the

1. Article 16.(1) of the Universal Declaration of Human Rights 1948, Ohchr.org, (last visited on 5th Sept 2021), <https://www.ohchr.org/Documents/Publications/ABCannexesen.pdf>

survey conducted in 2021² on married Indian woman in the reproductive age of 15-49 years to know the determinants of Primary Infertility, it was found that reproductive ability during the reproductive age determines fertility of the woman. There is no universal definition regarding infertility as it varies from sterile condition of 1 yr to 5 yrs or more than 5 yrs. Infertility³, as per the World Health Organization (here-in-after referred to as 'WHO' for brief) is a clinical disability rather than a disease. It can be in the form of primary or secondary infertility which needs medical attention and intervention. Infertility or inability to conceive a child within the initial years of marriage weakens the marital relationship creating distance between the spouses. This gradually effects the quality of married life leading further to domestic violence, intimate partner violence, extra-marital affair, clinical depression, suicide, sexual harassment, or divorce⁴

However, situations of this sort can be prevented by taking the aid of Science and Technology. The breakthrough in the field of reproductive medicine and medical advancement through Assisted Reproductive Technology (here-in-after referred to as 'ART' for brief) has paved the way for substituted reproduction as a remedy to compensate for infertility.

The various legislations enacted from time to time which speak on assisted reproductive technologies have made the concept of surrogacy more complex, than simple. The Pari- Materia laws are not in harmony with each other and contradict in their applications⁵.

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2. Naina Purkayastha, Himani Sharma, Prevalence and potential determinants of primary infertility in India: Evidence from Indian demographic health survey, *Clinical Epidemiology and Global Health*, Volume 9, 2021, Pages 162-170, ISSN 2213-3984, (last visited on 6th Sept 2021) <https://doi.org/10.1016/j.cegh.2020.08.008>
 3. Sexual and reproductive health – glossary of definitions for infertility and fertility care as developed in 2009 by WHO in partnership with International Committee for Monitoring Assisted Reproductive Technologies (ICMART) (visited on 5th Jan 2020), <https://www.who.int/reproductivehealth/topics/infertility/definitions/en/>
 4. Hirsch AM, Hirsch SM. The Effect of infertility on Marriage and Self-Concept. *J ObstetGynecol Neonatal Nurs*. 1989 Jan-Feb; 18(1):13-20. (last visited on 5th Jan 2020), <https://doi.org/10.1111/j.1552-6909>
 5. ICMR in 2002 made Surrogacy available by framing guidelines to the clients without even waiting for a legislation to validate it. The Surrogacy Act 2008 was enacted after a gap of 5 years in 2002. ICMR 2005, Point 3.10 states that a stranger also can act as a surrogate to the intending parents (last visited on 22nd Sept 2021) <https://main.icmr.nic.in/sites/default/files/guidelines/b.pdf>

SCOPE AND SIGNIFICANCE OF THE PROBLEM

Infertility, a disability to conceive a child even after one year of coitus is not a disease to be shunned upon. It is a reproductive inability to produce healthy egg or sperm resulting in natural conception and procreation. In a country like India where infertility is a taboo increasing day by day affecting human lives, no law has been enacted to address till now.

Due to the advancement of science and technology, health sector specifically reproductive sector got its new way of dealing with infertility issues. Assisted Reproductive Techniques (ART for brief) were invented to artificially perform the human act of release of eggs/ sperm and fertilisation outside human body. The egg and sperm so fertilised are injected into the intending mother uterus or into the womb of the surrogate. This practice has gained popularity as it solves a Herculean task of natural conception.

The story of surrogacy and its hidden challenges got unwrapped in Baby Manji⁶ case filed before the Rajasthan High Court by a non-government organization called Satya in the year 2008. Thousands of questions on ethics and morality arose through this case wherein Hon'ble Supreme Court by applying the Presumption of legality⁷ took a liberal stand and considered Surrogacy arrangements as lawful and permissible in the Indian society sans any laws on this subject. By 2011, infertility assistance and medical tourism of India was estimated about 2 billion USD industry. In 2013, Government of India extended its liberal approach towards medical tourism by issuing a Notification No. 52(RE-2013)/2009-2014 dated 2nd December 2013 permitting import of human embryos for artificial reproduction. Specific visas could be granted to foreign nationals to hire Indian woman as surrogate and fly back to their home country with the new-born. In 2014-15, India faced yet another legal issue with surrogacy in Jan Balaz⁸ case highlighted through a Public Interest Litigation by Ms. Jayshree Wad, an Advocate by profession. She sought a ban on commercial surrogacy and quashing of the above stated Government Notification as illegal and against public policy. After 6 years of an exponential growth of the surrogacy industry, the Government of India finally prohibited commercial surrogacy in

6. Baby Manji Yamada v/s Union of India, (2008)13 SCC 518

7. Sec 4 of the INDIAN EVIDENCE ACT, 1872 deals with presumptions in law. It is a rule of law which permits the court to presume a fact to be true and proved unless and until it is disproved.

8. Jan Balaz v/s Anand Municipality & Ors, AIR 2010 Guj. 21

2015 and allowed only altruistic surrogacy to needy, infertile married Indian couples after carefully diagnosing them. Years 2015 and 2016 witnessed the debate over 'commodification of babies' and 'womb for rent' between surrogates who contented that they have a right to livelihood as per the Indian Constitution and the same is being snatched from them by the Government on the pretext of few incidents. The government on the other side held a staunch approach of maligning motherhood and trying to destroy cultural values of India. Few incidents of surrogacy being carried out underground became the point of discussion and debate. The Hyderabad Police Task Force raided an infertility clinic in Banjara Hills and rescued 45 surrogate mothers who were kept in a limited space in an unhygienic condition above the clinic⁹. This further justified the apprehension of the government and hence it completely banned commercial gestational surrogacy (paid surrogacy).

In India average 18%, nearly 27.5 million couples in the reproductive age group suffer from infertility. This affects QoL (quality of life), marital adjustment, sexual functioning leading to marital discord. In the existing patriarchal set up, channelizing surrogacy through close relative (altruistic) will pave way for new form of silent harassment/ torture/ domestic violence within closed walls – reproductive trafficking. Further imposing blanket ban on commercial surrogacy without proper assessing increasing social demand and supply, will push the entire fertility market underground leading to illegal reproductive mechanisms to achieve the desired result.

Surrogate mother deserves dignity of labour and monetary compensation (in kind) for her tedious selfless service in the form of compensation. Rights of the surrogate child and his/her welfare should also be the primary concern of the law makers. A comprehensive legislation which shall safeguard the rights of surrogate mother and surrogate child preventing them from being exploited or abandoned is the need of the hour. Pragmatic approach can be formulated in Indian scenario by inferring best practices of Western countries.

RESEARCH QUESTIONS

- ✓ Whether infertility can be considered as a ground for divorce same as impotency?

9. Article titled 'Ban on Commercial Surrogacy must be lifted' reported in The New Indian Express newspaper dated 19th June 2017 by Express News Service, Hyderabad.

- ✓ What is the alternate remedy available to the intending couple if they fail to prove infertility before the appropriate authority within the stipulated period, can they still avail Surrogacy?
- ✓ Whether Bill 2020 balances technical issue of infertility with the desire to have one's genetic child?
- ✓ Whether the Bill is creating a platform for diluting marriage based on open-door discussion about infertility?
- ✓ Whether the law makers have taken first-hand inputs from the primary stakeholder - Surrogate on whom the entire story is built upon?
- ✓ Whether right approach has been taken by the law makers in prohibiting commercial (compensatory) surrogacy depriving Surrogate's right to livelihood?
- ✓ Whether law makers have forecasted perils of Altruistic surrogacy resulting in reproductive trafficking or other form of domestic violence?
- ✓ Whether Surrogacy option in India should be made available for others (married couple with single child, LGBT, individuals, intending father) as opposed in the Bill 2020.
- ✓ Whether law makers are creating gender discriminatory society by allowing intending woman to opt for surrogacy but denying the same to intending father?
- ✓ Whether it is unethical to compensate Surrogate (altruistic or compensatory) for her humanitarian act?

RESEARCH METHODOLOGY

Legal Impact Analysis methodology has been adopted to assess the possible impact of the Surrogacy (Regulation) Bill 2020 on primary stakeholders and the Society.

LACUNAS IN THE SURROGACY (REGULATION) BILL, 2020

- Altruistic Surrogacy defined under Sec 2(b)¹⁰ fails to mention clearly other prescribed expenses incurred on surrogate mother apart from the medical

10. The SURROGACY (REGULATION) BILL, 2020

expenses incurred on her. Can the Surrogate be given incentives in cash or kind for delivering bundle of joy? Does it amount to commercial surrogacy and punishable as per the Bill 2020?

- 5 years of waiting period (Sec 2 (p) of the Bill 2019) to avail surrogacy has been reduced to 1 year as per the Bill 2020¹¹. This drastic change in the waiting period is to lessen the physical and mental harassment/ pain the intending couples undergo. Though the intention is humane but the certification of infertility by the appropriate authority lowers the esteem of the couple before the society. Also, an apprehension that such certificate can be used as evidence to dissolve the marriage/ blackmail by either partner cannot be ignored. Moreover, in today's modern/hectic work-life 1 yr.time is too less to declare a couple as 'infertile'. This will add up to 85% of the population being infertile and availing surrogacy services. Demand and Supply for surrogates will push 'close relative' under more pressure and reproductive trafficking¹².
- Sec 2 (r)¹³ defines intending couple as a couple who have a medical condition necessitating gestational surrogacy and who intend to become parents through surrogacy. It is very complex to define medical conditions affecting reproductive organs as every individual is unique and surrounded by multiple factors. Infertility can be in various levels – primary, secondary, explained, or unexplained. How does the law handle such difficult issues? Which type of infertility will be prioritized as most severe.
- Sec 2 (s)¹⁴ dealing with Intending Woman has been inserted wherein widow or divorcee aged between 35 yrs to 45 yrs can beget her genetic child through surrogacy. However, a widower or divorcee (male) is not given this benefit. Does this provision violate Art 14 of the Indian Constitution?
- Sec 2 (zg)¹⁵ lays down as to who can be a surrogate. As per this provision she must be genetically related to the intending couple or intending woman for

11. Sec 2(p) prescribing 5 years waiting period has been omitted in the Bill 2020. WHO guidelines of 1 yr. is taken into consideration to determine infertility.

12. Shagufta Anjum, Altruistic Surrogacy: An Endeavour to Tackle Reproductive Exploitation? Centre For constitutional Research and Development, <https://ccrd.vidhiaagaz.com/altruistic-surrogacy-tackle-reproductive-exploitation/>

13. id.At 5

14. id.At 5

15. id.At 5

carrying out surrogacy. By inserting this provision, surrogacy within 'close relatives' is allowed in the form of altruistic and surrogacy for monetary gains in the name of commercial has been curtailed. As stated above, altruistic surrogacy may give rise to new form of domestic violence in the patriarchal setup. Does the law intend to deprive intending couples who cannot afford/find a close relative the right to start a family?

- As per Sec 4 (iii) (a) (I)¹⁶, a certificate of a medical indication in favour of either or both members of the intending couple or intending woman necessitating gestational surrogacy shall be obtained from District Medical Board to initiate the surrogacy process. This provision sounds impractical in application as it is cumbersome to the intending couples. Whether the District Medical Board is equipped with modern infrastructure to handle technical cases of infertility? Whether the intending couples can get certificate from private hospitals/ART clinics?
- Sec 4 (iii) (a) (II)¹⁷ – after the birth of the surrogate child on an application made by the intending couple or woman, an order concerning the parentage and custody of the child shall be passed by a court of the Magistrate of the first class or above. Given the scenario of birth rates per minute, backlog of cases and shortage of Judges, is the law trying to burden courts with additional responsibility and prolonged justice to the intending couple to adopt their child? What about the welfare (pre-natal care) of the newborn baby?
- No consideration by way of money or kind shall be demanded/ given by the Surrogate mother/ intending parents respectively - this clause has killed Commercial surrogacy snatching the bread and butter of economically poor surrogates. The mercantile element which the Bill puts forth as 'baby selling' / 'hiring of womb' / 'Commodification of life' all look very provocative against commercial surrogates. But this yellow- metal has brought tremendous positive changes in the life of surrogates and their families. Study reveals that these surrogates provide better life and secure future for their children which are also a right of every child under Article 21¹⁸ of the Indian Constitution. Whether the lawmakers have ignored the economic conditions

16. id.At 5

17. id.At 5

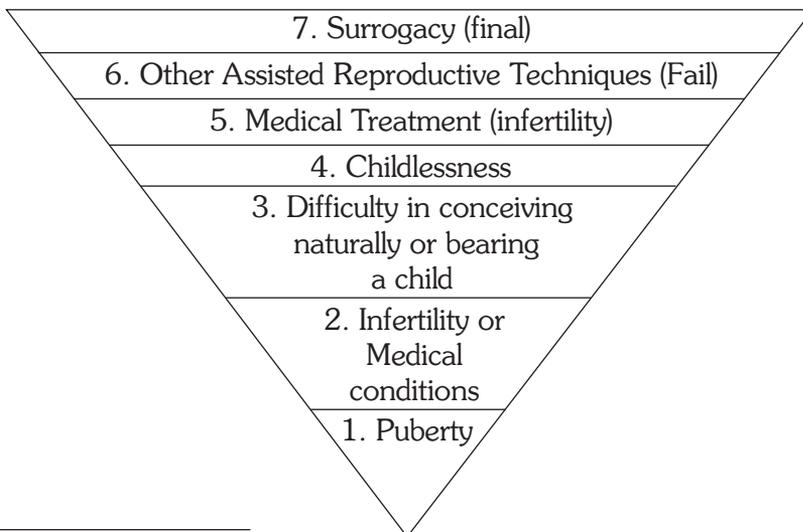
18. No Person shall be deprived of his life and personal liberty except according to the procedure established by law.

of families living in utter poverty unable to fetch one-time meal for their families?

- The intending parents shall have the absolute legal right over the surrogate child and the child will be deemed to be the biological child of the intending couple– the Bill is silent on the Contractual side of surrogacy Agreements as it has failed to draft a copy of the same. Further the Bill u/s 11 has directed the surrogate to relinquish all parental rights over the child but the Bill fails to define what Parental rights of a surrogate mother are.
- The Central and the State authorities shall regulate service providers such as surrogacy clinics, ART centres and hospitals. But as per the Bill, any person soliciting/ influencing/advertising surrogacy for fee, any women agreeing to act as a surrogate mother shall be punishable with imprisonment of 10 years and fine of up to 10 lakhs¹⁹. Law has been kind enough to permit surrogacy clinics to function with regulations there-by making them employable but cruel to the surrogates who wish to earn by renting their womb, snatching their right to livelihood.

ROOT CAUSE ANALYSIS THROUGH FUNNEL APPROACH:

To provide appropriate solution/s, one should understand the root cause of the problem. ‘Root cause’ analyses method is used to diagnose the hidden cause of an issue and frame answers to tackle that cause. Even Law Makers should apply this funnel approach to handle ‘Surrogacy’ rather than curbing it at the top level.



19. Sec 5 of THE SURROGACY (REGULATION) BILL 2020

Below mentioned funnel narrows down to the root cause of surrogacy. This graph can be interpreted as follows,

Funnel Graph

Level 1 – seed for healthy reproductive life gets sowed at the puberty age. This is a stage where a boy or a girl reach sexual maturity and become capable of reproduction. Hormonal changes in the body result in triggering reproductive organs such as ovaries in girls and testes in boys. The functioning of these organs needs to be maintained and timely monitored with their connected process. Ex: regular menstrual cycle for girls shedding eggs depicts healthy ovaries. There are many girls at adolescent age who suffer from irregular periods or uterus mal functions due to obesity, genetic disorder, or other factors. Timely diagnoses and treatment can be done to prevent future reproductive problems.

Level 2 – prolonged ignorance or shabby management of level 1 condition may lead to infertility or other chronic medical conditions affecting reproductive organs in a man or a woman. In India, every individual gets concerned about his/her reproductive capacity immediately after marriage and tend to treat themselves on their own. This adds up to the persisting problem (level1) and comes out as severe form of infertility (inability to procreate a child even after one year of coitus). This condition is due to the delay in getting the ‘right treatment at the right time’.

Level 3 – infertility acts as a barrier to achieve natural conception, pregnancy, and a baby. Infertility is gender neutral and a man, or a woman suffer infertility at different levels (primary, secondary, unexplained). Infertility and other medical conditions at Level 2 can affect natural conception, sustaining pregnancy, bearing baby for full term, delivery of a healthy child. These need to be handled at the level 2 to prevent untoward incidents at Level 3.

Level 4 – the stage of childlessness for a married couple is the worst nightmare anyone can even think of. It not only lowers their morale as an individual who is unable to conceive (wife) or unable to prove masculinity (husband) but also disturbs their marital relationship leading to psychological, physical, or emotional traumas. Large number of divorces, suicide, desertion, domestic violence, or intimate partner violence cases get reported at this stage. These harassments are more taxing than the reality of failure to beget a child naturally. Many happy families break at this stage unable to cope up with the situation.

Level 5 – the determined ones survive hardships under level 4 and finally knock the doors of medical science to get the relief. Infertility as stated earlier is a disease rather than a disorder as defined by World Health Organisation (WHO) which can be cured with appropriate medical examination and treatment. Progress in Reproductive Science has brought various methods to cure infertility and enable reproduction naturally. The lucky ones get cured at this level and beget their genetic child.

Level 6 – there are many couples who suffer from serious medical, genetic, or bodily disorders which cannot be cured at level 5. We can even find cases where first pregnancy was natural but second or further pregnancies get risky due to complications endangering life of the mother-to-be or the baby. Lifestyle changes, work related disorders, competitive world add fuel to this issue making it more complicated and an impossible task. In such scenario, Assisted Reproductive Techniques known as ART come as life-marriage savior. Some of the effective ART methods such as IVF, IUI, ZIFT, GIT, ICSI, IUTPI are successful in achieving pregnancy though the rate of success is measured between 20-60%. Science and Technology cannot unwrap the secrets of the Creator.

Level 7 – last resort for an infertile couple to get their offspring even after repeated ART failures is Surrogacy. This is a substituted mechanism wherein a 3rd party is hired for the task of conceiving, bearing, and delivering a child belonging to the intending couple. The woman is used as an alternate to the infertile wife who is unable to conceive or bear or deliver her child. In this entire process, womb of the surrogate will be used as a carrier to rear the genetic child belonging to the intending couple (Gestational Surrogacy). Surrogate is nowhere genetically linked to the child she bears and is not considered to be the legal mother. The infertile couple after undergoing so much struggle and traumas in their life, finally procure their genetic tie – joy of parenthood achieved through the help of an angel (surrogate) who deserves to be appreciated, rewarded for her efforts, and not shunned on the floor of Ethics and Morality.

Though his spectrum, one can conclude that Law makers need to focus on addressing Infertility at the primary level 1 and not at advanced level 7.

OBSERVATIONS

- As per the Doctrine of Utilitarianism, the highest morality is to maximize happiness or pleasure over pain. The law should always benefit the mankind

and try to solve their worries, not add more to their pain. Compensatory Surrogacy mutually benefits Surrogate (financial support) as well as intending couples to enjoy parenthood. Moreover, if altruistic surrogacy is permitted 'Willing' Surrogate is a vague term which lacks precise legal meaning. As per Section 2(b)²⁰, Willingness is a word used to describe a party who is prepared to immediately perform an obligation (promise) that is required under a contract.

- Prospective parents or ART clinics might compel needy fertile woman to reproductive labor in the guise of Altruistic Surrogacy. How can this type of surrogacy be a solution to curb women exploitation? Uncertainty and absence of regulations aid ART clinics to become commercial hubs dealing with human life in unethical manner.
- Surrogate body is the centric point of every ethical debate in this country, and no one dares to question the big market players such as the ART clinics who have turned service into mere business. By deleting the monetary part in the case of altruistic surrogacy, issue of woman's body being used or subjected to usage/ repeated failure of IVF/ high dose of medications cannot be ignored. Patriarchal society cannot make woman suffer always in the name of FAMILY. Woman have relentlessly played major role in the society without expecting anything in return. Now it is time to reward their unique feature and bestow dignity of labor which they undergo risking their life, well-being of her family.
- People who suffer from serious ailments lose/ reduce their fertility when they get exposed to high level of treatment or medications. In such circumstances, they have a right to preserve/ retain their fertility²¹ through various medical interventions and choose substituted reproduction as a feasible method to have their biological child. They cannot be deprived of this happiness merely because few instances of women being exploited in the name of surrogacy.
- Surrogacy laws are half baked in India as they do not apply 360-degree approach to the Surrogacy concept. There are many cases wherein Surrogate mother and the biological mother have fought over the maternity of the child

20. INDIAN CONTRACT ACT, 1872, willingness term is used to describe an acceptance for a promise to perform.

21. Article 23(c) of the United Convention on the RIGHTS OF PERSONS WITH DISABILITIES 2006

on the presumption that the child so conceived is due to their sexual union with the intending father (husband) and not due to donated eggs/ova²²

- Law must handle complex questions such as –
- Whether natural conception of surrogate during surrogacy agreement amounts to breach of Surrogacy Contract and termination? (If yes, then following situations need to be addressed);
- Who has the primary right to terminate the Surrogacy Contract?
- Whether the surrogate and her husband are liable to pay compensation to the intending couples for breach of contract?
- Whether the surrogate has any right to abort the child, if she is not prepared to have her genetic child (unwarranted pregnancies)?
- Whether ‘best interest of the child’ survives in cases of unwarranted pregnancies?
- Why Indian law favors Intending Mother over Surrogate Mother as compared to the western countries where the situation is extremely contrast.
- Best interest of the Surrogate child is not taken into consideration either before birth or after birth in the event of breach of marital cord between the intending couple (Baby M case²³). Supportive parenting²⁴ for the abandoned child is not considered in the Bill.
- Whether State can interfere in the personal autonomy of an individual merely on the notion that it fails to devise mechanism to check exploitation in reproduction industry.
- Whether India can afford to abstain from International Guidelines or Conventions on Human Rights when the country is moving towards infertility at a greater level?

22 . In the interest of SNV v/s N.M.V (Colorado Court of Appeals No. 10CA1302, 2011)

23 . Supra

24. Golombok S, Readings J, Blake L, Casey P, Marks A, Jadv V. Families created through surrogacy: mother-child relationships and children’s psychological adjustment at age 7. *Dev Psychol.* 2011;47(6): 1579-1588. (last visited on 23rd Sept 2021) doi:10.1037/a0025292

- Whether the Law is being just and reasonable to the individuals who do not fall under the bracket of ‘infertility’. As stated earlier, infertility is a clinical disability and not a disease²⁵. Right to form a family is an inherent right of every individual irrespective of his gender/marital/economic status which cannot be deprived by State Action.

CONCLUSION:

Based on the above observations, there is no better protection surrogacy or ART laws will have on woman performing altruistic surrogacy. Both commercial and altruistic form of surrogacy are likely to cause harm to a woman if not regulated properly. At this juncture, we need a robust mechanism and laws to handle complex cases like this and focus on the key players – surrogate.



25. Supra

RIGHT TO SELF-DETERMINATION 'AN EPITOME OF HUMAN RIGHTS'

Mrs. Chaitra H P^{*}

ABSTRACT

Right to Self-Determination (RSD) would simply mean as the right of the people to freely determine their political future and to pursue their economic, social and cultural rights and its development. It is one of the most significant as well as controversial right in International Law. The right to self-determination, a fundamental principle of human rights law, it is an individual and collective right of the needy people of the state. The conceptual evolution of the principle of self-determination of peoples has begun in post-Second World War i.e. contemporary world. In fact the evolution of self-determination has not ended. As of today, the internal and external self-determination norms are much more emphasized in the world States in increasing numbers have signed the instruments that mention about the RSD, such as the United Nations Charter (UN Charter), both the International Covenant on Civil and Political Rights (ICCPR) & the International Covenant on Economic, Social and Rights (ICESCR). First part of this paper would deal with the prevailing understanding of the term 'RSD' in International law. Second part would analyse the applicability of the RSD, such as internal and external RSD. Third part would deal with the two main approaches have been to focus on the peoples to whom the right applies and to focus on the territory affected by the right. In addition this paper

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would deal with the situations and issues pertaining to the RSD in the light of the International Human Rights Framework. The final part would deal with the notion of applying RSD with International Human Rights Laws.

Keywords: Self-determination, International Human Rights Law, UN Charter, ICCPR and ICESCR.

INTRODUCTION

Through the media reports, around the world we can find the demand for self-determination which is heard from many states- Kurds and Palestinians, Tibetans and Kashmiri, East Timorese, Eritreans and Zulus, Quebec, Ethiopia, Kosovo, Czechoslovakia, Sri Lanka ect., have implicitly or explicitly raised the question of self-determination. In these cases, communities have demanded for the international status and to have control over every day political, social and economic rights¹. Towards, the international peace and security every state has the obligation to “promote the realization of the right of self-determination” for all who claim, it.

In International Law, Right to Self-Determination (RSD) simply mean as the right of the people to freely determine their political future and to pursue their economic, social and cultural rights and its development. The right to self-determination, a fundamental principle of human rights law, it is an individual and collective right of the needy people of the state. Right to self-determination can be seen in two modes in International Law, i.e., Internal and External self-determination. The conceptual evolution of the principle of self-determination of peoples has begun in post-Second World War i.e. contemporary world. In fact the evolution of self-determination has not ended. As of today, the internal and external self-determination norms are much more emphasized in the world. States in increasing numbers have signed the instruments that mention about the RSD, such as the United Nations Charter (UN Charter), both the International Covenant on Civil and Political Rights (ICCPR) & the International Covenant on Economic, Social and Rights (ICESCR), etc..

The purpose of this article is to analyse the right to self-determination. First part of this paper would deal with the prevailing understanding of the term ‘RSD’

1 ROBERT MC CORQUODALE, Self-Determination: A Human Right Approach, The International and Comparative Law Quarterly, Vol 43.No. 4 (Oct., 1994); ERIC KOLODNER, The Future of the Right to Self-Determination, Connecticut Journal of International Law, Vol.10:153, (1994).

in International law. Second part would analyse the applicability of the RSD, such as internal and external RSD. Third part would deal with the two main approaches have been to focus on the peoples to whom the right applies and to focus on the territory affected by the right. In addition this paper would deal with the situations and issues pertaining to the RSD in the light of the International Human Rights Framework. The final part would deal with the notion of applying RSD with International Human Rights Laws.

HISTORICAL PROSPECTIVE OF RIGHT TO SELF-DETERMINATION

A. In Colonial context

Certain aspects of the principle of self-determination are as old as the nation state². Self-determination in its original meaning is an open term. The origins of the concept are some-times traced all the way to the Peace of Westphalia in 1648³. The best known historical instances of self-determination are probably the American and French Revolution of 1776 and 1789 respectively. The American colonist's invoked natural law and the natural rights of man, embodied the ideas of John Locke. The Declaration of Independence of America-1776 sums it up:

*"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights that among these are life, liberty and the pursuit of happiness. That to secure these rights Governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of Government becomes destructive of these ends, it is the right of the people to alter or abolish it and institute new Government"*⁴.

Thus the rights of the individual in society are the right of communities to make choices of identity and form of government. The American Revolution

2 M.K. NAWAZ, The Meaning and Range of the Principle of Self-determination, Duke Law Journal, Vol, 82 (1965).

3 MATEJ ACCETTO, The Right to Individual Self-Determination, Slovenian Law Review, Vol.1 3(2004), accessed at Heinonline.

4 Dr. Ian Brownlie, An Essay in the History of the Principle of Self-Determination, Ed. by, C. H. Alexandrowicz, Grotian Society Papers 1968, Studies in the History of the Law of Nations, Pb by, Martinus Nijhoff/The Hague/ 1970.

1776 proclaimed this not in explicit terms but, perhaps more effectively⁵. The history of self-determination is bound up with the history of the doctrine of popular sovereignty⁶ proclaimed by the French Revolution-1789:

“government should be based on the will of the people, not on that of the monarch, and people not content with the government of the country to they belong should be able to secede and organize themselves as they wish. So in the context of the French revolution self-determination is a democratic ideal valid for all mankind”⁷.

The next step in the historic evolution of self-determination does not occur until 1848. Then in the Bolshevik Revolution (1917-1923):

“the conception of individual self-determination as a corollary of democracy (the proposition that ‘Ruritaian have a right to choose to what state they shall belong’) to the conception of nationality as an objective right of nations to independent statehood (the proposition that ‘the Ruritaian nation has a right to constitute itself an independent state’). The rights of man envisaged by the French revolution were transferred to nations”⁸.

Based on these revolution the Polish, Italian, Magyar and German people claimed self-determination but also did other nationalities- the Danes, Czechs, Ruthenians, Slovaks, Croats and Slovenes- who lived in their midst⁹.

B. In Institutional Instrument context

The development of the right to self-determination shows that, it has become one of the most important and dynamic concepts in contemporary international life and that it exercises a profound influence on the political, legal, economic, social and cultural planes, in the matter of fundamental human rights and on the

5 Id., p.92

6 “Doctrine of popular sovereignty also called Squatter Sovereignty, in U. S. history, a controversial political doctrine that the people of federal territories should decide for themselves whether their territories would enter the Union as free or slave states”, accessed at <https://www.britannica.com>

7. A.RIGO SUREDA, *The Evolution of the Right of Self-Determination- A study of United Nations Practice*, A. W. Sijthoff- Leiden- 1973.

8 Id., p.18.

9 Id.,

life and fate of peoples and individuals¹⁰. Self-determination achieved greater prominence and wider recognition as a political-philosophical concept following the First World War. Nevertheless, international legal doctrine was slow to recognize the juridical significance of self-determination; Woodrow Wilson was, more than any other person, who first contributed to a theory of self-determination. He never precisely defined the principle of self-determination, but his predilections were manifested in his statement to the effect that “national aspirations must be respected; peoples may now be dominated and governed only by their own consent. ‘Self-determination’ is not a mere phrase it is an imperative principle of action....”¹¹.

Self-determination gained an official status after the Second World War, when the UN Charter proclaimed the principle of self-determination of people as one of its fundamental rights. The UN Charter¹² expressly mentions the principle of self-determination in articles 1(2)¹³ and 55¹⁴. The UN Charter also acknowledges the principle in Chapters XI, XII and XIII by imposing upon the¹⁵ trustee states of Non Self-Governing and Trust Territories the obligation to help those territories achieve self-government, it nevertheless gave rise to further development of the concept. In 1960 the Declaration on the Granting of Independence to Colonial Countries and Peoples¹⁶ was adopted, prior to the adoption of this declaration a numerous Resolutions expressing the right to self-determination were adopted by the General Assembly and some thirty Non-Self-Governing and Trust Territories had already been given independence. The development of self-

10 Mitchell A Hill. What the Principle of Self-Determination Means Today, 1 ILSA J.Int'l & Comp. L. 119(1995).

11 ANTONIO CASSESE, *Self-determination of people- A legal reappraisal*, (Cambridge University Press, 1996), p. 83.

12 Signed at San Francisco on 26 June 1945 and amended on 17 December 1963, 20 December 1965, and 20 December 1971.

13 U N Charter Art. 1(2) states that one of the purposes of the United Nations is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”. Accessed at, www.un.org.

14 U N Charter Art. 55 states with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:... universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Accessed at www.un.org.

15 U N Charter Art 73(b) (explaining that members assuming the responsibility for the administration of a territory must assist the people in the “progressive development of their free political institutions”). Accessed at www.un.org.

16 GA Resolution 1514(XV), December 14, 1960.

determination into a right in customary international law had hence started even though it was not affirmed.

The development of an international human rights has helped to sharpen the focus on self-determination as a legal right. The link between human right and self-determination was clearly established by the two international human rights covenants and now self-determination is considered a human right under international law¹⁷. Both, 1966 Covenants (ICCPR) & (ICESCR) included the right to self-determination in Article 1¹⁸. Self-determination has also been treated as a human right in other international and regional treaties, such as the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States of 1970¹⁹, the Final Act of Helsinki of the Conference on Security and Cooperation in Europe of 1975²⁰, and the African Charter on Human and Peoples Rights of 1981²¹. As a human right, the concept of self-determination offers a great opportunity to peoples who aspire to have a full measure of autonomy to exercise their democratic rights in different arrangements²².

Quite apart from the question of the law creating powers of the General Assembly by series of affirmative Resolutions²³, it would be difficult to deny the legal status of self-determination after 24 October 1970 when the General Assembly passed its celebrated Resolution 2625(XXV). By this resolution the Assembly adopted the 1970 Declaration in accordance with the Charter of United Nations²⁴. Of course, the reality of the concept stretches beyond treaty law and much of the content of self-determination has been crafted as customary law. Nevertheless, the interest of the States resulting in various treaty provisions

17 Bereket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience*, 29 Colum. Hum. Rts. L. Rev 91(1997).

18 International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S.3; International Covenant on Civil, and Political Rights, Dec. 16, 1966, 99 U. N. T. S. 171. Article 1 of each covenant provides: "All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development".

19 GA Resolution 2625(XXV), October 24, 1970.

20 Aug. 1, 1975.

21 OAU Doc. CAB/LEG/67/3 Rev. 5 (1981).

22 Supra n. 16, p 95.

23 G A Resolutions 1514 (XV), 1541 (XV), 1654 (XVI), 637 (XVII), 1810 (XVII), 1956 (XVIII), 2105 (XX), & 2189 (XXI).

24 Subrata Roy Chowdhury, *The Stuts and Norms of Self—Determination in Contemporary International Law*, Ed, by, *Essay on International Law and Relations in Honour of A.J.P.TAMMES*, pb. Sijthoff-Leyden, 1977.

and UN resolutions had provided the groundwork upon which the customary rules of self-determination have been built.

RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL HUMAN RIGHT LAW

A. Definition of Right to Self-Determination

The expression of right to self-determination is explicitly mentioned in the common Article 1(1) of the two International Human Rights Covenants provides that “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.²⁵

In many international treaties and instruments²⁶ the right has been declared, it also accepted as customary international law²⁷ and even a part of jus cogens²⁸. When the peoples are subjugated to alien subjugation, domination and exploitation constitutes a violation of the principles of equal rights and self-determination of peoples, as well as a denial of fundamental human rights, and is contrary to the UN Charter. It was clarified by the African Charter on Human and Peoples’ Rights, which starts the right of self-determination as “the right to free [colonized or oppressed peoples] from the bonds of domination”.²⁹

The right of self-determination is a right which reflects the importance given to communities, collectives and families in many societies and the general inherent communal quality of humans. The purpose of the protection of this right is to enable these communities as communities to prosper and transmit their culture as well as to participate fully in the political, economic and social process, thus allowing the distinct character of a community “to have this character reflected in the institutions of government under which it lives”. It also forms part of the empowering process of human rights. Thus the right protects people from being subject to oppression by subjugation, domination or

25 Art.1(1) ICCPR and ICESCR 1966.

26 E.g. Part VIII Helsinki Final Act 1975 and Art.20 African Charter on Human and Peoples’ Rights 1981.

27 Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Namibia case) I.C.J. Rep. 1971.

28 I. Brownlie, *Principles of Public International Law* (4th edn, 1991).

29 Art.20(2). The African Charter (ACHPR) has been ratified by all except two (Ethiopia and Swaziland) of the 51 OAU States.

exploitation because, as the African Charter makes clear, “nothing shall justify the domination of a people by another”.³⁰

B. Application of the Right to Self-Determination in Colonial context

This right applies to all peoples in colonial situations³¹. This position was upheld by the International Court of Justice in the Namibia case³² and there are number of uniform State practice consistent with right to self-determination application to colonial territory. While the colonial governments at the time may have denied that the right of self-determination had any impact, now it is clearly accepted by the international community that decolonisation was an exercise of the right of self-determination.³³

Since 1960, the focus of the right in the Declaration on Granting of Independence to Colonial Countries and Peoples, was on “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations”.³⁴ However, not one of the major international instruments which have dealt with the right of self-determination has limited the application of the right to colonial situations. For example, common Article 1 of the two International Human Rights Covenants of 1966 applies the right to “all peoples” without any restriction as to their status and the obligation is on all States, “including those having responsibility for the administration of colonial territories”, and Article 20(2) of the African Charter refers to both “colonized or oppressed people” as having the right.³⁵ In its General Comment on Article 1 of the International Covenant on Civil and Political Rights the Human Rights Committee also makes evident that:³⁶

30 Robert Mc Corquodale, *Self-Determination: Human Rights Approach*, national and Comparative, *Law Quarterly* (VOL. 43 Oct 1994) p.859.

31 Principle IV, G.A.Res.1541(XV), 15 Dec. 1960 defines a colony—or, rather, “a non-self-governing territory”—as “a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it”. This definition is often known as the “salt water” theory of colonialism.

32 *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Namibia case) I.C.J. Rep. 19 at p.31.

33 *Supra* n.30, p.860.

34 Preamble of The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annex to G.A.Res.2625(XXV), adopted without vote on 24 Oct. 1970.

35 *Supra* n.30, p.860.

36 General Comment 12(21), para.6,A/39/40(1984), p.143.

the obligations under Article 1 exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant (i.e. are in colonial territories). It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination.

Apart from these treaties, state practices also supports a broader application of the right to self-determination to non-colonial situations. These right have widespread across the world, the acceptance of the right applies to the Palestinians³⁷; to the blacks in South Africa³⁸ & former Southern Rhodesia³⁹; and other parties of territories such as Tibet⁴⁰; Germany⁴¹; break-up of Soviet Union and the former Yugoslavia recognized as New States in Eastern Europe with the European Community's Declaration on the Guidelines on the Recognition of New States⁴².

While by the above said situations may analogous to colonialism, every independent States was involved with the right to self-determination was expressly applied by other States as it was considered that some type of oppression of peoples by means of subjugation, domination or exploitation had occurred or was occurring.⁴³

Beyond the colonial context, right to self-determination applied has State practice, but it was unsurprising that there are very few statements by governments which unequivocally support the right to all non-colonial situations, considering that all States have a potential for the right of self-determination to be applicable within their territory. But the United Kingdom recognised this broad application of the right when it stated that the right of self-determination "is both inalienable and indivisible. The right is consider as fundamental to

37 G.A.Res.2787(XXVI) of 6 Dec. 1971, 3089D(XXVIII) of 7 Dec. 1973 and 3210(XXIX) of 14 Oct. 1974; Commission on Human Rights Res.2(XXXIV) of 14 Feb. 1978

38 R. McCorquodale, South Africa and the Right of Self-Determination (1994) 10 S.A.J.H.R. 4

39 Security Council Res.216 and 217, 12 Nov. 1965, and 232, 16 Dec. 1966.

40 G. A. Res. 1353(XIV), 21 Oct. 1959, 1723(XVI), 20 Dec. 1961, and 2079(XX), 18 Dec. 1965. The right of self-determination of the Tibetan peoples was accepted in the International Lawyers' Statement on Tibet, London 1993 (1993) 32 I.L.M. 1694.

41 Treaty on the Final Settlement with Respect to Germany, 1990. Preamble to the Treaty (reproduced in (1990) 29 I.L.M. 1186). Self-determination is also referred to in Arts.1 and 7 of the Treaty.

42 *Supra* n.30. p. 861.

43 *Supra* n.30.p.862.

international peace and security, and also to the protection of national integrity of all the States. Were all the nation states have vital interest in it? We cannot be selective in its application”⁴⁴. The equivocal support-balanced as it is against the significant State practice-does not prevent a customary international law rule operating, particularly in the field of human rights where obligations of States are not solely reciprocal.⁴⁵

The international community’s vigorous attempts to eradicate oppression of people by acceptance of these values and their right aim to protect human rights in all circumstances. Thus, by sufficient evidence today we can conclude the right of self-determination applies to all people in the world who are subject to oppression by subjugation, domination and exploitation by others people or states.

C. Wider range of application of the Right to Self-Determination

The right to self-determination has applied worldwide more than colonialism, there is increases in its understanding of application which leads to affects the affairs of State. Accordingly the right divided into two aspects i.e., ‘internal’ and ‘external’ self-determination. External self-determination was applied frequently in colonial context as it directly to States division, enlargement and States international relations with other States. As mentioned in General Assembly Resolution 1541(XV), external self-determination can be applied in three methods: “emergence as a sovereign independent State; ... free association with an independent State; or ... integration with an independent State”⁴⁶. Most importantly, the resolution does not speak on independence or secession from an independent State, nether it takes consult from all the people within the

44 Id.

45 In *Effect of Reservations on Entry into Force of the American Convention (Articles 74 and 75)* (1982) 67 I.L.R. 559, para.29, the Inter-American Court of Human Rights held that “modern human rights treaties in general, and the [ACHR] in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction”.

46 Principle VI-these are expressed in terms of the “full measure of self-government” which should be attained for colonies. This Resolution concerned the “Principles” to be applied to transmit information under Art. 73(e) of the UN Charter and was passed on 15 Dec. 1960, the day after the Declaration on Granting of Independence to Colonial Countries and Peoples.

territory before changing any sovereignty over the territory, but it applies particularly to the colonial territory only.

Right to Internal self-determination concerns the right of people within the State to choose their political status, participation and form of their government, i.e., States internal affairs. The wide application of the right was stated in the Declaration on Principles of International Law, as it is provided that only “a government representing the whole people belonging to the territory without distinction as to race, creed or colour” can be considered to be complying with the right of self-determination.⁴⁷ This right can exercise on various forms, from autonomy over policies and law in any part or region of the State, like Greenland’s relation over Denmark related to their education, social policies and cultural matters. This right mainly depend on the constitutional orders of the state and may challenge the present centralized structure of the state.⁴⁸

The depth of these right was increased in State practice in international instruments, particularly in the Conference on Security and Co-operation in Europe process and in the international community’s response to confirm the right to blacks in South Africa & Southern Rhodesia, and most of the colonies of the United Kingdom. Infringement of this right can be used as a ground for withholding recognition of an entity as a State or deny the legitimacy of a government or State were its not protecting the right. At present, a State’s internal protection of the right of self-determination is now of international concern, which is consistent with the development of international human rights law so that human rights are now a matter not solely within a State’s domestic jurisdiction.⁴⁹

APPROACHES TO RIGHT TO SELF-DETERMINATION

Across the world there are varies situation related to right to self-determination, to which International Lawyers have set down some guidelines or general legal rules to resolve the matter. The two main approaches are the peoples to whom the right applies and the territory which is affected by the right.

A. ‘Peoples’ approach to the Right to Self-Determination

47 Supra n.34.

48 Supra n.30, p.864.

49 Supra n.30, p.865.

In the peoples approach to the right to self-determination, there are many peoples approach which have started by many international instruments, juristic ect., like wise in this aspect the main question is who are the 'peoples' to whom the right applies? There are many answers offered for it, 'peoples' approach as set out some conditions have included: common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity; territorial connection; common economic life; and being a certain number, it as to be satisfied by a group to defined as 'peoples'⁵⁰. Another 'peoples' approach is limited only to "the people of a State in their entirety", which avoids other possible factors.⁵¹

However, there are many difficulties in this 'peoples' approach, to finalize or define the term people. Even the ILO Convention concerning Indigenous and Tribal People in Independent Countries 1986 and common Article 1 of the International Human Rights Covenants substituted the word 'peoples', which is understood in general sense.⁵²

Well, there are many State practice were we can see the right to self-determination is applied to the situations where the 'peoples' are concerned only a part of the inhabitants of the State, like the Czech Republic, Slovakia, The Palestinian and Tibetans have exercise the right to internal self-determination. And there some states which acknowledge, the right to self-determination is vested with people not the government, as expressed or declared in UN Charter and two International Covenants.⁵³

The 'peoples' approach is very rigid to define, where it applies only to the inhabitants of the State which leads to legitimate an oppressive government operating within unjust State boundaries and create greater disruption and conflict in the international community. This approach upholds the perpetual power of a State at the expense of the rights of the inhabitants, which is contrary

50 The description of "peoples" given by the UNESCO Meeting of Experts on Further Study of the Rights of Peoples (UNESCO, Paris, 1990).

51 Supra n.30.

52 M. Bossuyt, Guide to the Travaux Prdparatoires of the International Covenant on Civil and Political Rights (1987), pp.32-35. When defining terms to be used in the UN Conference on International Organization, the secretariat stated that "'nations' is used in the sense of all political entities, States and non-States, whereas 'peoples' refers to groups of human beings who may, or may not, comprise States or nations"

53 Supra n.30.

to the clear development of the right of self-determination and international law generally.⁵⁴

B. 'Territorial' approach to the Right to Self-Determination:

The 'territorial' approach is one of the main approach, which have the control over a territory of the State. During the colonial situations this approach was utilized to independent the State which was under the control of colonial power, it's also used for redrawing the boundaries of a States and the right applied only where the territory can be divided. This approach exercise only external self-determination, where the States will have the right to free secession. This approach can create a volatile environment, as there is a clear and absolute division of peoples within the State, where the peace and security cannot be maintained.⁵⁵ And there is a strong presumption that secession is against to non-colonial situations and it is not the only appropriate means to excise the right to self-determination in all situations. In fact there are some situations, were peoples involved rejected the desire of their 'leaders' for 'secession'.⁵⁶ Finally, this approach made a reckless difference to peoples who have decided their territory boundaries after the First World War- later which leads to many conflicts, as seen in Versailles Conference:⁵⁷

IN THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Through the 'peoples' and 'territorial' approach we cannot find a clear legal rules about the context of, and obligations of the right to self-determination. Now the requirement is a legal frame work for the right which develops in international law and which can provide the "very delicate balancing of interests"⁵⁸ relating to right to self-determination. Here, the framework is related to International Human Rights Law.

54 *Ib.*

55 L. Buchheit, *Secession: The Legitimacy of Self-Determination* (1978) notes at p.235: "It is only when a particular claim is recognised without specifying the circumstances which made it acceptable to the international community that other, dissimilar, movements might feel encouraged by the decision."

56 The referendum in 1980 for Quebec to secede did not gain the approval of a majority of voters nor did the referendum in Oct. 1992 on changes to the Canadian Constitution, which would have given some degree of secession (or further autonomy) to the Quebecois and to indigenous peoples of Canada—see G. Marchildon and E. Maxwell, *Quebec's Right of Secession under Canadian and International Law* (1992) 32 *Virg. J.I.L.* 583.

57 *Supra* n.30, p.870.

58 *Supra* n.28.

International human right law contained many global and regional treaties, and some of them are the part of international customary law, also binding on all the State parties. But only few states are party to human right treaty or instrument which deals with human rights⁵⁹. The Human Rights Committee (HRC), established under the International Covenant on Civil and Political Rights 1966 (ICCPR)⁶⁰, the European Court (and Commission) of Human Rights, established under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and the Inter-American Court (and Commission) of Human Rights, established under the American Convention on Human Rights 1969. The right to self-determination has been developed and took an appropriate structure within the framework of international human rights law.

A. Right to Self-Determination Within the Framework of Human Rights Law

Under the international human right treaties, only the two International Covenants, expressly protects the right to self-determination. But the Optional Protocol of ICCPR allows only individuals claims to the Human Rights Committee, likewise it's limited the claims by peoples for the violation of right to self-determination⁶¹. And even the African Commission on Human and Peoples' Rights and major International Human Right Tribunals, none of these consider directly the claims relating to abuse of the right to self-determination. Likewise, the individual rights i.e., civil and political rights where largely protected within the framework of international human rights law.

The purpose of the RSD is to protect the communities or ethnic groups from oppression and to empower them, likewise even the international human rights law seeks to protect the individual's rights from oppression and by doing so it also protect the groups or communities of which they are the part of it. For example, the rights to freedom of religion, freedom of association and freedom of

59 L. Henkin, Human Rights, in *Encyclopaedia of Public International Law* (1985), Vol.8, p.268 at p.271.

60 Under Art.40 all parties must submit regular reports to the HRC on their compliance with the ICCPR and the HRC reviews these reports. Individuals have a right of petition to the HRC where a State is a party to the Optional Protocol to the ICCPR 1966.

61 Art. Optional Protocol of the ICCPR.

assembly, right to freedom from discrimination and the rights of minorities⁶² are all jointly exercised by individuals with others and, together operate to protect the vital conditions for the formation and functioning of groups or communities. In addition, the Human Rights Commission has considered that the RSD is absolutely integrated into the protection of individual rights because:⁶³

the right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants (the ICCPR and the ICESCR) and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

The right is essential for the protection of individual rights because if peoples are being subjected to oppression they are not in a position to protect any of their individual rights. By these arguments we can say that, the international human rights law have established the general legal rules for economic, social and cultural rights, which protects the group's rights such as employees and families. And also, to find whether Serbian minorities in Croatia and Bosnia

Herzegovina were entitled to right to self-determination within the framework of human rights an Arbitration Committee on Yugoslavia was set up.⁶⁴

APPLYING THE INTERNATIONAL HUMAN RIGHTS LAW TO RIGHT TO SELF-DETERMINATION

It has already been stated, where peoples are subject to oppression by subjugation, domination and exploitation the international community has applied the right of self-determination in the form of internal or external. However, both the "peoples" and "territorial" approaches to the right imply that there are no limitations on the right and it can be shown that either the people or the territory is capable of holding it.

62 P. Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments* (1989) 38 I.C.L.Q. p.869-870. Minority rights have been part of international human rights law before most individual rights were protected by treaties.

63 HRC General Comments 12(21), para.1 (G.A. Official Records Doc.A/39/40, pp.142-143)

64 *Supra* n.30.

The right of self-determination is not an absolute right without any limitations. Its purpose is not directly to protect the personal or physical integrity of individuals or groups as is the purpose of the absolute rights and, unlike the absolute rights, the exercise of this right can involve major structural and institutional changes to a State and must affect, often significantly, most groups and individuals in that State and beyond that State⁶⁵. Therefore the right must require some limitations which are implied in nature while exercising it. These limitations on the right are designed to protect the rights of individuals (not just those seeking self-determination) and the general interests of the international community, can be appropriately dealt with by a human rights approach. This is because the international human rights law framework acknowledges the limitations on rights and offers a means to consider the exercise of the right in the context of the interests of all those potentially affected by its exercise. This framework also accepts the need for a State to act for the overall benefit of all the inhabitants on its territory, to the extent of its margin of appreciation, and thus allows the State to limit the exercise of the right to protect the above rights and interests, although this action by the State cannot be oppressive⁶⁶.

CONCLUSION

The right of self-determination applies to all situations where peoples are subject to oppression by subjugation, domination and exploitation by others. It is applicable to colonial or non-colonial territories, and to all peoples. So far, the legal approaches to the right had focused on the “peoples” and on the “territory”. These have been shown to be too rigid to be able to be used in the present variety of applications and exercises of the right, especially to internal self-determination.

The human rights approach recognized RSD as a right in human right but it's not an absolute right. This approach relies on the general legal rules developed within the international human rights law framework to enable the limitations on the right to be discerned and elaborated. By interpreting the right in the context of current State practice and current international standards, full account can be given to the development of the right over time and to its broad range of possible

65 For Example. The right of self-determination of the Kurds has impacts on Iraq, Turkey, Iran and Syria.

66 Supra n.30.

exercises, in contrast to the restrictive “territorial” approach which limit its exercise to secession or independence. Use can also be made of the broad and flexible rules concerning who is a “victim” able to bring a claim for violation of a human right to give a flexible definition of “peoples”, which avoids the barrenness and rigidity of the “peoples” approach.

The approach provides a coherent and consistent body of general legal rules by relying on the framework of international human rights law. By using this framework, the limitations on the right are discerned and considered. The right of self-determination does have limitations, both to protect the rights of others and to protect the general interests of society, especially the need to maintain international peace and security. But those limitations are applicable only in certain circumstances, such as where internal self-determination has already occurred, and where there is a pressing need for the limitations in the society concerned.

The rules expounded by the human rights approach to the right of self-determination are clear and able to be applied to a variety of situations without creating an increased threat to international peace and security. At the same time these rules respect the rights and interest of all members of international community



SHIFTING DIMENSIONS OF REGULATION OF MEDICAL EDUCATION IN INDIA

Mr. Jaihanuman H. K.*

ABSTRACT

Proper regulation of medical education is of paramount importance in ensuring the health of the community at large. The Medical Council of India had been the professional body regulating medical education in India since 1934. The working of Medical Council of India had been marred with controversies. Parliamentary standing Committee on health and family welfare and the National knowledge Commission have recommended to bring significant and structural changes in the regulation of medical education and the functioning of the Medical Council of India. In this background, significant developments have taken place in the years 2019 and 2020 in the domain of legal regulation of medical education in India. National Medical Commission Act, 2019 was enacted and the National medical Commission and other authorities are established under the Act, empowered with the task of regulation of medical education in India. The Medical Council of India was formally scrapped in the year 2000. The Act seeks to provide for a medical education system which improves access to quality and affordable medical education, to ensure availability of adequate and high-quality medical professionals in all parts of the country and periodic and transparent assessment of medical institutions.

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The first part of the article briefly explores into the meaning, nature and essential attributes of profession, professional education and role of professional council in the medical education. The second part critically analyses the working of the Medical Council of India from 1933 till 2020 as the prime regulator of medical education and profession. The third part considers and analyses the key provisions of the National Medical Commission Act, 2019 in the regulation of medical education and its accessibility. Part four gives brief reflections as to the impact of the new legislation on the professional nature of medical education and its accessibility. Part V has conclusions and suggestions as to the measures to be taken to ensure access to high quality and affordable medical education.

Key Words: Medical Education, Health, Medical Council of India, National Medical Commission Act, 2019.

“Medical education does not exist to provide students with a way of making a living but to ensure the health of the community.”¹

INTRODUCTION

The medical education cannot be seen as an end in itself, but should be geared and attuned to providing general, appropriate, accessible and affordable healthcare to all countrymen.² The system of the medical education as regulated by the Medical Council of India had failed to address the health care needs of the people.³ Therefore the medical education and its regulation in India witnessed far reaching changes in the years 2019 and 2020. The National Medical Commission Bill, 2019 was passed by the Lok Sabha on 29th July, 2019 and the Rajya Sabha on 1st August 2019. The President of India gave assent to the Bill on 8th August, 2019. In furtherance of these developments, The Indian Medical Council Act, 1956 was repealed with effect from 25th day of September, 2020.⁴ The Board of Governors appointed under section 3A of the Indian Medical

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- 1 A quote by Rudolf Virchow, available at https://www.goodreads.com/author/show/115871.Rudolf_Virchow accessed on 13th October 2019
 - 2 92nd Report of the Department-Related Parliamentary Standing Committee on Health and Family Welfare at p.7 <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Health%20and%20Family%20Welfare/92.pdf> accessed on 20th October 2020
 - 3 *ibid.* p.9
 - 4 Government of India, Ministry of health and family welfare, CG-DL-E-24092020-221940 (September 24, 2020) <http://www.egazette.nic.in/writeReadData/2020/221940.pdf> accessed on 12th October 2020

Council Act, 1956 was also dissolved.⁵ The provisions of the National Medical Commission Act, 2019 came into effect from 25th September, 2020.⁶ This legislation has been described as historic, path-breaking and game changer in the field of medical education.⁷ However K.K. Aggarwal, the President of the Indian Medical Association strongly opposed the National Medical Commission Act, 2019.⁸ Doctors across the nation took to the streets to protest against the Act.

The purpose of this paper is to examine the provisions of the National Medical Commission Act, 2019 with special reference to its impact on the professional nature of medical education and accessibility to quality and affordable medical education in India. This article is divided into five parts. The first part briefly explores into the meaning, nature and essential attributes of profession, professional education and role of professional council in the medical education. The second part critically analyses the working of the Medical Council of India from 1933 till 2020 as the prime regulator of medical education and profession. The third part considers and analyses the key provisions of the National Medical Commission Act, 2019 in the regulation of medical education and its accessibility. Part brief reflections as to the impact of the new legislation on the professional nature of medical education and its accessibility.

The medical profession and the medical education are of public importance in all societies. The medical education in India is not only of keen interest to India but also for the rest of the world. This is because; India has been the largest exporter of doctors for over hundred years.⁹ In the early part of twentieth century, doctors from India were sent to Arabia, Burma, Caribbean, China and parts of South America. The Medical Council of India had been the professional

5 *ibid*

6 Government of India, Ministry of health and family welfare, CG-DL-E-24092020-221939(September 24, 2020) <http://www.egazette.nic.in/writeReadData/2020/221939.pdf> accessed on 5th October 2020

7 Statement given by Dr. Harsha Vardhan, former Union Minister of Health and Family welfare, while addressing media on the National Medical Commission Act, 2019 on August 8, 2019, available at <https://pib.gov.in/newsite/PrintRelease.aspx?relid=192533> accessed on 13th October 2019

8 "National Medical Commission Bill opposed by IMA: All you need to know", India today web desk, December 17, 2017, <https://www.indiatoday.in/education-today/news/story/national-medical-commission-bill-ima-1110254-2017-12-17> accessed on 01.01.2020

9 "India Biggest Exporter of Doctors, Nurses to Europe: Report" December 29, 2015 <https://www.ndtv.com/indians-abroad/india-biggest-exporter-of-doctors-nurses-to-europe-report-1260003> accessed on 5th October 2020

body overseeing the medical education since 1934 in India. The Council's functioning led to many controversies since the year 2000. From University Education Commission Report of 1948 to the New National Education Policy of 2020, series of recommendations were made to bring reforms in the legal regulation of medical education.

Further the government policies and laws regulating admission of students and fixation of fee in medical colleges also led to a number of litigations. The Supreme Court of India has delivered many land mark judgements on these issues.¹⁰ The preamble of the National Medical Commission Act, 2019 seeks to provide for a medical education system that improves access to quality and affordable medical education in India. This paper, along with the examination of the impact of new law on the professional nature of medical education, also endeavours to analyse the manner in which the new legislation seeks to improve access to quality and affordable medical education.

MEANING AND NATURE OF PROFESSION AND PROFESSIONAL EDUCATION

For the purpose of ascertaining the impact of the National Medical Commission Act, 2019 on the professional nature of medical education, it is proper to have conceptual clarity as to the meaning and nature of Profession and Professional education and, the role of the Professional Council in the medical education.

It is not easy to define the term profession. Different people refer the term profession to mean different things. Profession is an occupation in which the preliminary training is intellectual in character involving knowledge and learning and not mere skill. Profession is pursued for others and not merely for one's self. In profession, the amount of financial return is not the accepted measure of success.¹¹ Professions are considered as the major bearers and transmitters of rational values and new technological knowledge. Emergence of strata of

10 *Champakam Dorai Rajan v. State of Madras AIR 1951 SC 226; Mohini Jain v. State of Karnataka, AIR 1992 SC 1858; Unni Krishnan v. State of A.P. (1993) 1 SCC 645; T.M.A. Pai Foundation v. State of Karnataka, AIR 2003 SC 355; Islamic Academy of Education v. State of Karnataka AIR 2003 SC 3724; P.A. Inamdar v. State of Maharashtra AIR 2005 SC 3236, etc.*

11 Brandeis L.D., Business – A Profession, Commencement address delivered at Brown University 1912 <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-1> Accessed on August 16, 2020

professional groups is considered as the most significant feature of the modern society.

It is the society which gives the profession its shape. Carr-Saunders and Wilson in their work 'Professions' contended that profession is a natural phenomenon; it is an organisation which spontaneously arises in order to fulfil the needs of the society. Contrary to this view, Magali Sarfatti Larson in his book 'The Rise of Professionalism' asserts that profession does not just arise; it is created by the efforts of its members.

In comparison with other occupations, the nature of services to be rendered by the professionals makes it necessary that, unqualified should be prevented from practicing profession. There is need to have single way of saying who is a professional and who is not. There is a need for updating the knowledge of the professional on a regular basis. To fulfil the above needs the professional councils are created. These professional councils are to regulate professional practice and prescribe curriculum. This regulation of professional education by the professional council itself is considered as indispensable and a fundamental feature of any profession. Professional councils are concerned with the content of the professional education and training. They need to satisfy themselves that the programme of study will equip successful students with the knowledge and ability to progress in to the profession.

The sociological studies also indicate that, the professions are to have three important elements. They are cognitive elements, normative elements and organisational elements. The cognitive elements are referred to the specialised knowledge and training. The normative elements represent the issues connected with ethics and the professionals' commitment to ensure public good by rendering his service. The organisational element refers to a national body in the nature of modern professional councils having disciplinary powers and is also entrusted with the task of supporting the cognitive and normative elements of the profession.¹²

Professional education is different from other areas of higher education because the curriculum addresses knowledge for and about practice. It is taught both in the context of higher education and the field of professional practice.

12 C.S. BELLIS, Professions in Society, British Actuarial Journal, (Vol.6.No.2), at pp.318-319

It has been contended that, for a profession to be recognised as a profession, it must be organised within a professional body. Professionals are allowed more autonomy in their work than other occupations. Instead of detailed legislation, professionals are self-regulated. Profession has monopoly over an area of work.

One major issue confronting medical education in India is the nature of relationship that exists between government and self-regulated profession and professional education. Government regulates most of the commercial activities in order to ensure public interest. The professional services are not considered as pure commercial activities because of their peculiar features. Self-regulation and monopoly over the work of professionals are considered as the most common approaches to regulate professions. These privileges of monopoly and self-regulation are meant to serve and protect the public.

The privileges of monopoly over the work and self-regulation serve the public interest against incompetence and misconduct. This further benefits profession itself by keeping its prestige intact, greater autonomy, authority to prescribe entry requirements and standard of practice. Thus, the primary role of professional council is to regulate the professional practice and ensure high standard in professional education as public service. To what extent the Medical Council of India has performed its tasks as a professional council in the regulation of medical profession and medical education is critically analysed in its historical perspective in the second part of this paper.

HISTORY OF MEDICAL EDUCATION IN INDIA AND THE WORKING OF THE MEDICAL COUNCIL OF INDIA

The history of modern medical education in India can be traced back to the year 1833. Lord William Bentinck, the then Governor-General-in-Council of British India constituted a committee to report on the medical education imparted in Calcutta Medical School and medical classes attached to the Sanskrit College and Calcutta Madrassa.¹³ The Committee submitted a report suggesting abolition of Calcutta Medical School, medical classes of Sanskrit College and Calcutta Madrassa. It recommended for the establishment of medical colleges and for teaching the medical science on European principles through the

13 Satpal Sangwan, Science Education in India under Colonial Constraints 1792-1857, Oxford Review of Education Vol. 16, No. 1 (1990), pp. 81-95. <https://www.jstor.org/stable/1050143> accessed on 18.10.2019.

medium of English. This report led to the establishment of medical colleges in Calcutta, Madras, Mumbai, Lahore, Delhi, Lucknow and other cities.

Initially the medical colleges used to grant their own diplomas. In 1857 the Medical College of Calcutta became affiliated to a university which was subsequently followed by other medical colleges. In the year 1925 there were ten university medical colleges in India and until 1934 there was no professional council for the purpose of registration of medical practitioners to ensure the standard of medical education and also to regulate the practice of medicine in India. In the year 1930 the conference of representatives of provincial governments and of the universities was convened by the government of India. In this conference it was resolved that an All-India Medical Council has to be established to supervise medical qualifications in India. In the year 1932 the Medical Council Bill was introduced in the legislative assembly and in 1933 The Indian Medical Council Act, 1933, No.27 of 1933 was brought into force. On the basis of this legislation, The Medical Council of India was established in 1934. The Medical Council of India was entrusted with the task of maintenance of uniform standard of medical qualifications for the whole of British India.

On 30th December 1956, The Indian Medical Council Act, 1933 was repealed and The Indian Medical Council Act, 1956 was enacted. In addition to the powers of the Medical Council of India under the old Act, the new Act empowered it to keep a register of medical practitioners. The Act empowered the Council to prescribe the standard of post graduate medical education for the guidance of Indian universities and also the power to ensure uniform standards in post graduate medical education.

In order to understand the need of the National Medical Commission Act, 2019 and dissolution of the Medical Council of India, it is very much necessary to analyse the working of the Medical Council of India from its inception under The Indian Medical Council Act, 1934 and 1956.

The Medical Council of India had been the regulator of medical education in India for more than 60 years since independence. The problems which medical education faced during this tenure of the Medical Council of India are many. Among those problems, the most important are, lack of transparency in the functioning of the education regulator (i.e., the Medical Council of India), lack of accountability, geographical mal-distribution of medical colleges in India,

absence of proper entrance test for admission to MBBS and postgraduate medical courses, charging capitation fee from students, by private medical colleges.

WORKING OF THE MEDICAL COUNCIL OF INDIA

The University Education Commission in its report of 1947 and 1948 itself has stated that, the Commission was not aware of any steps taken by the Medical Council of India to rectify serious defects in the Indian medical education system in those days.¹⁴ National Knowledge Commission in its report stated that the Medical Council of India's powers as regulator of entry to medical education should be withdrawn and its activities should be limited to that of professional association.¹⁵ The Medical Council of India has been in news for all wrong reasons from the year 2000. It was tainted with a series of scams from 2000 to 2018. The president of Medical Council of India was arrested in 2010 for allegedly demanding Rupees two crores bribe from a private medical college for giving recognition.¹⁶ *VyaysayikPareeksha Mandal (VYAPAM)* scam of 2009 has brought to light how entrance tests for admission to medical colleges were rigged.¹⁷ Even Judiciary was not spared from the irregularities in the medical education system. In the seventy years history of the Constitution of India, for the first time FIR was registered against a sitting judge of High Court with the permission of the Chief Justice of India. It is the Central Bureau of Investigation which registered the First Information Report against sitting judge Justice S.N. Shukla of the Allahabad High Court for his conduct in a miscellaneous bench No.19870.¹⁸ The accusation against the judge was that, he received bribe for giving a favorable order in the case connected with recognition of a private medical college.

14 Report of the University Education Commission, 1948 (Volume1) at p. 237 <http://14.139.60.153/bitstream/123456789/255/1/Report-Report%20of%20the%20University%20Education%20Commission%201948.pdf> accessed on 18th October 2020

15 National Knowledge Commission Report to the nation 2006-2009, at p. 63 <https://www.aicte-india.org/downloads/nkc.pdf> accessed on 18th October 2020

16 Sanjay Nagral, Kethan Desai and the Medical Council of India: the road to perdition? *Indian Journal of Medical Ethics* (Vol.VII No 3 July - September 2010) <https://ijme.in/wp-content/uploads/2016/11/1554-5.pdf> accessed on 20th October 2020

17 Times of India, June 16, 2015. <https://timesofindia.indiatimes.com/home/education/entrance-exams/Supreme-Court-junks-medical-entrance-test-rigged-by-hi-tech-cheats/articleshow/47683500.cms> accessed on 20th October 2020

18 Prasad Education Trust vs. Union of India MISC. BENCH No.19870 of 2017, Allahabad High Court.

There had been a hue and cry about the failure of the Medical Council of India in ensuring quality in medical education. The Medical Council of India is considered as responsible for the mismatch in the demand and supply of qualified medical practitioners in India and also for the geographical mal-distribution of medical Colleges. There are many allegations against the Medical Council of India. It has failed in its duties and massive money changed hand in granting approval for starting new medical colleges and also during the inspection of the existing colleges. The Council was being called 'an extortion syndicate' whose main function was to squeeze the private medical colleges for as much money as possible.¹⁹ It was alleged that the entire apparatus of the state – the legislature, the executive and the judiciary were aware of this and all colluded.²⁰ Rampant corruption was alleged to exist at every level of medical education from admission to medical colleges, getting degree and registration with the Medical Council.²¹ There were cases of leaking of question papers, and impersonation while writing medical entrance examinations.²² Corruption in the Medical Council of India led to its dissolution in 2010 and in its place the Board of Governors was appointed. The way in which the Medical Council of India dealt with the issues concerning medical education makes it clear that the continuance of the Medical Council of India as the sole regulator of medical education was no more in the public interest and further the indifferent attitude of the medical fraternity towards large-scale corruption in regulating medical education makes it sufficiently clear that the medical fraternity has breached the trust conferred on them to protect public interest through self-regulation and greater autonomy. Therefore, it is necessary to have far reaching structural changes in the way in which medical education is to be governed. Therefore, dissolution of the Medical Council of India is a progressive step in bringing desirable changes in the regulation of medical education.

19 George Thomas, "Regulation of Medical Education: Time for Radical Change", *Economic and political weekly*, Vol. 45, No. 22 May\29-June 4, 2010, <https://www.jstor.org/stable/27807069> p.13 accessed on 19.12.2019

20 *ibid.* P.13

21 Vijay Mahajan, White coated corruption, *Indian Journal of Medical Ethics*, (Vol VII No 1 January - March 2010) <https://ijme.in/articles/white-coated-corruption/?galley=html> accessed on 19.12.2019

22 "3 complaints of impersonation in medical entrance exam: CBI to HC," *Business Standard*, November 07, 2019, https://www.business-standard.com/article/pti-stories/3-complaints-of-impersonation-in-medical-entrance-exam-cbi-to-hc-119110701712_1.html accessed on 19.12.2019 <https://www.thehindu.com/news/cities/chennai/neet-impersonation-more-cases-likely/article29913943.ece> accessed on 19.12.2019

PROVISIONS OF THE NATIONAL MEDICAL COMMISSION ACT, 2019 GOVERNING THE MEDICAL EDUCATION IN INDIA

Following are some of the important reasons for the enactment of the National Medical Commission Act, 2019 as per the statement of objects and reasons to the National Medical Commission Bill, 2019. The first reason is that The Indian Medical Council Act, 1956 has not kept pace with time.²³ There should be separation of functions of the regulator of the medical education. The appointment of regulator has to be done through selection and not by election.²⁴ The Act further seeks to provide for a medical education system which improves access to quality and affordable medical education, to ensure availability of adequate and high-quality medical professionals in all parts of the country and periodic and transparent assessment of medical institutions. For achieving the above objectives, the legislation has a number of provisions which are analysed here under-

For the purpose of separation of functions of the regulator of medical education, the Act provides for the establishment of six authorities viz. the National Medical Commission, the Medical Advisory Council and four Autonomous Boards.

ESTABLISHMENT AND COMPOSITION OF THE NATIONAL MEDICAL COMMISSION

Section 3 of the National Medical Commission Act, 2019 provides for the establishment of the National Medical Commission by the Central Government. The National Medical Commission consists of a chairperson along with 10 ex-officio members and 22 part-time members. Thus, the total number of members of the National Medical Commission is 33.

1. The Chairperson

Chairperson should be a medical practitioner with post-graduation in any discipline of medical sciences. He should have an experience of 20 years which should also include experience as leader for at least ten years in medical education.

23 Statement of objects and reasons – The National Medical Commission Bill, 2019 https://www.prsindia.org/sites/default/files/bill_files/NMC%202019%281%29.pdf accessed on 18th October 2020

24 *ibid*

2. Ex-officio members

The number of ex-officio members is 14. The Presidents of the four Autonomous Boards established under this Act²⁵ are to be the ex-officio members of the Commission. The Central Government nominates five ex-officio members. The first nominated members are the Director of Health Services and the Directorate General of Health Services, New Delhi, the second member is the Director General of the Indian Council of Medical Research, the third member is one of the Directors of All India Institute of Medical Sciences. The fourth and fifth members are nominated from amongst the directors of the leading medical institutions specified in Section 4(3) (h) of the Act. Lastly a representative from the Ministry of Health and Family Welfare of Central Government will also be an ex-officio member of the commission.

3. The part-time members

The number of part-time members of the Commission is 22. They include three members from other disciplines such as law, management, economics, science, technology, medical ethics etc. State governments and union territories on rotational basis are to appoint 10 members to the Commission. They are Vice Chancellors of health universities of the States and union territories. The remaining nine members of the Commission are the elected members of the State Medical Councils.

The composition of the National Medical Commission makes it abundantly clear that, more than 87% of the members of the Commission are from amongst the medical professionals. Except the representative of the Ministry of Health and Family Welfare and three members from the areas other than medical profession, all other remaining twenty-nine members of the Commission are to be from medical profession. Further 60% of members of the Commission are to have vast experience in the area of medical education.

c. Appointment of Chairperson and part-time members of the National Medical Commission

Elaborate provisions are made as to the procedure to be adopted by the Central Government for the appointment of the Chairperson and Part-time

25 Section 16(1), The National Medical Commission Act, 2019

members of the Commission.²⁶ Appointments are to be on the recommendation of the Search Committee. The composition of the Search Committee makes it clear that the Central Government will have ultimate say in those appointments because; all the members of the search committee are nominated by the Central Government.

Selection instead of election has been chosen as the mode of appointment of regulators of medical education. This is in accordance with the statement of object and reasons found in the National Medical Commission Bill, 2019 but a clear deviation from the earlier position under the Indian Medical Council Act, 1956.

In the erstwhile Medical Council of India, more than 65% of members were elected members. The Government Universities/Health Universities and registered medical practitioners in the states used to elect these members. But these elections were also not free from controversies. It was alleged by a section of medical practitioners that the polling for the elections to the Medical Council of India were rigged by a section of doctors controlling the Indian Medical Association. The new papers in the year in 2013 and 2015 were filled with reports of malpractices in the election to the Medical Council of India.²⁷

The Indian Medical Association opposed the establishment of the National Medical Commission on the ground that, it has no elected members and has members from the fields other than medicine.

d. Functions of the National Medical Commission

The Commission is entrusted with the task of maintaining high standards in medical education by laying down policies along with necessary regulations. The Commission is empowered to frame guidelines to determine the maximum fee which can be charged by private medical colleges. This power of the Commission

26 Section 5(1) to (6), The National Medical Commission Act, 2019

27 SCOI Report, Incompetent, Inefficient or Corrupt? 'Rigged' Medical Council of India (MCI) election under SC scanner" Legally India, August 18, 2015 <https://www.legallyindia.com/the-bench-and-the-bar/incompetent-inefficient-or-corrupt-rigged-medical-council-of-india-mci-election-under-sc-scanner-scoi-report-20150818-6451> accessed on 19th October 2020, Jyothi Shelar, Medical Council election results stayed after rigging allegations. Mumbai Mirror, April 23, 2015 <https://mumbaimirror.indiatimes.com/mumbai/other/the-medical-council-election-results-stayed-after-rigging-allegations/articleshow/47019550.cms> accessed on 19th October 2020 West Bengal Medical Council Election Fraud: Doctor Registered 82years ago is claimed to havevoted, People for Better Treatment, July 6, 2013 <http://pbtindia.om/archives/1937> accessed on 19th October 2020

is however limited to 60% of the total medical seats available in those private medical colleges.²⁸ One of the key functions of the Commission is to conduct the National Eligibility cum-Entrance Test. This entrance test shall be the basis for admission of students to both undergraduate and postgraduate super-specialty medical education in different medical institutions governed under this Act. The Commission is further authorized to regulate the admission process of students to medical colleges by laying down regulations as to the common counseling.

e. The Medical Advisory Council and its functions

The Second important authority established by the Central Government under this Act to regulate medical education is the Medical Advisory Council.²⁹ The primary function of the Medical Advisory Council is to help the National Medical Commission in shaping the overall agenda, policy and actions relating to medical education and training. The Medical Advisory Council is also to advice the Commission on the measures to be taken for enhancing the equitable access to medical education.

f. composition of the Medical Advisory Council³⁰

The Chairman of the National Medical Commission is the *ex-officio* Chairman of the Medical Advisory Council. All the members of the National Medical Commission are also *ex-officio* members of the Medical Advisory Council. Further the Medical Advisory Council has the following members:

One representatives from Health Universities of each State and Union Territory, one elected representative to be nominated by the State Medical Councils of each state, the Chairman of the University Grants Commission, the Director of the National Assessment and Accreditation Council and four members to be nominated by the Central Government from among the persons holding the post of Director in the Indian Institute of Technology, The Indian Institute of Management and the Indian Institute of Science.

The composition of the Medical Advisory Council also makes it clear that, it is a body of experts from different discipline. The Medical Advisory Council has experts from the fields of management, technology and other sciences but majority of the members of the Advisory Council are still from the medical

28 Section 10(1)(a), National Medical Commission Act, 2019

29 Section 11(1), National Medical Commission Act, 2019

30 Section 11(2)(a) to (h), *ibid*

profession. This facilitates cross-discipline consultations and thereby allows framing policies and regulations after understanding ground realities prevailing in the system.

g. Autonomous Boards

The Act provides for the establishment of four Autonomous Boards viz. the Under-Graduate Medical Education Board, the Post-Graduate Medical Education Board, the Medical Assessment and Rating Board and the Ethics and Medical Registration Board.³¹ The First three Boards have been assigned with key roles in the regulation of medical education in India.

Further each of the Autonomous Boards, except the Ethics and Medical Registration Board are also required to be assisted by an Advisory Committee. The Advisory Committees are to include experts and it is to be constituted by the Commission. All the members of the Under-Graduate Medical Education Board and the Post-Graduate Medical Education Board are to be persons of outstanding ability, proven administrative capacity and integrity, possessing a postgraduate degree in any discipline of medical sciences from any University and having experience of not less than fifteen years in such field, out of which at least seven years shall be the head of a department or Head of an organization³² in the area of medical education, public health, community medicine or health research.³³

h. Under-Graduate and Post-Graduate Medical Education Boards

The Under-Graduate and Post-Graduate Medical Education Boards are entrusted with the task of determining the academic standards of medical education. These Boards are responsible for developing the curriculum. They determine the minimum requirements and standards in the infrastructure, in the quality of teaching faculty and in the examination for the purpose of granting recognition to medical qualifications. Further these Boards are also to facilitate the training of faculty members teaching in under-graduate level and post-graduate level.

31 Section 16(1) National Medical Commission Act, 2019

32 Explanation to Section 4, *ibid*

33 Section 17(2), *ibid*

i. The Medical Assessment and Rating Board

'The Medical Assessment and Rating Board' has a key role to play in the regulation of both under-graduate and post-graduate medical education. The powers and functions of the Medical Assessment and Rating Board can be grouped under four head viz., Grant of permissions to medical institutions, inspection of medical institutions for the purpose of assessment and rating, disciplinary actions against defaulting medical institutions, and publications of assessment and ratings. These powers and functions of the Board are discussed in detail hereunder.

1. **Grant of Permission:** The grant of permission by the Medical Assessment and Rating Board is necessary for the establishment of new medical institution or to introduce new post-graduate courses or to increase the number of seats in the existing medical institutions.
2. **Assessment and Rating:** The Assessment and Rating Board determines the procedure for the assessment and rating of the medical institutions. This is to ensure that the medical institutions are to comply with the standards laid down by the Under-graduate and Post-graduate Boards in the medical education. The Assessment and Rating Board is also entrusted with the functions of inspection of the medical institutions at regular intervals and assess those institutions as per the regulations made under the Act. One of the of criticisms against the new legislation is connected with the power of the Medical Assessment and Rating Board to hire and authorize third party agency to carry out inspection of medical institutions for the purpose of assessment and rating.³⁴
3. **Disciplinary powers:** If any medical institution fails to comply with the minimum standards prescribed by the Under-Graduate and Post-Graduate Medical Education Boards, the Medical Assessment and Rating Board can take appropriate disciplinary action against such institution. The disciplinary action can be in the form of warning, imposition of monetary penalty, reduction of intake or stoppage of admission. The Board can also give recommendation to the National Medical Commission to withdraw the recognition of the defaulting medical institutions.

34 Second proviso to Section 26(1) (c) of the National Medical Commission Act 2019

4. **Publication:** Further at regular intervals, the Medical Assessment and Rating Board is required to make available on its website the assessment and ratings of medical institutions.

The composition, powers and functions of the authorities established under this Act makes it very clear that there is clear separation of powers of regulation of medical education among the four Autonomous Boards. Areas of regulation of undergraduate, postgraduate medical education are entrusted with the first two Autonomous Boards. The accreditation and licensing are entrusted with the Medical Assessment and Rating Board. The Act also creates a platform for the cross consultation between the medical professionals and experts from other discipline like law, economics, technology, management, Sciences etc.

CRITICAL EVALUATION OF THE PROVISIONS OF THE NATIONAL MEDICAL COMMISSION ACT, 2019-IMPLICATIONS ON THE PROFESSIONAL NATURE OF MEDICAL EDUCATION

The National Medical Commission Act, 2019 led to unprecedented response from doctors. Almost three lakh doctors went on strike for one day against the provisions of the Act. The National Medical Commission Act is criticized for giving too much of power to the Central Government in the regulation of medical education. The reasons for such conclusion are that, the Central Government will appoint most of the members of the Commission, and also nominates members of the four Autonomous Boards. Further, the Central Government is empowered to function like an appellate body, authorised to set aside the routine decisions which can be taken by the Commission and other authorities under the Act. The Indian Medical Association, a national voluntary organization of doctors has criticized the composition of the National Medical Commission. According to them the authorities established under the Act lack autonomy and the system has become undemocratic due to the procedure prescribed for appointment of members of the Commission and other Authorities. The appointments under the Act are done by selection rather than by election. They further assert that in a democratic republic, to establish an institution with only nominated members is contrary to the basic principle of democracy. A section of medical practitioners does not agree with the views of the Indian Medical Association.

There are serious allegations even against this Indian Medical Association. It has been alleged that, the dubious functioning of the Indian Medical Association and the Medical Council of India are responsible for the spread of corruption in the medical profession.³⁵

Experts in the field of medical education and profession have not accepted the contentions of the Indian Medical Association as to the need of democracy in the National Medical Commission and other regulators of medical education. These experts deposed before the Parliamentary Standing Committee on health and family welfare, that the regulators of medical education should be nominated rather than elected.³⁶

Important arguments in favour of a nominated body of regulator of medical education are discussed here under.

Election to choose the members of National Medical Commission is unlikely to produce regulators of repute and moral authority. According to these experts, election to Medical Council of India is notorious for extensive use of money power. The private professional colleges are considered as the most important generators of black money in Indian economy.³⁷ This money power in the hands of the managements of some private medical colleges, whose number is continuously on rise since 1980 may give undue advantage to them in the election to the National Medical Commission. Private medical colleges will spend huge money in election and thereby ensure that the regulator will have their representatives in large number.³⁸ It has been pointed out that even in countries like Japan, Canada, UK and USA do not have elected members in the medical education regulators. Appointments are made through transparent process.

35 Vijay Mahajan, White Coated Corruption, Indian Journal of Medical Ethics, Vol.7, No.1, January to march 2020, <https://ijme.in/wp-content/uploads/2016/11/1506-5.pdf> accessed on 20th January, 2020.

36 Department-related parliamentary standing committee on health and family welfare, Ninety - Second Report, Functioning of Medical Council of India, March 8, 2016 at p. 14 <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Health%20and%20Family%20Welfare/92.pdf> p.14 accessed on 20th October, 2020

37 Black Money Rises in Education Sector, The Indian Express, June 30 2010 <http://archive.indianexpress.com/news/black-money-rises-in-education-sector/640406/> accessed on 20th October, 2020

38 Department-related Parliamentary Standing Committee on Health and Family Welfare, Ninety -Second Report, Functioning of Medical Council of India, March 8, 2016, at p.14 <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Health%20and%20Family%20Welfare/92.pdf> accessed on 20th October, 2020

Democracy in the professional body regulating medical education is not an indispensable requirement. If there is failure of the medical education system in satisfying the health needs of the society, it is ultimately the government which is responsible to the people for such failures. Therefore, giving extensive power to the government to appoint the regulator of medical education is hailed as a positive development. Experts have also pointed out that the government appointed regulatory bodies like National Board of examination; Board of Governors of Medical Council of India and Delhi Medical Council have performed commendably without any allegations of corruption and malpractices.³⁹

The sociological studies on profession, as discussed in the first part of this paper have pointed out that autonomy and auto regulation of professional education by professional council is an essential attribute of profession. This autonomy and auto regulation is not for the benefit of the professional but for the protection of public. Historical development of professions indicates that, self-regulation and autonomy is a privilege conferred by the state based on the trust that, the professional bodies are able to put aside their self interest in favour of promoting public interest. Such self-governance is acceptable only if it serves the public interest. The role of state in regulating the profession and professional education is well recognised even in ancient India. Sukra in ancient texts prohibited a person to practice as a doctor without king's licence.⁴⁰ Charaka and Sushruta the famous ancient Indian doctors observed that, it is the king's fault if incompetent doctors practice in the medical profession.⁴¹

Thus, state has to give primacy to public interest rather than the interest of the professionals while framing policies and legislations governing medical profession and medical education. It is contended that some of the common measures which state can undertake to ensure public health is to impose accountability on professionals, increasing the number of members appointed by the Government in professional councils, introducing agencies having overall supervision of the working of professional councils. These measures are termed as measures to transform professions from being self-regulated to that of being

39 *ibid* p.14

40 DR.A.S. ALTEKAR, *The Education in Ancient India*, (Sixth Edition 1965), Nand Kishore and Bros., Varanasi, at p.190

41 *ibid*. at. p. 190

co-regulated by both professionals and also the Government. Similar measures are found in the National Medical Commission Act, 2019.

a. Implications on the access to quality and affordable medical Education

In the year 2019, India has 70978 medical seats across 529 medical colleges. Of these 529 medical colleges, 260 are privately managed and they count for 35290 seats.⁴² The National Medical Commission Act, 2019 is criticized for legitimizing the menace of capitation fee by allowing Private medical colleges and deemed to be universities to have unfettered freedom to charge any amount of fee for giving admission in those institutions. It was pointed out that the National Medical Commission has power to frame guidelines for determination of fee and all other charges only for 50% of the seats of private medical colleges and deemed to be universities. The remaining 50% of seats are open for grab by any person who is rich and well off.⁴³ This effectively allows the private medical colleges to allot 17,645 seats to any person, provided; he obtained some rank in NEET. Thus, medical education is to become more expensive and this amounts to reservation for the rich. Entry of 17,645 less meritorious medical graduates to the profession is of grave concern. It will have its adverse effect on the health of the community.

It has been observed that, even though capitation fee is banned in India and Supreme Court has ruled in *T.M.A. Pai foundation v. State of Karnataka*⁴⁴ that, the colleges are prohibited from charging capitation fee, in reality illegally charging of capitation fee continued unabated. The National Institute of Public Finance and Policy in its report has pointed out that education sector is ranked second in generating black money in India.⁴⁵ It was further pointed out that the capitation fee paid to medical colleges in the year 2013 was Rs. 66144/- Crores. Our Courts, Government and Bureaucrats pretend that capitation fee does not exist. This sale of medical seats to the highest bidders has a profound impact on

42 "Biggest-ever addition to govt MBBS seats: 2,750 seats in 25 new colleges", Times of India, June 14, 2019 <https://timesofindia.indiatimes.com/home/education/biggest-ever-addition-to-govt-mbbs-seats-2750-seats-in-25-new-colleges/articleshowprint/69780392.cms> accessed on 10.09.2019

43 Section 10(1)(i), The National Medical Commission Act, 2019

44 *ibid.*

45 S Vaidhyasubramaniam, Administer Triple Test to Eradicate Capitation Fee, The New Indian Express, August 30, 2014 <https://www.newindianexpress.com/magazine/voices/2014/aug/30/Administer-Triple-Test-to-Eradicate-Capitation-Fee-654337.html> accessed on 08.01.2020

the quality of students taking admission to medical colleges and quality of medical professionals coming out of those colleges.

b National Eligibility -cum Entrance Test (NEET)

The menace of capitation fee was expected to be thwarted by the National Eligibility cum Entrance Test (NEET) in admission to medical colleges. The Supreme Court in the year 2016 cleared the deck for holding NEET for admission to medical colleges. But NEET itself has not been successful in ensuring merit in admission in medical colleges. Money continued to play a major role in admission to private medical colleges. In the year 2017, 57000 students have taken admission to 409 medical colleges. The average score of students in government-controlled seats was 448 out of 720 marks. On the other hand, the average score of students who have taken admission to seats controlled by private colleges was 306 out of 720. This clearly indicates that, in these private medical colleges, admission is entirely based on the ability to pay the exorbitant fee rather than the merit

One of the primary objectives of enacting National Medical Commission Act, 2019 has been to provide for a medical education system which improves access to quality and affordable medical education. But the provisions of the Act give very little indication as to how this goal is going to be achieved.

Proviso to Section 14(3) of the National Medical Commission Act, 2019 makes a passing reference to the power of the Central Government and State Governments to designate their authorities to conduct common counseling for All India Medical seats and seats at the state level. The Act does not provide for the enforcing mechanism to curb the practice of charging capitation fee and thereby undermining the merit. Nothing is stated in the legislation regarding assurance of transparency in admission process.

The Times of India in its report has clearly demonstrated that, it is not reservation but the money which dilutes merit in admission to medical colleges.⁴⁶

Medical Education needs to be regulated to protect the health of the community rather than to safeguard the interest of different stakeholder to make a living out of it. There is need to have more say for the government in admission

46 "Money, not quota, Dilutes merit in medical admissions, The Times of India, June 11, 2018 <https://timesofindia.indiatimes.com/india/money-not-quota-dilutes-merit-in-medical-admissions/articleshowprint/64534518.cms> accessed on 13.12.2018

of students to medical colleges even in private medical colleges beyond 50% of seats. Medical colleges need to be made more accountable and specific provisions are to be made to prevent unfair practices by private medical colleges. There were efforts in this direction by the earlier UPA government through the Prohibition of Unfair Practices in Technical Educational Institutions, Medical Educational Institutions and Universities Bill, 2010. The Bill was introduced in the Lok Sabha on 3rd May 2009, referred to Standing Committee on 13th May 2009 and the report of the Standing Committee was submitted on 30th May 2011. The Standing Committee stressed for more rigorous norms to curb unfair practices in medical colleges. Unfortunately, the Bill was not passed even after 9 years after the approval by standing committee.

CONCLUSION

Thus, the enactment of the National Medical Commission Act, 2019 has brought about far-reaching changes in the legal regulation of medical education. The provision of the National Medical Commission Act, 2019 dealing with establishment of National Medical Commission with sufficient safeguards against nepotism is a welcome step. The decisions are to be taken by the Commission involving wider consultation. The dissolution of the Medical Council of India is a welcome step. Mere alterations in the Medical Council of India were not sufficient and there was a need for substantial structural changes in regulation of medical education and medical profession as pointed out by the National Knowledge Commission in its recommendation dated 16th October 2007. The Commission has pointed out that the medical education system in India regulated by the Medical Council of India is neither adequate nor appropriate to meet the needs of the profession. The composition of different authorities established under the National Medical Commission Act, 2019 ensured that the experts in the profession got sufficient representation. Further even other stakeholders of medical education in the society also got representation.

On the issue of access to quality and affordable medical education, The National Medical Commission Act, 2019 is silent. There are no specific provisions to prevent the menace of capitation fee and other unfair practices by private medical colleges. Thus, the Act in its present form is not effective in preventing the practice of charging capitation fee which will perpetuate. Such a scenario is against the stated objective of providing a medical education system that improves access to quality and affordable medical education.

MEDIA TRIAL VIS-À-VIS RIGHT TO PRIVACY: A COMPARATIVE ANALYSIS

Mrs. Sharada KS*

ABSTRACT

Media is considered as one of the main pillars of democracy, it plays a pivotal role in forming an opinion in society. The media claims the right to investigate, to reveal, to expose, and to highlight the cases as their fundamental right under freedom of speech and expression. The media has been very enthusiastic in reporting the information even before the police. The process of media trial showed its power in many cases and succeeded in proving the events that were kept as secret and helping in solving cases. But many times these trials declared the accused guilty even before the court declares them and caused harm to the privacy right, fame, and reputation of an accused in society. This article tries to recognize the advantage and disadvantages of media trials and examines the position of this controversy in the United States of America and India.

Keywords: Media trial, Privacy, fundamental rights, American Constitution and Indian Constitution.

INTRODUCTION

In the 19th Century media is referred as to the Fourth estate and it is important because it counterbalances the other three organs of authority, the legislature,

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the executive, and the judiciary. In India we are no longer dependent on the opposition as a watchdog of authority, media is playing the intermediary role. Media functions as the watchdog role to safeguard the democracy and defend the public interest, to expose corruption. Media serves have a two-fold purpose, it carries information to the public and carries back public responses to the government.

Advanced technology transformed the quantum, quality, and content of information and entertainment level, and enhanced the transparency and accountability in public life. The advanced medium of audio-visual technology is offering live coverage and provides a wider platform for public participation, debate, and to form an opinion on issues of national or social concern¹.

MEDIA TRIAL

Media plays another revolutionary role in the preoccupation of sensational information which is called investigative journalism. Investigative journalism is not prohibited in India. It started the separate investigation by itself which is called 'media trial', and publishes its interpretation on fact.

The media trial was started in the year 1967, David Frost, UK TV host interviewed an insurance crook named Emil Savundra. The debate was started in an accusatory way and was tried by the media. Media trial is the trending topic in this movement. This expression refers to the media acting as judge, jury, and executioner. In media, the trial is conducted in parallel to the police investigation and declares verdict before the court passes its judgment. Cardinal principles of 'presumption of innocence until proven guilty' and 'guilty beyond a reasonable doubt' are at stake by the media trials.

CONSTITUTIONALITY OF MEDIA FREEDOM AND PRIVACY RIGHT

Freedom of speech and expression and the right to privacy both are important aspects of fundamental rights. Article 19(1)(a) guarantees freedom of speech and expression it includes media, the right to publish disseminated information. Article 21 of the Constitution guarantees the 'right to life and

1 MADHAVI GORADIA DIVAN, Facets of Media Law (2nd ed.) Eastern book Company (2013).

personal liberty',² and it includes the right to a fair trial³. Article 19(2) permits reasonable restrictions to be imposed by the statute, but privacy is not the ground under reasonable restriction⁴. In addition to this, there is no specific legislation to protect the right to privacy against excessive publicity by the press, including media trials in India. Under Article 19(2) 'administration of justice is also not explicitly defined as the restriction but section 2 of the Contempt of Courts Act 1971, clearly referred to the interference of the administration of justice in the definition of 'criminal contempt'⁵. Publications that "interfere or tend to interfere with the administration of justice amounts to criminal contempt" under the Act, reasonable restrictions on freedom of speech and expression can be imposed and it is valid. Freedom of speech and expression is an important right but not absolute.

Freedom of speech and expression is an enumerated fundamental right of the US Constitution but, it does not explicitly furnish a person with a right to privacy, it is divined and extracted by the judiciary. The roots of privacy rights can be found in the "First, Third, Fourth, Fifth and Ninth Amendment, the due process clause of the Fourteenth Amendment, and in the 'penumbras' of the Bill of Rights". Privacy is a limited right, it does not prohibit any publication which is of public interest. In *Cox Broadcasting Corp. v. Cohn*⁶, Mr. Cohn, the father of a deceased rape victim, sued a broadcasting company that had televised the name of his daughter. Relying on a "Georgia statute" which made it a misdemeanor for anyone to publish the name of a rape victim, Mr. Cohn claimed that his right to privacy had been invaded by the broadcast. Reversing the Georgia Supreme Court decision in favor of Mr. Cohn, US Supreme Court held that the "broadcast of a rape victim's name, procured from public court records, did not constitute an invasion of privacy". Moreover, the Court stressed the impropriety of imposing sanctions for the publication of truthful information gathered from court records open to public inspection. In *Cox's*, case the court said that the State of Georgia could not take punitive measures against, publishing the name of a rape victim in

2 M. P. JAIN, Indian Constitutional Law, 8th Edition, (New Delhi: Lexis Nexis, 2018)

3 GIFTY OOMMEN, Privacy as a human right and media trial in India the Age of Human Rights, Journal, 3 (December 2014) pp. 102-121, ISSN: 2340-9592,

4 <https://iapp.org/news/a/media-trials-in-india-an-unwritten-carve-out-to-the-right-to-privacy/>

5 <https://lawcommissionofindia.nic.in/reports/rep200.pdf>

6 *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, (1975)

the newspaper because that name was newsworthy. In *Florida Star v. BFJ*⁷ (1989) and *Smith v. Daily Mail publishing co.*⁸ cases, the Supreme Court held that the press may print the name of a rape victim or the name of a juvenile charged with murder though the state prohibits disseminating potentially sensitive information. Now the question is open whether liability can constitutionally be imposed for other private facts that would be offensive to a reasonable person and that are not of legitimate concern⁹.

Trial by media has focused the debate between freedom of speech and expression, and the right to a fair trial. It began in 1897, in the USA with the case of *Aron Burr*.¹⁰ The First Amendment of the American Constitution guarantees the freedom of speech and expression. The Fifth Amendment of the American Constitution protects the “right to life, liberty, and property”. The Sixth Amendment of the American Constitution ensures “the right to a speedy and public trial, by an impartial jury....”

In *Estes v. Texas*¹¹ case, the Supreme Court of US referred to the right to a fair trial as “the most fundamental of all freedom” and held that “the life or liberty of any individual in this land should not be put in jeopardy because of the actions of any news media”¹².

MEDIA TRIAL VIS-À-VIS RIGHT TO PRIVACY AND PRESS COUNCIL OF INDIA (PCI)

The media has been very enthusiastic to grab and report it the even before Police do. Investigative journalism is good but in the name of ‘breaking stories’, media reporters often make a story indulge without the slightest notion of individual privacy or sensitivity and compromise their journalistic ethics and propriety. Media publishes photographs of the suspects or the accused, or if it publishes statements that hold the suspect or accused guilty before the court passes any order. Media exercises unrestricted and uncontrolled freedom it leads to danger and serious risk of prejudice. Despite the significance of media it is

7 *Florida Star v. BFJ*, 491 U.S. 524(1989)

8 *Smith v. Daily Mail publishing co.* 443 U.S. 97(1979)

9 [https://www.stetson.edu/law/studyabroad/spain/media/Wk3.Stuart.Day1-2-Restatement-\(Second\)-of-Torts.pdf](https://www.stetson.edu/law/studyabroad/spain/media/Wk3.Stuart.Day1-2-Restatement-(Second)-of-Torts.pdf)

10 *United States v. Burr*, 25 F Cas 55 (D Va 1807)

11 *Estes v Texas*, 381 U.S. 532, 540 (1965).

12 *Id.*

desirable and expected to ensure that trial by media shall not hamper the fair investigation¹³.

The Press Council of India (PCI) laid down guidelines for journalistic conduct, to address the issue of privacy. It also lay down the guidelines for reporting cases and avoiding trial by media. These norms recognize privacy as an inviolable human right but the degree of privacy depends on the circumstances and the persons concerned. Journalists should not give excessive publicity to victims, witnesses, accused and suspected, because it amounts to an invasion of privacy

In the Gujarat Best Bakery¹⁴ case, the key witness Zaheera Sheikh was the victim of excessive media coverage and sympathy. Excessive exposure resulted in endangered her life. Identification of witnesses may force them to turn hostile or sometimes it may endanger the lives of witnesses also. In Kurshid Anwar¹⁵ a social activist committed suicide by jumping from the third floor. Mr. Anwar was labeled as a rapist by the news agency.

The privacy right of the accused or suspect is recognized by the PCI norms against the media trials. PCI norms also state that the visual representation in moments of personal grief should be avoided.

The Juvenile Justice (Care and Protection of Children) Act prohibits media from identification and disclosing the names, addresses, or schools of juveniles or that of a child in need of care and protection¹⁶. Section 228 A of the IPC states that the disclosure of the identity of a rape victim is prohibited and is punishable. In fact “names of the victims of sexual crime cannot be reported”.

The media spent enough newsprints about the crime in many cases and violated the PCI norms. In the Aarushi Talwar¹⁷ murder case media reports Rajesh Talwar and Nupur Talwar as the key accusers based on circumstantial evidence and suspicion even before the court pronounced any verdict. Media coverage was criticized on the salacious allegations against Aarushi and suspects. Aarushi's character was questioned even though there was no provident

13 RAM JETHMALANI & D. S. CHOPRA, Media Law , Second Edition, Vol. I, page no. 1562.

14 Zahira Habibulla H Sheikh and Anr. V State of Gujarat and Ors. 4 SCC 158. (2004)

15 <https://www.indiatoday.in/india/north/story/ngo-boss-khurshid-anwar-suicide-case-police-records-victim-statement-sexual-assault-charges-221806-2013-12-24>

16 <https://cis-india.org/internet-governance/blog/privacy/privacy-media-law>

17 Dr.(Smt) Nupur Talwar v. CBI, (2012) 11 SCC 465.

evidence to prove her affair with domestic helper Hemraj. Aarushi's parents Rajesh and Nupur convicted for the double murder and sentenced to life imprisonment by a special CBI Court in Ghaziabad. After nine years Allahabad High Court has acquitted the Talwars in all the charges. This reporting violated the privacy right of the family and its reputation and caused irreparable damages to human sensibilities.

An international student studying at Tata Institute of Social Science¹⁸ (TISS) was raped. In this case, the media did not reveal the girl's name but the name of the university and the course she was pursuing was revealed. The media reported sordid details of how the rape took place and PCI norms were violated by the media. A senior journalist Abishek Kumar (name changed) agreed that in the TISS case media crossed its boundaries in reporting. In media trials, media reporting has been relied on the information collected from the police source but creates an impression that its independent investigation wing has found the particular fact.

In the Sushant Singh¹⁹ case news channels were provocative in the name of news. Media blindly declared Rhea Chakraborty as an accused with shameless headlines like **“Sushanth par Rhea ka kaala jaadu”** (Rhea's black magic on Sushant) and **“Rhea ke jhooth par kya kehta hai India?”** (what does India have to say about Rhea's lies?)²⁰. She was dragged into the case unnecessarily and made her prime accused without any substantiative evidence. News channels showed her chats with Sushanth, and between other people as well, and showed her as the villain in the case. Media in the name of investigative journalism infringe the privacy right of the victim, the witnesses, the accused, and the suspects. In the Sushanth Singh Rajput case, the media violated the norms of Journalism conduct. The Press Council of India advised the media not to carry out their own 'parallel trials' and refrained from infringing privacy.

PROS AND CONS OF MEDIA TRIAL

The word media trial is not defined in the Constitution but media derives its power under Article 19 (1) (a) of the Constitution. People raise their voices against the injustice done by the authorities, media checks and balance the activities of the government.

18 <https://cis-india.org/internet-governance/blog/privacy/privacy-media-law>

19 Rhea Chakraborty v. Union of India and Anr. <https://indiankanoon.org/doc/134581494/>

20 <https://thewire.in/media/rhea-chakraborty-sushant-singh-rajput-aarushi-talwar-media-trial>

The media disclosed several scams, scandals, and cases and ensured justice to the common man. In the Priyadarshini Mattoo case, the media forms a public opinion and succeeded in ensuring justice to the common man. Another famous case is the Jessica Lal,²¹ case, it was a cold-blooded murder case in 1999. When a young woman refused to serve the son of a wealthy and powerful politician, at a restaurant so she was shot dead. In Manu Sharma's case, the media acted as a facilitator of justice. Through media trials, we achieved justice in many cases, but on the other side, it manipulates the mind of the audience, sometimes fake news provokes people²², and the information which the media reports may not be the authentic one.

Media trial has a good and bad impact. The media should be sensible enough in reporting matters. It should not report the cases just for sensationalism and TRPs²³. But in many cases media interferes and declares a person guilty even before the court decides who the culprit is. The trial is an essential process associated with the proceedings of the court in the administration of justice. Every accused has the 'right to receive a fair trial'. This increased interference of media in the investigation has a huge impact on the person's right to life and violates the privacy of the person. Mainly in the name of investigative journalism media interferes in the court proceedings, and declares the person guilty but in India, we have the judiciary to give the judgment on the cases. Freedom has to be used to avoid interference in the administration of justice²⁴.

REGULATORY MECHANISM

Media must have ethical and social responsibility while reporting, "with great power comes with great responsibility". In the absence of a statutory, mechanism, media is governed by several self-regulatory bodies. The Press Council of India, News Broadcasters Association, Broadcast Editors Association, News Broadcast Federation²⁵, these authorities have set their guidelines, but advisory in nature. One codified law on media and exclusive regulatory authority is the need of the day for proper regulation and to safeguard the right to privacy.

21 Sidhartha Vashisht v. State (NCT of Delhi), AIR 2010 SC 2352

22 <https://blog.ipleaders.in/media-trial-boon-or-bane/>

23 Arun Kumar Singh and Anil Kumar Media trials in India available at : <http://ssrn.com/abstract=2552426>

24 Sonakshi Pandey & Snigdha Srivastava, Right to Privacy as a Fundamental Right and Media Trials in India, 10 INDIAN J.L. & Just. 91 (2019).

25 <https://iapp.org/news/a/media-trials-in-india-an-unwritten-carve-out-to-the-right-to-privacy>

CONCLUSION

Freedom of expression and the right to privacy both are constitutionally recognized fundamental rights in India and USA. Almost all the countries in the world include a right to privacy in their Constitution explicitly or implicitly. US Commentators opinioned that media coverage adversely affects the fairness of the trial, freedom of speech would be served better by restricting rather than encouraging unrestricted media.

I conclude that Freedom of speech should be exercised very carefully and cautiously. When media is carrying proper function in a democracy, its freedom should be strongly upheld and protected, but when it is not doing so, and conflicting by attacking the basic freedoms of others, courts should not hesitate to restraint it. Media restraint on freedom must have the legitimate aim of protecting another individual Constitutional right and do not infringe the basic value of free speech in the name of restrictions²⁶. The media and judiciary both are engaged in discovering the truth, to uphold the values and essential for the progress of the society.



26 https://www.jstor.org/stable/pdf/27654682.pdf?ab_segments=0%252Fbasic_search_gs2%252Fcontrol&refreqid=excelsior%3A4bff9363d57c894972b6e6131e2368f5.

INITIATIVES FOR STRENGTHENING PANCHAYAT SYSTEM IN INDIA- AN ANALYSIS

Mr. Mahesh H. Hebbal¹

ABSTRACT

There is a government in India at the Center and State levels. But there is another important system for local governance. The foundation of the present local self-government in India was laid by the Panchayati Raj System (1992). But the history of Panchayati Raj starts from the self-sufficient and self-governing village communities. In the time of the Rig-Veda (1700 BC), evidence suggests that self-governing village bodies called 'sabhas' existed. With the passage of time, these bodies became panchayats (council of five persons). Panchayats were functional institutions of grassroots governance in almost every village. They endured the rise and fall of empires in the past, to the current highly structured system. Local self-government implies the transference of the power to rule to the lowest rungs of the political order. It is a form of democratic decentralization where the participation of even the grass root level of the society is ensured in the process of administration.

Key Words: *Local Self Government, Panchayat Raj System, Decentralization, Constitution, Democracy.*

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INTRODUCTION

Strengthening local governments is one of the most important governance challenges in today's India.¹ A strong and empowered local government comprising of PanchayatRajinstitutions at the grass root level in rural India has rightly been conceived as the most viable and proper mechanism of realising the goals of democracy and decentralization.² The dream of 'Gram Swaraj' of Mahatma Gandhi and motto of 'Power to People' are essence of true democracy. The task of capacity building of these large numbers of Panchayats is quite gigantic exercise. Even after 25 years of enactment of 73rd Constitutional (Amendment) Act and also after having five rounds of Panchayat elections in many States in India the empowerment of Panchayats has not taken place as envisioned in the 73rd Constitution (Amendment) Act in 1992. The 73rd Amendment to the Constitution in 1992 gave Constitutional status to the Panchayats as institutions of local self governmentand also for planning and implementing programmes for economic development and social justice.³

Mahatma Gandhi's vision of the democracy through people's participation could be ensured only by way of 'Gram Swarajya'. The Grama Sabha is really the corner stone of entire scheme of democratic decentralisation. It is a direct democracy at the grass roots level. Gandhiji had said "True democracy could not be worked by some persons sitting at the top. It had to be worked from below by the people of every village." The greater the power of Grama Sabha, the better it is for the people.Over the years, much change hasoccured in the functions, processes and structures of PanchayatRajand participatory governance and different States have evolved their own models of Panchayat Raj.⁴

Numerous Countries are experimenting with decentralization initiatives to devolve powers and responsibilities to elected councils at the lower tiers of the political and administrative system. Perhaps the most ambitious of all these and certainly the largest in terms of the number of elected representatives, is India's Panchayati Raj reforms introduced to glavanise local democracy and revitalize

1 T.R. RAGUNANDAN, *Decentralisation and Local Governments*1(New Delhi: Orient Black Swan Pvt.Ltd,2013) .

2 R.P. JOSHI AND G.S.NARWANI, *PanchayatRajIn India: Emerging Trends Across the States* 8 (New Delhi: Rawat Publications,2011).

3 DR. P. ANANTH, *PanchayatRaj in India*, Vol.1 No.1; *Journal of Education and Policy*(June 2014).

4 RAMESH K. ARORA AND MEENAKSHI HOOJA, *Panchayati Raj, Participation and Decentralisation*,3(New Delhi: Rawat Publications, 2009) .

grassroots development efforts.⁵ If these Constitutional amendments are implemented in letter and spirit the promise of a silent revolution dramatically alter the outlook for grassroots development through grass roots democracy by endowing power to the people, in rural India.⁶

To give effect to the 73rd Amendment of the Constitution, manifesting the commitment to the cause of translating the constitutional mandate of empowering the Panchayat to effectively function as Grama SwaRajit is the prime duty of the state to make the 'Gram Swarajyaa' dream of Mahtama Gandhi into reality in the year 2015, Karnataka State Legislature Amended the Karnataka Panchayat Raj Act, 1993 and renamed as The Karnataka Gram Swaraj and Panchayat Raj Act, 1993 to establish a three tier Panchayat Raj system in the state with the elected bodies at Grama, Taluk and District levels for greater participation of the people and more effective implementation of rural development programmes in the State.

INITIATIVES FOR PANCHAYAT RAJ INSTITUTIONS POSITION BEFORE 73RD CONSTITUTIONAL AMENDMENT

The 1957 Balwantrai Mehta Committee was constituted to assess the economy and efficiency of the Community Development Project and to study the efficacy of the programme in utilising local initiative and creating local institutions to facilitate the process of socio-economic development. According to the committee it was imperative to give power and responsibility to the community for the successful continuation of the process of development. Consequently, statutory elective local bodies with adequate resources, power and authority were recommended. On the basis of these recommendations the Panchayati Raj institutions were established for people's participation and the effective implementation of Community Development Projects. Very soon these Panchayati Raj institutions started collapsing due to lack of resources, lack of political support, bureaucratic antipathy and the domination of rural elites who cornered all the available resources. These institutions were often suspended or superseded. In development schemes the Panchayats played a marginal role, having no say in decision-making and implementation. These factors delegitimised the Panchayat Raj institutions.

5 L.C.JAIN, Decentralisation and Local Governance 10 (New Delhi: Orient Longman Pvt.Ltd.,2005).

6 Supra note 5p.63

In 1977 another committee under the chairmanship of Ashok Mehta was constituted to suggest measures for revitalising the Panchayat Raj institutions. The committee suggested a two-tier model at district and mandal level covering a population of 15,000 to 20,000. The Ashok Mehta committee recommended the abolition of the block as an administrative unit. The Chief Ministers' conference in 1979 rejected the idea of two-tier system and favoured the continuation of the three-tier system.

The G.V.K. Rao Committee was constituted in 1985 for reviewing the administrative arrangements for rural development programmes and poverty alleviation schemes. It agreed that the district should be the basic unit of policy planning and programme implementation but it emphasised the need for regular elections to the Panchayats. The seventh five-year plan recommended the strengthening of Panchayat Raj bodies through devolution of resources and greater autonomy of local bodies. It also suggested radical changes in the planning process for village and block level activities.

The Singhvi Committee formed in 1987 for reviewing the functioning of Panchayat Raj institutions recommended reorganisation of villages for creating viable Gram Panchayats. It also strongly recommended that greater financial resources should be made available to these institutions. Unfortunately, the Sarkaria Committee on centre-state relationship did not favour the Panchayat Raj institutions, although it did observe that local self-governing bodies were not working efficiently due to irregular elections and the suspension and supersession of these bodies on flimsy grounds.⁷

CONSTITUTIONAL FRAMEWORK OF PANCHAYAT RAJ INSTITUTIONS

The 64th Constitutional Amendment Bill suggested setting up of Panchayats in every state at the village level, intermediate level and district level. The intermediate level was not obligatory in the 4 states with a population of less than 20 lakhs. This bill was passed in the Lok Sabha in 1989 but could not be passed by the Rajya Sabha. The 73rd Constitutional Amendment Bill 1990 was introduced in the Lok Sabha and recommended that Gram Sabha should be constituted in each village in addition to the Panchayats at three levels.

7 AMITABH BEHAR AND YOGESH KUMAR, *Decentralisation in India: from Panchayati Raj to Gram Swaraj* 16 (London: Overseas Development Institute, 2002),

The bill recommended that the elections to the village Panchayats should be direct and at other levels at least 50% of seats should be directly elected. This bill also lapsed.

Following independence, the first draft of India's Constitution did not include any provision for the Panchayats even though Gandhiji had sought to make village Panchayats the very foundation of democracy in independent India. The President of the Constituent Assembly, Dr. Rajendra Prasad, drew the attention of the Law Minister, Dr. B.R. Ambedkar, to this lacuna in a letter dated 10 May 1948, initiating discussion and debate both outside and within the Constituent Assembly. This eventually led to the passage of an amendment proposed by the well-known Gandhian, Shri K. Santhanam, on 25 November 1948 including village Panchayats in Part IV of the Constitution containing the non-mandatory Directive Principles of State Policy. The amendment which was eventually numbered as Article 40 reads: "The state shall take steps to organise village Panchayats and endow them with such power and authority as may be necessary to enable them to function as units of self-government."⁸

THE POST CONSTITUTIONAL AMENDMENT INITIATIVES FOR STRENGTHENING PANCHAYAT RAJ INSTITUTIONS

The various committees and sub-committees made several recommendations and proposals for institutionalising the Panchayati Raj system and these efforts culminated in the form of the 73rd Constitutional Amendment providing Constitutional status to the Panchayat Raj institutions. The explanation for the easy passage of the 73rd Amendment Bill and the acceptance of radical restructuring of the state structure with far reaching political consequences goes way beyond the committee reports and proposals. To comprehend the dynamics of change it is imperative to understand the context of this Amendment.

Several decades of centralised planning and a top-down model of development had paid dividends in terms of economic growth and industrialisation. This development model was adopted with the hope that the trickle down effect will involve the poor and marginalised in the process of development. Unfortunately, this trickle down did not take place and a distorted and lopsided development process emerged, where the resources and authority became further concentrated in few hands. The fruits of development were

8 Supra note 5.p;19

neither shared, nor did the poor and marginalised have access to it. The marginalised sections, be they the poor, women or rural people, continued to be marginalised. It was clear by the 1980s that for more egalitarian and balanced development to be achieved, a more participative, democratic and decentralised bottom-up model of development was needed.

Development should be a flexible process emanating from the grassroot level and not a blue print given from above. For these ends, the social movements and civil society actors were demanding radical changes in the government structure, to make it more participative, decentralised, democratic, accountable and transparent. The underlying theme was to replace the State centric development process with a people centric development process. In this context state was under increasing pressure to radically restructure its governance system to make it more democratic and participative, and to address the needs and priorities of the marginalised sections of the society. It was genuinely felt a more grassroots approach would enhance the efficacy of the state's planning and implementation machinery, and incorporate the marginalised and under privileged in the mainstream of development. At this juncture the political will and support at the highest level also played a crucial role in preparing the ground for a PanchayatRajsystem.⁹

The 73rd Amendment Bill was passed by the Lok Sabha and the Rajya Sabha with near unanimity on the 22nd and 23rd December 1992 respectively. This bill was ratified by 17 State Assemblies in 1993 and came into force as Constitution 73rd Amendment Act from the 24th April 1993. The Act provides Constitutional status to the Panchayats and gives it uniformity by making the three-tier system a permanent feature. The key features of the Act are the following: *Panchayats* shall be constituted in every State at the village, intermediate and district level. However, the States with a population not exceeding 20 lakh have been given the option to not have any intermediate level Panchayat. There shall be a Gram Sabha in each village exercising such powers and performing such functions at the village level as the legislature of a State may provide by law. Members of Panchayats at all levels will be elected through direct elections. The election of the chairperson at the intermediate and district level will be through indirect elections and the mode of election of the chairperson of

9 VARSHA GANGULY, *State's Initiatives for Strengthening Local Governance*(Gurgoan: Institute of Rural Research and Development.2013).

the village Panchayaths been left to the respective States. Seats are reserved for Scheduled Caste and Scheduled Tribes at all level according to their population at each level. Not less than one-third of seats are reserved for women and these may be allotted by rotation. The office of chairperson will also be subject to this provision. A uniform five-year term has been granted to the Panchayats. In case of dissolution or supersession, elections should be held within six months of the date of dissolution. State legislatures have the legislative power to confer on the Panchayats such powers and authority as may be necessary to enable them to function as institutions of self governance. They may be entrusted with the responsibility of (i) preparing plans for social justice and economic development; (ii) implementation of schemes for social justice and economic development; and (iii) in regard to matters listed in the 11th schedule. The list contains 29 items, such as land improvement, minor irrigation, fisheries, education, women and child development. State government has the power to authorise the *Panchayats* to levy, collect and appropriate suitable local taxes. The Government can make grant-in-aid to the Panchayats from the consolidated fund of the concerned State. Review of the financial position of the Panchayats will be undertaken by a finance commission, which shall be constituted every five years. It will also make recommendations on the distribution of funds between State and local bodies. A State Election Commission shall be constituted to ensure free and fair elections to the *Panchayats*.

The 73rd Amendment was inserted in Part IX of the Constitution, containing article 243 to 243-O. Local government is an exclusive State subject under entry 5 of List II of the 7th Schedule, therefore 6 the Union just provides the outline of the *Panchayat system*, which would be implemented by the States by making laws or amending their existing laws to bring them in conformity with the provisions of the 73rd Amendment. It was binding on the States that the implementing legislation should be undertaken within a year of the commencement of the 73rd Amendment Act.¹⁰

STRENGTHENING PANCHAYATRAJ INSTITUTIONS : KARNATAKA EXPERIENCE

The Karnataka government has taken major initiatives in strengthening Local Self Government Institutions in the State. The Karnataka Zilla parishads, Taluk

10 A Report by Ministry of Panchayat Raj, "Roadmap for the Panchayati Raj: An All India Perspective" New Delhi, 2011 pp.13-14

PanchayatSamithis, Mandal Panchayats and Nyaya Panchayats Act, 1983 was a historic legislation passed by the state government much before the 73rd and 74th amendments were passed by Government of India in 1992 to establishment and strengthen the working of local self governments in the states. The Karnataka PanchayatRajBill, 1993 replaced the Karnataka Zilla parishads, Taluk PanchayatSamithis, Mandal Panchayats and Nyaya Panchayats Act, 1983 based on the changes proposed in the seventy-second Constitution (Amendment) Bill, 1991. The Bill is to establish a three-tieredPanchayatRajSystem in the State with the elected bodies at Grama, Taluk and District levels for greater participation of the people and more effective implementation of rural developed programes in the State. The following are the salient features of the Bill:

1. Establish a three-tiered Panchayat system in the State based on the population as ascertained at the last preceding census of which the figures have been published. It envisages elected bodies at all the three levels.
2. It provides for reservation of seats in favor of Scheduled Castes and Scheduled Tribes in proportion of their population and for reservation of one- third seats for women at all levels.
3. It also provides for reservation of seats and offices of chair persons at all levels for the persons belonging to Backward Classes of citizens.
4. It also provides for reservation of offices of chair persons at all levels in favour of Scheduled Castes and Scheduled Tribes and women.
5. It also envisages constitution of State Election Commission, the Finance Commission and district Planning Committee.

The State government has brought in amendments to the Karnataka *Panchayat Raj Act* in October 2003 and has taken steps to strengthen the *Gram Sabha*, to create and empower *ward sabha*; complete activity mapping; and rationalize and simplify schemes entrusted to the Panchayats are to be emulated countrywide. Further the monitoring of the actualization of devolution by a legislative committee is a significant step in the strengthening of Panchayats in the state.¹¹

11 NANDANA REDDY AND DAMODAR REDDY, Striking at the roots of Democracy, Economic and political weekly, Vol.XLII, No.18, 16301-1603 (May 5 2007)

The State government has also initiated a number of key reforms to strengthen the local self governments. Capacity building of personnel and strengthening the processes involved in the management of local self government have been initiated. Strengthening of Financial management/accounting reforms has been a key reform which has been promoted by the government in terms of improving accounting and financial reporting system, computerization of accounts and auditing have been introduced in local self governments. The accounting and financial reporting system for PRIs includes aspects like introducing a self-balancing book keeping (double entry book-keeping system); introducing standard accounting practices such as reconciliation, confirmation of balances, matching of main accounts with sub-accounts; initiating accounts and functional reporting need to be made timely; and appropriate functional reporting in prescribed formats.

The Gram Panchayats are also actively involved in the formulation of self help groups in the villages. The gram Panchayat members in general and women members in particular provide active help to the Non Governmental Organisations and functionaries of women and child development department for the formulation of Self help groups in the villages. These groups participate in activities related to Dairy activity, Sheep rearing, Sericulture, Horticulture, Weaving, Handicrafts, Minor irrigation project, Grocery shop, garments industry, Food product like pickle making, Paper products, Brick manufacturing, Catering services. Self help groups are also being drawn into activities like conducting survey of various development works, Entrusting mid-day meal scheme, Entrusting forest nursery and plantation work. Capacity building and skill development is taken up from time to time for the staff in the various committees so that they can perform their duties effectively. The Karnataka government provides training and capacity building of elected representatives of three tier *Panchayat Raj Institutions*.

The Government of Karnataka has made the social auditing mandatory for the Panchayats. The social auditing of the revenue and expenditure of the gram Panchayat is done every year in the month between September and November. The Government appoints nodal officer for each gram Panchayat for the conduction of social auditing in the village. The gram Panchayat fixes the date for the social auditing; on that day the taluk executive officer and the nodal officer present in the village. Panchayat secretary presents the revenue and expenditure

before the people of the village. The social auditing has reduced corruption and brought out transparency in the activity of gram Panchayats. It has made the expenditure need-based and rural governance people centered. It has also reduced the bureaucratic interference in the activities of the gram Panchayat.¹²

To fulfill the spirit of 73rd Amendment of the Constitution of India and for greater participation of the people to function as units of Grama Swaraj, the local Self-Government, the Karnataka State Legislature in the year 2015, amended *The Karnataka Panchayat Raj Act, 1993* and renamed as *The Karnataka Gram Swaraj and Panchayat Raj Act, 1993* to establish a three tier *Panchayat Raj system* in the state with the elected bodies at Grama, Taluk and District levels for greater participation of the people and more effective implementation of rural development programmes in the State. The Amendments are brought to strengthen the Panchayat system to make villages free from fear, exploitation and litigation, so that every individual can live with self-respect and dignity. The amendment also aims at empowering women to achieve gender equality, eradicating the evil practices of open defecation, exploitation and discrimination, ushering in an egalitarian society by empowering socially weaker sections in particular and people in general.

Further to strengthen Panchayats certain new initiatives have been incorporated in the amended Act, by inserting new Chapter I-A defines Directive Principles of a Panchayat Policy, it gives certain guidelines for the *Panchayats* that how *Panchayat* shall strive to promote:

- I. improved living standard of village community and quality of life by providing contamination free drinking water, health and sanitation facilities;
- II. the necessary rural infrastructure and involvement of rural communities and organizations in its improvement and development;
- III. democratic representation, social inclusion and meaningful community engagement in the Panchayat area, for planning asset management and sustainable development for enhancing the economic, social and environment well-being of its residents;

12 Supra note 4 pp.19-20

- IV. the use of resources at the command of Panchayat in a sustainable manner so as to conserve them for future generation and protect Forest and Wildlife in the Panchayat area;
- V. activities to protect and preserve art, culture and heritage of the local community and promote tourism;
- VI. the preservation, development and distribution of indigenous varieties of seeds like Navane, Sajje, Bili jola, Saame, Saave, Korli etc., and Herbs and Shrubs of Medicinal Value;
- VII. generation of employment opportunities by promoting Agro-industrial centers, rural cottage industries and a single window system for processing of documents to ease the business operations;
- VIII. a spirit of co-operation and an atmosphere of well-being by encouraging co-operative institutions so that they are able to work in accordance with National and State policies at the grass root level;
- IX. development and empowerment of human resource in rural area in terms of their skills, knowledge and other abilities;
- X. a safe and tolerant community that fosters peace social and communal harmony and abjures violence in all its forms.

It shall be an important directive policy of Gram Panchayat to prevent pessimistic attitude that may be permeating in the social fabric of residents of the village. Gram *Panchayat* shall pay special attention to those sections of farmers and other people who, on account of their vulnerability to socio economic pressures created by financial indebtedness, poverty and other factors, are psychologically prone to contemplate taking extreme step of destruction of their own lives. Further the gram Panchayat members shall educate the residents of the village of the futility of such mindset and instill confidence in the minds of all residents of the village.¹³

GOOD PRACTICES INITIATED BY STATES TO STRENGTHEN PANCHAYATS

In order to expand the scope and powers of Panchayats at the local level, the process of reforms have been initiated by various states which helped

¹³ SATHPALPULIANI, *The Karnataka Gram Swaraj and Panchayat Raj Act, 1993* 333 (Bengaluru: Karnataka Law Journal Publications, 2016).

strengthening of Panchayats. While some states have taken measures towards meeting the basic requirements of devolution as specified in the Constitution, other states have taken off to the next level in terms of promoting good governance, efficient service delivery, decentralized democracy, transparency, accountability and e-connectivity. Some of the recent initiatives as visible from the efforts of the state governments are mentioned below:

Karnataka guarantees Services to Citizens through Sakala

With effect from 2 April 2011, the Karnataka government has enacted the Karnataka Sakala Services Act 2011, which guarantees delivery of essential civic services to the citizens of Karnataka, within the stipulated time limit. As about 11 services pertaining to gram Panchayats are covered under Sakala, which includes maintenance of drinking water, street lights and village sanitation, issue of records such as cattle and crop census, Below poverty line list, e-payment for work executed under developmental schemes, etc. The procedures to be followed for the effective implementation of Sakala has been issued to the concerned state authorities through a circular on 10 January 2013 and the Services Guarantee Act has been introduced in all the *gram Panchayats* (5627 in number). Till the submission of this initiative, 1,98,305 applications had been received since 1 April 2012 and 1, 83,809 applicants had been delivered the services (92.69% of the total). This is a measure to promote transparency in administration and accountability in service delivery to the people.

Rajasthan revived District Planning Committees and Standing Committees

In 2012-13, measures have been taken by the Rajasthan Government, to strengthen the District Planning Committees and the Standing Committees at all three tiers of the Panchayats. The Deputy Directors of Plan has been deputed as the Chief Planning Officer, and the District Planning Committees are supported and supervised by the Joint Directors Statistics, at the Division level. Further, extensive guidelines have been issued by the Government of Rajasthan on 14 July 2011, to revive Standing Committees and strengthen their roles with respect to five departments that have been devolved to Panchayats.

Maharashtra revamped Integrated Watershed Management Programme Committee

Government of Maharashtra had launched the project called SANGRAM - Sanganakiya Grameen Maharashtra, a computerised programme for enabling rural Maharashtra to fight against corruption. This project is for effective implementation of development programmes, which is the convergent implementation of administrative reforms, on-line services, computerisation, bio metrics attendance, etc. All government services are made accessible to the common person in her/his locality through common service delivery outlets ensuring efficiency, transparency, and reliability of such services at affordable costs. E-tendering process and bio-metrics attendance are two tools in SANGRAM project for transparency in governance and administrative control. In addition, the structure of Integrated Watershed Management Programme (IWMP) committee has been changed as per the order of the Maharashtra Government, dated 27 September 2012. The major provisions are as follows: Gram Panchayat Sarpanch shall be the ex-officio Chairperson of this committee and secretary shall be selected by Gram Sabha. This committee shall work as sub-committee of gram Panchayat and will be responsible for operation and maintenance of watershed works, registering new works, accounts maintenance of expenditure, annual reports of accounts.

Gram Panchayats in Maharashtra are empowered to tax mobile towers and wind mills

In terms of empowerment of Panchayats to impose and collect taxes, the Maharashtra Government, has made an Amendment in rule 6, of the Maharashtra Village Panchayat Taxes and Fees (Amendment) Rule, 2011, on 21 November 2011 by which the gram Panchayats can charge tax on mobile towers and wind mills, which will help the gram Panchayat in generating substantial revenue.

Odisha launched Gram Sabha Sashaktikaran Karyakrama and Panchayat Helpline

The Gram Sabha Sashaktikaran Karyakrama (GSSK) campaign was launched on 2 October 2012, which is a drive for social mobilisation and enhancing institutional capacity of Panchayats through administrative and technical support. This campaign was mainly conducted through Palli Sabha and Gram

Sabha. Further, a toll free Panchayat Helpline was also launched by the Panchayati Raj department on 2 November 2012. This measure was taken to make the government more transparent, accountable and accessible. The helpline contributes to addressing the grievances of the citizens.

Madhya Pradesh ratified Panch Parmeswar Yojana

Panch Parmeswar Yojana, was launched on January 10, 2012, to consolidate the funds made available to *Panchayats* in the *Panchayati Raj* account through Integrated Action Plan for Rural Development. As per this initiative, the Gram Panchayats would get consolidated funds on the basis of population during the financial year. Under the scheme, a consolidated fund of Rs. 5 lakh is made available to *Gram Panchayats* with a maximum population of 2,000, Rs. 8 lakh to Gram Panchayats with the population of 2,000 to 5,000, Rs. 10 lakh to Gram Panchayats with the population of 5,000 to 10,000 and Rs. 15 lakh to the *Gram Panchayats* with the population of over 10,000. *Panch Parmeswar* has been regarded an effective mechanism, to facilitate Panchayats to carry out developmental work in a full-fledged manner.

Till recently, funds under various schemes were made available to Panchayats in piecemeal. Panch Parmeswar Yojna will help remove this lacuna. In the recent past, funds were separately received by the Gram Panchayats under various heads of 13th Finance Commission, basic grants under State Finance Plan and revenue share from mining and stamp duties due to which they were unable to utilise these funds simultaneously. Under the scheme, every Panchayat will be provided funds as per 13th Finance Commission and third State Finance Commission. If any Panchayat gets less funds under Panch Parmeswar Yojna, it will compensate the shortage from the funds received from mining and stamp duty revenue. Similarly, the Gram Panchayats which are getting more funds thus far can get additional funds after utilisation of previous funds. The Gram Panchayats have been suggested to chalk out an additional Integrated Action Plan for first two years on the basis of population. Under the scheme, construction of drains and internal roads and Anganwadi buildings, wherever previously sanctioned, are being undertaken.

Chattisgarh enforces Citizen's Charter through Lok Sewa Guarantee Act 2011

Through notification dated 16th December 2011, a time limit has been stipulated for the delivery of nine public services to citizens by gram *Panchayat and janpad Panchayats*. Responsibilities have also been fixed on certain public authorities for – (a) The delivery of each public service. (b) In the event of default and (c) Appellate authority. Every applicant who cannot obtain public services within the stipulated time shall be entitled to get the compensation as per the Act.¹⁴

CONCLUSION

The rationale of democratic decentralization is to give power to the people so as to create a sense of ownership in them and to ensure their participation in decision making.¹⁵

Our Constitution provides a clear mandate for democratic decentralization not only through the directive principles of states policy which exhorts the states to promote Panchayat Raj institutions but more specifically now through the 73rd Amendment of the Constitution which seek to create an institutional framework for ushering in grass roots democracy through the medium of self governing bodies in rural areas of country. However despite the Constitutional mandate the growth of local governing bodies as the third tier of governance in the country has been uneven, halting and slow. Even after passing of the 73rd Constitutional Amendment, transfer of funds, functions and other functionaries has been nominal in most of the States.

Over the years, much change has occurred in the functions, processes and structures of Panchayati Raj and Participatory governance. Various States have evolved their own models of PanchayatRajSystem. Some of the states such as Karnataka and Kerala have shown the way to how different functions can be entrusted do different tiers can be synergized to the benefit of the system as a whole. Each state government must establish an appropriate body to recommend the division of devolved functions to different tiers of the PanchayatRajsystem.¹⁶

14 V.N.ALOK, Strengthening of Panchayats in India:Comparing Devolution across States, 101(New Delhi: The Indian Institute of Public Administration,2013).

15 Supra note 1p.3

16 Supra note 5 p.64

In the State of Karnataka significant efforts are made through the recent amendments, by taking proper steps and measures for strengthening the Panchayat system to make villages free from fear, exploitation and litigation, so that every individual can live with self-respect and dignity. The amendment also aims at empowering women to achieve gender equality, eradicating the evil practices of open defecation, exploitation and discrimination, ushering in an egalitarian society by empowering socially weaker sections in particular and people in general. The above experiment that has gone through in Karnataka has Strengthened the democracy at the grass root Panchayat levels which is worthy of emulation in other states.



IMPACT ON RIGHT TO EDUCATION DURING THE PANDEMIC – ACOMPARATIVE ANALYSIS BETWEEN INDIA, USA AND UK

Smt. Deepa M. Patil^{*}

ABSTRACT

During the Coronavirus Pandemic situation more than the half of the world has closed their educational system, either full or particular reason. It is radical uncertain situation to take any decision regarding education. It gives great challenge to the Government, Authorities, Communities, Educationalist and families. It is big challenge to adopt any plan, in along with to protect goals and principles of the human society in along with the protection of life of the people. People need to be motivated, communicated and engaged in learning process. Closer of educational institutions hamper the entire growth of child either physical or mental. It also affected the ability to work and even one of the measure reason for increase the risks of violence against women and children. Different States have adopted different plan to overcome such situation. In this article author try to analyses the what were the measures adopted by different countries especially USA and UK? At the same time what was the position of India? What must be best method for education to regaining the position prior to the Pandemic?

Key Words: *Education, Rights, Humanity, Development, Protection*

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INTRODUCTION

An old Sanskrit adage states: “That is education which leads to liberation”- liberation from ignorance which shrouds the mind liberation from superstition which paralyses effort, liberation from prejudices which blind the vision of the Truth. Education is a dynamic process that starts from birth. It is the most important element for the growth and prosperity of a nation.¹ Education emancipates the human beings and leads to liberation from ignorance. Education is now being vision as a human right and an instrument of social change.² Education in its real sense is the pursuit of truth. It is endless journey through knowledge and enlightenment. Such a journey opens up new vistas of development of humanism.³ Education is that which provide dignity to the man, which also provides the environment for the development for the human rights and simultaneously rights of the others are also protected. Proper education leads to development and empowerment of the nation. The significance of the education cannot be marginalized.

A man without education is equal to animal. Education is essential for not only for the development of the individual personality it is essential for the realization of his consciousness and to help him to become the complete person. In the democratic country only the education can establish the informative and transformative government. Education and educated citizen is very essential for the development of the community, society and the nation. Education is a powerful tool for preparing citizens in the knowledge society. Education will amalgamate globalization with localization, enabling children and youth to become world citizens, with their roots deeply embedded culture and traditions.⁴

The most important and urgent reform needed in education is to transform it, to endeavour to relate it to the life, needs and aspirations of the people and

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- 1 A.P.J Abdul Kalam, “The pursuit of truth” – President A.P.J. Abdul Kalam’s address to the nation on the eve of 58th Independence Day in NCMP-DMPR-facilities (MPISG New Delhi, Archin Texture Imprints, 2004) <http://architexturez.net/dic/az-cf-21863>.
 - 2 Dr. Sanjay Sindhu, FUNDAMENTAL RIGHT TO EDUCATION IN INDIA: AN OVERVIEW, Vol.3(5) G.J.I.S.S., 92-95.
 - 3 A.P.J.ABDUL KALAM AND Y.S.RAJAN, Beyond 2020: A vision for Tomorrows India (Pengium Books Ltd 2014), ands. Vijay Kumar “Dr. A.P.J. Abdul Kalam’s Vision for the Nation” The Hindu Sep. 5, 2013 <http://www.thehindu.com>
 - 4 Ministry of Human Resource Development National Policy on Education 2016 Report of the Committee for Evolution of the New Education Policy https://www.academia.edu/36230895/Ministry_of_Human_Resource_Development_National_Policy_on_Education_2016_Report_of_the_Committee_for_Evolution_of_the-New_Education_Policy_Government_of_India visited on 25/02/2020 at 21:33

thereby make it the powerful instrument of social, economic and cultural transformation necessary for the realization of the national goals. For this purpose, education should be developed so as to increase productivity, achieve social and national integration, accelerate the process of modernization and cultivate social, moral and spiritual values.”⁵ .

In modern world schools have responsibility in particularly important space in the political socialization of students because of their dual functions, one is to preparing students to live and work with a diverse group of individuals and other is to introduce students to the state’s values surrounding democracy and human rights. As borders the notion of national identity and the questions of citizenship became notion of the democratic country.⁶ Another challenge before modern education is balance between education and economic priorities. In public marketplace especially in private service sectors citizens are considered as producer and consumer. Education is viewed as a part of a broader development strategy that can improve economic indicators and mode of gaining employment and success. The World Bank and the European Union, and international conferences spearheaded by the United Nations such international organisations also often defined and reinforced these global concepts.⁷

In welcoming address of ‘World Education Forum’ 2000 by hon’ble, President Mr. Abdoulaye Wade of the Republic of Senegal, who viewed that the education as a human right rooted in social and legal environment in along with the right of an individual to enjoy his life.⁸

No of International instruments put an obligation on the States which are parties to the instrument to provide free and compulsory education to all.

5 Report of the University Education Commission (Dr. S. Radhakrishnan Commission), 1948-

6 Dana Mitra, Ulrika Bergmark and Catrine Kostenius, and others Ironies of democracy: Purposes of education and the construction of citizens in Sweden, India and the United States Volume 11 Number 2, Citizenship Teaching & Learning. 2016 https://cbps.in/wp-content/uploads/Citizenship-Teaching-and-Learning-Volume-11-issue-2-2016-doi-10.13862Fctl.11.2.191_1-Mitra-Dana-Bergmark-Ulrika-Kostenius-Catrine-Brezicha-Kri-Ironies-of-democracy-Purposes-of-ed.pdf

7 Dana Mitra, Ulrika Bergmark and Catrine Kostenius, and others ,Ironies of democracy: Purposes of education and the construction of citizens in Sweden, India and the United State, Volume 11 Number 2, Citizenship Teaching & Learning. 2016 https://cbps.in/wp-content/uploads/Citizenship-Teaching-and-Learning-Volume-11-issue-2-2016-doi-10.13862Fctl.11.2.191_1-Mitra-Dana-Bergmark-Ulrika-Kostenius-Catrine-Brezicha-Kri-Ironies-of-democracy-Purposes-of-ed.pdf

8 Rama Kant Rai, Status of Elementary Education in India final edit https://www.academia.edu/37279823/Status_of_Elementary_Education_in_India_final_edit?email_work_card=view-paper

Article 26 of the Universal Declaration on Human Rights, Articles 4 and 5 of the Convention against Discrimination in Education (1960), Articles 28-30 of the Convention on the Rights of the Child, Articles 13 and 14 (right to education) of the International Covenant on Economic, Social and Cultural Rights, World Declaration on Education for All or the Dakar Framework for Action. Such instruments put not only free and compulsory education as mandatory duty on the State but which made State to provide education without any discrimination.

In this article we will discuss about, how the India, USA and UK try to implement these international treaties in providing education to their wards. Did the countries provide free and compulsory education to all without any discrimination? During the pandemic situation whether all these countries were in position to provide the education to all without any hurdle?

INDIAN POSITION

India is the country having history of civilisation more than 5000 years ago. Education was considered as only mode to attain salvation. As by the study of Indian history it can be realised that due to many invasions Indian civilisation underwent drastic changes. Along with change and development in civilisation, education also moulded and modified accordingly. Earlier education was provided according to class of the society. Later during Jainism and Buddhism concept of common education was started developing. But education was not common to common man during these period. During the Mughal period the rulers did not make any significant efforts to universalise the existing educational system, but tried to spread Islamic principles, laws, and social conventions as part of education in India. After independence in 1947 to establish educated society, the State has set up two important goals, (1) to provide Universal free and compulsory education to all and (2) develop all primary education institutions. For the attainment of these goal two committees were established for conduct the surveys for assessing the possibilities of providing primary school within the easy walkable distance from the home of every child. The committee has in the chairmanship of Shri. G. Ramachandran conducted the survey and submitted its report in 1956. As a result, National Institute of Basic Education was established in 1956. Later on the National Council of Educational Research and Training was set up as autonomous organisation in September 1961⁹. Along with this no

⁹ A. BISWAS, AND S.P. AGARWAL, Development of Education in India- A Historical Survey of Educational Documents before and after Independence 837 (New Delhi: Concept Publishing Company, 1994)

of commissions and committees were established to reconstruction of education in the independent India. Later commissions Universal Education Commission¹⁰ and the Secondary Education Commission,¹¹ the recommendation made by these commissions played important role in the field of education after independence. During the period of Jawaralal Nehru the Resolution on Scientific Policy was undertaken for the development of technology, science and scientific research was received special emphasis. Primary education really got its reconstruction only after the end of Third Five Year Plan. On the advice of Government in 1964-66 another commission¹² was established for the national pattern of education and on the general principles and policies for the development of education at all stages and in all aspects.¹³ Regrettably, in reality it was found that first legislature has totally ignore and failed to implement the aspiration of Constitutional framers. Even though goal was specially mentioned in the Constitutional provisions due to lack of political interest and aspirations there has been gross violation of the children rights. After analysing government statistics Central government in India do not appear to have focused on education as a national priority. Between 1951 -55 public expenditure on education was less than 1% of the total domestic product(GDP) of India. During 1955-56 the first time more than one percent of total GDP spent on education but this figure stayed between 1% to 2% and till 1979.¹⁴ After the study of national annual budget by Dr L. C. Jain a social activist noted that during 1951-61, Article 45 'lay under a lid' there was "not to be found a passing reference to education let alone to Article 45 in the budget speeches."¹⁵ It was increasingly evident that even three decades after the time limit set in Article 45, neither the Central Government not the various State Government were making much progress towards the attaining the goal set out by the draftsmen of that provision of the Constitution.¹⁶

10 (1948-49) the Commission was established to develop the higher and technical education.

11 (1952-53) the Commission was established to develop the secondary education.

12 Indian Education Commission also known as Kothari Education Commission.

13 The Commission has observed that the existing system of education is unrelated to the life and there is a wed gap between it and national development. it also recommended that education must be related to the life, needs and aspiration of the people.

14 Department of Education, Government of India, Selected Educational Statistics 2000- 2001 2 <http://www.education.nic.in/htmlweb/edustats-03.pdf>

15 L.G.JAIN, Are Our Budget Makers Faithful to the Constitution? A Tour of Budget, 1947-2001, National Centre for Advocacy Studies,2001.

16 VijayshriSripati and Arun K. Thiruvengadam, Constitutional Amendment Making the Right to Education a Fundamental Right, 152 Constitution, Vol. 1, ch. 3 (2002), <http://lawmin.nic.in/ncrwc/finalreport/v1ch3.htm> (last visited on 14/10/2020)

In 1968 the first official Policy¹⁷ was made by the Indian government for the development of primary education and try to implement it common school system to strength and access to the education and pave the way to social development. But due to lacking of detailed strategy, legal force, financial and organisation support the policy could not properly have implemented. The goal set by the drafts men of the Constitution need to be achieved by 1960, because of many factors this target again revised to 1970, then to 1976, again in 1988 present targeted to adopted in the policy frame after 65 year plans in 1990.

Matters did not improve significantly over next three decades. After the emergency an important change occurred in 1976, when, the education was added to the concurrent list after removing it from the State list.¹⁸ Constitution (Forty-second Amendment) Act on Indian Parliament, Dec 18, 1976,

The Educational Right has been reinforced by new 20 point program and announced by Prime Minister in 14th January, 1982.¹⁹ These moves were made to give more power to Central Government in the matter of providing educational services on the national basis, but it did not result in any marked changes in the immediate aftermath.

The National Policy on Education 1986 (revised in 1992) the Resolution stressed the role of education in promoting national progress, a sense of common citizenship and culture, and in strengthening national integration. The policy envisaged a National system of education which implies that “up to a given level, all students, irrespective of caste, creed, location or sex, have access to education of a comparative quality.”²⁰ The policy also states that “Sports and Physical education are an integral part of the learning progress, and will be included in the evaluation of performance . A nation- wide infrastructure for

17 The National Policy on Education 1968: A system of 12 years of School Education, popularly known as 10 + 2 system has been adopted. The 10 years' school is considered in three segments primary, middle and secondary. The primary and Middle together constitute elementary education.

18 Constitution (Forty-second Amendment) Act on Indian Parliament, Dec 18, 1976, <http://ondiacode.nic.in/coiweb/amend/amend42.hmt>. (Last visited on 14/10/2020)

19 "Point 16 of 20 point programme reads as follows: Spread universal elementary education in the age group of 6- 14 with special emphasis on the girl, and simultaneously involve students and voluntary agencies in programs for the removal of adult illiteracy

20 NEP Draft 2016. https://www.mhrd.gov.in/sites/upload_files/mhrd/files/nep/Inputs_Draft_NEP_2016.pdf (Last visited on 3/3/2020)

physical education, sports and games will be built into the educational edifice.”²¹ The policy also stress on the introduction of Yoga for the integrated development of body and mind. It is also stated that special cash incentives must be provided to the achievers in the extra-curricular activities especially Yoga and Sports. With all these objects also this policy not discussed about the shifting the free and compulsory education from non-enforceable right (DPSP) to enforceable one (F.R). Along with the national policies various state government brought different schemes for implementation of the education as a basic right. In 1990 Government has come out with the goals for universal primary education by 2010. The goal of universal and quality education is mainly emphasised by the Supreme Court in two historical judgments in 1993.²²

As the result of these developments in 2002 the Indian Parliament enacted 86th Constitutional Amendment Act inserted Art. 21 A and Art. 51A (k) and amended Art.45 in the Constitution. As a follow up legislation in terms of Art. 21-A of the Constitution of India, the Parliament enacted Right to Children to Free and Compulsory Education Act 2009 (RTE), which came in force on the 1st day of April, 2010.²³ The Act is a landmark in the history of education related legislation in India. The Act introduces a revolutionary change in enforcement of primary education in India. However, it was not made possible to implement the law as it was dreamed out by the legislature.

There are many important objects intended by the NEP 1986 were not supported by any legislations. It was only after the adoption of the National Plan and Action for Children, 2005 which took policies mainly on the pre- primary education.

National education policy 2016 emerged as a result of past experience and the concerns and imperatives, that have emerged in the light of changing in national development, goals, societal need as well as dynamic of local, national,

21 NEP 1986 cited at 8.20 p.143,144 Available at: https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/npe.pdf (Last Visited on 20/07/2020)

22 Mohini Jain Vs. State of Karnataka AIR 1992 SC 1858; (1992)3 SCC 666 and Unni Krishnan Vs. State of Andhra Pradesh AIR 1993 SC 2178; (1993) 1 SCC 645

23 Report of the Committee on Development of a Policy Framework for Implementation of the Right of Children to Free and Compulsory Education ACT 2009 in Schools in the NCT of Delhi. March 3, 2010 National Council of Educational Research and Training Aurobindo Marg, New Delhi <http://righttoeducation.in/sites/default/files/Report%20of%20the%20Committee%20on%20development%20of%20a%20policy%20framework%20for%20implementation%20of%20RTE%20school%20NCT%20delhi.pdf>

regional and global realities and changes including thinking learning need of children youth and adults.

Inspired by the thought of the father of the nation, policy bring into focus the role of education, in inculcating values, providing skills and competencies of citizens, and enabling them to contribute to the nation well-being. It recognises long-term economic growth and the development of the nation critically depend upon quality of products of the education system and that an education system built on premises of quality and equality is central to sustainable development and to achieving success in emerging knowledge economy and Society. The main vision emphasises that the quality education creates the enabled children and youth to become global citizens, with their deep rooted tradition and culture, which is main reason for the amalgamation of globalisation with the localisation.²⁴

The National Education Policy 2020, was adopted on the basis of the recommendation of the committee for drafting the National Education Policy (Chair: Dr. K. Kasturirangan) 2019. This policy provides for the restructuring of education system.

Foundation Stage; Three years (3yrs – 6yrs) pre-primary, and two years 1st and II Standard (at the age 6yrs-8yrs).

Primary Stage: class 3 to 5 (at the age of 8yrs-11yrs)

Middle Stage: Class 6 to 8 (at the age 11yrs-14yrs)

Secondary Stage: classes 9-12 (at the age 14yrs- 18yrs)

The main aim of the policy is to achieve Foundational literacy and numeracy, reforms in curriculum (which must develop the skill of critical thinking, discussion and analysis based learning), Medium of instruction (Vernacular or regional language must be medium of instructions until the completion of grade 8.), ensure universal coverage and inclusivity, Assessment of the Students(not only through the examination), effective governance of School (school complex concept must be introduced, Which must include all the stages of education), School regulation (done through self-regulation in along with the accreditation system), and Teacher training and management(their potentiality must be

24 Some Inputs for Draft National Education Policy 2016 [http://www. languageinindia.com /oct2016/Inputs_Draft_NEP_2016_1.pdf](http://www.languageinindia.com/oct2016/Inputs_Draft_NEP_2016_1.pdf)

enhanced through proper and periodic training. And a national curriculum framework for teacher education will be formulated by the National Council for teacher education in consultation with the NCERT).

CONSTITUTIONAL PROVISIONS AND RIGHT TO EDUCATION

The framers of the Indian Constitution were well aware of importance of educated people in realisation of democracy. It took lot of discussion in the CAD regarding the enforcement of educational right but due to economic instability after independence it was finally decided to incorporate these provisions in non-enforceable part of the Constitution,²⁵ for that reason only in framing of Art 45²⁶ (draft Art. 35) they put the time limitation of ten years, unlike any other Directive Principles. In another Article 41²⁷ also secures educational right in accordance within the economic capacity of the State. The Constitution is also contented with innumerable other provisions that have a bearing on education.²⁸ Art. 46²⁹, Art. 47,³⁰ But in accordance with the Art.37,³¹ Directive principles cannot be enforced in the Court of law as a matter of right. Furthermore, in the realm of fundamental rights as provided and protected in the part III of the Constitution in Art.28³² and Art.30³³ educational rights. There was another important debate was taken place among the framers of the Constitution about whether education shall be shifted either the Union or concurrent lists so that central government

25 C.A.D Vol. VII., New Delhi: Lok Sabha Secretariat, 538 to 540 (2003)

26 Art. 45 reads: "The State shall endeavour to provide within a period of ten years from the commencement of the Constitution for free and compulsory education for all children until they complete the age of fourteen years."

27 Article 41 reads: "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 case of unemployment, old age, sickness and disablement, and in other cases of underservant want."

28 ANURADHA SAIBABA RAJESH, The Fundamental Right to Primary education in India: A Critical Evaluation, Indian Journal of International Law, Vol (50)1-4 issue 2010, p 91-111

29 Art. 46 reads; "The State shall promote with special care the educational and economic interest of the weaker section of the people, and in particular, of the Schedule Caste and Schedule Tribes, and shall protect them from social injustice and all form of exploitation."

30 Art. 47 provides- Duty of the State to raise the level of nutrition and the standard of living and improve public health.

31 Art. 37 reads: "This provisions contained in this Part shall not be enforceable by any Court"

32 Art. 28 provides freedom as to attendance as religious instruction or religious worship in certain educational institutions.

33 Art. 30 grantees: Right of minorities to establish and administer educational institutions.

would enact laws on education.³⁴ Along with these provisions the citizens can perform Fundamental Duties as provided in part IVA³⁵ of the Constitution only he is well equipped with the proper education. In modern days many of the International Laws and treaties, conventions and agreements put the more responsibilities on the different nations who were parties to the contract must try to implement the same. Accordingly educational rights also got more importance by the different agreements and Art,51(c)³⁶ of the Indian Constitution imposes responsibility on the Government to implement the same. All the above provisions of the Constitution clearly indicate a commitment to giving Indian children in this freedom and dignity and recognising their essential contribution to building a democratic nation.³⁷ In 1993 after two historical judgements³⁸, there was pressure on the government to make the education as a fundamental right. As a result of this through the Constitutional amendment in 2002 and Art. 21A was incorporated and made the education from 6 years to 14 years as a fundamental Right, and also amended Art. 45 of DPSP, and Art.51 (A) (K) of Fundamental duties.

All the effort of the law making in along with the Constitutional Amendment for recognising education as a fundamental right can be achieved through the proper policies in this respect. The role of policies in realising this fundamental right can be done only through sincerity, commitment and proper policy measures. The pandemic situation in Covid- 19 made the Fundamental Right to education as a myth rather than the real. More than half population of the students, especially, economically backward class, socially backward class and rural class students are deprived of the online education or distant education because of lack of facilities like gadgets, internet, electricity and like aspects. The

34 Maulana Asad who was the first Union Minister of education strongly opposed living the education enter into the States. He also argued that it was necessary to give this power to the central government so that uniform or National standard for education would be established. However, the other members of the constituent assembly believed that India is multi linguistic country and which requires the decentralization of education policy through which every State can develop their script and culture. Education in mother tongue only the Mode to achieve the object. See Granville Austin, "The Indian Constitution: Cornerstone of a Constitution" London: Clarendon Press 1966.

35 Ins.by the Constitution (Forty-second Amendment) Act 1976, s. 11 (w.e.f. 3-1-1977)

36 Art.51 (c) provides, "Foster respect for International Law and treaty obligations in the dealings of organized people with one another."

37 SHANTHA SINHA, Emphasizing Universal Principles towards Deepening of Democracy Actualising Children's Right to Education 2569 Economic and Political Weekly June 18, 2005,

38 Mohini Jain Vs. State of Karnataka AIR 1992 SC 1858; (1992)3 SCC 666 and Unni Krishnan Vs. State of Andhra Pradesh AIR 1993 SC 2178; (1993) 1 SCC 645

online education made more work pressure on the teacher and made the student more abusive. They become irregular, low attention, fear of technology, and more attached to the gadgets, less active physically as well as mentally. It is the responsibility of the State to bring such scheme and policies which enable them to handle such unexpected situation without any difficulty. And the students should not have deprived of their enjoyment of Fundamental Right to Education.

JUDICIAL CONTRIBUTION TOWARD RIGHT TO FREE AND COMPULSORY EDUCATION

In a democracy the primary purpose of education is to provide an individual with the widest opportunity to develop his potentialities to the full. This direct link between education, national development and prosperity exist only when the national system of education is properly organized from both qualitative and quantitative points of view. India is in transition from a society in which education is a privilege of a small minority to one in which it could be made available to the masses of the people. The concept of Right to Education developed as a Fundamental Right due to keen interest taken by the Judiciary in two historical judgments,

*Mohini Jain and others V. State of Karnataka and others*³⁹, and *Unni Krishna and others V. State of Andhra Pradesh and others*⁴⁰

The three main issues addressed in these cases are

1. Whether the Constitution of India guarantees a fundamental right to education to its citizens? 2. Whether there is a fundamental right to establish an education institution under Article 19(1)(g)? 3. Does recognition or affiliation make the educational institution an instrumentality?

In deciding the matter Supreme Court states as Article 21 reads as follows: "Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law."⁴¹ "Right to life' is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of

39 (1992) 3 SCC 666

40 (1993) 1 SCC 645

41 *Unni Krishna V. State of Andhra Pradesh* (1993) 1 SCC 645 para 166

an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facility at all levels to its citizens.”⁴²

Mr. P.P. Rao, learned Senior Advocate, rightly submitted that when you lack a school building, teachers, books and proper facilities, your schooling might be “free” but it is not an “education” in any proper sense. Adequate number of schools must be established with proper infrastructure without further delay. In order to achieve the Constitutional goal of free and compulsory education, we have to appreciate the reality on the ground. A sizeable section of the country is still so poor that many parents are compelled to send their children to work. The State must carve out innovative policies to ensure that parents send their children to school. The Mid-Day Meal Scheme will go a long way in achieving this goal. But, apart from Mid-Day Meals, the Government should provide financial help to extremely poor parents.⁴³

Judicial development after Constitutional Amendment

In number of cases implementation of Right to Education and relation between Art 21A and 19 (1)(g) came before the Supreme Court

In the case of *TMA Pai Foundation V. State of Karnataka*⁴⁴ Court held that restriction imposed in *Unni Krishana* case is unreasonable and violates Art 19(1)(g) right to establish and administer an institution includes the right to admit students; right to set up reasonable fees structure; right to constitute a governing body; right to appoint staff and right to take disciplinary action. Through this judgment first time the concept of education considered as occupation under Art.19(1)(g) of the Constitution. The majority held that Art. 19 (1) (g) and Art. 26 confer rights to all citizens and religious denominations respectively to establish and maintain educational institutions. In addition to that Art. 30 (1) gives the right to religious and linguistic minorities to establish and administer educational institution of their choice.

A constitution Bench of five Judges was constituted to clarify the doubts/ anomalies in the above judgment by the Court in *Islamic Academy of Education V. State of Karnataka*.⁴⁵ Considered the question whether educational institutions

42 Mohini Jain v. State of Karnataka ((1992) 3 SCC 666) p. 679-80 (para 12)

43 *ibid*

44 AIR 2003 SC 355

45 AIR 2003 SC 3724

are entitled to fix own fee structure. The court held that there can be no fixing of a rigid fee structure by the Government. Each institute must have freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate surplus which must be used for the betterment and growth of the educational institution.

In *Modern School V. Union of India*⁴⁶ the Supreme Court held that “ A citizen has right to call upon the state to provide educational facilities within the limits of the economic capacity and development.”

*Avinash Malhotra V. Union of India*⁴⁷ Court gives direction for the safety of the infrastructure and security of the students against fire and Necessary training be imparted to the staff and other officials of the school to use the fire extinguishing equipment.

In *Ashoka Kumar Thakur's case*⁴⁸ Educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety. Further observed as under: “It has become necessary that the Government set a realistic target within which it must fully implement Article 21A regarding free and compulsory education for the entire country. The Government should suitably revise budget allocations for education. The priorities have to be set correctly. The most important fundamental right may be Article 21A, which, in the larger interest of the nation, must be fully implemented. Without Article 21A, the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. This is ultimately why the judiciary must oversee Government spending on free and compulsory education.”

It also observed that for implementation of Right to Education Parliament needs to take positive steps by enacting the law for implementation of duty under Art 51A(k) it becomes clear that parents would be responsible for sending their children to school. Article 51A read with 51A(k) is reproduced as under: “It shall be the duty of every citizen of India who is a parent or guardian to provide

46 AIR 2004 SC 2236

47 MANU/SC/0555/2009

48 Ashoka Kumar Thakur v. Union of India & Others. (2008) 6 SCC 1

opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.” Thus, Article 21A read with Article 51A(k) distributes an obligation amongst the State and parents: The State is concerned with free education, parents with compulsory.

RIGHT TO EDUCATION DURING PANDEMIC

During the pandemic situation the main responsibility of the State towards children are food security, health and proper education. For the security of the food state took very important measures by supplying essential to them to their residence and for protection of health lock down and all the education institutions were closed and bought the social distance properly. The very big challenge to the State is providing proper education to all irrespective of their economic, social and habitant aspects. India is the country were providing education through online mode (virtual mode) to everyone is impossible task because of many problems like poverty, lack of facilities such as electricity, internet supply, and availability of required gadgets.

The UN Sustainable Development Goals, a blueprint for creating a more just world, has named “quality education” as its fourth goal. One target of that goal is ensuring that by 2030, all children have the means to complete a “free, equitable, and quality primary and secondary education.”⁴⁹

The Delhi High Court held that online education was covered under the Right to Education (RTE) Act and therefore, the private schools were providing the same as part of their responsibilities under the statute and not as a voluntary or social service. The mode, manner and method of imparting education have evolved from time to time and if universal good quality education has to be achieved in future, the model and method of education have to undergo a complete revolution,” The bench further said that the schools were free to choose their mode and method of imparting education provided they fulfil the minimum statutory requirement. “Consequently, the concept of synchronous face-to-face real-time online education, like any other alternate means/methods of dissemination of education, in that sense, is covered under the RTE Act, 2009,”.

49 Arnold R. Grahl, „Facing the challenges of COVID-19, Rotary clubs and partner organizations are finding new ways to support access to education”<https://www.rotary.org/en/educating-in-a-pandemic-and>

The Karnataka High court held that the government of Karnataka does not have the power to ban the online education during the pandemic situation because this is only mode left with the authority to provide education. The bench said the government did not have powers under the Karnataka Education Act, 1983, to impose ban or restrictions on online education. The bench noted. “By enacting a law, reasonable restrictions could have been imposed on exercise of fundamental rights. But the Karnataka Education Act, 1983, cannot be the law which permits the state government to do that. And that impugned orders are not issued in exercise of any statutory power.” However, the court clarified that school authorities have no right to make online education compulsory for students or charge any extra fee for the same. The court added that the state government will have to take steps to ensure that those students not studying in “elite schools” and those in government schools were not deprived of education during this pandemic. The government will have to create infrastructure to give education in such types of schools during this period.⁵⁰

The Delhi High Court also stated that “No direction can be issued, to unaided/private schools, not to charge tuition fees during the period of the lockdown, consequent on the COVID pandemic, and to source the funds, for meeting expenses relatable to salaries of their staff, maintenance of their establishment, and providing of online education, from the monies available with their parent trusts/societies.”⁵¹

With regarding to collection of tuition fees the Supreme Court made the following observations: “The situation in each district, leave alone each State, differed from one another, and the apex court could not pass an “omnibus” order. Problem with every State is different. Parties are involving jurisdiction of this court as an omnibus case. But these are fact-intensive situations in each State and district”⁵²

50 Providing Online Education In Pandemic Responsibility Of Private Schools Under RTE Act: Delhi High Court <https://www.ndtv.com/education/providing-online-education-in-pandemic-responsibility-of-private-schools-under-rte-act-delhi-high-court>

51 Education | Press Trust of India | Updated: Sep 19, 2020 8:30 am IST | Source: PTI. Coronavirus: Karnataka High Court stays ban on online classes for school students, Jul 09, 2020 12:30 pm <https://scroll.in/latest/966940/coronavirus-karnataka-high-court-stays-ban-on-online-classes-for-school-students>

52 Naresh Kumar vs Director of Education & Anr on 24 April, 2020 <https://indian.kanoon.org/doc/94344571/>

During the pandemic situation in along with the State and educational institutions, it is the main responsibility and duty of parents and guardian under Art. 51A(k) to make maximum efforts to provide proper education to their wards.

POSITION IN USA

As law of the land US Constitution guarantees to its citizens Fundamental Rights known as Bill of Rights. The Constitution guarantees that all children be given equal educational opportunity no matter what their race, ethnic background, religion, or sex, or whether they are rich or poor, citizen or non-citizen. Access of public school for free education is given to every one irrespective of whether they are citizens or migrants (legally or illegally).

The Supreme Court of USA guarantees this in the landmark *Brown v. Board of Education* case when it struck down race segregation in the public schools.⁵³ It also observed that: “Today, education is perhaps the most important function of State and Local Governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later profession training, and in helping him to adjust normally to his environment.

*Spottswood T. Bolling v. Sharpe*⁵⁴ in which it was held that due process clause of the Fifty Amendment of the American Constitution prohibited racial segregation in the District of Columbia. Incidentally the Court made a remark:

‘Although the Court has not assumed to define “liberty” with any great precision, that terms is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.’

53 98 LEd 873: 347 US 483 (1954)

54 98 LEd 884: 347 US 497 (1953) (at p. 887)

The U.S. Constitution is not mention of education. Education is not a constitutionally protected right in US. That is an assertion made by the U.S. Supreme Court every time it has been challenged. The lineage begins with *San Antonio Independent School District v. Rodriguez* in 1973. The court opined that education “is not among the rights afforded explicit protection under our Federal Constitution.” In 1980 three other cases, affirmed that interpretation.⁵⁵ In the dissenting Judgement J. Eric Murphy referring judgement Rodriguez decided by the Supreme Court stated that “Education must be protected as fundamental in the Federal Constitution”.⁵⁶

RIGHT TO EDUCATION DURING PANDEMIC

Like other country even USA students underwent mental and physical challenges. Shutdown, lockdown, illness and death of loved one created fear, anxiety among young ones. Equal opportunity to access education is also affected during pandemic situation. Especially students of colour, English learners and students with the disability were not got an equal opportunity long with the other students.⁵⁷

The lockdowns in response to COVID-19 have interrupted conventional schooling with nationwide school closures in most OECD and partner countries. While the educational community have made concerted efforts to maintain learning continuity during this period, children and students have had to rely more on their own resources to continue learning remotely through the Internet, television or radio. Teachers also had to adapt to new pedagogical concepts and modes of delivery of teaching, for which they may not have been trained. In particular, learners in the most marginalised groups, who don't have access to digital learning resources or lack the resilience and engagement to learn on their own, are at risk of falling behind.⁵⁸

55 David Dorsey., Education is still (for now) not a fundamental right under the U.S. Constitution, In Education, September 17, 2020 <https://kansaspolicy.org/education-is-still-for-now-not-a-fundamental-right-under-the-u-s-constitution/>

56 David Dorsey., Education is still (for now) not a fundamental right under the U.S. Constitution, In Education, September 17, 2020 <https://kansaspolicy.org/education-is-still-for-now-not-a-fundamental-right-under-the-u-s-constitution/>

57 Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>

58 Andreas Schleicher., The impact of COVID-19 on education - Insights from Education at a Glance 2020, <https://www.oecd.org/education/the-impact-of-covid-19-on-education-insights-education-at-a-glance-2020.pdf>

Many schools even in USA are not in position to cope up with the advance teaching and learning through virtual mode and even time of learning process also dropped during the period. Mental status of the students affected because of lockdown, isolation, instability and uncertainty. Academic excellence of the students was also badly affected. Budget and logistics also became big challenge in many district of US. Students of color economically weak are not in the position to access equal education.⁵⁹ Many students of color also experienced disparities in their academic opportunities: less experienced teachers, tracking into less rigorous courses and programs, and lower expectations for their educational achievement.⁶⁰ Another difficulty faced by the students such as mental abuse and sexual harassment by household members as well as intimate partners, and online harassment from peers and others.⁶¹

The current Covid-19 crisis badly affect economic and revenue of the nation, which may lead to decline in the budget on the development of education.⁶²

POSITION IN UNITED KINGDOM

Till the age of 18-year education is compulsory for all. This education always need not be at school or full-time. According to the wish of the parent's education can be provided at home. Pre-primary education is provided in nursery as parent's wishes and which is not funded by the government. In 1988 National Curriculum provides frame work for education in England.⁶³ England also suffers with discrimination in providing education to blacks and white peoples.

59 Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>

60 Kenneth Shores et al., Categorical Inequality in Black and White: Linking Disproportionality across Multiple Educational Outcomes, 57 AM. EDUC. RESEARCH J. 2089, 2097 (2020); Roderick L. Carey, Am I Smart Enough? Will I Make Friends? And Can I Even Afford It? Exploring the College-Going Dilemmas of Black and Latino Adolescent Boys, 125 AM. J. OF EDUC. 381, 382 (2019) (noting the "multitude of educational barriers [that] disrupt particularly boys and young men of color, as they aspire to graduate high school, access higher education, succeed in college, and even imagine postgraduate studies"); Patricia Gandara, Lost Opportunities: The Difficult Journey to Higher Education for Underrepresented Minority Students, NAT'L ACADS. PRESS (2001) <https://www.nap.edu/read/10186/chapter/10>

61 Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>

62 Andreas Schleicher., "The impact of COVID-19 on education - Insights from Education at a Glance 2020", <https://www.oecd.org/education/the-impact-of-covid-19-on-education-insights-education-at-a-glance-2020.pdf>

63 Education in the United Kingdom https://en.wikipedia.org/wiki/Education_in_the_United_Kingdom

RIGHT TO EDUCATION DURING PANDEMIC

According to UNESCO report 90% of the students were affected by the Covid-19. Millions of pupils were out of school. Children's mainly teenager's future is in danger. Main impact of covid-19 was

First, due to poor accessibility or nonexistence of internet connection millions of students were denied to access education and knowledge. Online learning is not only discriminatory; it also poses great challenges in terms of privacy. Lastly, as demonstrated during the past few months, schools' closures have exposed the most vulnerable to greater risks. In shutting down schools, governments break children's protective shield against violence and hunger (BBC, 2020). Girls are particularly at risk with cases of prostitution, Female Genital Mutilation (FGM), unwanted pregnancies, and forced marriage on the rise since the beginning of the Pandemic (UN, 2020). According to the UNESCO, over 11 million girls may not go back to school after the COVID-19 crisis.⁶⁴ Technology and innovation in learning do not always present opportunities for quality and equality.

CONCLUSION

In the world history Covid-19 has affected more than million learner's future. 99 per cent low and poor income countries and 94 per cent other countries has closed school during this period. After absorbing above discussion we may conclude that developed nations like USA and UK and developing nations like India both are suffered with lack of facilities and discrimination in providing education to all. And Education is not given priority as it requires. Therefore, Governments should prioritise implementing the fundamental right to education for children during the pandemic, since children are out of school. Instead of relying on 'public health' to violate fundamental rights, governments should now take an approach that balances public health and the right to education. The State is not only legally obligated to do this but in fact doing so would improve the socio-economic condition of the nation. All measure steps need to be taken by policymakers and government institutions in future for providing proper education to all irrespective of their economic and social position of the pupils. Maybe this time the pandemic was an excuse for not enforcing fundamental right to education. But future need not be same.

⁶⁴ Professor Leïla Choukroune, Out of School: How the COVID-19 Pandemic Gravely Endangers the Right to Education, January 21st, 2021 <https://blogs.lse.ac.uk/humanrights/2021/01/21/out-of-school-how-the-covid-19-pandemic-gravely-endangers-the-right-to-education/>

CHANGING TENETS OF THE UNITED STATES BIOTECHNOLOGICAL PATENT SYSTEM

Dr. Smita K. Angadi^{*}

ABSTRACT

In 1980 it was in Diamond v. Chakrabarty, the United States Supreme Court referred to and highlighted the testimony in a footnote that “anything under the sun that is made by man” to obtain patent, and soon after these words became famous in patent system not just in the US but also around the world. It was indeed the dawn of new era which made pathway to many unexpected eventualities in the field of biotechnology and patent system. However, obtaining of such patent required a kind of human intervention which could transform a product of nature into a product of man. The ensuing biotechnology industries obtained thousands of patents over human genes, viruses, proteins and the processes of their biological manufacture. Evidently, it was the turning point where the basic tenets of patent system had begun to change due to the famous liberal judicial pronouncement. Thereafter many controversial cases relating to the subject-matter of patent were decided with no sufficient justification for granting patent by the US Supreme Court. Over the years, questions about the patent system were being raised concerning the ‘research tools’ of they were being used for improving public health or profits of Biotechnology industry. In spite of years of protests by health workers, patients and public outcries opposing such patent on research tools, situation remained the same. It was Myriad’s case

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in 2013 which fought back questioning the basic motives of research and patent. It laid a strong foundation for humanity at large by discovering a midway of relief to both patent holders and public health at large. By virtue of Myriad's case we can safely now say that, 'not everything under the sun made by man can be patented'.

Key words: Patent, biotechnology, United States(US), gene, public order.

INTRODUCTION

The patent law has evolved over years to become more aiding to the inventors. Biotechnological patents are one specific part of the patent law. The world has witnessed tremendous strides in biotechnology for which the inventors are investing great intellectual capacity to accomplish new horizons. This is because of the range of involved issues from the microorganisms to human gene which grew at an unimaginable pace in US. Such life forms as such were never patented earlier but, it was the US judiciary which attempted in proving that life forms are not products of nature, and therefore can be patented except a few things. This approach was gradually accepted and adopted by most of the nations.

BIOTECHNOLOGICAL PATENT

Biotechnology is a subject which involves living beings such as microorganisms, plants, virus, gene, cell, bacteria etc. A patent which is granted on such an invention involving such life forms is said to be a biotechnological patent. Great researches are being conducted in the field of biotechnology which evolves at a fast pace due to its inherent nature of evolution but it is difficult for law to evolve at the pace of biotechnology.

Emergence of Biotechnological Patents in US

The evolution of biotechnology patent law can be attributed to the United States. Thomas Jefferson drafted the first patent statute in the United States of America in the year 1793. The Act adopted the requirements of patentability such as 'novelty', 'utility' and 'non-obviousness' as put forth by the Venetian Statute. The belief behind this Act was thatingenuity should receive a liberal encouragement.¹ The Act broadly defines patentable subject matters as 'any new

1 Writings of Thomas Jefferson, Washington, 1871, (Oct. 21, 2021, 01:00 PM), <http://www.worldcat.org/title/writings-of-thomas-jefferson/oclc/2031532>.

or useful art, machine, manufacture or composition of matter, or any new or useful improvement thereof'. The subsequent Acts of 1836, 1870, and 1874 reiterate the philosophy outlined by the Act of 1793.

The patent laws were re-codified in the form of Patents Act, 1952, wherein under this enactment as well as all the earlier enactments, living organisms were excluded from being patented, not because of any religious beliefs or moral consideration but due to the fact that living organisms were considered to be the 'common heritage' of mankind and thus, were not considered to be patentable.²

The US Constitution states that; "the Congress shall have the power to promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries."³ It is evident that this provision does not speak anything about patenting of biotechnological inventions. It clearly indicates the power vested in Congress to promote the development of science and arts by granting exclusive rights to the inventors for a limited time. The promotion of science is where inception of Patent Law began. Even the United States Patent Act in its original form does not speak anything about patenting of biotechnological inventions. It states that, 'whoever invents or discovers any new or useful process, machine, manufacture, or composition of matter or any new or useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements under the patent law.'⁴

It was the judiciary which, without altering or changing any provisions of existing patent law, initiated the interpretation of the existing patent law in an innovative and liberal way thereby facilitating patent protection to biotechnological inventions. For the first time in history of patent law, a patent was granted on a living matter facilitated through the United States Patent Office granting a patent to Louis Pasteur on 'yeast' that is free from organic germs of disease.⁵ The Patent Office considered the invention as an article of manufacture within the meaning of patentable subject matter under US patent law.

Subsequently in *Ex parte Latimer*,⁶ a patent claim for fiber found in the needle

2 K.R.G. NAIR and ASHOK KUMAR, Intellectual Property Rights 189 (Allied 1994).

3 UNITED STATES CONST, art. 1, s. 8.

4 Title 35 UNITED STATES CODE, s. 101.

5 US Patent No: 141072 granted in the year 1873.

6 *Ex parte Latimer*, Comm'r Pat 1889, 123.

of the *Pinus astralis* was rejected on the belief that plants, even those artificially bred, were products of nature thereby setting a general rule that plants were natural products and not subjected to patent protection. The case law postulated the following two principles:

1. Plants are products of nature though artificially bred, and are not patentable.
2. Plants are not amenable to the 'written description requirement' under Section. 112 of the United States Patent Statute.

As explained above, living organisms were not considered as patentable prior to 1930. But, the Plant Patents Act, 1930, relaxed the condition by providing that the work of plant breeder in supporting the nature was patentable invention, thereby granting patent protection to reproduction of plants by grafting and budding of certain asexually produced plants. The Act further relaxed the written description requirement by stating that reasonable written description is sufficient to grant patents.⁷ The motive of the Act was to resolve technical problem of description of plants, discussed in Latimer's decision. Further in 1970, the Congress enacted the Plant Variety Protection Act, 1970, which lengthened the protection to certain new plant varieties which are capable of sexual reproduction.

Meanwhile, there were patent claims on different biological subject matters. In case of *Shell Development Co. v. Watson*⁸ the expression of 'composition of matter' under the patentable subject matter was interpreted to mean 'all compositions of two or more substances and all composite articles, whether they be the result of chemical union or of mechanical mixture or whether they be gases, fluids, powder or solids'. Under this interpretation, biotechnological inventions fall within the ambit of 'composition of one species and incorporating it into an intended species or isolation and purification of genetic material from different regions of human or animal body'. In this sense, biotechnological inventions are composition of genetic material from different species or different regions of a living being's body or of a life form. Hence it can be inferred that, the Court indicated liberalization of patent laws to encourage new techniques and technologies.

7 Title 35 UNITED STATES CODE, s.162.

8 *Development Co. v. Watson*, (D.C. 1957) 149 F. Supp. 279, 280.

Parallely, during this very period the discovery of DNA (Deoxyribose Nucleic Acid) by Crick and Watson in the year 1953, laid the foundation for modern biotechnology. Biotechnology developed as a science of miracles with the capacity to manipulate, manifest and produce innovative life forms. However, not much progress was made in patenting of biotechnological inventions in US till the 1960s, barring a few exceptions like the United States Patent Office reportedly granted of two patents on living micro-organisms in the year 1967 and 1968. There were no fresh claims for patenting of life forms before the United States judiciary, which is well known for its practical and liberal approach.⁹

The patenting of micro-organisms in the real sense, paved the way for evolution of biotechnological patent law only in *Diamond v. Chakraborty*¹⁰ case. Situation at US reached such a stage that only human beings are kept outside the ambit of patenting. The United States judiciary has played pivotal role and was creative enough to interpret the existing patent law in view of Constitutional mandates of promoting the progress of useful arts and science for the progress of the society. This judicial interpretation was followed by legislative amendments to streamline the law on biotechnological patents.

With a view to regulate patenting of biotechnological process, the United States introduced a new legislation, Biotechnology Process Patents Act, 1995, which, when read with the amendment, states to the effect that, both the biotechnological invention and the process to produce such invention, in order to be patented, shall be non-obvious to the effect that there shall be inventive step involved in both the process and the invention. The amendment allows patenting of biotechnological process using or resulting in composition of matter. The amendment further specifically states that the processes of genetic alteration of unicellular or multicellular organisms, expression, elimination, and alteration of nucleotide sequences, expression of physiological characteristics not naturally associated with the said organisms, cell fusion procedures yielding cell lines expressing a protein such as a monoclonal antibody, and methods of using a biotechnologically produced product or processes are patentable.¹¹

9 DONALD S.CHISUM, CRAIG ALLEN NARD, HERBERT F.SCHWARTZ, PAULINE NEWMAN, and SCOTT HIEFF F.,Principles of Patent Law: Cases and Materials,,New York Foundation Press (1998),(Oct. 26, 2021),https://scholarlycommons.law.case.edu/faculty_publications/1323/.

10 *Diamond v. Chakraborty*, (1980) 303 US 447.

11 Title 35 UNITED STATES CODE, s.103.

In the same year the Agreement of Trade Related aspects of Intellectual Property Rights (TRIPs) came into force offering patent protection to micro-organisms, plants, and animals. TRIPs stated that patents shall be made available for all kinds of inventions in all fields of technology. The innovative approach of the United States judiciary in evolving biotechnology patent law is reflected in the TRIPs since it proposes patenting of different biotechnological inventions of life forms like micro-organisms, plants, and animals including human genetic material. It can be assumed that the TRIPs Agreement which provided for international recognition to biotechnological patent law, has been inspired from the United States patent law.

DOCTRINE OF PRODUCT OF NATURE APPROACH IN US

The 'Doctrine of Product of Nature' played a significant role at US in course of granting patent to biotechnological innovations. Many patent applications have been rejected on the ground that claims on product of nature are not patentable. In *American Fruit Growers v. Brogdex*¹² a claim was made for oranges coated with preservatives, wherein it was held that the such oranges were insufficiently modified and there were no skilled men to differentiate them from the natural oranges and accordingly, they were held not to be new and hence, patent was denied on the basis of Doctrine of Product of Nature.

Earlier, due to this doctrine, there was a prevailing notion that all living beings are not new and hence, they are not at all patentable. In another instance, in *Funk Brothers Seed Co. v.Kalo Inoculant Co.*,¹³ the Supreme Court while discussing the patentability on the Doctrine of Product of Nature, observed that due to presence of bacteria infecting the roots of certain leguminous plants, they had the ability to convert nitrogen from the air into organic nitrogenous compounds. It was also a known fact that only certain species of bacteria restrained the process while others did not. The applicant in the this noted case claimed to have invented a product consisting of six strains of bacteria that were non-inhibitive and were suitable of use across all leguminous plants. Justice Douglas while delivering his judgment opined that, since the cumulative composition of the claimed product was only a replication of the characteristics of each individual strain, there was no invention. And since the product claims

12 *American Fruit Growers v. Brogdex*,283, U.S. 1.8, USPQ, 131 (1930).

13 *Funk Brothers Seed Co. v.Kalo Inoculant Co.*,33 US 127 (1948).

failed to describe an invention as per the meaning of the patent statutes, the decision perhaps is considered as interpretation of the non-obviousness requirement of Section. 103, Title 35, United States Code, and not as per the statutory requirements of patentable subject matter under Section 101 thereof.

Diamond v. Chakrabarty

In 1980 the USSupreme Court very narrowly ruled in *Diamond v. Chakrabarty*¹⁴ that a patent could be obtained under section 101 of the US patent law for a laboratory-created genetically engineered bacteriumthat, a live, human made micro-organism is patentable as it constitutes a 'manufacture' or 'composition of matter.

The Supreme Court while deciding in Chakrabarty's case did not agree with the prevailing idea of the Doctrine of Product of Nature which was supported by it in the *Funk Brothers Seed Co v. KaloInoculant Co.* case.¹⁵ The Supreme Court clearly distinguished between both the Chakrabarty's patent claims for genetically modified micro-organism to that of Funk Brotherscase in which the claimant had discovered certain strains of naturally occurring bacteria that were useful for agricultural purposes and which could be combined into a single package without harmful effects and sought a patent on it. The Court while rejecting the patent claim in Funk Brothers' Case pointed out that the applicant had discovered 'only some of the handiwork of nature.'¹⁶

However in Chakrabarty's case, the court observed that Chakrabarty had been successful in genetically engineering the micro-organisms and thereby had manipulated significantly the products of nature, and hence, upheld his patent application. In a stark contrast to its earlier stand, the court noted here that, "the patentee has produced a new bacterium with markedly different characteristics from any found in nature, and one having the potential for significant utility. His discovery is not nature's handiwork, but his own; accordingly it is patentable subject matter under Section. 101".

Here, the Supreme court while broadening the scope of patentable subject matter as defined under Section. 101, narrowed down the product of nature doctrine. Mr. Anand Chakrabarty, a researcher at General Electronics had

14 *Diamond*, supra note 10.

15 *Funk Brothers Seed Co.* supra note 13.

16 *Id.*

produced a genetically engineered micro-organism, a bacterium belonging to genus *pseudomonas*, that consisted of two plasmids that were genetically engineered to provide a separate hydro carbon de-gradative pathway. The invention made a bacterium capable of breaking down multiple components of crude oil, a characteristic that is nowhere found in any of the naturally occurring bacteria. The USPTO (United States Patent and Trademark Office) had rejected Chakrabarty's claims since the subject matter was a living being and was not covered under Section. 101.

The Court of Customs and Patent Appeals while hearing the appeal, reversed the USPTO's decision by stating that the issue was not whether the claimed bacterium was living or was inanimate, but whether the claimed bacterium constituted an invention or not by human intervention. In its view, the livingness of the invention does not hold any legal significance. On further appeal, US Supreme Court with the ratio of 5:4 held that, "The bacterium was human made instead of product of nature and was, therefore, patentable as a 'manufacture' or a 'composition of matter'."

In arriving to this decision, the court concluded that the legislature intended Section. 101 of the Act to include "anything under the sun that is made by man".¹⁷ It pointed out that the distinction as envisaged under Section. 101 of the Act is between human made and non-human made (natural) things and not between living things and non-living things. Hence, the US Supreme Court declared that "anything under the sun made by man" is subject matter for a patent. Subsequent to this decision, most of the patent offices in developed countries started considering patents on biotechnological inventions as 'composition of matter' within the ambit of patentable subject matter. This trend-setting decision of the US Supreme Court in the history of the Patent law has thus included biotechnological inventions within the scope of patentable subject matter. Based on this decision, subject matters such as including plants, animals and human genetic material were also liberally interpreted as patentable subject matter by the US Supreme Court and USPTO.

ADAPTIVE NATURE OF US BIOTECHNOLOGY PATENT LAW

A significant feature of the American society is that it swiftly adapts itself to the changing circumstances and hence is known to be very flexible and adaptive.

¹⁷ Diamond, supra note 10.

Probably the absence of any provision under the US Patent Law representing morality or public order might have aided in wide judicial interpretation.

However, soon after the decision in *Diamond v. Chakrabarty* case, numerous patent applications claiming various man-made non-natural life forms were filed. Priority was concentrated on benefits arising out of such inventions thereby completely ignoring the public order concerns. Setting the direction of US Supreme Court as a precedent, the USPTO granted countless patents on various micro-organisms thereby leading to further serious debates on the role of public order in patenting of living organisms.

The critics feared that once patenting of unicellular micro-organisms were allowed by USPTO as per the direction under *Chakrabarty*'s case, USPTO might someday extend the same to patenting of multi-cellular organisms including plants and animals. However their fears were soon realized in 1985, when for the first time a multi-cellular life form was claimed and patent was granted on a plant in *Ex parte Hibberd*,¹⁸ wherein the plant was claimed to have been genetically engineered to possess a very high level of amino acid tryptophan leading to serious debates on morality and public order in patenting. However genetically modified plants were termed as patentable by the United States Patent Offices Board of Patent Appeals and Interferences. Unlike plants and other living organisms like micro-organisms, animals are deemed to be higher life forms since they are capable of expressing their feelings and also choose their own destination, therefore, the moral and public order questions raised in patenting of animals was much more intense than that of patenting of lower life forms such as, plants and other micro-organisms.

In *Ex Parte Allen*,¹⁹ patent was sought for an invention claiming genetically engineered animal, an engineered oyster, possessing an extra set of chromosomes, which was rejected on the ground of obviousness. It was also argued that animals have right to preserve their integrity and natural characteristics and playing with their lives by making them vulnerable to diseases and thereby causing suffering is inhuman and against morality. But the scientists insisted that the potential benefits arising out of such manipulation should be taken in to account over and above public order or morality. The scientific

18 *Ex parte Hibberd*, 227 USPQ 443, 1985.

19 *Ex Parte Allen*, 1987 2 USPQ 2d 1425.

community further declared that, 'we are not trying to own God's wisdom but we are claiming for non-natural and human-made inventions having potential to benefit the society at large. We are claiming our labor and intellectual effort, which is not against public order morality'.

Approximately about a year later to this, a patent was granted by USPTO on a transgenic mouse useful in cancer testing in Harvard Oncomouse case.²⁰ A cancer causing gene was induced in to the mouse by genetic engineering thereby making it receptive to cancer. The opponents argued vehemently that the patent was immoral, expressing fears that this might lead to cloning and patenting of humans someday. But the patent office reasoned and argued that since cancer which was affecting millions of people, was one of the major diseases in the world, any invention that would help in testing cancer should be given priority and ultimately, patent was granted.

In 1993, the Government of US claimed patent before the patent office for a human cell line which was developed from the woman patients' blood and was found to be useful in research on AIDS(Acquired Immuno Deficiency Syndrome)and cancer. The claimed cell lines belonged to the women of GuaraniIndian tribe in Panama, South America. This clearly demonstrated that by applying for patent on human cells and genetic material, the Government of US itself was undermining morality involved therein, which led to severe protests by several non-governmental organizations including Rural Advancement Foundation International and tribal communities. The US Government defended its decision of seeking patent for a human cell line by claiming that the cell line was really helpful in research for AIDS and cancer, the two most deadly diseases globally. The patent application attracted severe criticism across the globe based on public order and morality with the critics claiming that the step taken by the US Government in claiming patent for human cell line would one day lead to commodification of life. Finally, yielding to the intense international criticism and oppositions, the Government of US withdrew the patent application.

However, patent was later allowed on human genetic material such as DNA for the first time by including it within the scope of patentable subject matter in *Amgen Inc. v. Chugai Pharmaceuticals Co.*²¹ which once again was confirmed in

20 US Patent No. US4736866A

21 *Amgen Inc. v Chugai Pharma. Co.*, 927 F.2d 1200 (Fed. Cir. 1991).

In re Bell²² by constituting human DNA as a patentable subject matter under Section. 101 of the Patent Act. The term ‘composition of matter’ in all the above mentioned decisions was meant to include living beings within the scope of patentable subject matter which clearly depicts the adaptive nature of US patent system which inevitably allowed biotechnological processes and products involving micro-organisms, plants, animals and human genetic materials to constitute under patentable subject matters. However, human beings are excluded from the scope of patentable subject matter and any attempt at cloning of human is barred with severe punishment under the Human Cloning Prohibition Act, 2003.

Myriad’s Case

For about three decades in US alarming number of patents had been granted based on the fundamental principle of Diamond’s case. However in 2010, a Federal District Court in the Southern District of New York while deciding on the patentability of purified DNA sequences, ruled against Myriad Genetics and in favor of the American Civil Liberties Union terming such inventions non-patentable.²³ Supreme Court concluded that an isolated DNA possesses same fundamental characteristic as that of a natural DNA and hence, the same is non-patentable under Section. 101 of the Patent Act; and even the patent claims on the methods were also abstract mental processes because of which, they too were termed as non-patentable. The Federal Circuit while hearing appeal against the said decision termed this rationale as controversial and reversed the decision observing that an isolated DNA had an extensive different chemical structure from that of a natural human genetic material.

However, the US Supreme Court in 2013 partly reversed the decision by holding that DNA was not patentable, with Justice Antonin Scalia noting that, “the portion of the DNA isolated from its natural state sought to be patented is identical to that portion of the DNA in its natural state”. The Supreme Court also held that only complimentary DNA can be patented since it does not occur naturally, which was welcomed by the American Civil Liberties Union and also Myriad Genetics.²⁴ Therefore this case to an extent changed the contours of US

22 In re Bell, 991 F.2d 781 (Fed. Cir. 1993).

23 Association for Molecular Pathology v. U.S. Patent and Trademark Office , 702 F. Supp. 2d 181 (S.D.N.Y. 2010).

24 Association For Molecular Pathology et al. v. Myriad Genetics, Inc., et al., 398 (569 U.S. 576 (2013).

ideology of patenting “anything under sun made by man”. In this case, BRCA1 and BRCA 2 genes (Breast Cancer gene) reveals that these patents have numerous policy implications. BRCA test only provides low predictive power to test the general population for the susceptibility of breast cancer, the Myriad BRCA test reportedly fails to detect 10–20% of all expected mutations. ‘Scientists with the Institut Curie have discovered the deletion in the BRCA1 gene accounting for the predisposition to breast cancer of one US family that the Myriad test fails to detect altogether.’ The failure to detect such a large percentage of mutations may have an adverse impact on the quality of the test. As a result of such a failure Myriad tests may fall well short of appropriate patient care, preventing patients from availing alternative more effective tests. Unlike in United Kingdom where, healthcare workers follow a model that integrates biological research, clinical investigation, and patient care, especially considering the psychological aspects of diagnostics, both for the individual patient and patient’s family on the contrary, in US Myriad was accused of dissociating genetic testing from patient care as it provides BRCA test results without any significant follow-up individualized genetic counselling. This seriously affect the patients, impeding the quality of patient care which is against moral value systems of healthcare. Allowing patents on genetic diagnostics may create a possibility that the test would not be available to a patient for purposes of diagnosing the health problem, hindering patient care and counters the goals of the healthcare system. Critics analyzed that in the case of diagnostic gene patents, doctors must either obtain a license to provide such a test or charge a patient fees for sending a sample to be tested at the corporation or research institution that holds the patent. In many situations, this fees are exorbitant. Due to high licensing fees, the doctor may even choose to perform an inferior procedure, perhaps resulting in inaccurate results or even failure to screen for the specific disease. Nothing can be more immoral than denying proper treatment and diagnosis to patients due to patents on medical treatments and diagnostic methods. This may have a deleterious effect on innovation and future research, which may ultimately result in an intellectual standstill. Because researchers and physicians are barred from the use of the BRCA1 gene itself. As a result, no improvements in the inaccuracies of the current testing mechanisms will be discovered.²⁵ US patent laws on biotechnological inventions do not have the force and effect of law and make no mention of morality or public policy issues.

25 K. K. SINGH, *Biotechnology and Intellectual Property Rights* 21 (Springer India 2015).

But this case to an extent brought a change which clearly established a new principle- “not everything under the sun made by man can be patented.”

Conclusion:

As on today, one cannot firmly say that biotechnological inventions are completely justified with proper fixed boundaries to obtain patent at US. Critics view this as a victory for biotechnology industry where the industry is pursuant to Court for securing patent protection.

Nevertheless, even after having pioneered the life form patenting by broad judicial interpretation, US still struggles in providing effective patent protection for specific life forms, like human genes and gene fragments. The approach of US patent system has not been homogenous while examining genetic inventions. It is high time that US considers the moral implications and only not commercial ends while granting patents to life forms by narrowing the scope of patentable subject matters. Nonetheless, in 2013 in the Myriad's case²⁶ the Supreme Court of US has changed its view to an extent on gene patenting and the earlier statement of US Supreme Court in Chakrabarty's case that “anything under sun made by man can be patented” does not hold valid anymore. The Supreme Court decided in Myriad's case that complementary DNA can be patented because it is not naturally occurring but excluded expressed sequence tags as they are close to products of nature. Therefore, the case laws are slowly being interpreted considering reasoning, public order and morality. Therefore it is necessary that US at the earliest, includes a law on morality and public order by virtue of Article.27.2 of TRIPs Agreement and make it official.

There are many patents granted on life forms like, genes, therapies, animals, etc., but it is not clear till today if patenting of life forms is fully justified in true sense. Because, gene is considered as an information and that becomes a difficulty for gene to pass the patentability criterion because it is more likely to be categorized as an abstract idea carrying genetic information. Complete breadth of gene patenting is also very harmful as it can create an unfavourable impact on follow-up research. Grant of multiple patents on single gene or a gene fragment, which can later be used by researchers as a research tools for further findings is obstructed by such multiple patents. As a result gene-based research is

26 Association For Molecular Pathology et al, supra note 24.

discouraged affecting healthcare of public at large. Patenting of upstream (basic) discoveries has increased drastically, leaving lesser scope and potential of access the existing research material which are research tools in real sense. This kind of patent obstruction prevents patients from even taking follow-up or a second opinion for verification by testing which was clearly pointed in Myriad's case thereby bringing balance to an extent between patent holders on one side and public health at large and researchers on the other side. If the balance is not maintained it will be unfair and failure of science since it cannot be used for benefit of larger masses.



IS THERE A CASE FOR REGULATION OF NANOCOSMECEUTICALSMARKET IN INDIA?

Monalisa Saha^{*}

ABSTRACT

Nanoengineering is a new age technology that has revolutionized many manufacturing processes and constituent of consumer products. In this article the author has tried to explain the technology and its application in various fields. But the author's focus has been limited to understanding the growing market of nanocosmeceuticals which has become omnipresent especially in urban locales. She argues for the creation of a regulatory mechanism which is largely absent at the moment in India. She argues that an exclusive technology specific or product specific market is not desirable keeping in mind the inherent nature of nanotechnology and suggests an alternative way to balance the competing interests of: clear short-term benefits verses unknown future risks that this technology holds for the society.

Key Words: Biotechnology, Nanoproducts, Pharmaceutical Products, Wealth, Nanoparticle, Cosmeceuticals

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INTRODUCTION

Nanoengineered products

We have had many technological evolutions over the years, right from information technology, genetechnology to biotechnology etc. Nanotechnology is one such technological evolution that is relatively new. Nanotechnology refers to the technology of manipulating matter at a nano level. This manipulation does not just happen in its physical properties of shape and size, but can also alter the inherent properties of the matter. In other words, nano technology allows manipulation of a matter in such a way that its physiochemical¹ properties can completely alter at a nanoscale. For example, a metal which is otherwise water repellent at a larger dimension, may become water absorbent at the nano scale, or a metal (like gold) which otherwise melts at a lower temperature could melt at a relatively higher temperature at nanoscale, or a metal's absorption capacity of solar energy could increase at the nano scale to render it more efficient to be used in solar batteries (like it happens with silicon)².

But unlike biotechnology and other technologies that have more or less a definite sector for application; what is rather unique about nanotechnology is that it is considered to be a platform technology that has found application in many sectors³. In fact, nanotechnology can virtually find application in many disciplines and across industries. Therefore, when we talk about nanotechnology and its application, the discussion can never be encompassed under a single sector/authority; or even be limited to nanotechnology as a process or product⁴.

NANOPRODUCTS AND HEALTH

Therefore, there are many types of nanoengineered products in the market today. The market for which has consistently increased because of its identified short term positive consequences. Benefits relate to new forms of energy generation such as fuel cells, thermoelectric devices, solar cells and improved

1 Jean C. Buzby Nanotechnology for Food Applications: More Questions than Answers, The Journal of Consumer Affairs, Vol. 44, No. 3 (Fall 2010), pp. 528-545 at p. 528

2 Ibid

3 Nupur Chowdhury, Regulatory Supervision of Emerging Technologies: A Case for Nanotechnology in India, EPW, Nov. 18-24, 2006, Vol. 41, No. 46 (Nov. 18-24, 2006), pp. 4730-4733, p.4732

4 AP Jayanthi ,Nanotechnology: Risk Governance in India, et al, 2012, Vol. 47, No. 4, pp. 34-40 at p. 38

batteries⁵. Nanotechnology has been specifically used in the health industry to try and improve various health parameters of humans. Nanomedicine or bio-nanotechnology⁶, is being used in the diagnosis of disease as well as treatment of various ailments, including cancer, diabetes, fungal infection, viral infection and gene therapy⁷, particularly in its early detection and treatment. For example, medicines type and dosage are not generally gene specific or person specific; but nano technology has made it possible to reach dosage consistency, to achieve faster pharmaceutical action, to decrease toxicity of drugs and to be able to target pharmaceutical products onto specific cells⁸. For example, since carbon nanotubes are sturdier, they prove to be stable drug carriers⁹. Specifically, S-NBI 29, a therapeutic agent that is of radioactive gold nano construct has been developed to treat solid tumours (in oral cancers, head and neck, prostate and pancreatic cancers).¹⁰ All of these developments have contributed to making nanopharmaceutical industry, one of the fastest growing industry which is carrying on its shoulder a lot of hope of revolutionising the healthcare industry.

This paper is particularly concerned with nanocosmeceuticals; which has been time and again distinguished from nanopharmaceuticals by policy makers. Irrespective of the product or sector nanotechnology is being promoted in and is finding use it, there are many studies that have been carried out in USA, Europe, Australia, that talk about the unknown risks that is involved in the use of such nanotechnology.

There isn't a conclusive¹¹ study to show the definitive negative impact of nanoproducts on health of humans. But there are studies that show potential for negative consequences. Primarily because of its shape and size that can allow nanoparticles to cross biological barriers and find their way into the human body through respiratory system or through dermal exposure or directly through

5 Barbara P. Karn and Lynn L. Bergeson Green, Nanotechnology: Straddling Promise and Uncertainty, 24 Nat. Resources & Env't 9 2009-2010, pp. 2 to 6, at p. 4

6 Azamat Ali and Dr. Kunal Sinha, Prospects of Nanotechnology Development in the Health Sector in India, International Journal of Health Sciences, 2014, vol 2, Issue. 2, pp. 109-125, at p. 110

7 Manish Anand and others, Governance and Nanotechnology Developments: A Focus on the Health Sector in India', Scripted Vol9, Issue 1, April 2021, pp: 6-24, at p. 7

8 Supra Note 6

9 Supra Note 7, at p. 8

10 Supra Note 6, at p. 119

11 Thomas Mathew, Nanotechnology: An Emerging Area of Scientific Issues and Legal Challenges, 2 Kathmandu Sch L. Rev 81 (2013) at p. 83

ingestion¹². Once inside the human body, these nanomaterials can be found to be deposited in various organs, particularly, the respiratory tract, skin, gastrointestinal tract inter alia.

Studies suggest that once inside the body, nano materials can land up interfering with the movement of essential nutrients or other substances into and out of various cells, or the nerve signal structure of the human body. There is a very real possibility that the original cell functionality could completely change, altering cell physiology and damaging nucleus and mitochondrial structures¹³.

Studies have shown that various nanomaterials like fullerenes, carbon nanotubes, multiwalled carbon nanotubes, nano titanium dioxide, metals and metal oxides nanomaterials etc have been found to affect and damage cardiovascular system, reduce carcinogenic responses, induce reproductive toxicity in off-springs, display toxicity towards aquatic species¹⁴, cause death of kidney cells¹⁵ etc.

And since, we know that materials at a nanosize can also have altered chemical characteristics, we may also be looking at a situation where these nanoparticles remain deposited on various organs of humans exhibiting their toxicity which may only become evident after many years have passed by¹⁶. Since nanoparticles have “a larger surface area per unit mass than the same material in bulk form”¹⁷, it has been noticed that some nanoparticles of various elements/compounds can show a vast array of differences in their “reactivity, bio-persistence, hydrophobic and electrophilic nature”¹⁸, all of which may result in unwanted consequences.

The demands by few scholars to focus on risks that may seem non-existent or mild may seem like being overcautious. But our experience¹⁹ with asbestos²⁰ and pesticides have shown how immediate benefits may sometimes carry side effects

12 Supra Note 7, at p. 8

13 Ibid

14 Ibid, at p. 9

15 Silpa Raj Nanotechnology in cosmetics: Opportunities and Challenges, et al, 2012, Journal of Pharmacy & BioAllied Sciences, as available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3425166/> [Last Visited: 02.02.2021]

16 Supra Note 4, at p. 35

17 Ibid

18 Ibid

19 Supra Note 1

20 Which was found to cause a type of lung cancer called mesophyllia

and potential to cause collateral damage that may only be delayed in time.²¹

NANOCOSMECEUTICALS PRODUCTS AND INDIA

Before we look at the market for Nanocosmeceuticals it is important that we distinguish between the following terms: pharmaceuticals/drugs, cosmetics, cosmeceuticals, nanoproducts, nanopharmaceuticals, nanocosmetics, nanocosmeceuticals.

Nanoproducts: include any product that contain nanoparticles. For example, toys, electronic gadgets etc.

Pharmaceuticals or Drugs are substances (other than food) that have the capacity to structurally or functionally bring about a change in the human body. These substances are intended for use on humans and animals for the diagnosis, treatment, mitigation or prevention of a disease, or disorder²². And drugs that have nanoparticles in them are called nanopharmaceuticals.

Cosmetics²³ means articles whose primary functions are to clean, beautify, promote attractiveness, or appearance. Such substances are intended to be more topical in the sense that there is no internal administration of these substances inside the human body. It is rubbed, poured, sprinkled or sprayed on the body. These are understood to not bring about any permanent alteration. Cosmetics that have nanoparticles in them are called nanocosmetics.

Cosmeceuticals are somewhere in-between drugs/pharmaceuticals and cosmetics. These products are known to “have measurable biological action on the skin like a drug but are regulated as cosmetics since it claims to affect appearance²⁴”. Though it is not considered to be truly medicinal in nature, such products have certain functional²⁵ attributes that can be measured which is why many skin scientists, physicians, and skin care professionals, have been able to

21 Supra Note 7, at p. 8

22 S. 3(b) of the DRUGS AND COSMETICS ACT, 1940

23 3(aaa) of the DRUGS AND COSMETICS ACT, 1940

24 Dr. Shashank Tiwari & Ms. Shreya Talreja, A concept of Nanotechnology in Cosmetics: A Complete Overview, Adalya Journal, as available at <https://www.researchgate.net/publication/345260997>, 2020, pp.14-23, at p. 14 [Last Visited: 22.01.2021]

25 Cosmeceuticals: Drugs v. Cosmetics, Eds Peter Elsner & Howard I. Maibach, 2000, New York, as available at <https://books.google.co.in/books?hl=en&lr=&id=zwYTsxFqZ1MC&oi=fnd&pg=PR3&dq=law+cosmetics+cosmeceuticals&ots=MULnmATEub&sig=q-AS4a5q8U4unTdm4HoP7AQriP4#v=onepage&q=law%20cosmetics%20>

successfully encourage its wide use amongst consumers looking to fight aging and wrinkling of the skin²⁶. And cosmeceuticals that have nanoparticles in them are known as nanocosmeceuticals.

It may also help to understand what comprises Fast-Moving Consumer Goods (FMCG); because nanocosmeceuticals can also be clubbed under this category of goods/products. FMCG products²⁷ encompass a variety of products that are demanded and consumed at a rather fast pace by consumers. These products are priced low and since they have a wide range of use, these are sold quickly²⁸; for example: toiletries, beverages, dry goods, packaged food and even cosmetics and nanocosmeceuticals. Therefore, nanocosmeceuticals can also be categorized as an FMCG.

In 2011 the global market for cosmeceuticals was \$ 31.7 billion; which was projected to increase to \$ 42.4 billion by 2018²⁹. Asian countries like India, Japan and China are all part of this global cosmeceutical market.³⁰

A large chunk of the market of nanotechnology that is found in cosmetics are sunscreens etc³¹, where the diameter of nanoparticles is more than 10 nm³². The other uses of nanoparticles in cosmetics are: body care products like perfumes, anti-aging creams, anti-wrinkle creams, hair³³ care products like conditioners, serums; makeup materials like foundations, bronzer etc³⁴.

To give an example, shampoos would previously only clean the hair, but now they have conditioning and moisturizing properties, due to the use nanoparticles that have an important ingredient in liposomes, called Photophatidylcholine, in

cosmeceuticals&f=false[Last Visited: 24.01.2021]

26 Alka Lohani, Nano-Technology -Based Cosmeceuticals, et al, 2014, ISRN Dermatology, Hindawai Publishing Corporation, as available at <https://downloads.hindawi.com/archive/2014/843687.pdf>, pp. 1-14, at p. 1[Last Visited: 20.01.2021]

27 Ibid

28 processed food, cosmetics, toys, electronic gadgets, sporting equipment, drugs, water filters, cleaning agents, hardware products etc.

29 Cosmeceuticals: Products and Global Markets, A BCC Research Report, 2013, as available at <https://www.bccresearch.com/market-research/advanced-materials/cosmeceuticals-global-markets.html> [Last Visited: 19.01.2021]

30 Supra Note 26, at p. 2

31 Supra Note 6, at p. 120

32 Gerhard J. Nohyket ,Grey Goo on the Skin? Nanotechnology, Cosmetic and Sunscreen Safety, al, Critical Reviews on Toxicology, 2007, as available at <https://www.researchgate.net/publication/6375044>, pp 251-277, at p. 252

33 Supra Note 26, at p. 2

34 Supra Note 24, at p. 14

them.³⁵ Cosmetic formulations that contain carbosiloxane dendrimer are known to provide better “water resistance, sebum resistance, glossiness, tactile sensation, and/or adhesive properties to the hair and or skin³⁶” and many companies like L’Oreal, Unilever, The Dow Chemical Company have secured patents on various hair care, skin care and nail care products.³⁷

Many big cosmetic companies have been spending heavily in research and development of nanocosmetic products or cosmeceuticals³⁸. These include: L’Oreal, P&G, Henkel, Unilever, Dior³⁹ and Johnson.

Some of the products using nanoparticles are: Capture by Dior, launched in 1986⁴⁰ (anti-aging cream); Nano Repair Q10 Cream and Nano Repair Q10 Serum by Dr. Kurt Richter Laboratorien in 2005 (antiaging cream)⁴¹.

EXISTING REGULATORY FRAMEWORK IN INDIA

In India we don’t have any specific law concerning the regulation of nanotechnology either as a process or as nanomaterials in products. We however have established doctrines (of precautionary principle and absolute liability) that could help us affix liability onto manufacturers. Also, since nanocosmeceuticals can be considered as consumer products, the Consumer Protection Act, 1986 is also applicable. We also have the Drugs and Cosmetics Act, 1940, The Drugs and Cosmetics Rules, 1945 which broadly concern regulation of manufacture, distribution, imports and sale of drugs.

There are also other laws concerning nanoproducts, like the Guidelines for Evaluation of nanopharmaceuticals in India”, 2019 the intent of which is to provide transparent, consistent and predictable regulatory pathways for nanopharmaceuticals in India⁴². It has been explicitly mentioned in the Guidelines that it isn’t applicable to “nanopharmaceuticals nor for cosmetics and nanoenabled devices or implants.”⁴³

35 Supra Note 26, at p. 3

36 Ibid

37 Ibid

38 Ibid

39 Ibid

40 Ibid

41 Ibid

42 Guidelines for Evaluation of Nanopharmaceuticals in India, Department of Biotechnology, Government of India, 2019, as available at http://dbtindia.gov.in/sites/default/files/uploadfiles/Guidelines_For_Evaluation_of_Nanopharmaceuticals_in_India_24.10.19.pdf, p. xvi [Last Visited: 13.01.2021]

43 Ibid

One may ask as to why inspite of the development of nanoproducts for over three decades, including the manufacture and use of nanocosmeceuticals since the 1980s, we don't have either a nano-technological specific regulation or any nanoproduct specific regulatory regime⁴⁴. This is because there are many technical problems with regulating the technology per se, because of the sheer multiplicity of players involved in various sectors. And also, because it turns out that the potential good (although short term) from the promotion and development of nanotechnology has been proved already by science, while the feared consequences have remained a conjecture. There are knowledge gaps in the procedure to infer toxicological effects that have led to contradictory results or inconclusive results. Due to the absence of standardized testing protocols, or the fact that testing methods are meant for materials in a bulk⁴⁵ form, and not for materials at nanoscale, or the fact that there are studies to depict toxicological consequences for only a few nanomaterials-means that at this moment we do not have enough evidence to suggest that nano materials are toxic either in the present or in the future.⁴⁶

It is also difficult to develop one single instrument suggesting of a top-down government approach⁴⁷. This is besides the fact that nanotechnology due to its intrinsic nature covers a wide variety of sectors-there are other regulatory barriers like 'information asymmetry, inter-agency coordination, and overlapping roles and mandates of various authorities/stakeholders.⁴⁸

Further, the government is cautious of building a regulatory structure also because the present benefits from nanotechnology is adding to the gross domestic product⁴⁹. It is wary about regulating this technology, lest it may thwart investment that is flowing into the sector and thereby remove an opportunity to grow for the Indian economy. Therefore, in India, the government has instead chosen a 'go-slow'⁵⁰ approach, in terms of imposing regulatory mandates on the growth of nanotechnology and nanoproducts, like nanocosmeceuticals.

44 Supra Note 7, at p. 13

45 Nanotechnology: Regulatory Outlook on Nanomaterials and Nanomedicines in United States, Europe and India, Applied Clinical Research, Clinical Trials & Regulatory Affairs, 2020, 7, pp. 225-236, at p.233

46 Supra Note 7, at p. 9

47 Ibid

48 Ibid, at p. 6.

49 Supra Note 11, at p. 83

50 Ibid

In fact it appears from many of the actions of the government that it is encouraging the technological growth in nanosector in possible ways, which is not just limited to financial means but also through providing institutional support⁵¹. The ministry in India in charge of in charge of promotion of research and development is the Ministry of Science and Technology. There are three particular departments that it functions through: The Department of Science (DST), the Department of Science and Industrial Research (DSIR), Department of Biotechnology (DBT). The DST is the nodal body and the overarching disbursement authority in terms of allocating various research funds. In 2001, the DST launched a national programme for 2002-2007, Nano Science and Technology Initiative (NSTI) with Rs. 60 crore allocated to it and to make further funds available for nanotech ventures⁵². Funds that were earmarked under Technology Information, Forecasting and Assessment Council (TIFACT) have been allocated to nanotech ventures that concern various other disciplines. In the 11th five year plan, Nano Mission was set up for 2007-2012 with a heightened budgetary allocation of Rs. 1000 crore⁵³. However, it seems that the DST has limited its focus on how to develop nanotechnology so as to ensure that it contributes to the economy of India. Research and Development in Nanotechnology does not seem to cover anything on risk assessment or management⁵⁴.

For instance, not only is the government's Department of Science has been funding various nanotechnology projects (primarily equipment research), it is also actively encouraging public-private partnership in various nanotech ventures.⁵⁵ From a government funding of Rs. 23 crores in 2006, the amount increased to \$400 million by 2021⁵⁶.

ANECDOTAL SURVEY ON NANOCOSMECEUTICALS

The author conducted a survey via Google-form between 1st March to 15th March, 2021. Five questions were asked in the questionnaire. The responses of which have been captured in Table 2, 3, 4, 5, 6. Two hundred and seventeen (217) responses were obtained.

51 Supra Note 7, at p. 18

52 Supra Note 6, at p. 111

53 Ibid

54 Supra Note 11, at p. 83

55 Supra Note 3, at p. 4732.

56 Supra Note 4

Table 1

Description	Number
Total Number of respondents	217
Total male respondents	87
Total Women respondents	113
Unknown sex	17
Age in years (18-30)	135
Age in years (31-40)	56
Age in years (41-50)	16
Age in years (51-60)	7
Age in years (Above 60)	3
Occupation (Student)	26
Occupation (Undergrad Student)	13
Occupation (Postgrad Student)	7
Occupation (Professional)	33
Occupation (Retired)	3
Occupation (Homemaker)	6
Occupation (Others: business/govt. employees)	2
Occupation (Unknown)	130
Number of Municipalities	181
No of Grampanchayats/BDOs	24
Unknown (data not complete)	12
Description	Number
Countries respondents reside in	Norway, India
Number and Names of states studied/identified	14; Bihar, Chandigarh, Delhi, Gujarat, Assam, Tamil Nadu, Uttarakhand Haryana, Karnataka, Maharashtra UP, West Bengal, Chattisgarh, Nainital
number and names of districts sub-divisions studied in West Bengal	11; Purba and Paschim Burdwan (clubbed as Burdwan), Purba and Paschim Mednipur (clubbed as Mednipur), Nadia, Hooghly, Howrah North 24 Parganas, South 24 Parganas, Jalpaiguri, KMC, Birbhum Purulia, Murshidabad
Highest Responses collected from	38; (KMC)
Second Highest Responses collected from	32; (Burdwan)
Third Highest Responses collected from	21; Bidhannagar of North 24 Parganas)

1. What types of cosmetic products do you use?

Table 2

Responses	Total (217)
Sunscreens, moisturizers, and facewash	171
Hair care products (shampoos, conditioners, serums)	176
Other skin products (an-aging cream	13
Eye liner and eye makeup kit	69
Lipsticks and makeup items like foundations, blush etc.	68
Nail paint and nail polish remover	60
Shaving cream, shaving gel	72

2. How do you choose cosmetic products?

Table 3

Responses	Total (217)
Advertisements	57
Doctors prescription	47
Recommendation from friends and salon professionals	87
By researching yourself	152

3. What purposes do you use cosmetic products for?

Table 4

Responses	Total (217)
Cleaning	173
Moisturizing	146
To enhance appearance	56
Sun protection	106
To look presentable	111
To prevent aging	12

4. Have you heard of nanocosmeceutical products?

Table 5

Responses	Total (217)	Panchayats (24)
Yes	173 (79.4%)	7
No	45 (20.6%)	17

5. Do you use nanocosmeceutical products?

Table 6

Responses	Total (217)	Panchayats (24)
Yes	201 (92.2%)	1
No	17 (7.8%)	23

Table 2 shows that the most used cosmetic products are shampoos, facewashes, hair care products with 171 and 176 respondents using them regularly. This is followed by 72 respondents using shaving cream/gel, 69 respondents using eye care products, 68 respondents using other makeup products (including lipsticks etc).

But it is interesting how nearly 173 persons have no idea about nanocosmeceuticals that do more than just cleanse different parts of our bodies temporarily.

Table 5 shows that 45 people heard of nanocosmeceuticals. When you look at this data qualitatively, it is evident that of these 45 persons who have heard of nanocosmeceuticals, only 12 use nanocosmeceuticals. This could mean that only 12 are aware of the fact that the product that they are using have nanoparticles in them. This also throws up another problem. There are nanocosmeceuticals that are made from nanoprocesses that may not eventually have nanoparticles in them. Since there are no regulations that require such products to specify the manner in which these nanocosmeceuticals are manufactured, it may be that the respondents are using the products, without knowing that they are using them. It is interesting how in the age of digitalization, televisions and globalization, those living in the rural parts of the states have also been exposed to concepts of nanocosmeceuticals. On qualitative assessment of data it is found that 7 respondents living in Panchayats have heard of nanocosmeceuticals; while only 1 respondent uses them.

Table Part 4 shows that nearly 106 persons use cosmetic products for sun protection, while 146 use it for moisturizing, 111 use it to enhance appearance. Since a large chunk of the market of nanotechnology is found in sunscreens and hair care products⁵⁷ it is quite possible that 106 persons are using nanocosmeceuticals without knowing that they are using them.

On analysis of the data collected qualitatively it appears that people in the rural areas also use cosmetics/cosmeceuticals products to improve appearance and look presentable. 9 out of 24 respondents have selected “improvement in appearance” and “to look presentable” as reasons for using cosmetics too.

Table 3 shows how advertisements are not the leading method of influencing respondents to use variety of cosmetic products. It turns out that respondents trust their own research and judgment the most, with 181 respondents stating that they choose cosmetic product after researching upon them independently. The only reason then that respondents 173 respondents haven't heard of nanocosmeceuticals properly is because the information is not available freely or in a language that can be understood easily by the common citizens. Manufacturers of nanocosmeceuticals do know that putting information in the public domain that focuses on the immediate benefit (e.g., moisturizing, cleaning, anti-aging) that can be derived from using nanocosmeceuticals will attract consumers. The future risks of using the products on the health of the humans and the environment at large, is not adequately researched upon and remains unknown.

RECOMMENDATION

It appears from the above discussion that there is no specific technology or product centric regulatory structure in place concerning nanocosmeceuticals yet in India.

The point is that it is difficult to regulate something which we don't know for certain to be bad. The situation becomes more difficult when we have evidence to show that its use is actually good. For instance, the benefits of titanium dioxides and zinc oxides are remarkable. But what the conservatives are arguing and what the author finds weight in is that, we need to harness technology in a cautious manner. There is no need to rush blindly. While it is important to focus on the

57 Supra Note 6, at p. 120

immediate benefit that a technology can offer, we need to remember our history lessons and keep it at the back of our mind, how long-term consequences can be quite opposite and grave if we are not careful enough. Therefore, the best approach is to also invest adequate resources in carrying our risk assessment studies, while we continue to also work on development of the technology to assess its commercialization potential⁵⁸.

While we invest in such risk assessment technology, we need rework on some of our fundamentals of assessment. For instance, most of the assessment methodology out there is meant to assess products in their bulk form and may not be able to assess their consequences at the nanolevel. Perhaps this is the reason why we are sometimes faced with contradictory results when trying to find out the potential negative impacts of nanoproducts like nanocosmeceuticals. But developing such new standards may take some time and therefore as some scholars have suggested that it is best to “probably assess risks associated for a nanomaterials product on a case-to-case basis⁵⁹”.

Evidently carrying out such studies, be it for the development of nanotechnology or for assessing its risks, requires a lot of resources. It is therefore in everyone’s interest to pool in their resources. India is already a key partner of the OECD and its Working Party, which is working towards integration of knowledge and expertise. They have been developing the—”Science based Support for Regulation of Manufactured Nanomaterials⁶⁰” and the NANoREG2⁶¹.

Also, it may be difficult to develop a technological specific regulation or a product regulatory regime that is complete on its own because of the inherent nature of this technology⁶². Appropriate regulatory structure needs to be drawn out requiring the stakeholders to balance these competing interests in the face of resource constraint. Therefore it is perhaps desirable that we chalk out a governance structure where we identify various stakeholders (including industrialists, scientists, academicians, policy experts), instead of just government bureaucrats⁶³) and require them to meet on a regular basis and

58 Supra Note 7, at p. 13

59 Supra Note 45, at p.233

60 Ibid, at p.234

61 Ibid

62 Supra Note 7, at p. 13

63 Supra Note 3, p. 4733

ensure that they engage in knowledge sharing, so that the wheel is not reinvented every time. Such multistakeholder deliberation will perhaps be able to make use of resources adequately and also be able to explore many unknown⁶⁴ aspects of use of nanocosmeceuticals in the present and future times.⁶⁵



64 like if they can interact at a secondary level when left out in the environment, thereby causing a graver challenge that we may not be able to anticipate yet

65 *Supra* Note 7, at p. 8

AADHAAR AND THE VIOLATION OF RIGHT TO PRIVACY

Harshita Kulkarni*

ABSTRACT

The rapid technological development has led to advancing the man at a higher pace. The recent identification scheme “Aadhaar” introduced in India under the arches of UIDAI is a classic example of this rampant technological development. This project has come under the scanner of people across the globe for various reasons, however the most significant one being that the project is in violation of the fundamental right of privacy conferred to citizens of this country. The ‘right to privacy’ is in nascent state of development when it comes to its legal recognition. The Supreme Court has recently recognised right to privacy in the case of Justice (Retd.) Puttuswamy v. Union of India, but at the same time it has conferred recognition to the Aadhaar project as well. The judgment has thus led to further confusions and complications in balancing the right to privacy and identification scheme of government. There are various ways in which the right to privacy has been attacked upon by the Aadhaar project, such as violating personal integrity, bodily integrity, data integrity, interlinking of the information, surveillance, so on and so forth. In addition, the technological developments are also posing new threats to protect this piece of right as they have the potential of piercing even the well-built system. It is only when the right to privacy and the identification scheme of government are balanced, we can advance in the direction towards progress without violating individual’s rights.

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Key Words: Aadhaar, privacy, technology, consent.

INTRODUCTION

Man has evolved from being a social animal to secluded animal and this transformation has been over a long period of time owing to his inquisitive nature which has prompted him to make new inventions each passing day. Despite the saying that man is social animal it is realized that privacy is not a naive concept, it has always existed in our society. The evidence of this can be traced since man felt the need for shelter, which then transformed from mere roof to four sided walls to secluded rooms¹. But the growth of this concept in a refined manner has come into light since the technological developments in the recent past. The most evident transformation has been since the invention of telephone and photography. These two technological revolutions have changed the very nature of socializing of humans. This kind of seclusion that man has opted may have indeed helped him grow better than the rest of the animals, but at the same time brought him close to new issues and challenges every passing day, demanding new ways of tackling them.

One such example of technological advancement is the introduction of Aadhaar scheme in India, a country which is still in the budding stage in terms of technological development and has higher risk of being exposed to irreversible damages. Aadhaar project has though entirely turned out to be posing numerable challenges which have the potential to cause serious damages, the violation of privacy rights is a major concern. Such apprehension has arisen mainly due to the fact that the information collected is sensitive personal information which the individuals should not be compelled to do away with. The government has ventured out and demanded from the people of this country to part with their personal information so that the welfare and growth of the country as a whole is achieved. This calls in for drawing a line of balance between the policy decision of government and the individual rights.

We are in an era where the technological development is at its peak, there is no choice to refuse this development. We must cop up with the developments at the same time there is a need to ensure that these technological developments do not take away the basic element of rights from the individuals. In the context of

1 "That the house of every individual is to him as his castle and fortress as well as for his defence against injury and violation, as for his repose..." *Semayne v. Richard Gresham*, 77 E.R 194.

Aadhaar there is a need to ensure that the project the government has come up with, does not interfere with the rights of individuals, it is therefore essential to understand the issues involved in the entire project. This article has succinctly highlighted the various issues in relation to Aadhaar which has led to violation of privacy rights of individuals. In this backdrop the government needs to be well prepared in terms of enforcement and redressal mechanism to tackle issues that arise. Without preparedness in terms of technology and law any kind venturing will lead to loss of rights of innocent citizens.

THE GROWTH OF PRIVACY

‘Man is a social being’ is a phrase commonly used that is exactly in contrast with right to privacy. The historical growth of civilisation when looked back through the lens of privacy tells us that initially when man was a wanderer, he was totally unaware of privacy, men lived together in literal sense, leaving no room for loneliness and that is why he was called a social being. It was from the point of safety as well, the fear that they would be attacked upon by other wild animals of the forests that brought them together. They haunted together, shared the food they had collected, protected each other, and thus stayed close to one another letting the others of the group know their whereabouts. The idea of shelter was the first which brought in the idea of privacy to man. This concept of shelter grew over the period of time from mere roof to four sided walls to secluded rooms. The idea of shelter gave men two personalities, one was meant for inside the house, the other one for the rest of the world. From then on everything changed around, as men became persuasive about privacy. Man’s ability to transform and adapt himself to the changing nature around him has thence been rapid.

The historical texts do mention the relevance of privacy, though not entirely in the sense as we attribute to it in present times. For example: Manusmriti prohibits bathing in tanks belonging to other men², similarly it also prohibits using wells, houses, gardens, etc. without owner’s permission. The object here is not that of securing privacy, but rather to be within the framework of what may also be

2 *Manusmriti*, Chapter IV, Verse 201 states
“*parakiyanipaneunasayad hi kadacana /
nipanakartu%snatvuduck[taC enalipyate*”,
which means: ‘He shall never bathe in the tanks belonging to other persons. Having bathed there, he becomes tainted with a part of the tank-digger’s sin’. Available at <https://www.wisdomlib.org/hinduism/book/manusmriti-with-the-commentary-of-medhatithi/d/doc200304.html>, [Last Accessed on 19-10-2021].

called as moral. Similarly, the Bible also brings in the concept of privacy by stating the famous story of Adam and Eve³ which highlighted the feeling of shame and the importance of covering the naked body. All these evidence tell us the tale of privacy as it existed in the earlier times.

The modern development of right to privacy is however considered to be from the publication of the famous article in United States written by Warren and Brandies⁴, which for the first time used the words 'right to privacy'. According to the authors, the concept of privacy which commenced as 'no interference with others property' expanded to 'no interference with others body' that is where offences like assault, battery, nuisance, reputation, etc. got recognition. Later privacy was expanded to embrace even intellect, this brought in further complications as intangible property was not considered as part of property then. Bestowing privacy rights to incorporeal property is an intricate issue which has gradually led to the idea of embracing 'right to be let alone'⁵, including the right not to be interfered with one's mind.

The developments in the area of right to privacy in United States is primarily based on the article of Warren and Brandies and the same has indeed influenced India's stand point on the issue. In the Indian scenario, the right to privacy is based upon the judicial pronouncements rather than any legislation as in case of the United States⁶. The initial status was that the right to privacy does not exist in India as the Constitution makers had not explicitly included it in the Constitution⁷. However, over the period of time the judicial view over the subject has evolved owing to the growing demands of the society and the influence of judicial decisions in U. S⁸ coupled with developments at the international level⁹, thereby

3 The famous story of Adam and Eve who ate the fruit of knowledge after which the couple felt it necessary to cover their naked body for which they sewed fig leaves together- all this is together linked to a realm of privacy. See S.K. Sharma, Privacy Law- A Comparative Study, (Atlantic Publishers & Distributors: New Delhi, 1994), p.25

4 WARREN AND BRANDIS, The Right to Privacy, Vol. 4, No. 5, Harvard Law Review, (1890), p.193

5 Ibid

6 The right to privacy in the U.S is protected under the "THE PRIVACY ACT, 1974"

7 M.P Sharma v. Satish Chandra, (1954) SCR 1077

8 Griswold v. Connecticut, 381 US 479 (1965) and Roe v. Wade, 410 US 113 (1973) are considered to be two such influential cases of U.S which changed the course of Supreme Court of India while considering the privacy issues, due to which in the case of Govind v. State of M.P, AIR 1975 SC 1378, the court accepted limited Fundamental Right to privacy.

9 Article 12, UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948 and Article 17, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966 have recognized the significance of right to privacy.

leading to the recognition of right to privacy. The recent judgment of the Supreme Court in the case of Justice (Retd.) Puttuswamy v. Union of India¹⁰, has changed the purview and scope of right to privacy altogether in the Indian context. The court has given a broader view to right to privacy to the extent that it has included even 'Informational Privacy'¹¹ under the umbrella of Article 21 of the Constitution.

In order to appreciate the significance of this piece of right conferred under Article 21, in the first place there is need to understand the meaning of privacy. Privacy is a multidimensional concept and cannot be placed under one umbrella of definition so, it can only be enumerated and not defined. Despite this difficulty in defining the concept its understanding is significant to have a clear idea of privacy issues. The term 'privacy' has been understood by the computer scientist in a narrow sense to be restricting to only data security. Whereas, for the lawyers there is a much wider range of issues connected with it, which first takes into consideration certain basic ingredients such as, the human body, personal identity and liberty to make decisions for himself¹². According to Richard B. Parker¹³, "... Privacy is control over when and by whom the various parts of us can be sensed by others. By 'sensed' is meant simply seen, heard, touched, smelled or tasted."

These ideas and definitions of privacy gives an idea as to the importance of concept of life which needs protection at all levels and over the period of time, the recognition attributed to it brings out its significance. In this context, any technological advancement needs to take into consideration the possible

10 (2017) 10 SCC 1

11 Informational Privacy which is also referred as data privacy implies the extent to which the given information regarding an individual can be used and at the same time informing the individuals whose data is collected as to the extent to which that information regarding him will be used. See, Christina P. Moniodis, "Moving from Nixon to NASA: Privacy's Second Strand- A Right to Informational Privacy", Yale Journal of Law and Technology (2012), Vol. 15 (1), p. 152.

12 As has been put succinctly by Justice Mc Reynolds in Meyer v. Nebraska (1923) 67 L Ed. 1042, "without doubt, it (privacy) denotes not merely freedom from bodily restraint but also the right of an individual to contract, to engage in any common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictate of his own conscience, and generally to enjoy those privileges long recognised at common law as essential to the orderly pursuit of happiness by free man... the established doctrine is that liberty may not be interfered with under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."

13 RICHARD B. PARKER A definition of Privacy in Philosophy and Public Affairs (1975) Vol. 4 (4), pp. 295-314

violation of rights in due course of its use. The miscalculation done by ascribing more significance to technological development over the violation of privacy rights can turn out fatal to any given society. Aadhaar project, prima facie, in terms of such significance attributed to right to privacy since ancient times seems to have breached this limit and has thereby given more room for its encroachment.

THE GROWTH OF AADHAAR

The millennial generation requires identification for innumerable purposes. India is no different in this matter, in fact the need for identification is even more intense in India owing to the vast and diverse population which imposes greater responsibility on the government to identify its citizens for fulfilling their basic needs. So far, there have been various modes used by the government to recognise its citizens, however it has always fallen short of having an efficient means which will remain unmanipulated. Fake documents are easily created which has led to delivering benefits to undeserving people. The way out for this problem as put forth by the government is that of creating a single identity for all the schemes and thereby employing means of identification which cannot be easily manipulated. In this context it was essential to identify such features which will be unique to each individual. Biometrics and iris scan were therefore considered as unique features of every individual and they became the most integral part of the Aadhaar project.

In this backdrop, the Unique Identification Authority of India (UIDAI) was setup in the year 2009 with the main task force of collecting the information and allotting a 12-digit unique number to every individual. However, the entire process of collecting information, storing it and allotting a unique identification number to 1.3 billion people of India is not a simple task. The UIDAI had to put in efforts to appoint people who could help in doing this task of entering the data of numerous people, train them, set up software in computers and connect other accessories which would read the fingerprints and iris scan of people. All of which costed enormous to the government, this in turn raised the eyebrows of many countries¹⁴, especially the developed countries as it was hard for them to

14 In United Kingdom, the idea was abandoned due to the reason that it was too complex, technically unsafe and expensive. SHANKKAR AIYAR, AADHAAR- A Biometric History of India's 12-Digit Revolution, (Westland Publications Ltd.: New Delhi, 2017), pp.112, 114.

imagine running of such a scheme at affordable cost in a vast country like India. The government however, efficiently covered up all the objections and defended itself by saying that since the identification scheme will help in successfully preventing leakages in delivering of benefits to the poor which have been taking since decades due to corruption and fake identities, the entire investment in the project is worth it.

Further, the objections were raised against making Aadhaar mandatory for every activity in this country¹⁵, this was not in accordance with the idea proposed at the commencement of the project. Nevertheless, the significance attributed to identification and the urge to compete with the developed countries led to the overall development of the scheme at the ground level. The later developments of the scheme surfaced the negative consequences and this turned out hard for the government to defend. For which the only basis of protection it could seek was to lay its importance in welfare schemes. Over the period of time, this defense of government has also showed its true colors¹⁶.

THE CONCERNS RAISED BY AADHAAR

Implementing an idea of identification in a developing country with vast population and diverse culture is indeed a daunting task which needs strong base and efficient mechanism for accomplishment. However, in the case of Aadhaar, it has faced challenges right from the time when the idea was introduced. Initially, the challenge was that it was an unlegislated and unregulated policy, further when it was legislated it was challenged for having undermined the parliamentary proceedings. At the beginning, the Aadhaar Act was drafted as National Identification Authority of India (NIDAI) Bill, 2010 and was presented before the Parliamentary Standing Committee on Finance, however the same was rejected by the committee on the ground that it had serious lacune¹⁷. The committee had asked the government to reconsider and review the UID scheme due to its

15 Aadhaar was required for even having network connections to mobile phones, Reliance Jio is one such telecom company which insisted on mandatory production of Aadhaar card for their services. *Ibid*, p.16.

16 The scheme has no much significance in the welfare schemes and it has done nothing more than adding new branches to the existing problems of the poor citizens. Discussed elaborately under next chapter.

17 Blow to Aadhaar project as Bill is rejected, Available at, <https://www.thehindu.com/news/national/Blow-to-Aadhaar-project-as-Bill-is-rejected/article13353344.ece>, [Last Accessed on 27-10-2021].

ambiguosness on its implementations and bring in fresh legislation before the parliament. The same was however not followed and the Bill was introduced in Lok Sabha as Money Bill with the intention to bypass Rajya Sabha where the then ruling government did not have majority. This itself called in for criticism from various sectors on the grounds that for a Bill to be passed as Money Bill it should deal with only matters that have been specified under Article 110 of the Constitution. The government ignored the same due to the pressure for having a statue in place for being able to run the scheme effectively by taking the defense that, since the funds for the project was utilized from the consolidated fund of India it is passed as Money Bill. There are various such challenges posed against the Aadhaar scheme, all of which have been suppressed similarly by the government and UIDAI.

One of such major weapons for defense at the hands of the government is to pose the entire scheme to be inevitable to give better services to the underprivileged through welfare schemes. Further, Aadhaar, which is a classic example of recent technological progress has made its base strong by making use of media along with technology for its advertisement and propagation. This inturn has manufactured an elite consensus among the people of this country. Media played a significant role in portraying only the brighter side and leaving apart the much darker side of surveillance and profiling which left the people blind folded of what is lying beyond the entire scheme. The project moved so swiftly that there is no possibility of rolling back. Over the period of time the vast amount of data collected, though may be portrayed to be very safe, but is prone to threat not only from the government but also from foreign countries.

The development in the identification sector at such higher pace has led the results to deviate from its original objective of ensuring the benefits of the government reach the poor, however it seems that the policy makers have overlooked at the imbalance which exists between the technology and poor of this country. It is hard to imagine that the poor in India who are yet struggling to have basic education, will be able to cope up with the technological advancement, especially when it is a matter affecting them. But since the project has always depicted to be pro poor and has left little room for the poor to reject the idea, the other rights that are violated in the process are altogether ignored. The project seems to have rather brought in new hurdles under the mask of delivering benefits to the poor. These hurdles are as follows:

1. Getting a Aadhaar number: when the project was launched, to get an Aadhaar number the individual had to go up to the office, wait in the queue, even after which the registration failed due to technical problems¹⁸. The issue occurred mainly in rural areas where there was already distress due to frequent power cuts. In all these circumstances there were many who were deprived of benefits and their rights. Though this may be an issue with regard to a small portion of the people yet it has potential to cause serious damage to one's living.

2. Seeding or linking: The scheme requires linking the Aadhaar number to multiple other benefit schemes. This in turn requires the concerned individual to run across different institutions to get it linked. The technological understanding of the requirements for all this affair is beyond the reach of the people for a simple reason that, since most people for whom these schemes are rolled out are the ones who are below poverty line with little idea of intricate issues relating to technology. Further, in the process of seeding there are possibilities of encountering fake identity cards and the Aadhaar scheme puts forth that such cards have to be weeded out. This idea has in turn led to serious outcomes due to absence of established mechanism to be followed while weeding out fake beneficiaries. For instance, if an individual's ration card has to be deleted because the authorities consider that it is fake or that the card has not been linked to Aadhaar number for some reason, there is no scope under the present scheme to give an opportunity of hearing to such individuals to verify if the card is indeed fake or there was some technical error while processing it¹⁹. In this backdrop, the privacy issues concerning the subject matter is altogether on a different footing and beyond the reach of majority people of this country.

3. Technological issues for drawing benefits: The scheme collects biometric information of individuals which will be utilized for the purpose of authentication for delivering of benefits. Such kind of authentication requires individual's presence in person at each time of verification, however there is a large chunk of people who cannot come in for verification frequently owing to their old age or some other physical disablement, say an individual wants to take the benefit of fair price shop which allots each individual certain fixed amount of ration every month, biometrics is required to be collected to verify that individual, and in case

18 PRASANNA S., Aadhaar- Constitutionally challenged, in *Dissent on Aadhaar- Big Data meets Big Brother*, Reetika Khera ed., (Orient Black Swan, Hyderabad, 2019), p. 138.

19 *Ibid*, p. 51

he fails to present himself physically, he may not get the benefits of fair price shop, as there is no room for verifying his identity beyond the factors that are unique to him. These instances have posed denser issues with regard to biometric verification for delivery of benefits.

4. False claim of corrupt free practices: one of the important claims made at the time of introduction of Aadhaar project was that it was for the purpose of eliminating corrupt practices in delivery of benefits under welfare schemes. But this is far from reality, in fact with the introduction of Aadhaar there have been new ways to practice corruption. For instance, at fair price shops- earlier there were issues that the ration is not reaching the poor and was diverted by the middlemen for their own benefit; after the introduction of Aadhaar, the agents are using technology as a tool to practice corruption by telling the beneficiaries that there is lack of power supply to use the biometric machine or that there are some technical errors for verifying the identity using biometrics or that there is lack of internet, etc., These excuses have left the poor of the country on the same platform as they were earlier. The Aadhaar project's significance to eliminate corruption therefore seems to be a myth.

5. Data Security Concerns: Apart from all this, there has been serious concerns over the reliability of biometrics and security of Central Identities Repository (CIDR- where the data of the entire population of this country is stored by UIDAI). In India where there are issues over basic supply of electricity, mobile connectivity and server connectivity, wisdom of such a move needs a consideration of all these factors as well. In the absence of a well-built mechanism and a proper regulatory authority, it is hard to protect the security of the information. The low level of preparedness for this entire scheme calls in serious questions affecting the security of the information collected. Further, the issue also becomes intense due to the absence of proper authority to audit the information, due to which the people of this country are losing the trust on this unique scheme of the government.

6. Cancellation of Aadhaar number: identification of people is a continuous process owing to deaths and births every day²⁰. Indeed, it is possible to register

20 India witnesses around 26 million births and 9 million deaths every year. SHANKKAR AIYAR, AADHAAR- A Biometric History of India's 12-Digit Revolution, (Westland Publications Ltd.: New Delhi, 2017), p. 44.

new numbers at the birth of a child, but it is difficult to get one cancelled²¹. In the absence of this provision, it is difficult to manage the huge data relating to people who are no more in existence to be stored in CIDR and at the same time it increases the risk of data protection involved therein.

PRIVACY CONCERNS WITH AADHAAR

Out of all the issues raised against Aadhaar scheme, the right to privacy seems to be one major aspect ruling over the rest of the issues. This is one of the major challenges faced by any technological advancement in the current society. The issue becomes brighter when the country does not have the requisite legal set up to protect this right. Aadhaar has faced challenge on these lines, however, what makes it different and more serious from other technologies is that it is an initiative of government by which it has collected and stored personal information of 1.3 billion people of this country. In any case of error or misuse of the information collected, the impact will be over the entire population who have trusted the system. The project has to run cautiously with well-built mechanism in order to secure individual rights, however it has been launched hastily without ensuring protection against violation of citizens right to privacy. In this context it is essential to understand the various ways in which the project has encroached over the privacy rights, which can be summed up as under:

1. Personal Integrity: the information collected under the Aadhaar project is personal, in the sense it is concerned with information relating one's life which he may not intend to share with others or may have preference for sharing. For instance, an individual may be comfortable sharing about information regarding his place of work while the same person may not be comfortable sharing about his financial status. This is how an individual sets limits with regard to any information pertaining to him. It is evident that this kind of choice of sharing information differs from person to person. The privacy concern also similarly changes from person to person. However, in case of Aadhaar, it differs from this vary concept of maintaining personal integrity of individuals and is considered to be in violation of right to privacy. The sensitivity of the information collected

21 It is stated that at present there is no provision for deactivating Aadhaar number, and if this has to be done efficiently it is required to link Aadhaar to birth and death registers. "What happens to Aadhaar number after cardholder's death?", Available at <https://www.dnaindia.com/india/report-what-happens-to-aadhaar-number-after-cardholder-s-death-2904346>, [Last Accessed on 20-10-2021].

under the project has the potential to pierce the individual's freedom to make choice of the information that he wishes to disclose about himself. The information is laid bare before so many people whom it was not intended to be disclosed, thereby leading to violation of rights of individuals. In the absence of protection to individual rights to make choice, one's personal integrity cannot be maintained.

2. Bodily Integrity: The Aadhaar project has mainly taken biometrics and iris scan into account to collect information that are unique to each individual, however, it is claimed that collection of such information is violating one's bodily integrity. What violates the right to privacy in this case is one's right to decide whether he would want to part with any of the information relating to his body or not and if the state can compel him to part with the same by making use of biometrics or iris scan²². Nevertheless, this claim has been defended by the pro Aadhaar groups by putting across two defenses: one, that biometrics are already in use for various purposes and has not caused any issue so far in relation to violation of privacy rights, for example biometrics is in use for identification for issuing driving license, passports, etc.; second, biometrics is nothing but high-quality photographs, and if it is declared that collecting such information amounts to expropriation of body then even the photographs collected for various other purposes should be considered to be expropriation of body. Moreover, mere scanning of fingerprints or iris scan does not lead to losing control of individuals over information relating to their body.

These defenses when analyzed brings out that, *firstly*, though biometrics may already have been in place prior to Aadhaar, but, the other authorities collecting biometric data have limited purpose for which that information can be used and moreover it is left to the choice of individual whether they want that service or not. For example, an individual who wants to travel abroad needs to have a passport and only those categories of persons who wish to travel abroad will

22 As has been rightly phrased out by Shyam Divan, senior advocate in the *Binoy Viswan v. Union of India* (2017) 7 SCC 59 (challenging the PAN-Aadhaar linking): "My fingerprints and iris are mine and my own. As far as I am concerned, the State cannot take away my body. This imperils my life. As long as my body is concerned, the State cannot expropriate it without consent, and for a limited purpose.... The right to life extends to allowing a person to preserve and protect his or her finger prints and iris scan. The strongest and most secure manner of a person protecting this facet of his or her bodily integrity and identity is to retain and not part with finger prints/iris scan." Available at: <https://thewire.in/law/aadhaar-verdict-does-the-mere-collection-of-biometrics-violate-bodily-integrity-and-privacy>. [Last accessed on 24-20-2021].

apply for the same, others are not under the compulsion to apply or give any information in such circumstances. The information collected in this process is also restricted to only use for the said purpose. In such cases the individuals have larger freedom to choose if they are willing to part with the information relating to their body in order to get the benefit. While in the case of Aadhaar, it requires individuals to enroll in the project immaterial of choice as it is linked to getting innumerable services all of which the individual cannot afford to opt out. *Secondly*, in the context of second defense, the most apt approach has been made by Justice Chandrachud in his dissenting judgment in the case of *Puttuswamy*²³, wherein, though he remained silent on the issue of whether biometrics can be compared to photographs in terms of technology, but stated that the biometric information collection does infringe personal space of individual, but at the same time it cannot be left out altogether in the current technologically advancing society. Therefore, the best that can be done is ensuring legal and technical safeguards so that the privacy rights are protected. He further also puts forth that the state should collect such information only when there is 'compelling legitimate interest'. This kind of approach when rightly applied in the case of Aadhaar may to certain extent help in securing the bodily integrity of individuals as the states will be restricted by the limited usage of the information.

3. Data Integrity: this has been one of the important challenges to securing right to privacy of individuals and to the Aadhaar project. Data integrity refers at the basic level to the extent of security provided to data collected, which in turn is a major concern for data scientists. In this context there are various aspects for consideration taken into account by such scientists, such as, what are the data that need to be secured, where is the data collected under the project stored, what is the level of protection given to this data, whether the data secured is full proof, what are the consequences of data breach, so on and so forth. But despite all these questions the most important question is not whether the information can be hacked but rather 'when' the information can be hacked. This question mainly arises due to linking Aadhaar number with various other database, the more the number of services to which it is linked the more is the exposure to the risk of misusing of the data. Such kind of exposure has the potential to give access to individual's entire profile at the instance of entering Aadhaar number,

23 Justice (Retd.) Puttuswamy v. Union of India, (2017) 10 SCC 1

thereby leading to loss of control over the information and the worst part is that there will be little that can be done in such aspects. In most of the circumstance the individual may be unaware of the unauthorized usage of his information such instances take over the very concept of privacy. Until Aadhaar was introduced, an individual was the only person who could create his profile, none else could do it, but with the introduction of this scheme the doors are wide open for the government or its agents to build profiles of people efficiently without their authorization. This happens mainly due to the data mining of private information that takes place at different levels by different agents.

In order to have a better idea of level of imperilment caused from the data mining, it is essential in the first place to understand the three different basic types of private information: biometric information- which under the Aadhaar Act mainly refers to fingerprints and iris scan²⁴, identity information- which is of wider scope which includes individual's Aadhaar number and demographic details collected along with biometrics²⁵ and personal information- which though not defined under the Act can be understood to be something more than biometric and identity details such as, income, travel history, banking details, phone records, etc., of an individual. While biometric information and identity information have been defined and accorded certain amount of protection under the Act, personal information is exposed to threat to privacy rights. For instance, the government makes it mandatory to produce Aadhaar number for buying railway ticket, by this the government has the ability to keep a track of all the places an individual has travelled right from the time of his birth and can do what it likes with this information. The Aadhaar Act gives no protection in such circumstances as it is not 'identity information' or 'biometric information'. Aadhaar enables the government to collect all such information and allocate it, as personal information has no protection under the Act. Further, even if it be assumed that such information can be protected under the Act, Section 33(2) provides power to the government to utilize the information in the 'national

24 Section 2(g), THE AADHAAR (TARGETED DELIVERY OF FINANCIAL AND OTHER SUBSIDIES, BENEFITS AND SERVICES) ACT, 2016, "biometric information" means photograph, finger print, Iris scan, or such other biological attributes of an individual as may be specified by regulations.

25 Section 2(n), THE AADHAAR (TARGETED DELIVERY OF FINANCIAL AND OTHER SUBSIDIES, BENEFITS AND SERVICES) ACT, 2016, "identity information" in respect of an individual, includes his Aadhaar number, his biometric information and his demographic information

interest'. What is the extent to which this term be expanded has not been defined under the Act, by which the government can in future at any point of time make use of the information collected under the Aadhaar project on the pretext of national interest²⁶. With all these objections, it is evident that the data integrity in case of Aadhaar has been violated.

5. Consent: when the Aadhaar project took off, the idea as propagated by its supporters was that it would involve voluntariness of individuals to have such unique numbers, so basically the idea was to include the consent of individuals. However, it has become evident that though the government stated that it is voluntary, over the period of time it somehow become mandatory due to its linkage to various services. An individual who wished to take the benefit of any schemes of government was to make a choice- not whether he wished to have a unique number for himself but rather if he wanted to derive the benefit of schemes of the government with which it is linked. Despite the direction of the Court that Aadhaar cannot be made mandatory and that the rule of consent ought to be followed²⁷, it has kind of remained mandatory without due consideration for two reasons: (i) due to lack of proper enforcing mechanism- there is no competent authority to redress the grievances²⁸. In the absence of an unbiased authority, even those who wish to make a complaint for not having followed the rule of consent there is no scope under the Act. (ii) that most of the people do not have the luxury to refuse the socioeconomic benefits with which Aadhaar is linked to. Aadhaar has by rule been made mandatory for deriving benefits which are essential for the survival and hence the question of consenting has no room there.

The Supreme court in the case of Puttuswamy has indeed recognized the significance of privacy and expanded the meaning of privacy from 'informational privacy' (which requires the authority collecting the personal information to obtain consent from the individuals to whom the information pertains) to include

26 *Cole v. Young*, 351 U.S. 536 (1956), it has been pointed out that the interpretation of the term 'national security' has to be used in definite and limited sense and should relate to only those activities which are directly concerned with the nation's safety as distinguished from the general welfare.

27 *Justice (Retd.) Puttuswamy v. Union of India*, (2017) 10 SCC 1

28 Section 47(1), THE AADHAAR (TARGETED DELIVERY OF FINANCIAL AND OTHER SUBSIDIES, BENEFITS AND SERVICES) ACT, 2016, No court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Authority or any officer or person authorized by it.

'informed consent', (i.e., the individual has to be informed as to the purpose for which the information has been collected). But under the Aadhaar scheme there has been no guidelines issued by the Supreme Court or by the government as to the mode of obtaining the consent and the extent to which the information collected shall be used. Moreover, due to the absence of any parameters of time for which it can be stored, the rule of consent has become futile and has led to affecting privacy rights of individuals.

6. Data Storage: The common perception revolving regarding the information contained in Aadhaar is that it is safe from accessibility as it is stored in a protected Central Identities Data Repository (CIDR). While it is true that the CIDR has safety measures in place to protect the data, it is not true that it is completely inaccessible by unauthorized persons. The technological advancement in the present times is at a rapid pace at global level and India has not matured enough to compete in this field. This drawback of India may cause serious threat to privacy as well as safety of the country as a whole, as the information stored is sensitive in nature.

Irrespective of security threats at international level, within India itself the data collected and stored is not innocuous. Private sector has access to many sensitive information collected under the Aadhaar project, which may not be stored or protected according to the requisite standards. Even the government authorities have the potential to access or misuse the information. For instance, at present there is lot of debate on linking Aadhaar with voter identity cards which is proof of identification at the time of election, this kind of linking may lead to unfair election practices as the information relating to individuals and their respective voting trend can easily be collected by the political parties. Further, the issue also lies in the fact that Aadhaar Act has itself makes provisions for accessing information in certain circumstances from the CIDR²⁹. This calls in for the issue of surveillance by the government over its citizens. The surveillance aspect is a serious problem and the countries across the globe who are technologically

29 Section 33(2), THE AADHAAR (TARGETED DELIVERY OF FINANCIAL AND OTHER SUBSIDIES, BENEFITS AND SERVICES) ACT, 2016, Nothing contained in sub-section (2) or sub-section (5) of section 28 and clause (b) of sub-section (1), sub-section (2) or sub-section (3) of section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, made in the interest of national security in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India specially authorised in this behalf by an order of the Central Government

advanced have already faced it. In fact, the ways and means employed for surveillance also cannot be gauged by the citizens.³⁰ Similarly, in India, the Aadhaar project has given a easy way in for tracking people and their whereabouts. Considering the defense of the government³¹, even if it be believed that at present we are not surveilled, the doors are wide open with easy accessibility and ready information for any individual.

CONCLUSION AND SUGGESTIONS

The developments in the field of technology at the global level has been rapid in the recent past and India is trying to be one of the competitors in this race so that it can settle out for some position, which in turn will enhance its overall economic growth. For achieving this, India has considered digital identification as one of the important factors³². Irrespective of the backdrop under which this idea was conceived, it needs to be considered that we have reached to a stage where there is no possibility of going back and this is due to the fact that there had been various lies, myths and fictions about Aadhaar which we were made to believe, leaving no room for reality. This is quite evident from the facts that a project which was made initially claiming to be voluntary but later it was made a mandatory document for identification not just for the welfare schemes proposed by the government but also for every day-to-day activity. Aadhaar is something that individuals cannot do away with.

The idea initially as proposed by the government was that the project was to help in identification of individuals who are eligible to get the benefits of government schemes and by this process it was supposed to help in eradicating the corrupt practices and plunge the pilferage that existed. However, in reality, it seems that it is the other way around, where rather these welfare schemes have

30 In America the citizens were totally unaware of surveillance until the revelations made by Edward Snowden which shook the entire globe and brought in the darker side of technology. According to the revelations made by Snowden the National Intelligence Agency (NIA) was keeping a track over the activities of its citizens and when this issue was brought to light it took defence that it was for the purpose of safety and security of the country and its citizens. However, this defence is far from reality.

31 In Puttuswamy's case, the statement on behalf of Attorney General and UIDAI representatives stated that, the state would not be interested in making mass surveillance of 1.2 billion people and that the entire idea is an absurdity and impossibility. Available at "Future of Freedom", <https://frontline.thehindu.com/cover-story/article25878618.ece> [Last Accessed on 28-10-2021]

32 Which in fact is not necessarily the sole basis for achieving developments as the countries without such digital identification have also performed well in the global competition.

been used to promote Aadhaar project. In true sense the project does not help much when it comes to eradication of corruption, to the maximum extent it can only prevent identity fraud. For example, Aadhaar cannot help in case the dealer gives less than due to the beneficiaries, similarly Aadhaar cannot help in case the agent over invoices. These instances make it clear that Aadhaar cannot be the one-on solution for the problems relating to corruption and the delivery of benefits. The digital identity has done little in resolving important issues like corruption and delivering of benefits. It cannot definitely be an option to put at stake sensitive information of such vast population for two reasons: one, that there is no way to change biometrics in case it is compromised, unlike keys or passwords which can be easily changed in case they are stolen or forgotten. Two, biometrics is very easy to steal, as fingerprints are left on probably every surface that is touched.

From these aspects considered, it is evident that, technological development has taken an altogether different stand with regard to most of the rights. It has no doubt proved to have made life of men easier but at the same time has led to complex issues which perhaps cannot be made to fit into defined set of legal principles. The idea of binding the multifaceted dimensions of the problems faced due to technological development is dense. The major hurdle being that most of the individuals who have been accessing the technologies unfortunately do not understand the complications that exists in the backdrop³³. Does that mean we need not look for any advancement with regard to technology? The answer to this question has two facets: firstly, it is practically not possible for us to go back to the time when man did not have a clue about what technology meant, so when we cannot restore it, we have to inevitably resort to it. Secondly, the inquisitive nature of man will not let him be content with the advancements he presently has, which ultimately will lead him to indefinite progression. Ultimately leaving just one way out of this, that is to develop the laws and enforce efficient mechanism at the same pace as the technology.

33 For example, social media houses insist that they are 'platform' not 'publishers' which means that, unlike newspapers, they aren't legally liable for the content that they host. This protection is extremely important for companies like Facebook or YouTube, without which they had to check billions of pieces of content uploaded on their site. Jamie Bartlett, *The People vs Tech: How the internet is killing democracy (and how do we save it)* (The Penguin Random House: UK, 2018), p.61.

India is a developing country, which has always received technology a little later than the developed countries. It therefore lacks first-hand experience with regard to resolving the multidimensional issues posed by it. At the same time, it also lacks the legal framework that is required to safeguard the citizens interest with regard to technological threats and also to protect its own data regarding administrative strategies which is meant to be kept secret so as to prevent any terror to the country. With the issue of technological hazards increasing at high pace, will India be able to sustain the threats and defend itself from the invasion that could possibly happen at any point of time? Are we equipped enough to fight out this technological battle against the countries that are already well equipped and experienced? Until these questions be answered, any advancement in this technical field cannot be aptly defended.



CONTAGION OF COVID -19 VIRUS IN CHILDREN PROTECTION HOMES

Sangeetha S M*

ABSTRACT

“We need penal code because the child is the father of a man and if we’re neglecting the underdevelopment in children, then we would be guilty of many faults and errors related to abandoning our children”. – Former Chief Justice of India, Justice V.K. Krishna Iyer.

In India, the legislature has enacted The Juvenile Justice (Care and Protection of Children) Act, 2015 to provide the justice to the juveniles and to rehabilitate the children who are under the care of Children Protection Homes. Even though we have enough provisions included under the said Act, because of the pandemic, changes have to be brought to the said Act and concerned authorities take proper measures to protect the juveniles from the Covid- 19 outbreak. This Article includes the pros and consequences of the guidelines given by the court in respect of the contagion of Covid -19 viruses in children Protection Homes. The Supreme Court has taken Suo Moto cognizance of the situation and challenges faced by the country. Compliance of order dated 03.04.2020 passed by Hon’ble Supreme Court in Suo Moto Writ Petition (Civil) No(s). 4/2020- In Re Contagion of Covid-19 Virus in children protection homes, where proper guidelines have been given to the Juvenile Justice Boards (JJB) and Children’s Courts, in furtherance of the fundamental principle of safety enshrined in the Juvenile Justice (Care and Protection of Children) Act. Along with taking health measures for preventing the biological risk of coronavirus infection, legislation should

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consider to focus on preventive and protective measures for the side effects involved in the actions taken.

Key Words: Juvenile Justice, Care and Protection, Pandemic, Juvenile Justice Boards (JJB), Supreme Court, Children.

INTRODUCTION

In India, a person below the age of 18 years is considered a 'child'. The Juvenile Justice system contemplates the legal response with respect to two categories of children, namely those who are 'in conflict with law (an individual under the age of 18 years who is accused of committing an offence); and those 'in need of care and protection '(children from deprived and marginalized sections of society as well as those with different needs and vulnerabilities). The Juvenile Justice Act 2015 signifies a child who conflicts with the law and asserted or found to have committed an offence and not finished the 18 years of age on the date of the delegation of such an offence¹. It also lets the significance of a juvenile as "juveniles" and a child underneath the age of 18 years². Section 3 of the Juvenile Justice Act 2015 states the principles of care and protection of children. Infectious diseases like COVID-19 can disrupt the environments in which children grow and develop. Disruptions to families, friendships, daily routines and the wider community can have negative consequences for children's well-being, development and protection. In addition, measures used to prevent and control the spread of COVID-19 can expose children to protection risks. Home-based, facility-based and zonal-based quarantine and isolation measures can all negatively impact children and their families³.

As taking into serious consideration of the pandemic issue the Honourable supreme court of India took suo-moto cognizance of the issue⁴ involving protection of children who fall within the ambit of Juvenile Justice (Care and Protection of Children) Act, 2015 from the spread of Coronavirus that is

1 Section 2(13) of the JUVENILE JUSTICE ACT 2015.

2 UNICEF: The Alliance for Child Protection in Humanitarian Action, Technical Note: Protection of Children during the Coronavirus Pandemic, Version 1, March 2019.

3 https://main.sci.gov.in/supremecourt/2020/10820/10820_2020_0_4_21584_Order_03-Apr-2020.pdf last visited on 22/11/2021 at 8.00p.m.

4. https://main.sci.gov.in/supremecourt/2020/10820/10820_2020_0_4_21584_Order_03-Apr-2020.pdf last visited on 22/11/2021 at 8.00p.m. (Suo Moto Writ Petition (Civil) No (S).4/2020)

sweeping the world, the bench of L. Nageswara Rao and Deepak Gupta, JJ issued extensive directions to various authorities⁵.

The following Directions formulated by the Supreme Court which have for the prevention of Covid -19 in child protection homes. These fundamental for formulation of these guidelines are current information and understanding of COVID19 precautions and response. However, these are also evolving with the progress of the pandemic. State Government and nodal departments are therefore requested to keep the superintendents at least with all relevant advisories, and circulars along with guidance issued where required.

The Juvenile Justice Committees (JJC)s of every High Court shall also ensure that these directions are complied with in letter and spirit. At the same time, it will be ensured that the directions issued by the State in respect of lockdown shall not be violated. However, we hope and expect that the district authorities will give necessary permission to transfer children to their family homes or Juvenile Justice Board (JJB) or any other authority.

MEASURES TO BE TAKEN BY CHILD WELFARE COMMITTEES

The Supreme Court has given the directions to the Child Welfare Committees to take necessary actions while conducting their inquiries/inspections and whether a child or children should be kept in the CCI considering the best interest, health, and safety concerns.

Guideline says that Gatekeeping, or preventive measures need to be considered and families counselled to ensure that institutionalization is the last resort. Focus should be on prevention of separation when possible. And the Court says the CWCs⁶ to monitor cases telephonically for children who have been sent back to their families and coordinate through the District Child Protection Committees and Foster care and Adoption Committees (SFCACs) for children in foster care.

Moreover that, Supreme Court guides the CWCs to avail online help desks and support systems for queries to be established at the state level for children and staff in CCIs: and to consider that violence, including sexual and gender-based violence may be exacerbated in contexts of anxiety and stress produced by

5 Child Care Institutions

6 Child Welfare Committee

lockdown and fear of the disease, CWCscan monitor regularly through video conferencing, WhatsApp and telephonically to ensure prevention of all forms of violence.⁷

MEASURES TO BE TAKEN BY JUVENILE JUSTICE BOARDS AND CHILDREN COURTS

The Supreme Court directed the Juvenile Justice Boards (JJB) and Children's Courts to proactively consider steps that are to be taken in the light of COVID 19, while conducting their inquiries/inspections. Online or videosessions can be organized. The Juvenile Justice Boards/Children's Court may consider measures to prevent children residing in Observation Homes, Special Homes and Places of Safety from risk of harm arising outof COVID 19. They are:

1. In this regard, JJBs and Children's Courts are directed to proactively consider whether a child or children should be kept in the CCI considering the best interest, health and safety concerns. These may include:
2. Children alleged to be in conflict with law, residing in Observation Homes, JJB shall consider proper steps to release all children on bail, unless there are clear and valid reasons for the application of the proviso to Section 12, JJ Act, 2015.
3. Video conferencing or online sittings can be held to prevent contact for speedy disposal of cases.
4. It also Ensure that counselling services are provided for all children in Observation homes. As per the decision of the Supreme Court it is important to consider that violence, including sexual violence maybe exacerbated in contexts of anxiety and stress produced by lockdown and fear of the disease. JJBs would need to monitor the situation in the Observation Homes on a regular basis.⁸

MEASURES TO BE TAKEN BY GOVERNMENTS

The Honourable Supreme court gave other directions to the government where includes all states need to recognize that COVID19 has been declared a pandemic, which warrants urgent attention and action to emergency and

7 Ibid

8 Ibid

disaster situation from arising with regard to children in State care. It is directed that all State Governments shall:

1. Circulate information to all CCIs about how to deal with COVID 19 immediately, with instructions that awareness about COVID-19 is spread in a timely and effective manner.

2. Begin preparing for a disaster/emergency situation that may arise. Work with Persons in Charge of CCIs and District Child Protection Units to plan staffing rotations or schedules to reduce in person interaction by CCI staff, where feasible. Begin developing a system for how to organise trained volunteers who could step in to care for children, when the need arises.

3. The state shall ensure that all government functionaries perform their duties diligently, and that strict action would be taken should there be any dereliction of duty. As per Rule 66 (1), Juvenile Justice Model Rules, 2016, any dereliction of duty, violation of rules and orders, shall be viewed seriously and strict disciplinary actions shall be taken or recommended by the Person in charge against the erring officials.

4. Supreme court mandates the states to make provisions to ensure that counselling is made available, and that there are monitoring systems in place to prevent violence, abuse, and neglect, including gender-based violence, which may be exacerbated in contexts of stress produced by lockdown. And to ensure adequate budgetary allocation is made to meet the costs that are likely to arise for the effective management of the pandemic, and that all bottlenecks and procedural delays are effectively curbed.

5. Supreme court also directs the State to avail of good quality face masks, soap, disinfectants such as bleach, or alcohol-based disinfectants, etc.

6. The state to ensure availability of adequate food, drinking water, and other necessities such as clean clothes, menstrual hygiene products, etc.

DIRECTIONS TO CCIs

The guideline says that the Person in Charge of the CCI and all other staff working in the CCI shall proactively and diligently take all necessary steps to keep the children safe from the risk of harm arising out of COVID19, in furtherance of the fundamental principle of safety enshrined in the Juvenile

Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015). The following are the directions to CCIs:

1. The Health Ministry has set up new National for any queries or clarifications related to Coronavirus pandemic., In the case of staff or children with symptoms, call the helpline above mention and or a local doctor. Go to the hospital only if you receive such advice by doctor/helpline, or if symptoms are severe.
2. Staff or any other individual found to be exhibiting symptoms of COVID19 should not be permitted to enter the CCI.
3. CCIs should promote social distancing. The Ministry of Health and Family Welfare, Government of India (MOHFW), has issued Guidelines on Social Distancing.
4. CCIs should enforce regular hand washing with safe water and soap, alcohol rub/hand sanitizer or chlorine solution and, at a minimum, daily disinfection and cleaning of various surfaces including the kitchen and bathrooms. Where adequate water is not available, immediate steps should be taken to ensure it is made available through necessary action, including enhancing budget allocation for the said purpose.
5. CCIs should provide appropriate water, sanitation, disinfection, and waste management facilities and follow environmental cleaning and decontamination procedures. This information should be made available to families fostering children under foster or kinship care schemes.⁹

PREVENTIVE MEASURES FOR CCIs

To prevent children and staff members in CCIs from getting infected by COVID 19, Persons in Charge of CCIs shall:

1. Know and make known how COVID 19 spreads and the best way to prevent illness is to avoid being exposed to this virus. Current understanding on the virus is that it spreads mainly from person-to-person. and between a person who is infected with the virus and other people who are in close contact with that person and those who are having face-to-face contact with a COVID19 patient within 2

⁹ Ibid

meters and for 15 minutes.

2. Through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs; Further directed to the CCIs to take necessary steps to practice, promote and demonstrate positive hygiene behaviours and monitor their uptake

3. Frequent usage of hand sanitizer by guard, gardener, driver, etc. present in the residential premises/compound. Ensure that hands are cleaned and disinfected often clean hands at the main door and schedule regular hand washing reminders.

4. If possible, do arrangements, hand sanitizers that contain at least 70% alcohol. Ensure that all surfaces of hands are covered, and they are rubbed together until they feel dry. The Person in Charge of the CCI should make necessary arrangements to utilize emergency/contingency funds for this purpose, and submit requisition for additional budgetary allocation where required, at the earliest.

5. And the Supreme court directs the State to make awareness among the children and the staffs to Practice social distancing: it includes Physical distancing and prohibits shaking hands and hugging as a matter of greeting. Supreme Court Instruct children and staff to maintain social distance by putting distance (at least 2 metres (6 feet) distance between yourself and anyone who is coughing or sneezing) between themselves and other people if COVID19 is spreading in the community. This is especially important for people who are at higher risk of getting very sick, such as older; to reduce number of people entering CCIs; SC directs the States to conduct meetings through video conferences and/or rescheduled; Distancing should be applying in the CCIs where children and staff members congregate such as the reading, dining, and television rooms. For example, use of these spaces can be scheduled at 25% participation and the schedule developed to ensure more social distancing.

6. Cleaning and disinfecting rigorously. SC gives the guidelines to the CCIs to maintain hygiene in food, dress etc. The Supreme Court mainly concentrates the Children in protection homes Families that are fostering children should receive information about how to prevent COVID19.

Follow up should be made on their health and psychosocial wellbeing status, and they should be informed of how to do in case of symptoms.¹⁰

GUIDANCE ON MEASURES TO ENSURE WELLBEING OF CHILDREN

The Supreme court directed that the children, during the pandemic, if the covid-19 attacks the children, it is natural to feel stress, anxiety, grief, and worry during the disease. They may express psychological distress (anxiety, sadness) by acting out in a different way each child behaves differently. Some may become silent while other may feel and express anger and hyperactivity. In this condition, it is the responsibility to the CCI staffs to investigate the mental conditions of the children who are in protection homes.

MEASURES FOR CHILDREN UNDER FOSTER AND KINSHIP CARE

The Supreme direction towards measures for children under foster and kinship are as follows:

1. Families that are fostering children should receive information about how to prevent COVID19 as indicated above.
2. Follow up should be made on their health and psychosocial wellbeing status, and they should be informed of how to do in case of symptoms

GUIDANCE ON MEASURES TO ENSURE WELLBEING OF CHILDREN (CNCP¹¹ and CiCWL)¹²

The supreme court taken well decision over to ensure well being of children by suggesting some guidelines to CNCP and CiWL and they are as follows:

1. It is important to acknowledge that for children, it is natural to feel stress, anxiety, grief, and worry during an ongoing pandemic like COVID19 disease. They may express psychological distress (anxiety, sadness) by acting out in a different way each child behaves differently. Some may become silent while other may feel and express anger and hyperactivity.

10 Ibid

11 children in need of care and protection

12 Children in contact with the law

2. Reassure the children that they are safe. Let them know it is okay if they feel upset. Share with them how you deal with your own stress so that they can learn how to cope from you. Caregivers need to validate these emotions and talk to children calmly about what is happening in a way that they can understand. Keep it simple and appropriate for each child's age. Give children opportunities to talk about what they are feeling. Anxiety and stress is also borne out of lack of knowledge, rumours and misinformation. Provide right kind of information from trusted sources in an honest, age-appropriate manner. Take time to talk with the children and to share the facts about COVID-19, enabling them to understand the actual risk can make an outbreak less stressful.

3. Encourage children to connect with each other and to talk with people they trust, about their concerns and how they are feeling.

4. Avoid watching, reading, listening, or discussing too much news about the COVID-19 and persuade children to divert their attention to other topics as well. Children may misinterpret what they hear and can be frightened about something they do not understand. Hearing about the pandemic repeatedly can be upsetting.

5. Disruption of routine and closure of schools may be stressful for children. Try to continue with the regular routine maintained in the home, with minimal disruptions, to maintain a sense of security and wellbeing, while taking all measures to ensure the safety of the children and the staff.

6. Spend time with children and help them to unwind, preferably doing activities they enjoy. Make it a point to have interactive activities, games etc. with children to keep them engaged in a positive way. Make sure children have enough opportunity to move around, run and do physical activities, even if they are not going to school or playing with friends outside. If schools are going to be closed for a period of time, talk to teachers to put up a list of interactive child-centric activities to keep children engaged.

7. It is important to consider that violence, including sexual and gender-based violence may be exacerbated in contexts of anxiety and stress produced by lockdown and fear of the disease. Do not use corporal punishment/ violence to discipline children. This will add to their anxiety and stress and may have serious mental health implications. All CCI staff need to be cognizant of the fact that there is an increased risk of violence (by peers, other

staff members) including sexual abuse. Ensure prevention of all forms of violence.

8. Guide students on how to support their peers and prevent exclusion and bullying.

9. Work with the health staff/social workers/counsellors to identify and support children and staff who exhibit signs of distress in the CCI. In CCIs, there may be some children who are undergoing some kind of counselling or treatment for pre-existing mental health issues. Ensure continuance of the treatment/therapy in consultation with the therapist/psychiatrist.

10. Ensure that no staff or child is subject to any form of stigmatizing words or behaviour arising due to coughing, sneezing, etc., as this violates the principles of 'equality and non-discrimination' 'dignity and worth'.

11. Encourage and support children to take care of their bodies taking deep breaths, stretching, doing yoga/meditation, eating healthy, well-balanced meals, exercising regularly, getting plenty of sleep, etc.

12. Work with social service systems to ensure continuity of critical services that may take place in CCIs, such as health screenings, or therapies for children with special needs. Consider the specific needs of children with disabilities, and how marginalized populations may be more acutely impacted by the illness or its secondary effects.¹³

The timing and duration of the pandemic's effects are a critical factor in assessing what influence they will ultimately have on the trajectory of children's lives. The ultimate impact of the crisis on children hinges on how much time it will take for the pandemic to end. A longer struggle to contain the virus not only prolongs the pain caused by the pandemic but raises the prospect that the pandemic's impact will have lingering or persistent effects on children. Banning the arrest or detention of children for violating directives relating to COVID-19; ensuring any child that has been arrested or detained is immediately returned to his or her family; and releasing children in detention, whenever possible. That will be a simple solution for the protection of children from the pandemic.

13 Suo Moto Writ Petition (Civil) No(S). 4/2020)

Ensuring that children, adolescents and young people have access to COVID19 testing, treatment and vaccines as and when they become available in protection homes.¹⁴

Whatever the mechanism set forth for the protection of children against the covid-19, there is lack of proper implementation of all those policies which is framed by the Supreme Court. Immediate government measures need to ensure that children have access to good food, receive protection against child abuse and neglect, have continued access to child physical and mental health services, and can navigate safely on the internet. Policies also need to support parental employment. This is an unprecedented crisis, and it presents unprecedented risks to the rights and safety and development of the world's children. Those risks can only be mitigated through unprecedented international solidarity for children and humanity.¹⁵ We must work together to make progress on these three fronts—information, solidarity and action. We have a chance to not only defeat this pandemic, but to transform the way we nurture and invest in the young generation. But we must act now, we must act decisively, and at very large scale. This is not a gradual issue, it is a clarion call for the world's children, the world's future.



14 <https://data.unicef.org/topic/child-survival/covid-19/>

15 [https://www.unicef.org/media/65991/file/Technical%20note:%20Protection%20of%20children%20during%20the%20coronavirus%20disease%202019%20\(COVID-19\)%20pandemic.pdf](https://www.unicef.org/media/65991/file/Technical%20note:%20Protection%20of%20children%20during%20the%20coronavirus%20disease%202019%20(COVID-19)%20pandemic.pdf) LAST VISITED ON 22/11/2021 at 8.30 p.m.

LAWS GOVERNING THE FOOD INDUSTRY IN INDIA WITH SPECIAL REFERENCE TO FOOD SAFETY AND STANDARDS ACT, 2006

Mr. Karthik Anand*

ABSTRACT

Food is one of the basic human needs, therefore a minimal level of standard as prescribed should be followed according to the laws. According to the latest UN estimates for 2019, India has the world's second largest population behind China, with 1.37 billion people. With such a large population to feed, it's even more critical that the country maintain a solid agricultural basis and sufficient food supplies. India finds it difficult to execute strong food safety measures due to antiquated legislation, a lack of infrastructure, and a lack of public awareness of standards and quality. Food safety infrastructure, such as laboratories, slaughterhouses, and quarantine facilities, is underfunded. The laws on food adulteration have been evolving throughout the years, therefore proper vigil should be exercised. National legal frameworks are a key pillar in an effective food control system. In all countries, food is governed by a complexity of laws and regulations, which set out the government's requirements to be met by food chain operators to ensure food safety and quality. The term "food law" applies to legislation which regulates the production, trade and handling of food and hence covers the regulation of food control, food safety, quality and relevant aspects of food trade across the entire food chain, from the provision for animal feed to the consumer.

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Key Words : Food, Food Industry, Food Safety and Standards Authority (FSSAI), Food Regulations

INTRODUCTION

Food security, as defined by the United Nations' Committee on World Food Security, means that all people, at all times, have physical, social, and economic access to sufficient, safe, and nutritious food that meets their food preferences and dietary needs for an active and healthy life¹. The monetary quality of food security is that it generally relies upon a singular's pay. An individual whose pay fulfills each of his necessities in everyday existence with no disturbance will normally encounter bigger availability of food and security than the people who endure to get by. Subsequently, it can without much of a stretch be expressed that the dissemination of food security and nourishment among people in a nation shifts as indicated by their financial situations with.

- Food security is the combination of the following three elements:
Food availability i.e. food should be accessible in adequate amounts and on a predictable premise. It considers stock and creation in an enabled region and to acquire food from somewhere else, through exchange or help.
- **Food access** i.e. every human being should have the option to consistently obtain sufficient amounts of food, through buy, home creation, bargain, exchange (barter), getting or food help.
- **Food utilization:** Consumed food must have a positive nutritional impact on people. It involves cooking, stockpiling and cleanliness rehearses, people wellbeing, water and sterilization, taking care of and sharing practices inside the family. To protect all the individuals from various food adulteration and mismanagement the Government of India enacted many rules and regulations.

FOOD SECURITY IN INDIA - BRIEF HISTORY

Food security concerns can be traced back to the experience of the Bengal Famine in 1943 during British pioneer rule, during which around 2 million to 3 million individuals died because of starvation. Since accomplishing freedom, an underlying hurry to industrialize while overlooking agribusiness, two progressive

1 International food policy reserach institute (26.09.2021 at 10:45 A.M) <https://www.ifpri.org/topic/food-security>

dry spells during the 1960s, and reliance on food help from the United States presented India's weakness to a few shocks on the food security front. The nation went through a Green Revolution in the last part of the 1960s and mid 1970s, empowering it to defeat usefulness stagnation and to all together further develop food grain creation. In spite of its prosperity, the Green Revolution is frequently reprimanded for being centered around just two oats, wheat and rice; being restricted to a couple of asset plentiful districts in the northwestern and southern pieces of the country that helped for the most part rich ranchers; and putting an excess of weight on the biology of these locales, particularly soil and water. The Green Revolution was followed by the White Revolution, which was started by Operation Flood during the 1970s and 1980s. This public drive has reformed fluid milk creation and promotion in India, making it the biggest maker of milk. Of late, particularly during the post-2000 period, mixture maize for poultry and mechanical use and *Bacillus thuringiensis* (Bt) cotton have shown incredible steps underway, prompting sizeable fares of cotton, which made India the second biggest exporter of cotton in 2007–2008.

FOOD INSECURITY MEANING

Food Insecurity, as the name recommends, is an interruption in the security of food and wellbeing among individuals. Food Insecurity exists at whatever point the eating examples and food consumption among people bring about pessimistic and unsafe results. As expressed before, food security among people is to a great extent subject to their monetary situations with. Moreover, one of the primary driver of food instability among individuals is likewise identified with their financial norms.

The part of joblessness among social orders can be viewed as the critical monetary reason for food instability. Because of absence of cash and different assets, a few group can't bear the cost of dinners for endurance. This is particularly obvious in agricultural nations like India where a huge piece of the populace is neediness blasted. Since they need food security, they are frequently malnourished and carry on with a broken way of life. That carries us with the impacts of food frailty among individuals.

Because of the developing populace, food instability is turning out to be more pervasive among individuals of the world. Accordingly, the impacts of food frailty are keeping nations from keeping appropriate financial control. One of the

significant impacts of food uncertainty lies with the strength of devastated kids. Lack of healthy sustenance is a typical sight among these kids which prompts sicknesses, for example, weakness and expands levels of animosity and uneasiness.

MAJOR CONCERNS FOR FOOD SECURITY IN INDIA

India, at present has the biggest number of undernourished individuals on the earth for example around 195 million. Almost 47 million or 4 out of 10 youngsters in India don't meet their full human potential on account of constant undernutrition or hindering. Farming efficiency in India is amazingly low. According to World Bank figures, grain yield in India is assessed to be 2,992 kg for each hectare as against 7,318.4 kg per hectare in North America. The creation of the food crate is progressively moving away from grains to high #value farming products like fish, eggs, milk and meat. As wages keep on rising, this pattern will proceed and the backhanded interest for food from feed will fill quickly in India. As indicated by FAO assessments in "The State of Food Security and Nutrition in the World, 2018" report, about 14.8% of the populace is undernourished in India. Additionally, 51.4% of ladies in the conceive age between 15 to 49 years are pale. Further as per the report 38.4% of youngsters matured under five in India are hindered (excessively short for their age), while 21% experience the ill effects of squandering, which means their weight is excessively low for their height. India positioned 76th in 113 nations surveyed by The Global Food Security Index (GFSI) in the year 2018, in view of four boundaries—moderateness, accessibility and quality and wellbeing. According to the Global Hunger Index, 2018, India was positioned 103rd out of 119 qualifying nations.²

AGRIBUSINESS AND FOOD SECURITY

Since food security is to a great extent reliant upon the agrarian acts of a country, it is significant that rural practices are dealt with in any case. In this way, the program of Agriculture and Food Security exists to help horticultural creation for ranchers. This is one of the Food Security programs that exist to help rural upgrades by offering inventive methods of creation to ranchers across the globe.

2 Dhristi to the point on food security (26.09.2021, 10.45 A..M) <https://www.drishtiiias.com/to-the-points/paper3/food-security-1>

Since unhealthiness is one of the serious issues that outcome from financial balances among social orders, this program under the act of Global Food Security is intended to work on the sustenance of the individuals who are influenced. Thusly, the essential food security mission it follows is to help little ranchers across the globe to offer them more advantageous methods of agrarian creation to work on their sustenance alongside their earnings.

The public authority of India has additionally dispatched a comparative program to work on the arrangement of food and security to ranchers of India. It is known as the National Food Security Mission, dispatched in 2007. The reason and objective of this program are horticulture and food security.

REASON BEHIND FOOD SECURITY

The food security of many individuals across nations is influenced because of a few variables, alongside contrasts in monetary norms. These components are straightforwardly in charge of the kind and the amount of food created. These components are:

- Environmental Change and Global Warming
- Shortage of land for cultivating
- Mechanical boundaries
- Lacking stockpile of water for water system

Reasons behind the current Food Security in India : Issues Faced in India -

Notwithstanding surplus food-grains stock, it is likewise a reality that countless individuals need more cash to take care of themselves two times every day.

1. Deficient and ill-advised storage spaces for grains, which are regularly put away outside under canvases that give little security from dampness and bugs.
2. Insufficient cold stockpiling and cold chain transportation framework is a significant reason for organic products, vegetables and other transitory items to spoil.
3. Helpless streets and wasteful vehicle frameworks can create gigantic setbacks. This thus causes rot of temperature delicate produce.
4. Restricted reach of Mandis, which are at present the mark of conglomeration

for farming produce. This stances issues for little ranchers who don't have legitimate vehicle offices available to them and need to travel an average of 12 km to the nearest Mandi.

5 . Various layers of agents between the rancher and the end purchaser, driving up costs and diminishing bartering force and value straightforwardness for the ranchers. These mediators have prompted an expense expansion of ~250% (over the expense of creation).

6 . Absence of an all around created rural financial area, which powers formers to take advances with exorbitant interest from commission specialists.

7. Absence of schooling and preparing on new procedures, advances and horticultural items.

8. There has been a slow shift from development of food harvests to development of natural products, vegetables, oil seeds, and yields which act additionally as modern crude materials. This had prompted the decrease in net planted region under grains, millets and heartbeats.

9. The utilization of increasingly more land for development of plants, product houses and havens has decreased the land under development and presently prolific land for cultivating, is as of now not accessible.

10. The usefulness of land has begun showing a declining pattern. Composts, pesticides and insect poisons, which once showed sensational outcomes, are currently being considered answerable for decreasing richness of the dirt³ Inorder to overcome these challenges government of India enacted Food Safety and Standards Act, 2006

Food Safety and Standards Act, 2006 (FSS Act), 2006 consolidates various acts & orders that had earlier handled food related issues in various Ministries and Departments, such as–

- Prevention of Food Adulteration Act, 1954
- Fruit Products Order, 1955
- Meat Food Products Order, 1973

3 Dr. Sultan Singh Jaswal Associate Professor Department of Commerce Govt. College Dhaliara Kangra, Challenges to Food Security in India (26.09.2021, 1.00 P.M) https://www.iosrjournals.org/iosr-jhss/papers/Vol19-issue4/Version-2/N01942_93100.pdf

- Vegetable Oil Products (Control) Order, 1947
- Edible Oils Packaging (Regulation) Order 1988
- Milk and Milk Products Order, 1992

SUMMARY OF THE FOOD SAFETY AND STANDARD ACT, 2006

The Act plans to build up a solitary reference point for all matters identifying with sanitation and guidelines, by moving from staggered, multi-departmental control to a solitary line of order. With this impact, the Act sets up a free legal Authority – the Food Safety and Standards Authority of India with head office at Delhi. The Sanitation and Standards Authority of India (FSSAI) and the State Food Safety Authorities will uphold different arrangements of the Act.⁴

Establishment of the Authority Ministry of Health & Family Welfare, Government of India is the Administrative Ministry for the implementation of FSSAI. The Chairperson and Chief Executive Officer of Food Safety and Standards Authority of India (FSSAI) have already been appointed by the Government of India. The Chairperson is in the rank of Secretary to Government of India.

FOOD SAFETY AND STANDARDS AUTHORITY OF INDIA (FSSAI)

FSSAI is a government authority to give a food permit to each food business in India. FSSAI ensures that the food business runs with proper permit and a quality check. The food organizations are needed to keep the FSSAI guidelines and rules. FSSAI is completely liable for setting the norm and standards and controls for the government assistance of food organizations in India.

FSSAI REGISTRATION (FOOD LICENSE)

FSSAI - Food Safety and Standards Authority of India is an autonomous body established under the Ministry of Health & Family Welfare, Government of India. The FSSAI has been established under the Food Safety and Standards Act, 2006 which is a consolidating statute related to food safety and regulation in India. It is an organization that monitors and governs the food business in India. FSSAI License is responsible for protecting and promoting public health through the regulation and supervision of food safety.

4 FSSAI - Food Safety and Standards Authority of India (26.09.2021, 11:03 A.M)
<http://dcac.du.ac.in/documents/E-Resource/2020/Metrial/23BijayaThakur2.pdf>

FSSAI has been mandated by the FSS Act, 2006 and its functions

1. Framing of Regulations to lay down the Standards and guidelines in relation to articles of food and specifying appropriate system of enforcing various standards thus notified.
2. Framing of Regulations to lay down the Standards and guidelines in relation to articles of food and specifying appropriate system of enforcing various standards thus notified.
3. Setting down methodology and rules for accreditation of research facilities and notice of the licensed labs.
4. To give appropriate advice and specialized help to Central Government and State Governments in the issues of outlining the approach and rules in regions which have a immediate or roundabout direction of food handling and nourishment.
5. Gather and examine information with respect to food utilization, rate and pervasiveness of natural danger, impurities in food, buildups of different pollutants in food varieties items, ID of arising dangers and presentation of quick ready framework.
6. Building a data network the nation over so general society, customers, Panchayats and so on get fast, dependable and target data about sanitation and issues of concern.
7. Provide training programmes for persons who are involved or intend to get involved in food businesses
8. Add to the improvement of global specialized guidelines for food, sterile and phyto-sanitary norms.
9. Promote general awareness about food safety and food standards.

FSSAI STRUCTURE

- The FSSAI comprises a Chairperson and twenty two members out of which one third are to be women.
- The Chairperson of FSSAI is appointed by the Central Government.
- The Food Authority is assisted by Scientific Committees and Panels

in setting standards and the Central Advisory Committee in coordinating with enforcement agencies.

- The primary responsibility for enforcement is largely with the State Food Safety Commissioners.⁵

Importance of FSSAI License : Any individual desires to begin or continue any food business will make an application for grant of a permit to the Designated Officer in such a way containing such points of interest and charges as might be indicated by guidelines.

Importance of FSSAI

The significance of FSSAI License is that it guarantees that your food is confirmed artificially and consequently is protected to burn-through. “Health is Wealth” is a typical statement just as true. In this manner, anything related straightforwardly to wellbeing involves extraordinary affectability. The Food business is helpless against numerous allegations of food defilement and utilization of modest, dangerous fixings. Food permit shields your food business from such allegations. Food permit is a proof of the way that your food is protected and is entirely palatable with no wellbeing results. Then, it makes your business solid. In the wake of getting a food permit, you can make an authority declaration of the equivalent. You can likewise utilize the way that you are affirmed by FSSAI while you’re promoting. This system assists with acquiring clients. They begin confiding in you. Clients, likewise acquire financial backers and accomplices. Food permit hence, effectively expands your unwavering quality and reliability. Other than unwavering quality and confirmation that your food is protected to devour, a food permit guarantees the client that your food is of elevated requirements. At the time of food check, a quality confirmation is likewise led. This quality test guarantees the elevated requirement of your food item which thus guarantees your clients. Food permit is acquired solely after check. This confirmation is done at a synthetic level and checks every single fixing you have utilized in the creation of the food item. This way you are guaranteed that the assembly of your food is done in the right manner. The check might prompt pointing out any imperfection or potential enhancements in your food item.

5 Supra n.2

LOOPHOLES IN FOOD SAFETY ACT

In spite of having a legitimate structure set up, India actually battles with authorizing food handling standards and guidelines successfully, compelling execution is battled with ample difficulties. India presents a one of a kind instance of boundlessness and intricacy. The very truth that the Act stretches out its locale to all people by whom food business is continued or claimed under the meaning of FBOs (Food Business Operators) is an enormous base to cover. Indian FBOs range from humble road vendors to stylish high road food sellers with various middle people and complex cycles and it is for sure a test to accommodate administrative oversight from ranch to fork! Additionally, presently there are restricted quantities of Food Safety Officers combined with deficiency of value labs lacking consistency of standard.

Indeed, even today, the quantity of research facilities per million individuals in the nation is far beneath different nations like China and the US. There is additionally a critical need to update the framework in the vast majority of our food testing research facilities. Indeed, even as far as human resources, most Food and Drug Administrations in the states work far underneath the ideal limit. Indeed, by and large, labs have to be closed down because of the shortfall of Food Analysts. For this reason, it very well may be critical to empower private area cooperation in the setting up and upkeep of research facilities.

RECENT GOVERNMENT INITIATIVES

National Food Security Mission

It is a Centrally Sponsored Scheme dispatched in 2007. It plans to build creation of rice, wheat, beats, coarse oats and business crops, through region extension and efficiency upgrade. It pursues reestablishing soil richness and efficiency at the singular ranch level and improving homestead level economy. It further plans to expand the accessibility of vegetable oils and to diminish the import of consumable oils.

Rashtriya Krishi Vikas Yojana (RKVY)

It was started in 2007, and permitted states to pick their own agribusiness and unified area advancement exercises according to the region/state farming arrangement. It was changed over into a Centrally Sponsored Scheme in 2014-15 additionally with 100% focal help. Rashtriya Krishi Vikas Yojana (RKVY) has

been named as Rashtriya Krishi Vikas Yojana-Remunerative Approaches for Agriculture and Allied Sector Rejuvenation (RKVY-RAFTAAR) for a long time for example from 2017-18 to 2019-20.

Goals: Making cultivating a profitable financial action through reinforcing the rancher's work, hazard relief and advancing agri business. Significant spotlight is on pre and post-reap foundation, other than advancing agri-business and developments.

Incorporated Schemes on Oilseeds, Pulses, Palm oil and Maize (ISOPOM)

Pradhan Mantri Fasal Bima Yojana

E-commercial center: The public authority has made an electronic public farming business sector (eNAM) to associate all managed discount produce markets through a dish India exchanging entryway.

Monstrous water system and soil and water gathering project to expand the nation's gross flooded region from 90 million hectares to 103 million hectares by 2017. The public authority has likewise found a way to battle under-and lack of healthy sustenance in the course of recent many years, though. The presentation of early afternoon dinners at schools. It is a Centrally-Sponsored Scheme which covers all younger students considered in Classes I-VIII of Government, Government-Aided Schools.

Anganwadi frameworks to give apportions to pregnant and lactating moms, Sponsored grain for those living beneath the destitution line through a public appropriation framework.

Food fortress

The National Food Security Act (NFSA), 2013, legitimately qualifies up for 75% of the country populace and half of the metropolitan populace to get financed food grains under the Targeted Public Distribution System. The oldest lady of the family, old enough 18 years or above is ordered to be the top of the family for the motivation behind giving proportion cards under the Act.

SUGGESTIONS

There is a need to move from the current costly, wasteful and defilement ridden institutional game plans to those that will guarantee modest conveyance of imperative quality grains in a straightforward way and are self-focusing on.

Prospects market and deregulation: The current framework set apart by input appropriations and high MSP ought to be eliminated. To keep away from wide fluctuations in costs and forestall trouble selling by little ranchers, the prospects market can be energized. Further developed correspondence frameworks using data innovation might assist ranchers with improving arrangement for their produce. Harvest protection plans can be advanced with the government meeting a significant piece of the protection premium to secure the ranchers against normal disasters.

In the first place, all limitations on foodgrains in regards to State development, loading, sending out and institutional credit and exchange financing ought to be repudiated. Deregulation will help compensate for any shortfall among creation and utilization needs, lessen supply fluctuation, increment productivity in asset use and grant creation in locales more fit to it. Nourishment for-training program: To accomplish penny percent proficiency, the food security need can be gainfully connected to expanded enrolment in schools. With the elimination of PDS, food coupons might be given to needy individuals relying upon their privilege. Changed nourishment for-work conspire/direct sponsorships: With legitimization of information endowments and MSP, the Central Government will be left with adequate assets, which might be given as awards to each State contingent upon the quantity of poor.

The State government will thus convey the awards to the town bodies, which can settle on the rundown of fundamental framework work the town needs and permit each poor resident to contribute through his work and get compensated in food coupons and money.

Local area grain stockpiling banks: The FCI can be step by step destroyed and acquisition decentralized through the formation of food grain banks in each square/town of the region, from which individuals might get financed food grains against food coupons. The food coupons can be numbered sequentially to keep away from fakes. The grain store rooms can be made inside two years under the current provincial advancement plans and the underlying parcel of grains can emerge from the current FCI stocks. On the off chance that socially satisfactory, the chance of generally modest coarse grains, as bajara and ragi and nourishing grains like millets and heartbeats meeting the wholesome necessities of individuals can likewise be investigated. This won't just amplify the food crate yet

in addition forestall such locally adjusted grains from becoming terminated. The people group can be approved to deal with the food banks.

This decentralized administration will work on the conveyance of qualifications, decrease dealing with transport costs and take out debasement, accordingly cutting down the issue cost generously. To implement proficiency in grain banks activity, individuals can likewise be given an alternative to get foodgrains against food coupons from the open market, if the rates in the grain banks are higher, quality is poor or administrations are insufficient. An asset can be set up to repay the food retailers for the introduced coupons. This opposition will prompt steady improvement and lower costs. It should likewise be compulsory to keep a little cradle stock at the State level, to manage exigencies. Upgrading agribusiness efficiency: The public authority, through interests in fundamental horticulture foundation, credit linkages and empowering the utilization of most recent strategies, inspire each region/square to accomplish nearby independence in food grain creation. In any case, rather than focusing just on rice or wheat, the food crop with a potential in the space should be supported. Production of vital foundations like water system offices will likewise reproduce private interests in farming.

The emphasis on sped up food grains creation on a maintainable premise and deregulation in grains would assist with making enormous business and decrease the rate of neediness in provincial regions. This will prompt quicker monetary development and give buying capacity to individuals. A five-year fleeting period might be permitted while carrying out these. Hence, India can accomplish food security in the genuine sense and in a reasonable time period.

HOW INDIA CAN IMPROVE ITS FOOD SECURITY AFTER THE PANDEMIC PASSES

The Comprehensive National Nutrition Survey proposed that 33% of Indian youngsters are hindered and underweight. The difficulties of COVID emergency are probably going to disintegrate the present circumstance. The International Labor Organization has assessed that around 400 million Indians casual areas are probably going to be pushed into profound destitution because of COVID. India's weakness to environmental change and expanding recurrence of outrageous occasions all together represent a genuine test to the food and nourishment security situation in the country. It is exceptionally improbable that

the circumstance will return to the “old” typical soon. I’m finishing up this with five key considerations:

Development of inclusion of social security nets – First, given the Center is spending a tremendous measure of assets, there is a need to pursue guaranteeing that the huge number of weak individuals who are as of now out of food based social wellbeing nets are completely included into the food framework across all states. Given colossal ascent in the number of workforce, there could likewise be arrangements made to present nourishment for resources and to conspire advancing afforestation or local area foundation program. This ‘One Nation, One Card’ the nation over is an incredible move toward this path and no obstacle ought to permit it to stop its universalisation soon.

Expansion of the food bushel of social security nets and taking care of practices – Second, taking into account restricted admittance to nutritious food, there is a need to grow the food container to guarantee that all key supplement prerequisites are satisfied. Techniques, for example, nutri-garden/kitchen gardens, micronutrient supplementation and fortress alongside direct money dispersion ought to advance better nourishing results.

A reconnaissance framework for food and nourishment security and commitment with NGOs – Third, with development of transient workers, loss of wages and business at different areas, there is an expected rise of new areas of interest as for food and sustenance security. Proceeded with commitment by NGOs can assist load up with blinding spots and supplement government endeavors. Combination of global positioning frameworks of the three food-based security nets under NFSA – Fourth, it will be fortunate to by and large gander at each of the three food-based mediations and coordinate their information on recipients to advance complementarity and further improvement of their viability and their effect. Supporting horticulture and unified areas – Finally, it is urgent to intently watch arising worries in the accessibility of ranch sources of info like work, rural sources of info, hardware and money, so the cultivating framework keeps on running continuous and long haul food security is kept on being guaranteed.⁶

6 How India Can Improve Its Food Security After the Pandemic Passes (26.02.2021, 8.00 A:M) <https://thewire.in/agriculture/how-india-can-improve-its-food-security-after-the-pandemic-passes>

CONCLUSION

Food security of a country is guaranteed if every one of its residents have



THE GLOBAL CHALLENGES OF HIGHER EDUCATION-AN ANALYSIS

Irappa S. Medar^{*}

“You educate a man; you educate a man. You educate a woman; you educate a generation.” Brigham Young.

ABSTRACT

The paper is divided in to three parts. The first part of the paper analyses in detail the importance of education. The second part sheds light in to the global education and the pitfalls in Indian higher education sector to meet the global challenges. The author also put forward certain recommendations to revamp the Indian higher education sector in the third part.

Key Words: Education, Indian Education, Global Education, Global Challenges, Quality enhancement

INTRODUCTION

Education is the act or process of imparting or acquiring general knowledge, developing the powers of reasoning and judgment and generally of preparing oneself or others intellectually for mature life or we may say that education is defined as the process of gaining knowledge. But in present scenario Education has become an act of depositing, in which the students are the depositories and the teacher is the depositor. Instead of communicating, the teacher issues

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communiqués and makes deposits which the students patiently receive, memorize, and repeat.¹ All views of Scholars on education say that education means imparting knowledge. But as the teacher one should question themselves that are they imparting knowledge to students? Here most of the teacher's answer to this question is no. Teachers are putting only information into student's brain. At last education is not the amount of information that is put into human brain.² So all problems pertaining to education, higher education and future of students lies in the basic system of education.

NOW all the countries of the world have realized that the economic success of the nation is directly determined by their education systems.³

So our India has stepped forward to change our education policy. Hence Indian government has introduced national education policy 2020.

Our Indian higher education system is very large in the world. From the ancient period education was there, but after independent its growth and development is very high. Several School, Colleges, Research Institutes and Universities are established by government and also private agencies. All these institutions all over the country to generate and disseminate knowledge coupled with the noble intention of providing easy access to higher education to the common Indian. The development of a country relies highly on the Education policy followed in that country. The development rate will be high only if quality higher education is given to the people. Education has been seen as the foundation in a person's life. The most important and urgent reform needed in education, is to transform it, to endeavor to relate it to the life, needs and aspirations of the people, and thereby make it a powerful instrument of the social, economic and cultural transformation necessary for the realization of the national goals.

Education is the very basic need of the society. Without education, usage, invention and advancements in different fields will not be possible. Higher

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- 1 FREIRE, PAULO, Pedagogy of the Oppressed, New York: Continuum Books, 1993.
 - 2 http://rkmvu.ac.in/overview/our_inspiration/#:~:text=Swami%20Vivekananda%20on%20Education&text=%E2%80%9CEducation%20is%20not%20the%20amount,character%2Dmaking%20assimilation%20of%20ideas last accessed on 25/02/2021 at 9:00 AM
 - 3 Keynote speech by Elizabeth King Non-resident senior fellow at the Brookings Institution, and formerly the Director for Education of the World Bank. She was invited to be a keynote speaker on the theme of "Education for Economic Success" at the Education World Forum, which brought education ministers and leaders from over 75 countries together in London.

education plays a vital role in creating a knowledgeable society. Higher educational institutions and organizations work for a creating knowledgeable society. Progress towards a knowledge-based society and economy will require that universities, as centers of knowledge creation, and their partners in society and government, give Knowledge Management their full attention. Universities teaching a curriculum and syllabus based education “by the book”, may not solve the complex questions of the future, but by Knowledge Management. Our aim is to make the Universities perform well in the future, using Knowledge portals⁴.

MEANING AND DEFINITION OF EDUCATION

The first thing that strikes in our minds when we think about education is gaining knowledge. Education is a tool which provides people with knowledge, skill, technique, and information that enables them to know their rights and duties toward their family, society as well as the nation. It expands vision and outlook to see the world. It develops the capabilities to fight against injustice, violence, corruption and many other bad elements in the society. Education gives us knowledge of the world around us. It develops in us a perspective of looking at life. It is the most important element in the evolution of the nation. Without education, one will not explore new ideas. It means one will not able to develop the world because without ideas there is no creativity and without creativity, there is no development of the nation.⁵ According to Oxford Dictionary, “Education is a process of teaching, training and learning, especially in schools, colleges or universities, to improve knowledge and develop skills.”⁶ The knowledge, skill, and understanding that you get from attending a school, college, or university.⁷ Education refers to the discipline that is concerned with methods of teaching and learning in schools or school-like environments, as opposed to various non formal and informal means of socialization.⁸

4 Anand Kumar, N. V., & Uma, G. V, Design and development of Meta-model for knowledge management in Higher education domain (Unpublished Thesis). Chennai: Anna University

5 <https://www.theasianschool.net/blog/importance-of-education> last accessed on 25/11/2021 at 9.15 AM

6 <https://www.oxfordlearnersdictionaries.com/> last accessed on 25/02/2021 at 9.20 AM

7 Merriam-Webster, Incorporated, 47 Federal Street, P.O. Box 281, Springfield, MA 01102.

8 <https://www.britannica.com/topic/education> last accessed on 25/02/2021 at 9:24 AM

SHAKESPEARE⁹:

According to Shakespeare, “learning is an ongoing and necessary process that a person must do for one’s self. Regardless of your source of knowledge, one must “act” on other’s considerations and follow their knowledge to enhance your learning and experience.”

ARISTOTLE¹⁰:

a) Education builds up man’s workforce particularly his psyche so he might have the option to appreciate the examination of incomparable truth, goodness, and magnificence in which amazing joy basically comprises. In momentarily he clarified education as “The formation of a spiritual mind in a sound body.”

b) Education is the way toward preparing man to satisfy his point by practicing all the resources to the furthest influences as a civilian.

SOCRATES¹¹:

“Education implies the freeing once again from the thoughts of all-inclusive legitimacy which are idle in the brain of each man.”

IMPORTANCE OF EDUCATION

Education is an important issue in one’s life. It is the key to success in the future and to have many opportunities in our life. Education has many advantages for people. For instance, it illuminates a person’s mind and thinking. It helps students to plan for work or pursue a higher education while graduating from university. Having education in an area helps people think, feel and behave in a way that contributes to their success, and improves not only their personal satisfaction but also their community. In addition, education develops human

9 William Shakespeare’s influence on education arises not as the result of theoretical reasoning or practical experience but instead as a result of his prolific writing. Shakespeare’s influence has shaped the education of generations of students, and it is for this reason that Shakespeare’s own thoughts regarding education are of interest.

10 Aristotle believed that education was central – the fulfilled person was an educated person.

11 Socrates believed that there were different kinds of knowledge, important and trivial. He acknowledges that most of us know many “trivial” things. He states that the craftsman possesses important knowledge, the practice of his craft, but this is important only to himself, the craftsman. But this is not the important knowledge that Socrates is referring to. The most important of all knowledge is “how best to live.” He posits that this is not easily answered, and most people live in shameful ignorance regarding matters of ethics and morals.

personality, thoughts, dealing with others and prepares people for life experiences. It makes people have a special status in their own society and everywhere they live in.¹²

I believe that everyone is entitled to have education “from cradle to grave”. There are various benefits of having education such as having a good career, having a good status in society and having self-confidence. First of all, education gives us the chance of having a good career in our life. We can have plenty of chances to work at any workplace we wish. In other words, opportunities for a better employment can be more and easy. The highly educated we are the better chance we get. Moreover, education polishes our mind, reinforces our thoughts, and strengthens our character and behaviors toward others. It equips us with information in various fields in general and our specialization in particular; especially what we need to master in our job career.

Therefore, without education we may not survive properly nor have a decent profession. Furthermore, education grants us a good status in society. As educated people, we are considered as a valuable source of knowledge for our society. Having education helps us teach others morals, manners and ethics in our society. For this reason, people deal with us in a considerable and special way for being productive and resourceful. In addition, education makes us a role model in society when our people need us to guide them to the right way or when they want to take a decision. Thus, it is an honor for us to serve our community and contribute towards its advancement. In fact, being educated is an advantage to help our people and build a good society.

Besides, it is very well-known that having self-confidence is always generated from education. It is a great blessing for us to have self-confidence which leads to many advantages and success in life. For example, it helps us manage specific tasks, tackle life’s challenges and maintain positive stands. Additionally, having self-confidence is typically based on proper education; paving the path for us to success. Accordingly, self-confidence makes us aware of how well we perform a task or a range of actions. In short, being educated is undoubtedly being self-confident and successful in life.

12 Al-Shuaibi, Abdulghani. (2014). The Importance of Education. The Importance of Education https://www.researchgate.net/publication/260075970_The_Importance_of_Education last accessed on 25/02/2021 at 10:15 AM

All in all, education is the process of acquiring knowledge and information that lead to a successful future. As discussed above, there are a lot of positive traits of having education; such as having a good career, having a good status in society, and having self-confidence. Education makes us view obstacles as challenges to overcome with no fear; facing new things. It is the main factor behind successful people and the merit of developed countries. Therefore, education is deemed a real success behind any future success.¹³

INDIAN SCENARIO OF EDUCATION

India is the second-largest education network in the world after China, with around 950 universities and 45,000 colleges. The Indian Higher Education system is known for its quality of education and affordability, especially in the engineering and technology disciplines. Indian institutes offer equally competitive non-STEM disciplines such as commerce, business management, humanities, arts, social affairs, and allied medical sciences, and are as popular as STEM courses.

The higher education system in India is a complex construct where change is constant. Many developments to the system with the growing global trends; and a building expanse of institutions ensures necessary revisions and upgrades to make for exciting courses and specializations offered in Indian institutes. Students can choose from a diverse range of courses at India's many institutes.

India's institutes mainly comprise of universities and colleges, further characterized as Central universities, State universities, Private universities, Deemed universities, Public colleges, Private colleges and Autonomous colleges. India is also home to prestigious institutes recognized as Institutes of National Importance (INI) and Institutes of Eminence (IoE). Distance learning and open education are also features of the Indian higher education system and are looked after by the Distance Education Council.

The Study in India program has partnered with more than 100 premier Indian institutes, including 10 state universities, 20 deemed universities, 40 Institutes of National Importance, 5 Institutes of Eminence, and many top colleges.¹⁴

13 https://www.researchgate.net/publication/260075970_The_Importance_of_Education last accessed on 25/02/2021 at 10:20 AM

14 <https://www.studyinindia.gov.in/planyourstudies/DetailsofIndianEducations> last accessed on 26/02/2021 at 12.05 PM

GLOBAL EDUCATION

A global education is one that incorporates learning about the cultures, geographies, histories, and current issues of all the world's regions. It emphasizes the interconnectedness and diversity of peoples and histories. Global education develops students' skills to engage with their global peers and highlights actions students can take as citizens of the world. It is a lens that can be applied to all disciplines and all grade levels as well as the broader school community.

Global learning is essential in the 21st century as barriers between nations and people continue to fade. From the information we consume to the business we conduct to the people we meet, our lives are becoming ever more global. The diversity of our communities reflects this reality as well. It follows that students need to become more informed and compassionate citizens and teachers are critical to making this happen.

All educators have a responsibility to create a globally inclusive environment for students. Schools, for example, can promote a more nuanced understanding of the multiple perspectives held by the world's people. A global classroom can enable students to connect with other ideas and cultures as they navigate and evaluate a variety of information. Teachers of all disciplines can create meaningful learning opportunities that explore cross-cultural perspectives, draw from international examples and encourage analytical thinking about global issues. Together, these global learning experiences prepare students to engage the larger world with greater confidence, thoughtfulness and empathy.

All students deserve a high-quality global education. Working together with educators and schools, Primary Source seeks to make this possible.¹⁵

GLOBAL CHALLENGES IN HIGHER EDUCATION

The inflation of college tuition, continuing technology integration, increasing complexity of transnational education and reforming education for refugees will continually challenge higher education worldwide.¹⁶ The arrival of new

15 <https://primarysource.org/about-us/what-is-global-education/> last accessed on 26/02/2021 at 12:15 PM

16 https://www.researchgate.net/publication/338392356_Global_Challenges_in_Higher_Education_A_Critical_Review_of_the_Literature last accessed on 27/02/2021 at 10.00 AM

technologies dramatically affects the functioning and the organization of higher education in the world (Neshkovska, 2018).¹⁷

The following are the important challenges in higher education

1. **Lack of job opportunities:** According to a report, almost 2 million graduates and half a million postgraduates are unemployed in India. around 47% graduates in India are not suitable for any kind of industry role. Above all, the level of educated unemployment in India increases with higher education. while, at the primary level, youth unemployment is somewhere around 3.6%, it is 8% at the graduate level and 9.3% at the post-graduate level.
2. **The low quality of teaching and subject centric:** When we compare our educational institutions with the ones outside of the country, we come to an understanding that the teaching methodology is extremely flawed. Outdated curriculum, inferior teaching resources, lack of basic infrastructure, to name a few, is at the root of youth unemployment. The students are not trained to meet the needs of the economy, or understand the subject to the core, but rather to cram up the syllabus and get the right grades.
3. **Lack of quality research:** low inputs available for research and inadequate industry linkages amplify the existing limited uptake of good quality independent research in HEIs across all disciplines. We find that while countries like the United States, China and South Korea have invested in research to build a skilled, productive and flexible labour force, HEIs in India, in contrast, lack the culture of independent academic research.
4. **Lack of skilled teaching staff:** At the tertiary level there is no formal training for the faculty members. Therefore unqualified and untrained faculty members are appointed. As they don't have knowledge of teaching technique and pedagogy, their quality of teaching is very poor and learning outcome is meager.

17 Neshkovska, S., (2018). Contemporary Challenges of Higher Education Teachers. Retrieved from (PDF) CONTEMPORARY CHALLENGES OF HIGHER EDUCATION TEACHERS (researchgate.net) on 27/02/2021 at 1.00 PM

5. **Giving importance to certificates than skills:** Do our colleges and universities prepare students for the workplace? Does the much talked about outcome based education in institutes of higher education lead to skill development and guarantee jobs? For years, it has been said that most graduates in India do not have adequate skills that are required at the workplace. Our education system has been under attack for producing graduates who lack employability skills.
6. **Rapid changes in technologies:** There are some risks of using ICT in education which have to be mitigated proper mechanisms. They are: It may create a digital divide within class as students who are more familiar with ICT will reap more benefits and learn faster than those who are not as technology savvy. It may shift the attention from the primary goal of the learning process to developing ICT skills, which is the secondary goal. It can affect the bonding process between the teacher and the student as ICT becomes a communication tool rather than face to face conversation and thus the transactional distance is increased. Also since not all teachers are experts with ICT they may be lax in updating the course content online which can slow down the learning among students. The potential of plagiarism is high as student can copy information rather than learning and developing their own skills. There is a need for training all stakeholders in ICT. The cost of hardware and software can be very high.
7. **Political interference in the governance of universities:** Political interference affecting quality in education.¹⁸ Education is an obvious factor in the matter of good governance. Although education is expected to be free from politics, yet many times the educational policies followed by a government may be influenced by politics. Since historic times there has been a tendency to politicize the education system. In fact, we have witnessed on various occasions that largely the education system was used to train young minds to behave according to the aspirations of the ruling class. Political Interference in higher education has been a case of worry because of continuously low ranking of Indian academic

18 <https://timesofindia.indiatimes.com/city/hubballi/political-interference-affecting-quality-in-education-rayareddy/articleshow/55900773.cms> last accessed on 27/02/2021 at 10:00 AM

institutions. In India, politics have a deep impact on the working of the people, society, and development. There have been various causes behind such political aspirations.

8. **Shortage of resources:** Bulk of the enrolment in higher education is handled by state universities and their affiliated colleges. However, these state universities receive very small amounts of grants in comparison.
9. **Lack of employable skills:** Only a small proportion of Indian graduates are considered employable. Placement outcome also drop significantly as we move away from the top institutes.
10. Indian higher education faces the problem of **poor quality of curriculum**. In most of the higher educational institutes curriculum is out-dated and irrelevant.
11. Apart from the highly recognized higher educational institutes in India most of the colleges and universities lack in the basic and **high-end research facilities**.
12. Many institutes are running **without proper infrastructure and basic facilities** like library, hostels, transport, sports facility etc. which is desirable to rank the quality institution.
13. There is **no policy framework** for participation of foreign universities in higher education.

Like this there are many global challenges in higher education particularly in India compared to other countries of the world. We are lacking in quality higher education.

Hence we must find out solutions to these global challenges

QUALITY ENHANCEMENT IN HIGHER EDUCATION TO MEET GLOBAL CHALLENGES

Henard & Leprince-Ringuet (2012) acknowledged that the quality of learning and teaching is essential because it is the only way to become recognized globally.¹⁹ However, education comes with a cost. Many academic leaders believe

19 Henard, F., Leprince-Ringuet, S., (2012). THE PATH TO QUALITY TEACHING IN HIGHER EDUCATION. Retrieved from <http://www.oecd.org/education/imhe/44150246.pdf> last accessed on 27/02/2021 at 01:00 PM

that cost and employment issues will be the key factors driving the future on higher education (Elaine & Seaman, 2015).²⁰ Although adopting emerging technology could provide responses to address those challenges about teaching and learning quality, student-demographic fluctuation, and the technologies to accommodate student learning (Sarker, Davis, & Tiropanis, 2010).²¹

However, with a cut to education, policymakers and administrators find it difficult to implement technology with a meager budget. Financial challenges are far-reaching and may impact on institutions' capability to implement new technology and promote data infrastructures.

Following are some methods that can be used to meet the global challenges of higher education.

1. By improving the quality of higher education:

At present our higher education is not up to the mark. Teachers of higher education they are not concentrating on what students need. They're only concentrating on only what is given in syllabus. In order to meet global challenges of higher education this system must be changed.

2. By empowering students with technical skills:

Today what we are teaching to students is outdated. Because of this our students cannot compete with students of other countries²² where the system of higher education is different. In majority of the Western countries they teach students how to live life not how to acquire certificates. So The Indian higher education also should inculcate technical skills in our students in order to meet global challenges.

3. By developing research habits among teachers of higher education:

At present our higher education teachers they are only focusing on completing syllabus not on improving their quality, not on improving their

20 Elaine, A., Seaman, J., (2015). GRADE LEVEL: TRACKING ONLINE EDUCATION IN THE UNITED STATES. Retrieved from <https://files.eric.ed.gov/fulltext/ED572778.pdf> on 27/02/2021 at 1:42 PM

21 Sarker, F., Davis, H., Tiropanis, T., (2010). A REVIEW OF HIGHER EDUCATION CHALLENGES AND DATA INFRASTRUCTURE RESPONSES. Retrieved from https://www.researchgate.net/publication/47784874_A_Review_of_Higher_Education_Challenges_and_Data_Infrastructure_Responses on 27/02/2021 at 2:00 PM

22 <http://forum.mit.edu/articles/global-issues-in-higher-education-what-american-colleges-should-know-fp/> last visited on 27-02-2021 at 3.12 PM

teaching skills. In order to improve their teaching skills or in order to teach in productive way teachers must engage themselves in research activities. They must write research articles, present seminar by this, teacher can understand what students need. By this teachers can produce a good, productive student than mere degree holders.

4. Teacher education²³:

In order to meet the global challenges of higher education our teachers must be properly trained. They must be trained through quality teacher educators. For example by conducting various orientation programmers, refresher course, workshops, seminars, and symposium. Etc.

5. Giving preference to regional needs:

Many colleges being affiliated to universities they teach students what University says but need of region which is far away from the University maybe some other thing? Even though teachers know how to train students to meet new local needs, they cannot do so. Because of affiliation to University they cannot act on their own. If this thing is solved it can solve a major global challenge of higher education.

6. By inculcating research habits among students:

A student of any age group must be encouraged to engage in research activities. It may be at the level of school or at the level of college or at the level of higher education. Many students even though they are interested to take part in research activities they do not take part. The main reason for this is financial burden. If proper funding is provided to students to engage themselves in research activities definitely the interested students in research they may do wonders.

7. By giving various trainings to government college students:

The students of Government College or University compared to private University get fewer marks because of their poor communication skills, writing skills and lack of technical skills etc. in order to make them face global challenges the government must expose them to ICT tools. By this the difference between the students of government colleges and private colleges can be reduced.

23 <https://www.ijedr.org/papers/IJEDR1702310.pdf> last visited on 02-03-2021 at 3:37 PM

8. By increasing student teacher ratio²⁴:

Due to lack of teaching staff the students are not getting eminent teachers. In order to remove this difficulty the governments should think of appointing new teachers.

9. By improving universities in all perspective:

None of the universities and institutions from India is in the list of top 100 universities in the world. This resulted in graduates with low employability. This is the common feature of higher education in India.

10. By social responsible education system:

The role of Universities in shaping students feature depends on transparent, progressive and socially responsible educational system. In order to achieve this, we need good governance in the higher education system which would encourage optimization of resources and infrastructure. Initiatives also need to be taken to take care of the human sides of the enterprise in terms of good salary, parity and other world class benefits.

11. By Autonomous status:

Autonomous status should be provided to colleges in order frame their own syllabus, decide subjects, examination and evaluation etc.

FINDINGS AND CONCLUSIONS

- There is a need to rethink about the current curriculum of the higher institutes, make it more inclusive and viable in present time.
- Enabling education that is relevant to the economy and society is very crucial.
- There is a need for development of human resources to be translated into action through vocational and professional education.
- In our culturally plural society, education should foster universal and eternal values, oriented towards the unity and integration of our people.

24 <https://www.indiatoday.in/education-today/news/story/india-s-student-teacher-ratio-lowest-lags-behind-brazil-and-china-1568695-2019-07-14> last visited on 02-03-2021 at 4.02 PM

The duty of meeting challenges in higher education it cast on teacher, student, government and society. First of all we need to change our higher education system. Our higher education system is subject centric.²⁵ But it should be student centric education. Then only it is possible to meet the global challenges of higher education. Only speaking on the issues of higher education is not sufficient to change the system. All the stakeholders including society must take part in this process to change the system of higher education. It is not only the duty of government to change the system. A student must think of changing himself in order to bring change to the nation and a teacher instead of transferring information to students he must transfer the knowledge to the students. By all these things our system can be changed.



25 <https://www.ugc.ac.in/oldpdf/pub/he/heindia.pdf> visited on 03-03-2021 at 4.27 PM

THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE PROTECTION OF IPR: AN ASSESSMENT

NATASHA K

INTRODUCTION

Intellectual Property Rights [hereinafter referred to as 'IPR'] are one of the most upcoming fields of law in a global world. It is one of the truly important rights granted to the people which help them safeguard their work that is a result of immense hard-work, skill and effort. In short, when there is a guarantee that one's work will be shielded from being exploited and that there will be enough financial gain for the amount of skill, labor and effort put into it, the world will be a place full of inventions, companies, brands and artistic works; and this exactly is the purpose behind the IPR laws that are present universally.

WAS THERE IPR PROTECTION BEFORE UNITED NATIONS?

Gradually, endeavours to multiply the scope and subject matter of intellectual property began in the second half of the 19th century. Initiated in part, by unions who were fascinated by the protection of industrial property as well as literary and artistic works, the push for IPR protection has grown to the extent that very few countries have remained outside the range of one international intellectual property treaty or another.

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The 1883 **Paris Convention**: This international agreement is the first key step taken to help creators safeguard and be rest assured that their intellectual works are protected in other countries. The need for international protection of intellectual property rights became apparent when foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna, Austria in 1873 because they were fearful their ideas would be pilfered and exploited commercially in other countries. The Paris Convention covers areas related to patents, trademarks and industrial designs.

The 1886 **Berne Convention for the Protection of Literary and Artistic Works** (Berne Convention)¹: This came up as a result of a campaign by a French Writer, Victor. It assured creators the due protection and safeguard from being exploited by others. It included protection of songs, theatre, paintings etc.

The 1891 **Madrid Agreement**: Once this was established, the international standard for filing IP internationally. The Madrid System is an expedient and cost-effective solution for registering and administering trademarks worldwide. The system makes it feasible to safeguard a mark in a large number of countries by acquiring an international registration that has validity in each of the allocated contracting parties.

The 1893 **United International Bureaux for the Protection of Intellectual Property** (BIRPI): This was essentially set up to administer the Berne and Paris conventions that were in place at that point in time. BIRPI is the predecessor of what is now called as World Intellectual Property Rights (WIPO).

Despite the success of developed countries in creating the first international treaties on IPR, many newly independent countries were disinclined to sign and ratify the Paris Convention, because of philosophical differences over the role of IPR in thought-provoking innovation and the influence on development. Even though developed economies codified some of their industries' international IPR objectives in early treaties, many IPR protection goals were not realised, and emerging technologies wanted new forms of protection or inclusion in older forms. Countries were interested in extending the scope of IPR beyond the Paris and Berne Conventions because of a lack of strong enforcement provisions for national judicial and administrative entities as well as a perceived lack of an

1 The text of the Berne Convention is electronically available at: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

effective and binding dispute settlement mechanism to which countries could resort to in the event of a dispute. This push conflicted with the growing belligerence of a few of the larger developing countries who were interested in preserving the policy space to tailor their laws to suit their national interests and led to some tense debates on the role of IPR in furthering development from the 1960s.

ESTABLISHMENT OF UNITED NATIONS AND IPR

United Nations was formed and brought into existence in the year 1945 with the purpose of maintaining international peace and security, developing friendly relations among nations, achieving international cooperation, and be a hub for harmonizing the actions of nations. Since the other conventions related to IPR were already in existence, as mentioned above, the United Nations included within its branches the WIPO. Before we talk about its inclusion with UN, we need to first see what WIPO is and how it came into existence.

- WHAT IS WIPO?

In the year 1970, the BIRPI transforms in to becoming World Intellectual Property Organization and thus becoming the successor of the same². The convention establishing WIPO was signed at Stockholm in 1967 and thereafter gained status of specialized agency of the UN in the year 1974. Being a specialized agency, it is subject to the competence of UN and its organs and is responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it. WIPO is dedicated to promoting creativity and innovation by ensuring that the rights of the creators and owners of intellectual property are protected worldwide, and the inventors and authors are thus recognized and rewarded for their ingenuity.

- ROLES AND FUNCTIONS

Since it is one of the most important conventions with respect to IPR in the world, it has some functions and roles to fulfill in order to serve its purpose. They are as follows:

- They are required to set norms and regulations for the enforcement and protection of IP rights with the help of treaties.

2 <https://www.wipo.int/about-wipo/en/history.html>

- Provide any kind of technical assistance to states with respect to IPR.
- They are also required to set standards and classification internationally and maintain cooperation between industrial property offices concerning trademarks, patents and documentation.
- Manage and administer all registration related activities.

Thus, the WIPO helps in bridging the gap between the countries and their respective IPRs. The International Union for the Protection of New Varieties of Plants (UPOV) operates within the WIPO system and is responsible for an international system of protection of new plant varieties.

EFFORTS MADE FOR DEVELOPING & UNDER-DEVELOPED NATIONS IN PROTECTION OF IPR

IPR and developing/under-developed nations have a significant connection to boost the economy, thus the purpose of ensuring IPR protection was realized as an important step to help the countries climb up the ladder. These objectives provide important public benefits. Disclosure gives the public access to new things—inventions, product designs, or works of authorship—that the originator might otherwise keep secret. It also promotes progress by making knowledge available so others can build on it.

Intellectual property is a crucial factor in fostering economic development. At the microeconomic level, patent, copyright, and similar forms of intellectual property protection provide a medium by which visionaries and investors can recoup the investment of time and money needed to bring a new creation to the market. At the macroeconomic level, intellectual property stimulates economic development by encouraging domestic innovation and foreign direct investment. The intellectual property system also creates an outline in which developing countries can participate in the economic activities of the developed world. The following are the consequences of good IPR protection in a not so developed nation:

- (i) Access to technology—One of the IPRs that focuses on innovation; usually it is related to some kind of technological developments. Moreover, the importance of intellectual property protection was greater for high-technology industries and for investments with the greatest potential to transfer technology.

- (ii) Boost in private sector -Another component essential for economic development is the legal means to avert deceitful and deceptive practices and to provide an efficient remedy when such practices happen. The lack of such protection also makes it more difficult to establish new businesses because sceptical consumers are unwilling to take a chance on an unknown vendor. When the market permits acts of unfair competition, such as trademark infringement, handling off goods as those of another, or falsely disparaging a contender, it is difficult for merchants to establish a reputation for honesty and quality that would enable them to develop their businesses.
- (iii) GDP and economy booster—Once these nations have a strong IPR protection, it eventually encourages and promotes innovation and creativity which helps the citizens of the nation to make use of their skill and talent to turn it into an economically beneficial product. The promotion of national creative and innovative activity is the bedrock on which the foundations of national industrial and economic progress must rest, and to promote it, adequate and effective protection of intellectual property rights is a basic precondition³. Innovation in technology is moving very fast and confidence in the intellectual property system is a powerful stimulus to such innovation. The protection of intellectual property rights also influences investment decisions.

The United Nations and its branches have taken efforts to ensure protection to achieve their goals of bringing the countries at par with the rest of the world. There is a need to come up with legislations to ensure IPR protection on a country-to-country basis. The logic of the existence of IP policy flows from the fact of having a legal right for monopoly on the results of intellectual activity, the logic of competition policy is based on the economic substance of a monopoly in each case. In other words, competitive policy relied on “principle of rationality”⁴.

ROLE OF THE WORLD TRADE ORGANIZATION IN SAFEGUARDING IPR

In the background of the structural changes in the world economy, the successful conclusion of the Uruguay round of trade negotiations paved the way

3 Shahid Alikhan, Socio-Economic benefits of Intellectual Protection in developing countries, WIPO Library, 11 (2009).

4 N.N Karpova, Economic aspects of intellectual property in countries with economies in transition, WIPO, 59.

for a new era of profound significance for the emerging trading system. The Uruguay Round negotiations formally began in 1986 and it took seven years for its conclusion in the year 1993. As a result, replacing the GATT, the World Trade Organization (WTO) was established on the 1st January, 1995. The creation of WTO is, in fact, a landmark in the history of multilateral trading system. One of the major developments is the agreements having far reaching impact on IPRs is the agreement on trade related aspects of Intellectual Property Rights (hereinafter referred to as TRIPS).

ESTABLISHMENT OF TRIPS

TRIPS is the global binding charter of IPRs, it is one of its kind agreement which creates a multilateral framework for enforcement of all IPRs which were so far left to the nation States to carry out at their discretion under national laws.⁵ The objectives of TRIPS are as follows:

- To ensure proper accountability and not a barrier to legitimate trade;
- To provide a multifaceted framework of principles and rules dealing with international trade;
- To resolve disputes on trade-related IP issues through various procedures;
- To cater to the needs and requirements of the least developed nations with respect to flexibility of implementation of these regulations in order to help them keep up with other countries.

TRIPS framework essentially consists of 7 parts containing 73 articles which consists of basic principles, obligation of member states, National Treatment, Copyright related issues, industrial design, Layout design, Plant variety protection etc.

FAO AND IPR PROTECTION

The U.N. Food and Agriculture Organization (FAO) also extends trade-related technical assistance on intellectual property. The FAO program incorporates a variety of forms of technical aid, including advice and assistance in formulating legislation for the safeguard of new plant varieties, workshops and meetings, and advice on the structure of implementing organizations. Intellectual property

5 5, Jorg Reinbothe & Anthony Howard, *The State of Play in the Negotiations of TRIPs*, 157 (EIPR, 1991).

rights, including on test data for agrochemicals, should be implemented in a way that contributes to agricultural production and poverty reduction through access to required inputs at affordable costs. Governments should avoid implementing legal regimes that create exclusivity over the use of such data⁶. The US Supreme Court decision in *Diamond v Chakrabarty*⁷ influenced national legislation and case law in many jurisdictions, opening the door for the patentability of living organisms, including microbes, plants and animals and their parts and components.

UNESCO'S GOAL FOR IPR PROTECTION

In 1982, an expert group convened by WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO) developed a sui generis model in 1982, Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (the Model Provisions, 1982) were adopted under the auspices of WIPO and UNESCO. They establish two main categories of acts against which Traditional Cultural Expressions are protected, namely 'illicit exploitation' and 'other prejudicial' actions. The Model Provisions have influenced the national laws of many countries and they have implemented the same in some way or the other.

Visual arts and crafts are an important source of income for Indigenous artists and communities in Australia, and the level of copyright and other IP protection they enjoy is of utmost importance to them, according to a report issued in 2002. It is estimated that the indigenous visual arts and crafts industry has a turnover of approximately US\$130 million in Australia, of which indigenous people receive approximately US\$30 million.

The basic idea is to protect heritage 'intangible' properties under the garb of UNESCO which is a very wise step to ensure that such heritages are not left out amongst the tangible ones.

CONCLUSION

It is important to understand that IPR is one of the most important tools to overall development of a country, and ultimately the global economy. Having

6 Food & Agriculture Organization, PANEL OF EMINENT EXPERTS ON ETHICS IN FOOD AND AGRICULTURE, <http://www.fao.org/3/i2043e/i2043e02d.pdf>

7 *Diamond v. Chakrabarty* 447 US 303 (1980).

understood the evolution of IPR protection and the governing bodies for the same, it becomes easier to conclude that in the 21st century there has been significant rise in IPR filings and applications and a sense of encouragement to the inventors and creators. A key factor in the ultimate success in securing the GATT TRIPs agreement was the preparedness of the United States to define its negotiating objectives through domestic trade legislation.



CONSTITUTIONAL POLICY TOWARDS CONCEPT OF GENDER JUSTICE IN INDIA

Bharati S Dodamani*

ABSTRACT

This article evaluates those constitutional development that ensure gender justice in India. The concept of 'gender justice' implies a comprehensive goal and scheme of protecting the class of 'subordinated gender from exploitation and denials inflicted by the dominant gender. In particular, it means that women must exercise full participation in the decision-making process in all walks of life, and fully participate along with men in finding equitable and practical solutions to issues in the family and society. The laws are already there in the constitution favouring equqlity yet, a woman is in a disadvantageous position even in the 21st century. Despite the broad horizon provided by the constitution, the interpretations of these provisions have echoed the patriarchal and conservative nature of Indian society. The interpretation of separate laws on the ground that the women are weak and are different from men creates an imbalance in society. Women are subjected to as subordinate to men, when they are put under the status of the weaker sex. The constituion has given the tag of weaker sex perhaps keeping in mind the past discrimination that a woman has gone through. The constituiton nowhere mentions that women are weak in comparison to the men according to nature such patriarchal interpretations have been prevalent for a long time. The Preamble to the Constitution of India assures all citizens, Social,

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Economic and Political Justice and Equality of Opportunity and Status. The Preamble of the Constitution has been framed with great care and deliberation so that it reflects the high purpose and noble objectives of the Constitution makers.. Thus, 'gender justice' has been embodied in the Constitution right from its incorporation.

Keywords: gender justice, constitution ,preamble ,equality and women

1. INTRODUCTION

Women enjoy a unique position in every society and country of the world. Despite their contribution in all spheres of life, they suffer in silence and form a class which is in silence and form a class which is in a disadvantaged position because of several barriers and impediments.

Historically, women had the unfortunate fate of bearing the brunt of discrimination in all walk of life. Access to good things of life like education, employment, property and opportunity to participate in social and political life on a footing equal to that of men was denied to them. Even now this “dismal picture” continues in some spheres. Their responsibility is practically exclusive but in house keeping, in child bearing caring and in the upkeep of family’s spirit and ethos. However, their biological characteristics, while essential for continuity of humankind, often are the factors that face male aggression.

The concept of gender justice implies a comprehensive goal and scheme for protecting this class of subordinated gender from the exploitations and denials inflicted by the dominant gender. The concept of gender justice is founded on the proposition that women are in no way inferior to men; more than that –they are also human. Women are entitled to enjoy economic, social, cultural and political rights without discrimination, on a footing of equality with men. The concept of gender justice guaranteed in the Constitution, the preamble to the Constitution, seeks to secure to its citizen including women-folk, justice social economic and political; liberties of thought, expression, belief, faith and worship; equality of status and opportunity to promote fraternity assuring dignity of the individual. The framers and founding fathers of the Constitution of India incorporated certain sacrosanct ideals in the form of comprehensive rights for women so as to metamorphose the abstract ideals into a concrete form, which would enable the upliftment of the status of women in an otherwise male-dominated chauvinistic society.

In spite of special Constitutional guarantees and other legislations, crimes against women have not abated. The review of the disabilities and constraints on women, which stem from socio-cultural institutions, indicates that the majority of women are still very far from enjoying the rights and opportunities guaranteed to them by the Constitution.

2. ISSUES PERTAINING TO GENDER PREVAILING IN INDIA

As distinct from sex, which is a personal biological factor based on nature, the image of gender surpasses mere distinction between women and men and represents socio-economic, cultural and psychological factors that make one class strong over the other. Gender stands for characteristics of men and women, which are socially determined rather than biologically determined. It determines the social role, access to opportunities, entitlement to resources for these two categories and builds cultural implications upon them. In practice it generates biases in favour of men and against women in relation to work, sharing of benefits, enjoying of human rights and following of tradition¹.

The role of men and women in the development process has received much attention in the 21st century. Concerns with regard to women and their inclusion or exclusion in the development process have been increasingly examined.

The 20th century, probably, is one which has experienced the most difficulty in defining the role of a person as male or female. Early Women's Studies Scholars tended to think of differences between men and women as being innate and immutable. The theory argues that a person's role was specified under patriarchal framework where scope of gender (masculine or feminine) was limited within the understanding of biological understanding of sex (male and female).

India, singly accounts for 15 percent of the world's women. Because of this huge share, any change and variation in women's status, affects a substantial number of the 'woman population' of the world. India, with its vast regional differences, has a variety of cultures which determine the differential status of

1 B K Nagala, Sex and Gender: cognitive Analysis, in MODERNITY, FEMINISM AND WOMEN EMPOWERMENT (Abha Avasthi and A K Srivastava ed, 2001) Jaipur, 131, New Delhi Rawat publications

women across the country. Nonetheless, social discrimination and economic deprivation on the basis of gender, is common to all irrespective of religion, caste, community or State².

India has its cultural roots, political perspectives, Constitutional pledges and trusts with destiny, which together constitute the nations founding faith of Social Justice with an egalitarian bias and participative accent. In this context, our legislatures, courts and governments must be judged by fundamental evaluation of their performance, dismissing the propagandised plans of development and social justice litigation as misleading flares.

There are new enemies of Social Justice communalism and religious fanaticism are invasions on social justice, especially gender justice, because our gods are masculine as processed by fundamentalists of every faith. Wearing the holy visage if Manu and Muhammad, Jesus and Zoraster, these exploitative force use theology of human rights. The biggest minority in India is its womanhood subjected to generation of gender injustice. Even today, the situation leaves much to be desired³.

Issues related to gender deprivation and discrimination are omnipresent in contemporary development and other discourses on women in India in much the same way empowerment is and yet much of these discourses limit themselves to systematically establish gender inequalities in terms of access to productive as well as reproductive resources.

3. WOMEN'S EMPOWERMENT IN SOCIAL, ECONOMIC AND POLITICAL FIELD FOR ENSURING GENDER JUSTICE

The empowerment process may be broken down into three dimensions economic, social and political (which reinforce each other). The Economic aspect would include increasing women's access and command over tangible and intangible resources such as wealth, property, employment, knowledge and information. Social aspect would include changing the existing discriminatory ideology and culture which determine the environment for women existence. Finally, Political process must increase women's presence and influence in the

2 BHASWATI DAS AND VIMAL KHAWAS, GENDER ISSUE IN DEVELOPMENT-CONCERNS FOR 21ST CENTURY" 2-3 (New Delh, Rawat Publication 2009)

3 V R KRISHNA IYER, SOCIAL JUSTICE SUNSET OR DAUN. pp 4 and 5 (Lalbagh, Lucknow Eastern Book Co. 1993)

power structure. Political ability to bring about changes in women's legal status, to direct resources to women and to get access to positions of power is of crucial importance. Each component reinforces the other.⁴ Among the objectives stated in the preamble of the Constitution, the people of India resolve to constitute India into a sovereign republic and to secure social, economic, and political justice to all its citizens, thus reflecting the hopes and aspirations of all.

a. Political Empowerment of Women

Despite the fact that women participated equally in the freedom struggle and, under the Constitution and law, have equal rights as men, enabling them to take part effectively in the administration of the country, it has had little effect as they are negligibly represented in politics. Women and politics have become an area of great interest to students and scholars of all Social Sciences. As women and their organisations throughout the world have been agitating for their rightful place in the society, the attention of the scholars of various disciplines is rightly focused on various issues relating to women's position in different fields,⁵ for example their representation in the Lok Sabha is far below the expected numbers. This has led to the demand for reservation of 33 percent seats for women in the Lok Sabha and Vidhan Sabha.

Political empowerment of women has been brought by the Constitution (73rd Amendment) Act, 1992 and (74th Amendment) Act 1992, which reserve seats for women in Gram panchayats and Municipal bodies; however illiteracy, lack of political awareness, physical violence and economic dependence are a few reasons which restrain women from taking part in the political process of the nation.

b. Economic Empowerment of Women

Empowerment is a new goal to be achieved with much broader scope and perspective. Empowerment can embrace economic independence, social transformation and political authorization which can be continuous processes and end both. Since women constitute half the population of the world, all these

4 Jamil Ahmad, Gender Inequality and Women Empowerment, A Review, in A.K.Sinha(Ed), NEW DIMENSIONS OF WOMEN EMPOWERMENT, 130, (A.K.Sinha ed, 2008) (New Delhi; Deep and Deep Publications Pvt. Ltd.)

5 Arun Kumar, Political Empowerment of Women, in WOMEN EMPOWERMENT CHALLENGES AND STRATEGIES 214, (Lakshmi Raju ed, 2007), (New Delhi; Regal Publications)

attributes are necessary in women to maintain perfect social order.⁶ There has been a catena of legislation conferring equal rights on women and men. These legislations have been guided by the provisions of the Fundamental Rights and the Directive Principles of State policy. Here again, there is a total lack of awareness regarding economic rights among women. Laws to improve their condition in matters relating to wages, maternity benefits, equal remuneration and property or succession have been enacted to provide the necessary protection in these areas.⁷

c. Social Justice and Women Empowerment

Social justice is one of the basic principle for peaceful living. It is fundamental that all people should have equal access to wealth, justice, health, well-being and opportunity. India is one among the nations that upholds the principle of Social justice. In order to achieve social justice, the Indian people, need to address a myriad of problems that people face in this country, because of caste, gender, religion, culture, tradition and others⁸. Social Justice is an expression which has found its way in to the vocabulary of the Constitution and has become a part of the Constitutional terminology. The Constituent Assembly, even before it set out to fulfill its task of framing a Constitution for India, declared in the resolution passed by it that social justice is one of the goals to be achieved. It became vision of the people of India and a promise of the Constitution speaking through its preamble and some of the enacting provisions that there shall be secured to all the citizens, social justice⁹. The Supreme Court viewed that full development of personality and fundamental freedom of women and their equal participation in political, social, economic and cultural life are concomitants for national development, social and family stability and growth- culturally, socially and economically. All forms of discrimination on grounds of gender are violative of fundamental freedom and human rights.¹⁰

6 Kumkum Narain, Empowerment of Women through Economics Measures ,in .A.K.Sinha (Ed), NEW DIMENSIONS OF WOMEN EMPOWERMENT 179, (.A.K.Sinha ed,2008) (New Delhi; Deep and Deep Publications Pvt. Ltd.)

7 MAMATHA RAO, LAW RELATING TO WOMEN AND CHILDREN 68,(EBC Lucknow 2018)

8 <http://www.dianova.org>>News Visited on 21st october 2021

9 <http://www.ijtr.nic.in>>art43 PDF vited on 22 october 2021

10 Valasamma Paul v. Cochin University, (1996) 3 SCC 545(India)

4. THE CONSTITUTION OF INDIA AND GENDER JUSTICE

The Constitution of India assures the dignity of individuals irrespective of sex, community or place of birth. This is clear from the Preamble of the Constitution and the provisions contained in 'Fundamental Rights and Directive Principle of State Policy'. With regard to women, the Constitution contains many negative and positive provisions which go a long way in securing 'Gender Justice'. This history of suppression of women in India is a very long one and possibly the same has been responsible for including certain general as well as specific provision for the upliftment of the status of the women. The Constitution aims at creating legal norms, social philosophy and economic values, which are to be effected by striking synthesis, harmony and fundamental adjustment between individual rights and social interest to achieve the desired community goals.

The Preamble contains the quitesence of the Constitution and reflects the ideals and aspirations of the people. The preamble contains the goal of equality of status and opportunity to all citizens. The framers of the Constitution were not atisfied with mere territorial unity and integrity. If the unity is to be lating, it should be based on social, economic and political justice, according to the father of the Constitution.

The policy of protection to women is evident in various parts of the Constitution. The growth of 'case law' has added to its strength in recent times. Some constitutional amendments have introduced new provisions for women's welfare and better public participation. The Preamble's reference to social justice and dignity of the individual as value goals of the policy has inspired judiciary to elaborate women's right to include the concept of dignified life. In fact, gender justice enables the flourish of right to be human on the part of woman. As Justice Dr.A.S. Anand has obeserved, "the process of gender justice, broadly speaking, covers the rights of women against exploitation and victimization. Unless we recognise her rights as her basic human rights gender justice would only be 'lip service' with no tangible result."¹¹ Justice V.R.Krishna Iyer has put it emphatically, "the fight is not for woman's status but for human worth. The claim is not for woman's status but for human worth. The claim is not to end inequality of women but to restore universal justice. The bid is not for

11 A.S.ANAND, JUSTICE FOR WOMEN 69,(New Delhi: Universal Law Publishers 2002)

loaves and fishes forsaken gender but for cosmic harmony which never comes till woman comes.¹²"

a. Right to equality

The United States developed affirmative action to fight discrimination against minority groups and women. India created affirmative action to remedy its history of discrimination against groups, such as the untouchables (who occupy the lowest rung in the Hindu caste system), covers other backward classes, minorities and women. The safeguard contained in 'the fundamental rights section of the Indian Constitution closely resembles affirmative action programs in the United States. Article 14 of the Indian Constitution establishes the general right of equality. Article 14 of the Constitution further provides that the State shall not deny to any person equality before law and equal protection of laws within the territory of India.¹³ The concept of equality under Article 14 espouses the principle that similarly situated person will be treated alike. The law, therefore, need not apply identically to each and every person. The legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate.

Article 15(1) and (2) prevent the State from making any discriminatory law on the ground of gender alone. The Constitution is thus characterised by gender equality. The Constitution insists on equality of Status and it negates gender bias. Article 15(3) constitute exception to Article 15(1) and (2). Article 15(3) recognise the fact that the women in India have been socially and economically handicapped for centuries and as a result thereof, they cannot fully participate in the socio-economic activities of the nation on a footing of equality. The purpose of article 15(3) is to eliminate this socio-economic backwardness of women and to empower them in such a manner as to bring about effective equality between men and women. Article 15(3) allows State to make special provisions for women and children. This calls for operation of the substantive equality mechanism for

12 V.R KRISHNA IYER, LAW AND LIFE, 31, (New Delhi: Vikas publishing House 1979)

13 P.M. BAKSHI, CONSTITUTION OF INDIA. 16,(Universal Law Publishing Co. Pvt. Ltd. Eighth Edition 2008)

their well-being.¹⁴ The explicit objective of this provision is elimination of substantive inequality of the disadvantaged group in the society by positive measures. In interpreting Art15(3) it is regarded that the special provisions can be only facilitative, protective and corrective for women but not discriminatory against them¹⁵.

The operation of Article.15(3) can be illustrated by the judiciary in a few cases. Under section 497 of the Indian Pnal Code, the offence of adultery can be committed only by a male and not by a female who cannot even be punished as an abettor. As this provision makes a special provision for women, it is saved by Article.15(3). The apex Court has observed that “sex is a sound classification and although there can be no discrimination in general on that ground the Constitution itself provides for special provisions in the case of women and children by clause(3) of Article.15. article 14 and 15 thus read together validate the last sentence of section 497 of I.P.C., which prohibits women from being punished as an abettor of the offence of adultery.”¹⁶ Upholding section 497, the Bombay High Court had said in an earlier case that the discrimination made by section 497 is based not on the fact that of men, but “women in this country were so situated that special legislation was required in order to protect them”.

The validity of section 497, Indian Penal Code 1860(IPC), which punishes only a male participant in the offence of adultery and exempts the woman from punishment, was challenged as violative of Article 14 and 15(1) of the Constitution. The petitioner contended that even though the woman may be equally guilty as an abettor, only the man was punished, which violates the right to equality on the ground of sex. The Supreme court upheld the validity of the provision on the ground that the classification was not based on sex alone. The Court obviously relied upon the mandate of Article15(3) to uphold this provision.¹⁷

The Constitutional validity of section 497 IPC was again challenged before the Supreme Court in the Sowmithri Vishnu case; the petitioner contended that the section of adultery punished the man who had illicit relations with another

14 Ratna Kapur and Brenda Cossman, On Women, Equality and the Constitution: through the looking Glass of Feminism in NLSJ 1 FOR A CRITIQUE ABOUT FORMALISTIC AND SUBSTANTIVE GENDER EQUALITY APPROACHES(1993)1

15 Mahadeb Jiew v. B.B.Sen, AIR 1951 Cal 563(India)

16 Yusuf Abdul Aziz v. State of Bombay, AIR 1954 SC 321 (India); Sowmithri Vishnu v. Union of India, (1985) SCC(Cri) 325 (India)

17 Ibid

person's wife, but did not punish the woman who was a party to adultery. The section enabled the husband to prosecute the paramour of his wife, but did not allow him to prosecute the woman who had an adulterous relationship with her husband and therefore violated article 15(2) of the Constitution, which forbade discrimination on the ground of sex. Negating the contentions, the court observed that it is commonly accepted that it is the man who is the seducer and not the woman. Women were not punishable for adultery because they were less likely to indulge in it. The Supreme Court refused to intervene and upheld the validity of the section holding that the wife is a victim and not the author of crime¹⁸.

In *Dattatreya* the Bombay High Court looked to the social, historic and economic inequality of women and upheld the reservation of seats for women in municipalities as a special provision "to raise the position of women to that of men". The corrective approach to gender for overcoming the subordinations and past denials is explicit here.¹⁹ Andhra Pradesh State Service Rules which prescribed a minimum preference of 30 per cent of the posts in each reservation category, was upheld by the apex court on the ground that making special provisions for women in respect of employment or posts under the State is an integral part of Art. 15(3), which could not be whittled down in any manner by Art.16.²⁰ The court regarded that creating job opportunities for women was an important limb of gender equality. The Court looked to the interrelations between Articles 15 and 16 and viewed that Art.15 is more general provisions and the latter, a more specific one. Since Art.16 does not touch upon any special provision for women, it cannot in any manner derogate from the power conferred upon the State in this connection under Art. 15(3). The judgement makes a progressive development in the sphere of gender justice.²¹

b. Right to Dignified life

Gender equality becomes elusive in the absence of the right to live with dignity. In the light of the proposition in *Maneka Gandhi v. Union of India*²² that

18 Ibid

19 *Dattatreya Motiram More v. State of Bombay*, AIR 1953 Bom. 311. (India)

20 *Government of Andhra Pradesh v. Vijaya Kumar*, AIR 1995 SC 1648(India)

21 P.NAGABOOSHANAM, SOCIAL JUSTICE AND WEAKER SECTIONS. 154-5,(Chennai: C.Sitaraman & Co.,2000)

22 AIR 1978 SC 597(India)

the procedure established by law applied for deprivation of right to life or personal liberty shall be just, fair and reasonable, the judiciary began to probe into the constitutionality of law and procedure on both substantive and procedural grounds. This gave a sound footing for developing feminist perspective like dignity of womanhood and preciousness of right to privacy of woman as the essential components of 'due process culture'. The Supreme Court recognised that privacy was an important aspect of personal liberty. The Apex Court was shocked to learn that an Life Insurance Corporation questionnaire sought information about the date of menstrual periods and past pregnancies, and the petitioner was terminated for not providing correct information to the LIC. The Supreme Court held that the questionnaire amounted to invasion of privacy and that, therefore, such a probe could not be made.²³

The right to personal liberty, guaranteed under Article 21 included the right to privacy. Information about health could be sought where such information was relevant for selling insurance cover, but not for the person seeking employment. In the context of legal protection of women, the above approach contemplates at least the following things: first, when the basic essentials that make up the dignified life of women are deprived by state inaction, legal vacuums, and mute tolerance of hegemonic private actions which impact upon women adversely, the positive right of sustenance, shelter and protection shall be recognised and secured by judiciary under Art. 21. Suitable legislative and administrative follow up actions shall be taken in support of such rights. Going beyond the dichotomy of procedural and substantive due process, the substance and outcome of the law should internalize the protection perspective of Art. 21. Second, an activist application of constitutional remedies like writ of habeas corpus and monetary compensation and heightened scrutiny of privacy invasions add to the worth of dignified life of women. The rehabilitative side of protection against immoral trafficking is a component of this strategy. Thirdly, it contemplates strict implementation of laws relating to dowry prohibition, sati, rape and other sexual offences, prevention of immoral traffic, prohibition of indecent representation of women, and guarantee of right to maintenance and maternity benefit.

In *Zahida Begum v. Mushtaque Ahamed*²⁴, a suit was filed by the wife for

23 Neera Mathur V. LIC, (1992)1 SCC 286(India)

24 AIR 2006 Kar 10(India)

dissolution of marriage on the ground of impotency of the husband, who was unable to perform marital obligations. On the contrary the respondent husband requested the court that his wife be directed to undergo medical check up so as to ascertain her virginity. The High Court of Karanatak held that the direction of the of the trial court to the wife to undergo medical virginity test was improper and invaded privacy of the plaintiff wife, which was violative of Article 21 of the Constitution.

The Apex Court ruled that “rape was was not only an offence under the Indian Penal Code, but was violation of a woman’s right to live with dignity and personal freedom”²⁵. It is a crime against basic human rights and is also violative of the victim’s most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. Many feminists emphasized that rape is less sexual offence than an act of aggression aimed at degrading and humiliating women. The Supreme Court further said with reference to rape, that unchastity of a women does not make her “open to any and every person to violate her person as and when he wishes”. Even a prostitute has a right to privacy under Article 21, and no person can rape her just because she is a woman of easy virtue²⁶.

c. Right to maintenance

The judicial approach about right to maintenance is influenced by its consideration of ‘dignified life’. As held in *Salapa Devi* case²⁷, the law of maintenance is aimed at prevention of vagrancy, and securing of the right to food, clothing and shelter to the deserted wife and children. According to Krishna Iyer J. it contains a social purpose that the ill-used wives and desperate divorcess shall not be driven to moral and material dereliction to seek sanctuary in the streets. In various cases the Supreme Court applied Section. 125 of the Criminal Procedure Code irrespective of the claims of the Muslim personal law that the Muslim husband’s obligation to pay maintenance to his divorced wife is confined to iddat period²⁸. A statute enacted to override section.125 and to uphold personal law was interpreted in *Danial Latifi*²⁹ as not defeating the obligation of the Muslim husband to pay maintenance even beyond the iddat period.

25 *Bodhisattwa Gautam v. Subhra chakkraborty*, (1996) 1 SCC 490(India)

26 *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57(India)

27 *Naurang Sing v. Salapa Devi*, AIR 1968 All 412(India)

28 *Bai Tahira v. Ali Husain*, AIR 1979 SC 352(India); *Fazlunbi v. Khader*, AIR 1980 SC 1730(India); *Mohammed Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 946(India)

29 *Danial Latifi v. Union of India*, AIR 2001 SC 3958(India)

d. Procedural due process

Concerning protection of physical privacy of women vis-a-vi investigative agency, it is laid down in the Nandini Satpathi case³⁰ that the arrest of a woman shall be done as far as possible by a woman police officer and investigation of woman detainee shall be done only in the presence of her lawyer without using third degree methods. In another case for redressing the grievances of custodial violence against women in police lock-ups, the Supreme Court directed for establishment of the exclusively female lock-up, separation of female arrestees from the male arrestees, investigation by female police constable and surprise visit to police lockups by Session Judge for inspection³¹.

5. DIRECTIVE PRINCIPLE OF STATE POLICY AND GENDER JUSTICE

The elevation of the position of the Directive Principles in Constitutional jurisprudence from relative insignificance to that of important set of inevitable values in recent decades could wield its own influence upon the protection of interests of women. Some of the provisions touching the interest of women can be looked to for appreciating the Constitutional concern. The Directive Principles of State Policy go to strengthen the objectives of the preamble. As if the promotion of welfare provided in article 38(1) is inadequate, the Constitution (Forty Fourth Amendment) Act, 1978 reiterated the importance of minimizing the inequalities in income and endeavour to eliminate inequalities of status, facilities and opportunities. More specifically, article 39(a) imposes an obligation on the State to secure the right to adequate means of livelihood for both men and women equally. Equal pay for equal work for both men and women under article 39(d) has the judicial stamp of approval. Article 39(e) obligates the State to ensure that the health and strength of workers, men and women, are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 42 mandates the State to make provisions for securing just and human conditions of work and for maternity relief.

6. FUNDAMENTAL DUTIES AND GENDER JUSTICE

The technique of building a harmonious and happy society through imposition of fundamental duties in a citizens's conduct, is employed under

30 Nandini Satpathi v. P.L.Dani, AIR 1978 SC 1025(India)

31 Sheela Barse v. State of Maharashtra, AIR 1983 SC 378 (India)

Article 51.A with a belief that universal performance of duties towards all, protects rights better. Art. 51.A(e) imposes duty to renounces derogatory to the



AN ANALYSIS OF SICK INDUSTRIAL COMPANIES ACT AND ENACTMENT OF IBC

Swapna Somayaji*

ABSTRACT

The banking sector is the backbone of a country's economy and directly affects its development. In order to ensure continued growth, it is critical that the banks and financial institutions are robust in managing the stress, particularly caused by non-performing assets (NPAs) or bad loans. NPAs are nothing but assets and loans that have become unrecoverable and costs banks a loss of plenty of resources – neither are banks able to earn interest on the locked amount in loans nor are they able to recover the base loan amount from the defaulters. The problem of NPA is faced globally but when it comes to developing countries like India, the magnitude is undoubtedly very high. The Government of India has initiated economic reforms to cope up the speed of the global economy, but it is impossible to achieve unless the Indian banking and financial system will be at a complete overhaul. Major portion of bad debts in Indian Banks arose out of lending to the priority sector at the dictates of politicians and bureaucrats. If only banks had monitored their loans effectively, the bad debt problem could have been contained if not eliminated. The scope of this study covers on the basis: (i) measures for the banks to avoid future NPAs & to reduce existing NPAs, (ii) guide for the government in creating & implementing new strategies to control NPAs,

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(iii) selecting appropriate techniques suited to manage the NPAs and develop a time bound action plan to arrest the growth of NPAs.

In the 1990's the government appointed the Narasimham Committee to study the reasons for NPA and to recommend the steps to reduce NPA. The Government of India in the year 1990 introduced a number of reforms to deal with the problems of NPA. In this backdrop the present paper to highlight the major reasons for the NPA.

Keywords: NPA, reasons, provisioning, bank, profitability, borrower, asset quality.

INTRODUCTION

The Industrial sickness strained the economic systems and conditions of Financial Institutions as well as severely affected the prospects of new investments. To overcome Industrial sickness, the Government adopted ad hoc measures like nationalisation of the bank but that did not yield a permanent solution. Industrial sickness had a deleterious impact on Indian economy as Indian economy is particularly driven by major Industries such as cotton, jute and textile, small steel and engineering and these Industries were severely hit by Industrial sickness and created the problem for the overall economy. Industrial sickness has not only impacted owners, employees and creditors but also has led to wastage of national resources and social unrest. Hence in this regard appropriate measures have to be designed to identify the indicators of Industrial sickness at an early stage in order to take preventive action for sickness.

The Sick Industrial Companies (Special Provision) Act, 1985 came to enacted by Government of India on the recommendations of T. Tiwari Committee Report (1981)¹ with a view to detect potentially sick companies owning industrial undertakings, and to take timely action with respect to these companies and to enforce measures so determined. The Act aimed at revival of sick companies and closure when company had no absolute chances of revival, or alternatively so that the investment locked with these companies could be used somewhere productive.

1 See, Prof (Dr.) Sreerenganadhan K, Miss Varghese Roshna, Management of Industrial Sickness <http://www.mgu.ernet.in/DLR/DLArchive/sre06.pdf>, last accessed on 18th October, 2009.

Industrial Sickness

A Sick industrial unit is defined under the Act as one which is in existence since 5 years and had incurred accumulated losses equal to or more than its entire net worth at the end of any financial year.²

This sickness could be due to internal factors such as (mismanagement, overestimation of demand, wrong location, poor project implementation etc.) and the external factors include (energy crisis, raw materials shortage, infrastructure bottlenecks, inadequate credit facilities etc.).³

Industrial Sickness impacts economy leading to loss of revenue to the government, increased NPAs with the financial institutions, unemployment issues, loss of production and many other socio-economic problems.

Important Features of the Act

The Act has two quasi-judicial bodies through its provisions to deal with the cases under this Act. These two quasi-judicial bodies included —

- a. The Board for Industrial and Financial Reconstruction (BIFR) enjoyed the status an Apex boards responsible with dealing with the issue of industrial sickness. The board was entrusted with revival of potentially sick industrial units and rehabilitating them, and also, to liquidate non-viable companies.
- b. The Appellate Authority for Industrial and Financial Reconstruction (AAIFR) was established to hear the appeals brought up against the orders of the BIFR.

DRAWBACKS IN THE ACT

The functioning of the Act was not found to be satisfactory and a lot of issues were found during the period of its implementation. The definition of ‘sicknesses was termed to be deficient and restrictive under the act and belatedly it was recognised by the BIFR as well.

Nirmala Ganapathy said: “One look at the track record of BIFR, and it doesn’t take a whiz to conclude that it is nothing but a graveyard of companies. A

2 SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985,

3 <https://www.scribd.com/doc/19150346/Industrial-Sickness-of-India>

tiny fraction comes out healthy — only if the promoter is interested in putting it back up on its feet.”

One of the biggest drawback was present in the Act was Section 22 dealt with moratorium and immunity was granted against any kind of proceedings for the recovery of dues, during pending inquires under a scheme. The Government was of the opinion that both the quasi-judicial bodies were unable to fulfil the objects as envisaged under the Act which dealt with reviving of viable sick companies in a reasonable time frame.

Alongwith the above issues, it was further seen that the judgements pronounced by BIFR and the AAIFR were taken on appeal to the High Court which in turn led to the issue for disposal of the cases leading to long time delays.

One of the defects present in BIFR that it took a substantial time in determining whether a company was ‘sick’ and to formulate revival proceedings. The longer time is also due to banks and financial institutions have their own hierarchy in decision making, resulting in long delays. The decisions taken by the bank are neither transparent, nor are they subject to judicial review. By the time bank takes the decision and communicates the plan, which had been conceived, loses its viability resulting in failure of revival schemes even after sanction.

AMENDMENT AND REPEAL OF THE ACT

a. Justice V. Balakrishna Eradi Committee, 1999⁴

The Government constituted a Committee in 1999 under Justice V. Balakrishna Eradi, to review the law regarding the Insolvency and Winding of Companies. The Committee presented a report titled, ‘Report of the High Level Committee on Law Relating to Insolvency and Winding up of Companies’.⁵ The Committee after hearing all the parties and on analysis of statistical data presented to it, opined that the facts and figures indicated that the utility of SICA and the institutions established under it were in question.

The problem of insolvency persisted due to delays which were inherent in the procedures under the Act concerning revival and reconstruction. These delays further intensified by large scale misuse of provisions contained in Section 22

4 <http://bifr.nic.in/aboutus.htm>

5 Shri Justice V. Balakrishna Eradi, Report of High Level Committee on Law relating to Insolvency and winding up of Companies, 2000, p. 47.

which allowed suspension of legal proceedings, suits and enforcement of contracts and other remedies. The Committee emphasised the relative effectiveness of the Act was compromised by the delays caused by the BIFR in disposal of cases. The success rate of the provisions enshrined in the act had hence fallen short of what it was expected to be. The Committee concluded with a recommendation that the Act should be repealed and the provisions which were contained therein concerning the rehabilitation and revival of the company should be modified and brought under the Companies Act, 1956.

b. Advisory Group on Bankruptcy Laws, 2001:

The Advisory Group headed by N.L. Mitra recommended that the BIFR as well as the AAIFR should be taken out and the insolvency laws should be made into a separate and comprehensive Bankruptcy Code to govern Insolvencies which were Corporate in nature.

The suggestions recommended by the group was considered regarding the Companies Act for creating a consolidated tribunal in the form of the National Company Law Tribunal (NCLT) and the appellate authority, the National Company Law Appellate Tribunal (NCLAT) who were to take over the functions which were earlier under the BIFR and the AAIFR and also the High Courts as concerning insolvency.

It was decided to incorporate the provisions relating to sick Industries in the Companies (Second Amendment) Act, 2002 by adding Part VI under the topic of ‘Revival and Rehabilitation of Sick Industrial Companies’ from Section 424A to 424L and thereby it was decided that the Act would be repealed by bringing the SICA (Special Provisions) Repeal Act, 2003.

But the changes could not be incorporated due to the following reasons —

- the constitutionality of creating the NCLT and the NCLAT was challenged on the grounds of excessive delegation of judicial functions—a petition in the Supreme Court was not disposed until 2010 when the constitutionality was upheld but there were changes recommended with respect to specifics as to the appointment criteria to such bodies.
- other provisions in the Companies (Second Amendment) Act, 2002 and the SICA (Special Provisions) Repeal Act, 2003, were not notified, and

therefore not brought into effect by the Government through publication in the Official Gazette.

Hence, both laws continued to prevail at that time and the BIFR and the AAIFR continued to function.

c. J Irani Committee Report, 2005:

The Committee was established to review the laws pertaining to liquidation and restructuring of the companies recommended several revisions to the Companies Act, more particularly for a transparent and globally acceptable insolvency and restructuring procedures, in short. According to the report, “it is important that the basic principles guiding the operation of corporate entities from registration to winding up or liquidation should be available in a single, comprehensive, centrally administered framework”.

- **The Companies Act, 2013:**

Chapter XIX (sections 253 to 269) of the Companies Act, 2013, i.e. the successor legislation of the Companies Act, 1956 deal with revival and rehabilitation of sick companies. Section 255 of the Code read with 11th schedule provides for amendments in the Companies Act, 2013.

- **Insolvency and Bankruptcy Code, 2016:**

Section 252 of the Insolvency and Bankruptcy Code, 2016 provides for amendment of the SICA Repeal Act in the manner provided under read with the 8th schedule of section 252. 8th schedule provides for substitution in section 4 (b) of the SICA Repeal Act. The section provides that any reference made to BIFR, or any enquiry before BIFR or any appeal pending before the AAIFR would automatically stand abated from 01.12.2016. Furthermore, the proviso of section 4(b) of the Repeal Act, 2003 provides the companies, who have made any reference made to BIFR, any inquiry pending before BIFR, any appeal preferred to AAIFR, or any proceedings pending before BIFR/AAIFR to make a reference to the NCLT under the Code within 180 days from the commencement of the provisions of the Code i.e., 01.12.2016. The enactment of the SICA Repeal Act, 2003 has allowed for cases to be dealt with in a better manner than before by consolidating sections of the SICA, 1986 in the Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016.

The Sick Industrial Companies (Special Provisions) Act, 1985 (**SICA**) was enacted to make special provisions for the timely detection of sick (and potentially sick) companies owning industrial undertakings. The Board for Industrial and Financial Reconstruction (**BIFR**) was formed under the SICA to determine the sickness of such industrial companies and to prescribe measures either for the revival of potentially viable units or the closure of unviable companies.

With effect from December 1, 2016, the SICA has been repealed by the Sick Industrial Companies (Special Provisions) Repeal Act, 2016 (**“Repeal Act”**). This has resulted in the dissolution of the BIFR and other bodies formed under the SICA.⁶

- **SICA and its Repeal:**

In practice, the time taken by the BIFR and the appellate body under the SICA (AAIFR) in dealing with cases of industrial sickness and revival was often plagued with uncertainties and time consuming. Further, there were often separate matters pending under different statutes (such as SICA and the Companies Act) and before various forums with respect to the same company. This often caused confusion and conflict regarding the jurisdictions of such bodies. It was therefore decided that instead of various bodies looking into different matters, one body should be constituted to handle all such matters and to dispose of all pending matters, allowing companies to approach a single forum and address varying pending disputes.

Accordingly, the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) were constituted under Companies Act, 2013 (Companies Act). The NCLT has the jurisdiction to hear matters with respect to, amongst others, the management of a company, mergers and amalgamations and revival or rehabilitation of companies. The jurisdiction of the NCLT has been further bolstered by the Insolvency and Bankruptcy Code, 2016 (Bankruptcy Code) which, amongst other things, provides that corporate insolvency processes may be initiated before the NCLT.

With the Bankruptcy Code coming into effect, all proceedings pending before the BIFR and AAIFR stand abated. However, the entity whose reference

⁶ Ministry of Finance, Notification No. S.O. 3568(E), dated November 25, 2016,

has abated may initiate fresh proceedings before the NCLT under the Bankruptcy Code (that of corporate insolvency resolution), within 180 days of the commencement of the Bankruptcy Code, i.e. December 1, 2016. Further, as per the provisions of the Repeal Act, the repeal of SICA would not affect any orders sanctioning a scheme under SICA, however, the same does not provide any clarity with respect to the manner in which the administration of such schemes (that have not yet been implemented) may be carried out.

PROCEDURE FOR REHABILITATION OF SICK COMPANIES UNDER THE BANKRUPTCY CODE:

The Bankruptcy Code attempts to harmonise the process of insolvency, restructuring and rehabilitation under the umbrella of the “corporate insolvency resolution process”. Under the Bankruptcy Code, the process for corporate insolvency may be initiated by a financial creditor, an operational creditor or the company (irrespective of whether the same owns an industrial undertaking or not) itself (“Insolvency Applicant”). The corporate insolvency proceeds when there is a debt, in respect of which the corporate debtor has committed a default, the amount of default should be Rs. 1 lakh or more. It is pertinent to note that the Bankruptcy Code aims to move away from the “sickness” test encapsulated under SICA and the Companies Act, 2013 (under Chapter XIX, which now stands deleted) to the “cash flow” test, allowing for a more objective standard of evaluation.

An Insolvency Applicant may thereafter file an application before the NCLT for the initiation of the corporate insolvency resolution process in respect of the corporate debtor upon complying with certain prescribed procedural requirements. Upon being satisfied with the contents of the application, the NCLT may admit or reject the application.

If the application is admitted, the corporate insolvency resolution process for such corporate debtor commences. On admission of the application, the NCLT shall declare a moratorium period during where no legal proceedings may be instituted or continued against the corporate debtor. Further, an “interim resolution professional” will be appointed and a public announcement of the initiation of the corporate insolvency process issued. Such resolution professionals have to be registered with the Insolvency and Bankruptcy Board of India after clearing an examination.

The Bankruptcy Code prescribes detailed steps on the manner in which the corporate insolvency process is to be carried out, which includes the formation of a resolution plan to attempt to revive and rehabilitate the business of the company. In the event the resolution plan is approved, the same is implemented accordingly. However, if no resolution plan is agreed upon or approved by the NCLT within 180 days of the admission of the application, the company will be wound up as per the provisions of the Bankruptcy Code.

DEVELOPMENT OF IBC

The change in the law, brought about by the repeal of SICA and the notification of the Bankruptcy Code, moves beyond the concept of a “sick” company or an “industrial undertaking”, and consolidates the revival process for all companies under one law, before a single tribunal. This should make the process speedier and efficient. The success of such a move will, however, depend on the NCLT being provided with the necessary infrastructural and legal support to handle the potential volume of matters.

It remains to be seen whether a qualified pool of insolvency resolution professionals who will help with the implementation of the law will be efficiently formed. The new regime can also aid corporates achieve greater efficiency in functioning by promoting an environment that supports commercial prudence and people who want to do business. Banks and lenders may approve of the new regime as it allows for a speedy resolution of matters where large amounts of funds may be tied up, while simultaneously allowing such creditors to be an active part of the resolution process of a corporate debtor.

The Code is significantly influenced by other jurisdictions and was enacted to address the various flaws that existed in previous processes for corporate reconstruction and rehabilitation. The Code in comparison is much simpler and effective and involves an integrated “Corporate insolvency resolution process”.⁷ On default, any financial creditor, operational creditor, or the corporate debtor itself may file an application with the National Company Law Tribunal (“NCLT”) to begin the insolvency resolution process. The NCLT may accept the application if the existence of a default and non-payment of dues by the defaulter is established. The following elements of the Code make it a successful instrument for a company’s rehabilitation:

7 <https://nclat.nic.in/Useradmin/upload/744324065bebc1bd0ef4a.pdf>

1. Lenders participate actively in the decision-making process as members of a “committee of creditors.” Lenders also have the authority to determine which investment plans are acceptable. Under the SICA, the BIFR was in charge of receiving and deciding on creditors’ comments and objections. With the involvement of lenders, such commercial decisions become easier, and all stakeholders have a clear stake in the company’s recovery.
2. The activities and routine business are continued and handled by the resolution professional with prior consent from the committee of creditors, despite the moratorium prohibiting any action by creditors or anyone against the defaulting company. As a result, the company is preserved as a going concern.
3. For all parties involved in insolvency procedures, the Code has established distinct levels of accountability and responsibility. As a result, the creditors’ committee is responsible for the resolution professional’s activities and vice versa. In addition, the resolution professional must provide regular progress reports to the NCLTs to keep them informed of the insolvency’s progress.
4. From the beginning to the finish of the procedure, timelines have been established. The entire insolvency resolution procedure is limited to 180 days; However it can be extended to 270 days if necessary thus making it a strictly time bound process.

CONCLUSION

Any corporate body, whether through service or sale agreements, or through loans from banks and financial institutions, judgments, or even interactions with the government, incurs a variety of obligations while operating. A corporate entity’s debt load can sometimes become so high that it endangers its continued existence and operation, while creditors risk losing their whole investment. It should be emphasised that a business’s liquidation or wind-up, as an alternative to insolvency procedures, would result in a complete wrap-up of the firm in such a way that it would no longer exist. When compared to insolvency processes, wind-up processes cause the economy to suffer a bigger loss. Therefore, The Code has revolutionized the process of insolvency resolution in India. IBC is, without a doubt, a comprehensive law with a swift and precise \m for dealing

with insolvency issues. The time-bound aspect of IBC is a win-win situation since the Companies' resources are deployed in the appropriate place at the appropriate time, whether it's by paying creditors or winding up. The company does not continue to lose money indefinitely, inflicting a setback to the economy as whole and impacting individual debtors. Thus, the Code has established a new and improved framework for corporate insolvency resolution, which is far superior to the SICA regime.



**MILITARY AND PARAMILITARY ACTIVITIES IN AND
AGAINST NICARAGUA
(NICARAGUA V/S UNITED STATES OF AMERICA)
(1984 TO 1986)**

Mrs. SUREKHA. K*

INTRODUCTION

The International Court of Justice (ICJ) is the United Nations' principal judicial body (UN). The United Nations Charter established it in June 1945, and it commenced operations in April 1946. It is the only International Court with broad subject matter jurisdiction over disputes involving all United Nations members. The International Court of Justice (ICJ) is a significant political and academic institution. The International Court of Justice handed down one of its most significant decisions in 40 years in June 1986. It was without a doubt the most crucial for the United States. According to some observers, the choice was the best the quote had to offer, and it was made under tough conditions. Others claim that the ruling was the worst in the Court's history, and that it was doomed to ruin the Court's credibility as a judicial institution. Both sides agree, however, that the Court's ruling in Nicaragua was, without a doubt, the most important case it had heard in a long time.

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Facts of the case

On April 9th, 1984, the Republic of Nicaragua submitted the complaint to the International Court of Justice (ICJ)¹, alleging that, the United States, was using military force against Nicaragua in violation of International Law.² The Nicaraguan application stated in part that; The United States of America is using military force against Nicaragua and intervening in Nicaragua's internal affairs, in violation of Nicaragua's sovereignty, territorial integrity, and political independence and of the most fundamental universally accepted principles of international law. The United States has created an 'army' of more than ten thousand mercenaries installed them within more than ten base camps in Honduras along the border with Nicaragua. Trained them with arms, ammunition, food, and medical supplies, and directed their attack against human and economic targets inside Nicaragua.³

The question before the Court was-

1. Whether the International Court of Justice (ICJ) lacked jurisdiction to hear the case?

The United States claimed that the International Court of Justice added new jurisdiction to try to delay the case, claiming that the United Nations Charter on the Organization of American States gave it that authority. Are multilateral treaties necessary for the trial of a lawsuit since all treaty signatories are parties to the case? The United States asserted that the International Court of Justice lacks jurisdiction in this case due to the absence of other members. The US further contended that the provisions raised by Nicaragua had been reserved by them and that the International Court of Justice was not qualified to rule on them.

2. Does the United States' assistance for the Contras constitute interference with Nicaraguan sovereignty?

1 Four decisions of significance were issued by the Court: first was the order of 10th May 1984 concerning provisional measures of protection (Nicaragua Provisional Measures [1984] ICJ Rep.169); the second was the Order of 4th October 1984, concerning

2 Nicaraguan Application to the International Court of Justice of April 9. 1984, quoted in case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v/s United States) 1984 ICJ – (Judgement No. Nov. 26).

3 THOMAS J. PAX "Nicaragua v/s United States in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion?" Boston College of International and Comparative Law Review, Volume 8 issue 2 Article 7. Page no.471.

Nicaragua maintained that the United States' participation in creating the Contras and personally helping them in suppressing the Sandinista revolution was a clear interference in the country's internal affairs, and thus a breach of the United Nations Convention on the Rights and Duties of States. Apart from that, Nicaragua alleged that the US strikes on land, air, and sea were a breach of international land and sea regulations, as well as an act of aerial trespass that violated a number of international laws and treaties.

3. Has the US breached Article 2⁴ of the United Nations Charter, Articles 18⁵ and 20⁶ of the Charter on the Organization of American States, and Article 8 of the Conventions on States' Rights and Duties?

Nicaragua claimed that the US had recruited, trained, and equipped the recruits with weaponry in order to cause disruptions and incite violence in Nicaragua. This was an obvious breach of UN Charter Article 2(4), which prohibits members from using force against a state's political independence or territorial integrity. The US administration had conducted unauthorised military action against Nicaragua, which was a clear breach of Articles 18 and 20 of the Charter of the Organization of American States because it was not an act of self-defence.

In short, the reason for appearing before was that,

1. The question of use of force and aggression for the first time was square Lee put before the Court and considered in most sweeping way. this subject matter of great political and legal importance, belonging as it did to sphere which, up to that time, had been regarded in some circles as not fully suitable for adjudication.
2. Dispute concerning the relation between a 'great power,' a permanent, member of Security Council of the United Nations and a small State, situated in a 'sphere of influence' of former. Ultimately, the great power

4 All members shall reference in their international relations from the threat or use of force against the territorial integrity or political independence of any State, are in any other manner inconsistent with the purposes of the United Nations

5 The American states bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defence in accordance with the existing treaties or in fulfilment thereof.

6 All international disputes that may arise between the American States shall be submitted to the peaceful procedures set port in this Charter, before being referred to the Security Council of the United Nations.

was condemned for having committed unlawful acts. this would have happened on a Court of Justice not in dispute settlement schemes of political nature.

3. Finally, the judgments are striking in their scope and detail, treated with great care a host of questions of international law, placing Military and Paramilitary Activities in and against Nicaragua amongst the most densely reasoned and extensive analytical tools issued by the Court.

United States challenged the jurisdiction of ICJ when it was held responsible for Illegal military and paramilitary activities in and against Nicaragua. Though a declaration accepting the mandatory jurisdiction of the Court was deposited by the United States. It tried to justify the declaration in 1984 notification by referring to 1946 declaration and stating in part that the declaration “shall not apply the disputes with any Central American State...” Apart from maintaining the ground that the ICJ lacked jurisdiction, The United States also argued that Nicaragua failed to deposit a similar declaration to the Court. on the other hand,

On November 26, 1984, the ICJ completed the initial stage of the proceedings by deciding the admissibility and destruction issues in this case. despite the contention by the United States that it would not be subject to the Court’s jurisdiction, the ICJ declared that the application was admissible and that the Court had hear the case. This was an unprecedented departure from the established legal principles governing the ICJ’s jurisdiction that had been nurtured for decades. In this single dramatic move, the ICJ had a stretched its basis for jurisdiction far beyond limits upon which it had historically relied. In its judgment, the ICJ discussed the validity of declarations of consent to the compulsory jurisdiction of the Court made by both the United States and Nicaragua. search declarations made pursuant to Article 36(2) of the Statute of the Court,⁷ are necessary to enable the Court to invoke its compulsory give jurisdiction over a State.

⁷ The state parties to the present Statutemay at any time declare that they recognise as compulsory ipsofacto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning

- a. the interpretation of a treaty.
- b. any question of international law.
- c. the existence of any fact which, if established, would constitute a breach of an international obligation.
- d. the nature and extent of the reparation to be made for the breach of an international obligation.

Effect of Article 36(2) of Statute to the settlement of Nicaragua Case

Even in recent years, the United States has been and continues to be an active participant in cases before the Court, appearing before it more than any other state. On the other hand, the US has never been willing to yield to the Court's plenary authority and has consistently reacted negatively to court decisions that are detrimental to US interests. In response to the Court's decisions, the US refused to participate in the merits hearings in the lawsuit initiated by Nicaragua in 1984 and withdrew from the Court's compulsory jurisdiction in 1986.⁸

Effect toward the international Court of Justice

The competence of the Court depends on the 'will of parties' to the dispute. If there is a will of the parties to the dispute to settle that dispute applying to the Court, new quote will be competent to resolve the dispute.⁹ If, however, there is no any will, the Court cannot establish jurisdiction in the dispute. The appearance of Article 36(2) in the Statute if ICJ is obstacle to the admissibility of the Court compulsory jurisdiction. The case of Nicaragua has marked the effect of applying this provision where the USA refused to appear before the court based on this Article. this article in its nature excludes the competence of the Court due to the fact that it is unable to summon the country by force but depend on the will of the State. The ICJ has been criticised for its limited effectiveness and the many failures it has experienced. One or more of the involved parties refuse to accept the jurisdiction of the Court; this is the case of United States in case of Nicaragua, thus resulting in the Court being ineffective.¹⁰

Effect of Article 36(2) of the Statute of ICJ- State of Nicaragua

The State of Nicaragua as an applicant to the Court, it had also filed a request for indication of provisional measures Under Article 41 of the Statute.¹¹ The

8 DAVID TUYISHIME on "Critical Analysis on the ineffectiveness of ICJ in Settlement of Disputes between States: The Example of Nicaragua Case" E- Journal of Law, page no. 111

9 L. PAULUS, *Jurisprudence of International Court of Justice, and Lockerbie Cases: Preliminary Objections*, London, Oxford University Press, page no. 550. 1988.

10 *Supra* 7, page no. 112

11 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of the either party.

2. Pending the final decision, notice of measures suggested shall forthwith be given to parties and to the Security – Council.

present case concerns a dispute between the Government of Republic of Nicaragua and Government of United States of America. Contention of Nicaragua was that certain military and paramilitary activities conducted in Nicaragua and in waters of its coasts, responsibility for which is attributed by Nicaragua to the United States. By a letter from the United States Ambassador at Hague to the Registrar dated 13 April 1984, and in the course of the oral proceedings held on request by Nicaragua for the indication of provisional measures, the United States of America contended inter alia that Court was without jurisdiction to deal with the Application and requested that proceedings be terminated by the removal of the case from the list. Court is not precluded from adjudicating legal dispute presented in the Application by any considerations of admissibility and the Application is admissible.¹²

CONCLUSION

The case confronted the Court with a number of novel, sensitive, and difficult problems. In both fact and law, it was a case of first impression. Nicaragua has accused the US of employing force against it in the form of direct strikes as well as direct and indirect support for armed insurgencies within the country. It alleged that the US's economic boycott of Nicaragua, as well as US military aircraft's overflights of Nicaragua and military manoeuvres near the Nicaraguan border, were all violations of international law. Nicaragua further argued that the United States' creation of written instructions and materials for the revolutionary Contras was a breach of international humanitarian law. The United Nations Charter, several multilateral treaties, and general and customary international law were used to support these arguments. The Nicaragua issue has significant long-term ramifications for both the US and the Court.



¹² J.T CHRISTIAN, "The Statute of ICJ: A Commentary, London, Oxford University Press, 2012, page no.694.