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Issue I

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VIPS STUDENT LAW REVIEW

VIVEKANANDA INSTITUE OF PROFESSIONAL STUDIES

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Editorial Board

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EDITORIAL

We are happy to present the first issue of *VIPS Student Law Review*, Volume I, Issue I. It is an Annual blind peer reviewed journal that provides a platform to academicians, professionals and students to express their views on various dimensions of law. The Journal tries to bring to the fore front the important contemporary legal issues which are relevant both for academic and practical research. The *VIPS Student Law Review* (VSLR), Vol I, Issue I, has attracted high quality research articles, notes and case comments. On *call for papers,* we received more than 100 interests across the country from various academicians, legal professionals and law students as well. Therefore, in this issue we have made two sections, of which one section is exclusively secured for law students authors of various universities. In addition, the editorial board has been assisted by law students, VIPS. Thus, law students have played an important role in giving final shape to the present issue.

The articles selected in the Review are addressing various contemporary issues and perspectives. Shri Sudhir Kumar Jain, Principle Judge, Family court (West Delhi) in his article has examines the issues, challenges and solution for implementing Mediation in District Courts. According to him Alternative Dispute Resolution could be one of the best strategies for quicker resolution of dispute to lessen the burden on the courts. He has identified various challenges in mediation process and has suggested solutions for the same.

Mrs. V. SreeVidya, Senior Civil Judge, Chennai, has examines the judicial perspective of the theory of presumption as a Cannon of Justice. She has unfolded the critical nature of 'assumption" in the legal and judicial process. Mr Virek Aggarwal discussed the problem of men in matrimonial voilence. He suggested that men may also be protected by law in India in the cases of matrimonial violence. Adv. Saksham Bhardwaj, critically analyses the performer's rights under the Copyright Act, 1957. Further Dr. Archana Gadekar revealed an upcoming area of research regarding right to forgotten. She examines the conflict between freedom of speech and expression and right to privacy in this era of 'Google it and know'. Ms. Priya Bhatnagar, examines the regulatory challenges faced by the coal sector in India and the need for an independent regulator. Ms. Ankita Kumar Gupta, advocated the need for a gender neutral approach on rape laws in India along with effective measurements that should be taken against false allegations of rape. Ms. Kanchan Lavania, examines the impact of globalization on achieving the sustainable development goals of decent work and economic growth.

In the student section, Ms. Neha Jain, in her article examines the plight of child labour in India. In the research article authored by Diksha Dubey, she critically analyses the reservation in private sector and right to employment. Ms. Udhaya Karthika and Ms. Tanisha Verma examines the DNA Technology(use and application) Regulation Bill, 2019 and its effectiveness in upholding the principles of privacy.

Under Case Comment, two case comments are given. In the first case comment, Indrajeet Dey, critically examines *Dr. Subhas Kashinath Mahajan* v. *State of Maharashtra* AIR 2018 SC 1498. In the second case comment, Adarsh Pandey and Arunaditya Singh Parihar examines landmark case of *Shayara Bano* v. *Union of India* AIR 2017 SC 4609.

At this juncture I would like to acknowledge the efforts of core student team assisting the editorial board of VSLR. The publication of the first volume of this journal has been made possible by the hard work by the following students:

Priyanshi, 5th Year, BALLB(H), (enrollment no. 16217703815)
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Anish Sethi, Alumni, (enrollment no. 08117703814)
Garima Jindal, Alumni, (enrollment no. 31817703814)

I thank our reviewers for reviewing the articles timely and for giving their inputs. Special mention to the Registrar office, VIPS and their staff for their support. I am thankful to the Editorial committee for releasing the issue in time.

Dr. Rashmi Salpekar
Prof. & Dean, VSLLS, VIPS
Editor

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Case Comments

Implementation of Mediation in District Courts: Issues, Challenges and Solutions

Sudhir Kumar Jain*

Abstract

Justice Delivery System in India is described by technical procedures with characteristics of the adversarial system with accompanying delays, arrears and taxing cost. Justice delivery system reliance on win-lose situation leads to repeated use of the legal process. The unwarranted delays in dispensation of justice undermine the credibility of entire justice delivery system of the country. It leads to instances where people are settling disputes on their own, resulting in emergence of criminal syndicates and mob justice indicative of loss of confidence of the people in the rule of law and constitutional mechanisms. The adversarial system may be appropriate method where authoritative interpretation or establishment of rights are required. To make rule of law a reality, assurance of speedy justice should be extended to citizens. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays. Justice Delivery System in India is under stress mainly because of the huge pendency of cases in courts. It emphasizes the desirability to take advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial. In a developing country like India with major economic reforms, Alternative Dispute Resolution Mechanism could be one of the best strategies for quicker resolution of disputes to lessen the burden on the courts and to provide suitable mechanism for expeditious resolution of disputes.

Keywords: *Mediation, District Courts, ADR Mechanism, Arbitration, Conciliation, Lok Adalat*

* Principal Judge, Family Court (West), Delhi

INTRODUCTION

In Indian Legal System, appropriate methods of disputes resolution are available, such as arbitration, conciliation, mediation and Lok Adalat etc. These methods are less formal, encourage disputants to communicate and participate in the search for solutions, focus better on the root causes of the conflict, salvage relationships, and have significant savings in time and cost.

Mediation is one of the tools to resolve a dispute by direct negotiation with the opposite party. Mediation in comparison to a lawsuit is quick, private, fair and inexpensive. Mediation is a different paradigm and path from litigation which focuses on the past, establishing blame and liability and a win-lose results. In mediation, the emphasis is on the future cooperation and direct communication with objective of sustainable solutions with win-win situation for all parties.

In India, after the incorporation of Section 89 in Code of Civil Procedure, 1908, mediation in the legal way, was first introduced. Mediation was stated to be a new concept in justice delivery system for the resolution of the disputes outside the traditional court mechanism. When the section 89 was introduced, concept of mediation was not known, trained mediators were not available and mediation centres were not established in the judicial districts.

The Supreme Court of India has constituted Mediation and Conciliation Project Committee (MCPC) on 09.04.2005. This committee in its meeting held on 11.07.2005 had decided to initiate a pilot project on Judicial Mediation in Delhi. Mediation as such was introduced in justice delivery system. The 30 Judicial Officers were imparted 40 hours training on *"Techniques of Mediation"* by the experts invited from ISDLS. In Delhi District Courts, formal Judicial Mediation was started w.e.f. 13.09.2005 with six judicial officers functioning as trained mediators. The encouraging success on mediation leads to the establishment of mediation centres District Courts. In Delhi till 31.08.2018, 2,32,611 cases have been referred for mediation, out of which 1,65,228 cases have been settled including 36,342 connected cases.

Despite success of Mediation, many challenges have come into path of success of mediation. The exposure of mediation to different stakeholders in justice delivery system was limited. The Advocates, Judicial Officers and the litigants were apprehensive about the future relationship between the mediation and adjudication. There was a cynicism over the application of mediation to the variety of legal disputes outside commercial disputes.

The Judicial Officers were not aware about the workplace mechanism for the referral of

the cases to Mediation. The adequate trained mediators were not available. Mediation Centres was not properly established with adequate infrastructures. Mediation was taken as to compromise with settled values and principles of Justice Delivery System.

Issues and Challenges

There were various issues and challenges in the implementation and establishment of mediation at institutional level. The various issues and challenges in implementation and establishment of Mediation with proposed solutions are as under:-

Introduction of Mediation in Judicial System

The accepted way of the dispute adjudication was the court litigation although Section 89 was incorporated in the Code of Civil Procedure, 1908 and became operative w.e.f. 01.07.2002. The utility and application of mediation in dispute resolution other than dispute adjudication was not known in Courts. The Judicial Officers perceived Mediation as undermining of their authority to adjudicate. Lawyers perceived mediation as dilution of their professional work and alarming drop in revenue. There was lot of resentment among members of Bar regarding the introduction of mediation. The litigants were apprehensive of utility of mediation in resolution of dispute which was to be conducted by a non-judicial person. So, introduction of mediation as a tool of disputes resolution was one of the challenges in implementation of mediation.

Proposed Solution

i. The sensitization/awareness programmes should be conducted for the members of Bar and potential litigants to generate acceptability and confidence in mediation process by highlighting the benefits and utility of mediation as a viable and suitable alternative to dispute adjudication.

Selection of Proposed Mediators and Training in 'Concept and Techniques of Mediation'

The availability of trained mediators was a substantive problem in implementation of Mediation. The selection of mediators and their training is another challenge which required urgent attention and solution. If the mediation is to be introduced and established in justice delivery system, the proper selection and training of proposed mediators is mandatory.

Proposed Solutions

i. The proposed mediators should be both Judicial Officers and Advocates. The participation of Judicial Officers at threshold gives credibility to the system.

ii. The eligibility criteria for section of potential mediators must be systematic and regulated. The judicial officers and advocates having positive mind-set for mediation should be selected as mediators.

iii. The strict guidelines should be laid down for process of selection of mediators.

iv. There should be adequate number of trained Mediators in a mediation centre but there should not be surplus Mediators.

v. Proposed Mediators must be neutral and must possess common understanding of human nature, behaviour and psychology besides having communication skills for better output qualitatively and quantitatively.

vi. The training in the "Concept and Techniques of Mediation" must be of high quality and as per international norms and standards.

vii. The training tools and methodology must match with international standards but suitable and modified as per local needs and requirements. The specialised topics like understanding of human psychology, mediation and judicial reforms, mediation and spirituality, mediation jurisprudence and mediation management should also be included in training curriculum.

Establishment and Management of Mediation Centre

Another big challenge for introduction and implementation of the mediation was the establishment of mediation centre and its management. The organizational governance and structure of mediation centre are crucial for its efficiency at functional level. The crucial factors are:

i. Adequate infrastructure

ii. Appointment of Coordinator

iii. Posting of mediation friendly supporting staff

iv. Mediator's own Commitment and positive Behaviour towards mediation

Proposed Solutions

i. The sufficient financial assistance for the establishment of the mediation centres.

ii. Periodical evaluation of functioning of mediation centres.

iii. Periodical review of performance of Mediators.

iv. Mediation centre should be given distinct identity from Legal Services Authority. However, there should be proper coordination and understanding between Legal Services Authority and Mediation Centre.

v. An efficient coordinator is backbone of a mediation centre. A full time coordinator preferable a senior Judicial Officer should be appointed in Mediation Centre to coordinate between the Referral Judges and Mediators and to regulate affairs of mediation centre and flow of cases.

vi. Proper infrastructure in a mediation centre.

vii. The staff/officials posted in the mediation centre should be litigants friendly. The sensitization programme should be conducted regularly to make them litigants friendly and to develop positive mind-set necessary for the proper functioning of the mediation centre.

Referral of Suitable and Adequate Cases for Mediation

The mind-set/attitude of judicial officers needs to be changed for referral of cases for mediation. They should be motivated to overcome psychological barrier of opposing mediation, and should refer adequate cases for mediation. If adequate cases are not referred for mediation, it will render mediation centres and mediators non-functional. There should be sufficient work for mediators.

Proposed Solutions

i. The sensitization Programmes for Judicial officers to sensitize them regarding identification of cases suitable for mediation and to refer adequate cases for mediation.

ii. Monitoring of referral of cases for mediation per Judge/per year.

iii. There should be regular interaction between Mediators and the Referral Judges for better output of mediation qualitatively and quantitatively.

iv. Unfit cases should not be referred for mediation.

Awareness about Benefits and Utility of Mediation

The judicial officers and advocates are basically trained and expertise in adversarial system. To implement mediation, the issue of awareness is a big challenge for concerned authorities.

The need of spreading and generate proper awareness about mediation process and its benefits among various stakeholders required to be addressed immediately. The lack of proper awareness about the mediation process and its benefits among different stakeholders such as Judicial Officers, Advocates, Litigants, etc. can render the institution of mediation futile and non-operational. The litigants should be encouraged to take recourse to mediation for resolution of disputes in place of court litigation. The proper and systematic awareness programmes shall help to counter the resistance to mediation and to change the negative perception of different stakeholders in justice delivery system about the utility of mediation.

Proposed Solutions

i. In every judicial district, awareness programmes highlighting its benefits must be conducted urgently and promptly.

ii. Awareness among judicial officers, advocates, litigants etc. should be generated to the fact that Mediation is an independent method of disputes resolution apart from court adjudication.

iii. Awareness camps should be organized periodically about mediation and its benefits.

iv. The senior members of the Bar and executive members of District Bar Association should be involved in the awareness programmes.

v. The awareness about mediation may be generated through documentaries, posters, hand-outs, pamphlets, etc.

vi. The pamphlets highlighting the mediation process and its benefits should be annexed with the summons of the case at the time of service.

vii. Awareness among the advocates should be generated that mediation does not adversely affect their legal practice and professional income.

Credibility and Acceptability of Mediation

To establish credibility and acceptance of mediation is another issue which needs urgent attention. The litigants, lawyers and judicial officer/judges should accept mediation as a part of judicial and legal work. The different stakeholders must have confidence in the system of mediation and in the mediator as a person of integrity, free of prejudice and pressures.

Proposed Solutions

i. Mediation spirit must be developed among different stakeholders of justice

delivery system.

ii. The Judicial Officers must consider mediation as a part of dispensation of judicial work.

iii. Apprehensions that mediation postulates destruction of the traditional sources of work for the legal professionals should be dispelled.

iv. The lawyers should be sensitized to take mediation as a source of additional income as lawyers can also function as professional negotiators in mediation process for the parties.

v. The Litigants should be made to understand that mediation is better option than litigation.

vi. The message should be spread that mediation provides effective intervention before disputes assume formal legal character of a court case.

Upgrading of Standards of Mediation and Mediation Practices

In future, upgrading of standard of mediators and mediation process would be a big challenge. To match with international standard, constant upgrading of mediators and mediation practices would be required.

Proposed Solutions

i. Refresher Courses/Advance Courses/Orientation Programmes for Mediators should be conducted periodically to refine and enhance their functional knowledge and skills.

ii. Constant up gradation of infrastructure in mediation centres keeping in view the anticipated increase in cases referred for mediation.

iii. The litigants may be asked to give option for mediation by filling a simple form at the time of filing of first pleading.

iv. Fee of Advocate Mediators must be reviewed periodically.

v. Online/E-mediation should be developed and encouraged.

vi. The government litigation should be encouraged to be resolved through mediation.

vii. Mediation must be set up as an independent institution of Disputes Resolution.

viii. Code of Conduct for mediators must be developed.

A Prolegomenon to Presumption as a Canon of Justice: The Judicial Perspective

V. Sree Vidya*

Abstract

Presumption as a Canon of Justice is a theory, which cannot be avoided, and has applicability in the day to day proceedings of every civil or criminal court. The legal fraternity including the judiciary today look up to presumption as only an underdeveloped theory and have the fear of misinterpreting the theory of presumption with all the types and methods of presumption as they perceive. Presumption, being an exception to the law of evidence, is treated as the same by different countries which are developing in the field of law, as a mysterious theory, and many are still confused about the applicability of conclusive proof as against presumption.

This article has been mooted for decongesting the theory of presumption, demarcating the concept of burden of proof, and conclusive proof from statutory presumption of law. It is also attempting to differentiate the presumptions of fact with the presumption of law. It deals with the appreciation of evidence when conclusive proof is offered.

***Keywords**: Presumption, Pre-emption, Justice, Evidence, Presumption theories*

Introduction

Empirical research shows that judges have sometimes dealt with presumption on a sarcastic note. Justice Scalia of the Supreme Court of California, was ranked number one for his sarcasm, "Well, duh!" was his usual word, and, the second reaction would be "Oh, really? Well, can you prove it?" was the most asked question.[1] Sarcastically, how can one prove presumption? Can proved pre-emption be also termed as presumption? The Indian Evidence

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1 Hasen, Richard L., *Essay: The Most Sarcastic Justice* (February 8, 2015). 18 Green Bag 2d, 215, 2015; UC Irvine School of Law Research Paper No. 2015-11. Available at SSRN

Act, 1872 deals with presumption under various sections that need not be mentioned here, but presumption can be termed comprehensively as an exceptional exception to the Law of Evidence itself. Presumption is a Canon of Constructive Law, and on a shorter note presumption is a deemed assumption and on the other hand presumption can be termed as prevention and is a corollary to presumption.

Presumption and its Connotation

A presumption is a supposition, opinion, or a belief that is previously formed. In *Fanshow v. Rotterdam,* it was observed that 'Presumption' is the evidence of things not seen; where, from an apparent effect, you may infer a probable cause'[2]. "Though presumption is that, what may be doubted of, yet it shall be accounted as a truth, if the contrary be not proved."[3]

A presumption can be termed as an inference about the existence of a fact that is not actually known and has arisen from its connection with another fact, which is known. It is a conclusion that is drawn from proof of facts or circumstances, and stands as an establishing fact until it is overcome by a contrary proof. As observed by Abbott, C.J., in *R v. Burdett*, "A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged but of which there is no direct proof"[4]. Therefore it can be observed that the presumption of any fact is and would be an inference of that fact from others that are known.

"The word presumption, inherently imports an act of reasoning a conclusion of the judgment and it is applied to denote such facts or moral phenomena, as from experience we know to be invariably, or commonly, connected with some other related facts."[5] A presumption is a probable inference that common sense draws from circumstances that usually occur in such cases. The slightest presumption is of the nature of probability, and there are almost infinite shades from slight probability to the highest moral certainty. A presumption, strictly speaking, results from a previously known and ascertained connection between the presumed fact and the fact from which the inference is made.[6]

2 *Fanshow v. Rotterdam* I Ellen, 284

3 *Presumption,* Tomlins Law Dictionary

4 *R. v. Burdett*, 4B. & Aid, 16

5 Sir Alfred Wills,*" 'Wills' Principles of Circumstantial Evidence" (1937)* A book on Circumstantial Evidence

6 *M S Narayana Menon v. State of Kerala and Anr*, AIR 2006 SC 3366

Presumption of Fact, Presumption of Innocence and Presumption of Law: The most confused concepts of law

A *'Presumption of fact'* is an inference of the existence of a certain fact arising from its necessary and usual connection with other facts which are known. A presumption of fact is an inference, which a reasonable man would draw from certain facts, which have been proved. Its basis is in logic, and its source is probability. A presumption of fact is a logical argument from fact to fact; or, as the distinction is sometimes put, it is an argument, which infers a fact otherwise doubtful from a fact, which is proved. Hence, a presumption of fact, to be valid, must rest on a fact in proof.[7]

A *'Presumption of Innocence'* means that every accused is to be presumed innocent until proved guilty. The legal presumption of innocence, which arises in favour of the accused on the trial of every criminal case, is to be regarded by the jury as a matter of evidence in favour of the accused, introduced by the law in his behalf.

A *'Presumption of law'* is a presumption that is artificially made by annexing a rule or legal incident to a particular fact to be proved. A presumption of law is a judicial postulate that a particular incident is universally assignable to a particular subject. A presumption of law is conclusive in nature and is an inference, which the Court draws from the proof, which no evidence, however strong, will be permitted to overturn. Legal presumptions are artificial rules established by law on consideration of public policy or public convenience, against which no evidence is received. Presumptions of law are usually founded upon reasons of public policy and social convenience and safety, which are warranted by the legal experience of Courts in administering justice. Some of these presumptions have become established and conclusive rules of law, while others are only prima facie evidence, and may be rebutted.[8]

According to the Harvard Law review[9], a detailed consideration of presumption is a herculean task, which is unprofitable. There are many courts, which have not differentiated or demarcated the connivance between the presumption of law and the presumption of fact. Until this day, disputable presumptions of law have always confused the judiciary in undisputed presumption of facts. Simply speaking synonymous to presumption, "it is just a rule of law and just shall draw a particular inference from a particular fact or from

7 The Legal Concept of Evidence, First published Fri Nov 13, 2015, Stanford Encyclopedia of Philosophy

8 Presumptions; Are They Evidence? J. P. McBaine California Law Review Vol. 26, No. 5 (Jul., 1938), pp. 519-563

9 *Harvard Law Review, Vol.3. 141-166 No.4 (November 15, 1889).* Available online at https://www.jstor.org/stable/1321688?seq=1#metadata_info_tab_contents Accessed on 05.04.2018

particular evidence, unless and until the truth of such inference is disproved", are the invincible words of Justice J.F. Stephen in an introduction to the Indian Evidence Act in 1872.

Hence, accordingly, one can understand that law has not mandated any rule for any inference, to be presumed by any Court of law. "The word 'evidence' in legal parlance includes all the means by which, any alleged matter of fact, the proof of which is submitted to investigation, is established or disproved." These are the words of Green Leaf in his opening sentence of Global Treaties, but Sir Henry Maine quotes that, "the English law of evidence would probably never come into existence but for one peculiarity of the English judicial administration, judge of law, or judge of fact or of the judge from the Jury." Of course, evidence is only a set of rules, which persuade the court of law to do some investigations regarding question of fact and question of law. Hence where presumptions are concerned, each Court of law is an investigating officer itself without restricting the process of reasoning and arguments. Hence, presumption can also be qualified as a process of natural reasoning. In *re Brown v. Foster*[10] "inference is supplied otherwise than by reasoning or by statements, whether oral or written and it seems impossible to deny to this, in the name of evidence, and, this is what Bentham called real evidence - valuable discrimination, when it is limited to that which is presented directly to the senses of the Tribunal."

Testing Presumption in the Touchstone of Logic, Assumption and Reasoning

Law has prescribed neither any test of relevancy nor any test for presumption, and refers only to the test of logic and assumption with use of reasoning. That any test of reasoning is known to the judiciary is also presumed, and assumed to have been sufficiently made known, is the concept. The simple role of exception to presumption is whether any presumption is logically inadmissible or whether the facts are logically admissible. The rules of exclusions with exceptions are presumption so that the primary exceptions to the rules now become law. In law hearsay, evidence is excluded but, still it can be admitted on the proposition, when it has a logical connection, relevancy and admissibility with the chain of circumstances so relied upon with the presumption. Thus totally summing up we can treat the term 'Evidence', as an ambiguous term only. Hence, any substantial law or

10 *Brown v. Foster, In Re*. 113 Mass., at page 137, a basis of inference is supplied otherwise than by reasoning or by statements, whether oral or written; and it seems impossible to deny to this the name of 'evidence'.

pleading with any proposition of the substantial law must be proved with the evidence, according to the procedural law. It means, if one is having a wrong conception of the standard of diligence, which has to be confirmed to, in evidence then, that determination of controversial diligence, would make you clear about the proposition of the substantial law taken by the person and the true proposition of evidence, which has to be logically treated as evidence only. Thus, evidence as a matter of ambiguity, can be stated to be a logical inference of the proof of existence of ultimate facts.

Is presumption a disguised form of evidence?

It can be said that the rule of presumption in cases of paternity, will be that, an existing marriage is a conclusive proof of legitimacy. Even if the mother remained unmarried, when the child was born in continuance of a valid marriage within 280 days, then, it shall be a conclusive proof that he is the legitimate son of that man in marriage, unless it can be shown that the parties have had no access to each other when the child had been begotten. This is propounded in Section 112 of the Indian Evidence Act[11] and of course protects the child from being termed as a illegitimate. In the view of the legislators, it is not in the interest of a person being termed as an illegitimate who is being protected but it is the chastity of the women which is being tested and protected by the lawmakers. Given the constant, polygamy is illegal and monogamy is the rule of law, chastity being presumed, illegitimacy prevented, and presumption as a rule of evidence displays role of the society as well.

Can conclusive presumption be termed as a good presumption?

A cross-sectional study on the theory of presumption puts in line the prima facie rules, which lead to evidentiary values in substantive law and that which form the fundamental proposition of the law as well. Mostly, substantive law is always aimed at interpreting the conduct of a man with the society, or in the personal perspective of behavior of men with each other. Preponderance of probability inferences the existence of the facts, which become the substantive law itself. The degree of evidence becomes the degree of proposition. There are cases in the Negotiable Instruments Act, 1881 also, which mandate that the judges shall draw a particular inference as a mode of proposition but, the said inferences can only be a presumption of fact under the garb of presumption of law. Section 113 of the Negotiable Instruments Act, 1881,[12] propounds the court to presume consideration to be legal and valid

11 Section 112, Indian Evidence Act, 1872

12 Section 113, Negotiable Instruments Act, 1881

in the light of section 9 Negotiable Instruments Act, 1881,[13] but whether this proposition acts as a fact under the garb of legality, is subject to discussion and clarification.

The General Principles regulating 'the Burden of Proof'

The section 102 of the Indian Evidence Act, 1872[14], reiterates that the burden of proof in a suit or proceeding lies only on that person, who would fail if no evidence at all were given on either side. It is always asserting the affirmative, who has the burden to prove, the facts, and the general rule of evidence is that, if in order to make out a title, it is necessary to prove the negative, if the assertion of a negative is essential, then the proof of such assertion rests upon the party contending the affirmative, for in the rules of evidence we see that affirmative or negative are, after all relative and not absolute. This general rule is the test of evidence and there are other rules also like, which party would badly suffer if evidence were not let in. If evidence is not let in, then, it becomes *onus probandi*, the distinct meaning of which is that if no evidence is given by the party, on whom the burden is cast the inference must be found against him. *Onus probandi* is thus collateral with statutory presumption. Presumably, this can be said as a reason why burden of proof has not been defined in the Indian Evidence Act, 1872.

Hence, strictly saying, burden of proof according to Section 102 of the Indian Evidence Act 1872 is conceptually on a different proposition with Section 105 of the Indian Evidence Act 1872.[15]

The burden of proof as seen in section 102 of the Indian Evidence Act, 1872 lies on the party who would be unsuccessful first if no evidence were given and this for the test of burden of proof, then the burden cannot remain constant but must shift as soon as he produces evidence which prima facie gives rise to a presumption in his favour. It may shift back if the rebutting evidence produced by his opponent preponderates. Rebuttable presumption clearly is rule of evidence effect of shifting the burden of proof and it is hard to see how unconstitutional one has the opportunity to displace presumption by leaving evidence.[16]

Statutory presumptions are in other words the legal way of saying that no one shall be entitled to give evidence of any fact without first showing that he is legally entitled to do so. It means the person first must have a burden of proof to prove any assertive proposition,

13 Section 9, Negotiable Instruments Act, 1881

14 Section 102, The Indian Evidence Act, 1872

15 Section 105, The Indian Evidence Act, 1872

16 *Sodhi Transport Co. & Anr. v. State of U.P. & Anr*, 1106 (1986) 2 SCC 486.

permitted by law. Just as how rebuttable presumption shifts a burden of proof, similarly, burden of proof may also be shifted by evidence raising a prima facie case. Presumptions of law are rebuttable, but presumptions of fact are stronger and the parties by every piece of evidence must be strong enough to establish negative of the negative.

Specific and varied cases of presumption in other laws

As observed in *Ramanathan v. Bank of Bengal*[17] ordinarily a person who has the title, carries with him the presumption in his favour and hence, when adverse possession is asserted, loss of title, by the plaintiff to the person in adverse possession is proved by the person in adverse possession. An agent carries with him the presumption of agency, the burden of proving the authority of the agent is the only on the plaintiff. Also as observed in *Kalyan v. Ahmed*[18] in case of appeals, it is very well settled that the burden of proof that the judgment appealed from is wrong rests upon the appellant.

The Concepts of Presumption of Payment, Presumptive Damages, Presumptive Evidence and Presumptive Notice

There is a presumption of law that a judgment on which no execution has been issued or attempt is made to enforce the same for over 20 years has been paid. Mere lapse of time less than the period prescribed by the statute of limitation creates no *'presumption of payment'* and hence a presumptive fact is that which may be assumed valid or true until the contrary is established. Just as, a presumptive heir is one presumed or expected to be heir; presumptive evidence founded on some presumption or supposition; so likewise presumptive reasoning; but a presumptuous man, a presumptuous thought, a presumptuous behavior all indicate an unauthorized presumption in one's own favour. Presumptuous is a stronger term than presuming because it has a more definite use; the former designates the express quality of presumption, the latter the inclination.

The term *'presumptive damages'* is used to designate those damages that are allowed to the victim by way of imposing a punishment on the wrong-doer. It is synonymous with the terms 'exemplary', 'vindictive', and 'punitive' damages.

The term *'presumptive evidence'* consists in the proof of minor or other facts incidental to or usually connected with the fact sought to be proved, which, when taken together, inferentially establish or prove the fact in question to a reasonable degree of certainty. The

17 *Ramanathan v. Bank of Bengal* 7 BUR, LT 126: 23. IC. 516

18 *Kalyan v. Ahmed* 38 CWN 1157 PC

term *'presumptive evidence'* is sometimes used to designate what is ordinarily known as circumstantial evidence, and consists of evidence drawn by human experience from the connection of cause and effect and observation of human conduct.

'Presumptive notice' is where the law imputes to a purchaser the knowledge of an act of which the exercise of common prudence and ordinary diligence must have apprised him and that causes, the difference between *'presumptive notice'* and '*constructive notice'*. The former is an inference of fact, which is capable of being explained or contradicted, while the latter is a conclusion of law, which cannot be contradicted, and thus presumptive proof is not positive proof, but sufficient to raise a presumption in favour of the fact alleged.

The Abortive Rule of Presumption

The characteristic of presumption is that, a logically evident rule of substantial law in a subsidiary proposition is the process forever discovering the identity legally and practically. Hence, it can be said that the difference between the enacted rule of presumption and the judicial rule is only in the development of the judicial rule and the ground rules are those which must be remembered and applied in legal discussions.

The Bursting of the Bubble Theory

According to the *Corpus Juris Secundum*[19], presumptions of nearly 113 types have been classified. The bursting of bubble theory is one such theory, which can be applied in Indian law also. It can be said that, here in India, the bubble theory may have been termed as the preponderance of probability. Considering the issues of self-defence, *mens rea*, insanity etc., as defence are the probabilities, which would burst the bubble of the statutory presumption. Affirmative defence or even the burden to persuade the prosecution to preponder probability to a certain degree would be the bursting bubble theory. Many of the legal professionals in Indian would have never even heard about the bursting of the bubble theory.

19 *Corpus Juris Secundum: A Contemporary Statement of American Law, As Derived From, Reported Cases and Legislation, Volume 38A*- It is an encyclopedia of United States law at the federal and state levels. It is arranged alphabetically, into over 430 topics, which in turn are arranged into subheadings. As of 2010, CJS consisted of 164 bound volumes, 5 index volumes and 11 tables of cases volumes.

Presumption in civil cases

The Nebraska Law Review on Presumption[20] has dealt with presumption in civil cases in detail. It states that, "the effect of presumption is that the mission is impossible for the party against whom it is directed and the burden of proving the non existence of the presumed effect is more probable than the existence," and this is most apt and direct definition to presumption.

Case study on Rebuttable Presumption

The most appropriate and earliest case study on presumption is that of *Balfour v. Balfour*[21]. The brief facts of the case is that, Mrs. and Mr. Balfour were married in 1900, and they spent the first 15 years of their marriage in Ceylon where Mr. Balfour was employed as a civil engineer and they went to England from November 1915 to August 1916 on a vacation. Towards the end of the vacation Mrs. Balfour received an advice that she remain in England for treating rheumatic arthritis, and on August 8, 1916 before returning to Ceylon, Mr. Balfour agreed to send Mrs. Balfour a monthly amount of Rs.30 as an allowance, until she could join him in Ceylon. Mr. Balfour had to be separated later on.

The issue was whether the agreement between Mrs. and Mr. Balfour which was reached on 8 August 1916, was legally binding or not. Lord Atkin in his opinion had signified the plaintiff intention to establish a contract was not established. He also ruled that such arrangements made in between husband and wife are arrangements in which there are mutual promises or in which there are reservations found within the definition. Significantly, this decision established that, there is a rebuttable presumption in relation to agreements of a domestic nature that parties did not intend to create legally enforceable agreement. It was held that there was a rebuttable presumption embodied in the arrangement. This is the caption of cases of business transactions even in the Negotiable Instruments Act, 1881, today being the onus to establish on the party alleging that the legally binding contract exists to abort the presumption.

20 John E. North, *Presumption Rules Try to Indicate if Fact Can, Should Be Inferred, (1974)*. Nebraska Law Review on Presumption, Volume 53, Issue 3 Available online at : https://digitalcommons.unl.edu/nlr/vol53/iss3/4

21 *Balfour v. Balfour* (1919) 2KB 571

Criticism to the Theory of Presumptions

Presumption of Legal Knowledge

It is often said that the *'presumption of legal knowledge'* or knowledge of the laws of the state in every citizen is a positive rule of law, and applies to all cases where acts are knowingly done which are expressly forbidden by law, and gives rise to a conclusive presumption or criminal intent. If the word 'conclusive', in this connection, means 'irrefutable' then such presumption is very unreasonable when applied to all criminal charges, and is not justified to that extent. "No man knows all the law. Judges differ in their legal decisions, and lawyers are continually discussing in the Courts doubtful and controversial questions of law. The presumption of legal knowledge is a general rule, and not accurately defined as to the extent of its application. One cannot regard it as a positive rule of law, but as a very strong presumption, subject to some reasonable qualifications, in criminal trials where the life and liberty of the citizen are involved. In such cases the law should be literally construed, so as to give effect to all of its beneficent provisions, to avoid conflict of rules of law and secure the citizen against anything that would be unjust or oppressive. The beneficent presumption of innocence, and the doctrine of a reasonable doubt which is so important in a trial by jury would be of little benefit to a person on trial for crime, if the mere proof of an unlawful act, knowingly committed by him, was received in a Court of justice as conclusive evidence of guilt." Presumptions are the canons of law involving reasoning and augmentation, and one can say that presumptions are grounded on general experience and probability of some kind. These are in fact prima facie assumptions. The mechanism of presumptions has been dealt with Judge Maxey. He has suggested a rational creation of presumptions and division of presumptions into functional categories.

"Presumptions arise as follows: They are either (1) A procedural expedient, or (2) A rule of proof production based upon the comparative availability of material evidence to the respective parties, or (3) A conclusion firmly based upon the generally known results of wide human experience, or (4) A combination of (1) and (3)"[22]

Presumptions in the judicial process, is a law making tool and power of judges includes the authority to make law. The law made by the Judiciary, with presumptions indicate say that presumptions are now not with regard to the problem of proof, but are rather outmoded myths in law. It is law that a child under the age of 7 is conclusively presumed to be

22 Ernest f. Roberts, *An Introduction To The Study Of Presumptions,* Villanova Law Review, Vol. 4 Summer, 1959 Number 4, Cornell Law Faculty Publications. Paper 1260 available online at http://scholarship.law.cornell.edu/facpub/1260.

incapable of doing any crime and the child cannot be fully convicted for grave crime but these are pseudo procedural in nature, which have disguised rules of substantive law and in fact has nothing to do with presumptions. In criminal cases, there is a presumption of innocence.[23] In fact it is not a presumption at all but a method of fixing an accepted state of mind, which is orienting the mind of the court to do its duty only. The court is not supposed to draw any favorable inference from the fact before the court. In cases where persons go missing that the person has been in continuous absence away from home for 7 years and has not been and heard of by persons who would naturally have received news from him then the law will create a presumption that the person is dead and hence presumption also is a generator of proof for the court.

Conclusion

Presumption has always been perplexing and conflicting in many logical inferences. Judicial recognition of such logical inference is only resumption. Courts have been now burdened with the concept of presumptions without having been properly explained and hence statutory presumptions have been mandatorily followed in many courts of law. The courts must hold in mind substantive criminal law and the substantive laws which are necessary to the strength of a conviction, and hence the necessity for this critical review on presumption. Presumption as a canon of justice needs improvisation.

23 *Dataram Singh v. State of Uttar Pradesh & anr.* Criminal Appeal No. 227/2018

PROTECTIVE LEGISLATION FOR MEN IN MATRIMONIAL VIOLENCE- NEED FOR LAW IN INDIA

Virek Aggarwal*

Abstract

Several laws, in India and around the world, have been designed to provide legal protection to women, who have been perceived as a vulnerable group. In order to confer protection to women in disputes arising out of matrimonial relationships, particularly domestic violence and cruelty, India enacted the Protection of Women from Domestic Violence Act, 2005 and amended the Indian Penal Code in 1983 to insert section 498A, to make cruelty against women punishable. The above legislations are great examples of the legal provisions enacted for protection of women. However, the vital question which arises for consideration is whether men can be "victim" to the above offences in which protection has been afforded to Women exclusively. There is not a single law for protection of Men in India in the field of matrimonial violence. Further no research has ever been conducted to assess the extent of the crime against men in this field. Having no law to address a particular offence is a violation of the right to legal remedy. This paper focuses on the need for creation and implementation of legislations for protection of men in India against domestic violence and cruelty, parallel to those enacted for women.

INTRODUCTION

The Constitution of India aims to secure justice for all, which includes providing legal remedy against any wrongful or un-just act across all cross sections of society. However, in recent times, there have been infrequent incidents where men have been the 'victim' of emotional and mental harassment in matrimonial cases, yet there is no legal remedy protecting men and enabling them a legal action in such situations. While laws have been created to rightfully protect women in such incidents, men are still deprived of the

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appropriate legal protection which has led to incidents where the husband have committed suicide due to harassment by wife or her family members. Such extreme situations may be rare, but cannot be completely ruled out. The idea of protective rights for men has seldom been perceived as a legislative lacuna.

Women in India, unfortunately, carry a long history of reported cases of violence against them. Indubitably, protective legislations are positive steps aimed at empowerment of women. But legal issues relating to men cannot be completely ignored as men too, can be victim to violence by the other party to the marriage. In India however no step has ever been taken towards enacting protective legislation for men, let alone any study in this field has been conducted at the national level. Since no one has ever conducted a study in this area to gather data, comparable to those for women, this lacks sufficient statistics and gets washed under other general legal framework.

Matrimonial relation is a relation of union of both the sexes. An act of aggression can be committed by either side. It can assume the shape of domestic violence, in the nature of economic deprivation or physical or psychological torture, or it may amount to cruelty to the extent of harassment which drives the other to commit suicide. This paper is divided in 2 parts. The first focuses on the need of law on Domestic Violence for men in India, and the other focuses on the need for law on cruelty on the husband by the wife and her relatives in India.

Domestic Violence against Men in India

A "domestic relationship", as per the Protection of Women from Domestic Violence Act, 2005[1] means "a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family". *Domestic Violence* as per the aforesaid Act means[2] "any act, omission or commission or conduct of the respondent in case it - harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or otherwise

1 Section 2(f) of the Protection of Women from Domestic Violence Act, 2005, (Act No. 43 of 2005)

2 Section 2(g) read with Section 3 of the Protection of Women from Domestic Violence Act, 2005, (Act No. 43 of 2005)

injures or causes harm, whether physical or mental, to the aggrieved person." However the Act has been enacted specially for protection of women, and therefore the "aggrieved person" in the above Act is limited to women victims, and defined as "any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent." [3] Various reliefs have been provided in the said Act, including monitory relief, custody order, residence order, interim compensation etc. The preamble of the Act, itself sets out the objective that it is enacted for providing more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The objective of the Act is undoubtedly noble and does confer protection to women. However the question arises as to whether the men in India, deserve equal protection, against any alleged violence by women. Male victims of domestic violence may suffer psychologically or socially on account of anger or harsh abuses from their wives and her relatives; they can suffer economically when the wife controls the finance resources against the wishes of the husband and compels the expenditure in a certain way, they may suffer mentally on account of lifestyle differences etc. As per a recent published report in the Indian Journal of Community Medicine, a research was conducted in this field in the year 2012-13, in District Rohtak, in the stateof Haryana, in which a total of 1000 married men in the age group of 21–49 years were interviewed using modified conflict tactics scale. It was found that 52.4% of men experienced gender-based violence. Out of 1000, males 51.5% experienced violence at the hands of their wives/ intimate partner at least once in their lifetime and 10.5% in the last 12 months. The most common spousal violence was emotional (51.6%) followed by physical violence (6%).[4] In the recent years the incidents of suicide by men have been reported from across the country, and in most of the cases, the suicide notes have alleged the harassment at the hands of wife and her relatives. In April 2019, a 40 year old man jumped on the railway track and committed suicide, and the suicide note alleged the harassment of wife, her brother and mother, and the lover[5]. The matter is under investigation. In May 2019, in a similar incident, reported from Ahemdabad, a man committed suicide by consuming sedatives, and an FIR was filed against his wife and her parents, for abetment to suicide of her husband, as it was alleged that he had been harassed by her wife and previously also the wife had filed

3 Section 2(a) of the Protection of Women from Domestic Violence Act, 2005, (Act No. 43 of 2005)

4 Malik JS, Nadda A.(2019) A cross-sectional study of gender-based violence against men in the rural area of Haryana, India. Indian Journal of Community Medicine 2019;44:35-8

5 India Today(2019, April 22), 'Pune man kills self after being harassed by wife, her lover'.URL (consulted June 5,2019), from https://www.indiatoday.in/crime/story/pune-man-kills-self-after-being-harassed-by-wife-her-lover-1507080-2019-04-22

a case for domestic violence against the husband.[6]In January 2019, in the national capital, Delhi, a man committed suicide by hanging himself, and early investigation showed that he had alleged in a video in his mobile phone about the harassment by his in laws as the reason for the drastic step[7]. These are just the few instances which have come up in media reports, which show that Men can also be victims of Domestic Violence from the wife and harassment at the hands of the wife and the in laws has been a cause of suicide in most of the reported cases.

"Cruelty" against Men

Section 498A of the Indian Penal Code was introduced in the year 1983, and makes the Husband or relative of husband punishable for subjecting a women to cruelty. According to the above provision, "Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine." The expression cruelty has been defined very broadly so as to include, any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. In *Arneshkumar v State of Bihar*[8], Hon'ble Supreme Court observed th*at, "* Section 498-A of the IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bed-ridden grand-fathers and grand-mothers of the husbands, their sisters living abroad for decades are arrested.» The Hon'ble Supreme Court took cognizance of the alarming number of matrimonial disputes in recent years, and directed all the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is

6 Times of India (2019, May 17)'Man commits suicide alleging harassment by wife'. URL (consulted on June 16,2019), from https://timesofindia.indiatimes.com/city/ahmedabad/man-commits-suicide-alleging-harassment-by-wife/articleshow/69365083.cms

7 The Pioneer (2019, January 7), 'Man commits suicide, alleges harassment'. URL (consulted on June 10, 2019) from https://www.dailypioneer.com/2019/state-editions/man-commits-suicide--alleges-harassment.html

8 (2014) 8 SCC 273

registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, of the code of Criminal Procedure.

Cruelty in simple parlance means a behavior that causes pain or suffering to others, especially deliberately.[9] The term in simplest terms, would indicate cruelty committed by one individual human being or many on the other or others. This term however conceived in the Indian legal penal scenario, is confined only to cruelty committed by male perpetrator on women victims. There have been instances where the conduct of women, has compelled the husband to take suicidal step, as discussed above.[10] In such a situation the women perpetrator can be punished with abetment to suicide. However there is no provision of protecting the Men from cruelty meted at the hands of wife during the course of marriage, when they are alive.

Very often the cruelty inflicted on men, goes unnoticed. Such instances go unreported for several reasons. One such reason is the perceived social notion of masculinity, that the men cannot be victimized. The term victim is itself a subjective term, which varies with situations. A woman in rural India, unaware of her rights, and completely dependent on the husband for earnings, may be a possible victim of cruelty from her husband. On the other hand, a well educated woman, well aware of her rights, being equally independent economically and socially as that of the husband, may be a possible victim, or may be a possible perpetrator. Thus the term victim varies from facts to facts, in different situations. A generalized recognition of women as victim of cruelty, has deprived the Men of certain protections, which the legislation in India did not foresee. It becomes imperative to enact laws for protection of men also, in the wake of growing instances of harassment against them. The idea of “male victim”, should not be lost sight of completely.

Conclusion

Matrimonial violence has to be viewed from an unbiased perspective as the aggression can be caused from either party to the marriage. The social demographic across India is so varied and complex, that no generalization can be drawn in favour of one gender against the other. Most of the studies and research in the field of domestic violence, and cruelty focus on the crime committed against women,There is no proper research on the topic of violence and cruelty committed against men. Thus there are no accurate figures available at the national level. The possibility of exploring protection to men in the law relating domestic

9 Oxford Learners Dictionary. URL (consulted on June 14, 2019) from https://www.oxfordlearnersdictionaries.com/definition/english/cruelty

10 Supra, Notes 5,6 and 7

violence and cruelty should be considered by the legislature of the country at the earliest, as affording no protection to a class of individuals, is a violation of the basic right to legal remedy.The right to legal remedy is one of the most precious human rights, which was also recognized by the founders of the Constitution of India. It is inevitable for any country that its legal system make provisions for all sections of society to address their problems, as Earl Warren once remarked in "The Law and the Future" that "The success of any legal system is measured by its fidelity to the universal ideal of justice." Therefore Justice must pervade through all sections and all genders of society.

Performer's Rights under Copyright Act, 1957: Critical Analysis

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Abstract

Law of copyright in India exhaustively provides for the mechanism to safeguard the rights of author. The performers have also been given certain right so that they can exploit the work, either by way of communication to the public or by broadcasting of the same. Through an amendment made in 1994, the Copyright Act has granted rights to the performer in their performances. The scope of definition of the 'performer' under section 2 (qq) was also widen up through the 1994 amendment act. In the later stage, the performer under section 38A and section 38B has been granted exclusive rights and moral rights, through an amendment of 2012. Section 38A (1) (b) of the said act provides for only 'first broadcast rights and communication to the public'. In this paper, there will be comparative study of the similar provision among Nations like India, United States and United Kingdom. The paper will also discuss certain international agreements with regard to performer's rights. Finally, the paper will carve out what could be the proposed amendment under Indian Copyright regime for strengthen the regime of performers rights in India.

Keywords: *Copyrights, Copyright Act, 1957, Performer, Performer's Rights, Broadcast Rights*

Introduction

In every society the performers establish a nexus between the literary, musical work, dramatic work and the public. The fact that the performers spend enough time, skill and labor in any act must be rewarded. The key definition of 'performer' provided under the international law will include actors, singers, musicians, dancers and other people who sing, act, deliver, play in, declaim, or otherwise perform the artistic work. This

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definition covers all sorts of components of performers of work in public domain under its sweep. On the contrary note it excludes all types of person who do not perform any 'work' like acrobats, sports personalities, variety artistic, and extras on the stage. This led us to frame an opinion that the umbrella cover of the definition of the performer needs wider interpretation in the coming days. Thereby we can say that the performers' rights are very weak. This can be traced out from the history itself. In the ancient time, strolling players or actors were basically regarded as vagrants. This was that era when the copyright law was in its initial stage of its developments. Adam Smith in his own work i.e. *The Wealth of Nations* has given the buffoons, players, musicians, opera dancers, opera singers as the key example of the unproductive labor.[1] The modern era has tried to remove this kind of social stigma and from the bottom of the social parameter, star performers had gone to the top and infact some has become an idol in the modern society.[2] The other reason can be the technical and historical one. Further Adam Smith says that ''the work of all of them perishes in the instant of its production.'' This connotation might be correct in his era. The performance needs to be fixed. When the performance can be fixed and the resultant fixation can be performed in public and can be reproduced thereby involves two key rights in the copyright regime. These rights are basically known as the right of reproduction and the right of the performance. The performer has a key role in the work and he must be vested with certain rights without prejudice to the interest of the author or the owner of the work. The copyright law, therefore, has made it possible for the performers through the amendments of 1994 and 2012 to claim their right and prove their existence under the law.

In India, the definition of the performer which was inserted through the 1994 Indian Amendment in the Copyright Act covers wide variety of components. Under Section 2(qq), it defines that "performer includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or anyother person who makes a performance." However, this does not suffice purpose unless interpreted in the favor of performer broadcasting rights. As far as the Indian regime of Copyright Law is concerned, the broadcasting and communication of the performance to the public is provided within the sweep of section 38A (1) (b) of the Copyright Act of 1957. This amendment was brought in the year 2012 in the light of the performer's right with respect to broadcasting or communication to the public. How much is it justifiable to say that the performer will have just one chance of broadcast and communication to the public, to the performer, though

1 Smith Adam, *The Wealth of Nations* Book II, Ch. III, quoted by Thomson, Edward, 'Twenty Years of Rome Convention' Copyright, (1981), 274.

2 *Copyright Law and Performers Right*, Chapter-8, SHODHGANGA available at http://shodhganga.inflibnet.ac.in/bitstream/10603/52362/13/13_chapter%208.pdf (last accessed on Mar. 07, 2018)

he is not having any authorship/ownership over the work created. This is unjust provision which will be analysed in this paper at the later stages. Thereby we can opine that the performer position under the law is somehow seems to be weak. On one said the Copyright Act is trying to improve the status of performer and on the other hand they are curtailing the right of performance for the one-time maximum. These things will be analyzing in the further stages in this paper after going through comparative analysis of the same.

As per the Indian Copyright Act, 1957, the performer is granted broadcasting right or communication to the public for one time only, under the auspices of section 38A (1) (b) of the said Act. The prime objective in this paper will be to analyze the impact of the amendments upon the performer's rights and moral rights of the performers. This paper will restrict itself to the comparative analysis of India, US and UK legislations dealing with the regime of Copyright Law, as far as performer's rights are concerned.

Role of International Treaties in Performers Right

There are various international treaties which specifically provides for the performers right and its components. Some of key international instruments are categorically discussed below

Trade Related Aspects of Intellectual Property Rights (TRIPS)

Article 14 (1)[3] provide for the authorization of the rights of performers under the Trade Related Aspects of Intellectual Property Rights (TRIPS)[4] agreement, which provides for the extensive protection of performers rights under its sweep.[5] Clause 3 of the said article also provide for the broadcasting organisations and its fixations. So under the TRIPS agreement which is also followed by India, it has provided the exclusive right of prevention of performances if done without their authorisation. The Indian Act is not silent about the aspect of live performance and broadcast by wireless means. There is no ambiguity here. Moreover, the mode of communication to the public since clause 3 of the said article 14 talks about the communication to public of the TV broadcast, which is also provided under Indian legislation of the copyright Act, 1957.

3 *Article 14, TRIPS*- Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

4 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 UNTS 299; 33 ILM 1197 (1994), available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (last accessed on Jul. 04, 2018)

5 Standards concerning the availability, scope and use of Intellectual Property Rights, WTO, available at https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm (last accessed on Mar.09, 2018)

WIPO Performance and Phonograms Treaty (1996)

It is basically one of the WIPO Administered treaties. This was brought into force for specifically concentration over the regime of the performer's rights. The other goal of this treaty is to recognize the key impact of the information and the communication technique on the side of the production and use of the performances. Now if we take the recourse this treaty, it also provides for the performers communication right and broadcasting right. Article 6 of WPPT[6] says that the performer can have communication and broadcasting rights of the said performance for one time i.e. its right will get extinguish as far as broadcast is concerned, after one performance.[7]

So there is a clear understanding that under Indian Copyright Act, 1957, the legislator has done cut and paste option by copying it verbatim. Though they have provided for the concept of fixed or unfixed performances but still there is some ambiguity lying as to why there is one time/first broadcast as to unfixed performance. Section 38A (1) (b)[8] of the said Act provide for exclusive rights which need more clarity. So the difference can be seen where the WPPT expressly provides for the unfixed performance but this is not mentioned in Indian legislation clearly. Still there is an ambiguity that why only one time of broadcasting and communication to the public right is provided even under WPPT. This led us to ponder over that if the performance is unfixed than can the performer have aforesaid rights for more than one time since Section 38 A (1) (b) is somehow seems to be silent upon this aspect. Through the lateral interpretation of clause (b) under section 38A, it can be figured out that this clause talks about unfixed performances. So it can be inferred that Indian legislation talks about the unfixed performance too.

Beijing Treaty on the Protection of Audiovisual Performances, 2012

The said treaty was adopted on 24 June, 2012 for conferring rights upon the performers. Under this treaty Article 11 say that the "performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their fixed performances in audiovisual fixations".[9] This treaty also provides for the right of equal remuneration

6 *Article 6 of WPPT* Performers shall enjoy the exclusive right of authorizing, as regards their performances: (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance.

7 WIPO Performance and Phonograms Treaty (WPPT), available at http://www.wipo.int/edocs/lexdocs/treaties/en/wppt/trt_wppt_001en.pdf (last accessed on Mar. 10, 2018)

8 Act, 1957, No. 14, Acts of Parliament, 1957 (India).

9 Beijing Treaty on Audiovisual Performances, WIPO, available at http://www.wipo.int/treaties/en/text.jsp?file_id=295837#art11 (last accessed on Mar.11, 2018)

under its sweep. Now after going through this provision of the Beijing Treaty, it can be categorically compared that it also does not talk about the concept of one time performer communication to public and broadcasting right. This is one of the most recent treaties signed at the international level. Indian government could have taken its recourse while coming up with 2012 amendment and thereby they could have expended the scope of performer's rights.

Copyright Law in United States

In the United States, the senate has passed the resolution so as to ratify WIPO Internet treaty in the year 1998. During the deliberations made on the implementation of the treaties, the exclusive rights thing which includes making the work available, the officials from the Copyright Office has testified that this treaty will not be requiring any amendment to the regime of the exclusive rights provided under section 106, US copyright law.

In the light of the proposition taken up in this paper that whether the one time broadcasting and communication to the public right is justified under Indian law, if we go by the comparative analysis of section 106, US copyright law, it talks about the exclusive rights in clause 4[10] which means that there is no restriction on the performance of the work, which is copyrighted in the public. In the sound recording clause 6[11] there is no as such restriction to perform the work publicly only for one time.

In US, The Digital Millennium Copyright Act (DMCA), 1998 is not clearly specifying the implementation of the right of the communication to the public or providing available to the public. Due to this there is an uncertainty that mere just transmission or the access of a copyright work upon online is falling within the ambit of the existing US rights as far as the reproduction etc are concerned. Article 10 of the said Act basically talks about the fixed performances and making them available to the public. However, the recent digital performance rights enacted law grants rights for digital transmission as far as the sound recording is concerned.[12] So here also the US does not restricting the performance communication to the public for one time only, under the umbrella cover of the performers' rights.

10 Copyright Law, USC title 17, Section 106- In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.

11 US Copyright Law, USC title 17, Section 106- In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

12 Iftikhar Hussian Bhat, *Right of Communication to the Public in Digital Environment,* available at http://www.ijesi.org/papers/Vol%202(4)/Version-2/B240714.pdf (last accessed on Mar. 11, 2018)

The other thing which needs attention is the number of broadcasting rights given in the United States. The issue initially was before the court of law was whether mere picking up of broadcast will constitute as the performance or not. The Supreme Court in its opinion has categorically stated that it will not be termed as the performance.[13] They established the theory of multiple performances. Infact previously the court has held that picking up of broadcast of radio is a kind of separate performance. Still it did not clear that whether author's performance right is infringed or not when the broadcast is authorized by author.[14]

From the above discussion in the light of the USA legislation pertaining to copyright, it is clear that they do not have such a kind of one-time performer's broadcasting right which is like in India under Section 38A (1) (b).

Copyright Law in United Kingdom and European Union

The regime of the copyright in the United Kingdom is basically governed by the CDPA, 1988. All the kind of copyrights are governed by this Act including performers broadcasting and communication to the public right also. If we take the wholesome concept of the Europe, the performers are basically granted the protection in their performances. These protections are granted in the field of audiovisual, dance, music or any other type of performances. The performer right is generally divided into two key category namely moral and economic rights in the Europe. In Europe the exclusive rights are granted to the performer who enjoys the following rights: -

- Right to have equitable remuneration for broadcasting and communication to public.
- Right to have the equitable remuneration for the rental.
- Remuneration for the private copying as the counterpart for a use of corresponding exception to reproduction right.

No doubt that the rights of the performer are limited in the Europe too. No where it is specifically mentioned in the text, that the exclusive right for the broadcasting and communication to the public of the performance is granted for one time only upon the performer. Factually also the most performers in Europe are basically dependent upon the economic right i.e. right of remuneration, rather than the exclusive performance rights.

Even the broadcasting right granted under Article 3 of Directive of 2001/29/EC says about

13 283 U.S. 191 (1931), Annotated in Numerous Law Reviews, quoted in Varmer.

14 *supra* note 2.

exclusive rights of performers.[15] Here also it can be seen that the broadcasting right is not limited to one time broadcasting only, unlike India. In the case of the Germany, the exclusive right of communication to the public is basically excluded for fixed performance or broadcast. They are having right to get remuneration.[16]

In the United Kingdom under CDPA law, it does not specifically talks about the process of the exclusive rights as far as the performer's rights are concerned.[17] Under Section 182 of the UK CDPA it says that the consent will be required for the broadcasting of the performance under the regime of performer's rights. This is the place where we can say that in somewhat manner the performer rights are being protected and will amount to infringement if the broadcast is done without his/her consent. On the other hand, if we talk about the concept of making the work available to the public, Section 182C of the CDPA says that the consent of the performer will be required while the work is communicated by third party to the public. These are the rights which are falling in the favor the performers.

Now in the light of the India legislation, we can say that the performers rights in UK also does not specify and such restriction which will lead it to confer upon the performer only one-time performance right.

Indian Scenario of Performer's Right

If we go by the Indian Copyright Act of 1957, the broadcasting rights are governed by it. The amendment made in the year 1994 has granted certain rights in the name of the performer's right. The ambit of these rights was widen up under 2012 Amendment Act in which certain rights like performer's broadcasting and communication to the public rights has got its space under the provision of section 38A of the Copyright Act, 1957. Also the pre-existing section 38 clause 3 and 4 were also omitted so as to incorporate this under section 38A. This was done in line with Article 6-10 of the WPPT.[18] The ambit of the

15 Article 3, Directive of 2001/29/EC- Member nation shall provide for exclusive right upon performers to basically authorize/prohibit making it available to public, by wireless or wire means of the fixation of their performance, in such a way that the member of public might access it from a place and a time chosen individually.

16 *Performers Rights in European Legislation: Situation and Elements for Improvement*, AEPO-ARTIS, available at https://www.ipf.si/media/1078/aepo-artis-study-update_200912.pdf (last accessed on Mar. 12, 2018)

17 Copyright Design and Patent Act, 1988, available at https://www.legislation.gov.uk/ukpga/1988/48/contents (last accessed on Jul. 02 2018)

18 *WIPO Performances and Phonograms Treaty*, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997), available at, http://www.wipo.int/clea/docs_new/pdf/en/wo/wo034en.pdf (last accessed on Jul. 04, 2018)

section 38A is vast to cover ample no of rights in favour of the performer under the Indian legislation. The need has come to analyse this section in the favour of the performer.

Section 38A of the said Act provided for the exclusive performers right, which encompasses a duty to do or not to do certain acts. These rights can be exercise without prejudice towards the rights of author. However, the proviso appended to this section allows performers to get the royalty, if they are commercialising the performance. This is one of the great steps taken up by the Indian legislators because earlier they are deprived of the same. The negative right is now a positive right.

Initially in the 20th century when the case like *Fortune Film International v. Dev Anand*[19] had come up before the Bombay High Court, it has refused to recognize the claim of the actor in the movie *Darling Darling*. The actor wants to claim the copyright in his own performance, which was vehemently denied by the court. Later on, the initiative was taken up by the then government in the form of strengthening performer's rights through 1994 Amendment Act and 2012 Amendment Act.

Moreover, the amendment of 2012 has also brought the definition of 'communication to the public' under the provisions of section 2 (ff), which has extended the rights of the performers. By this way, the right which was limited to author is now also available to the performer as well. The right of communication of work to the public is the key component of the performers' right. This is so because it helps in protecting the work on the internet as well also. Now this protection is also available to 'performances' from just 'work'.

Now after the insertion of the new section 38B through 2012 Amendment Act it secures the moral rights for the performers. This insertion was made by virtue of Article 6 of the WPPT.[20] The concept of the moral right may have been brought for preventing the possibility of alteration of performances in the digital world. The explanation appended to this sections says that the 'mere removal of a performance for editing can be done for technical purposes' without any fear of legal suit.'[21]

This was the actual scenario in which the process of the performer's rights was strengthened. The ambiguity is still prevailing that is why there is only first broadcast right afforded to

19 *Fortune Film International v. Dev Anand*, (1979) 17 A.l.R. Bom.

20 *WIPO Performances and Phonograms Treaty*, Dec. 20, 1996, art. 06, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997), available at http://www.wipo.int/clea/docs_new/pdf/en/wo/wo034en.pdf (last accessed on Jul. 04, 2018)

21 Abhai Pandey, *Inside Views: Development In Indian IP Law: The Copyright (Amendment) Act 2012,* IP WATCH, available at https://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-the-copyright-amendment-act-2012/ (last accessed on Mar. 09, 2018)

the performer in terms of broadcasting of his/her performance. Let's take a look at the bill which was tabled down in the parliament, so as to ascertain the intent of the legislature.

Proposed Bill History for Insertion of Section 38A

The clause 25 of the 227th report on Copyright Amendment Bill, 2010 ought to omit Section 38 (3) (4) and thereby inserting Section 38A. Clause 26 specifically brought section 38A.

The said committee has taken the note of certain factors for the insertion pertaining to the moral and exclusive rights. In this report, the committee was later intimated that insertion of section 38A was done so as to substitute the existing rights of performer which was providing only the right to prohibit. This was also laid in this report that such insertion was done so as to be in line with article 6-10 of WPPT, as discussed above. Likely the insertion of section 38B was done for the introduction of the moral rights of the performers.[22] This was also in line with the Article 5 of WPPT.[23]

In the above stated parliamentary debate, we can say that there is no as such discussion prevailed during the formulation of the above stated report, which is conferring only first broadcasting right of the performance, while inserting section 38A (1) (b). So this is a grey area under the Indian Copyright Act, which needs more clarity.

22 Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010, Department-Related Parliamentary Standing Committee On Human Resource Development, available at http://www.prsindia.org/uploads/media/Copyright%20Act/SCR%20Copyright%20Bill%202010.pdf. (last accessed on Mar. 10, 2018)

23 Article 5- Moral Rights of Performers (1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.
(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.
(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.
Available at http://www.wipo.int/treaties/en/text.jsp?file_id=295578#P90_8664 (last accessed on Jul. 04, 2018)

Conclusion

In light of the discussion held above, we can say that the statement of purpose framed in this paper has been disproved. This is so because there are no traces as to why the great mind of our legislators has incorporated this provision while securing the rights of the performer through the Copyright (Amendment) Act, 2012.

Article 7 of the Rome convention for protection of performers, producers of phonogram and broadcasting organization (1961) provides for the minimum level of the protection for the Performers.[24] According to this the broadcast and communication of the performance can be done (without the consent of the performer), except where it has been already broadcasted. Under the TRIPS, it provide for the concept of controlling fixation of performance which is unfixed for the phonograms.[25] The provision of Article 7, Rome Convention was copied by WPPT during its drafting. However as far as international agreements are concerned it can be seen that where the WPPT expressly provides for the both fixed and unfixed performance under article 6, the same has been provided under section 38A of the Indian copyright law. Still there is an ambiguity that why only one time or first broadcasting right under WPPT is provided, which was adopted by India in its legislation. The mere cut and paste option performed while copying WPPT provision will not going to suffice the purpose. Even under the TRIPS agreement which is also followed by India, it has provided the exclusive right of prevention of performances, if done without their authorisation. Still the Indian Act is silent about the aspect of live performance and broadcast by wireless means under the provision of section 38A (1) (b). This is also a grey area which needs to be worked upon for clearing the clouds of ambiguity. Than going through the provisions of recent treaty i.e. Beijing Treaty of 2012, it can be categorically compared that it also does not talk about the concept of one-time performer's broadcasting right. This is one of the most recent treaties signed at the international level. Indian government could have taken its recourse while coming up with 2012 amendment and thereby they could have expanded the scope of performer's rights. Though the fact that this amendment made in Indian Copyright Act, 1957 was brought 3 days before the Beijing treaty has come up, is undeniable.

In the context of the United States, through the above discussion in the light of the USA legislation pertaining to copyright, it is clear that they do not have such a kind of one-time

24 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961, Oct. 26, 1961, art 7, 496 UNTS 43; BTS 38 (1964), available at http://www.wipo.int/treaties/en/text.jsp?file_id=289757 (last accessed on Jul. 04, 2018)

25 Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions Geneva 1996, Vol.1, WIPO, available at ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_348e_v1.pdf (last accessed on Mar. 14, 2018, 03:52 PM)

performer's broadcasting right like India has under Section 38A (1) (b). In the European context, there is no doubt that the rights of the performer are limited in the Europe also. The statue seems to be does not specifically mentioned, that the exclusive right for the broadcasting and communication to the public of the performance, except where it has been already broadcasted, is granted for one time only upon the performer. However, only in the case of Germany, the exclusive right of communication to the public is basically excluded for fixed performance or broadcast. Under the United Kingdom CDPA law, it does not specifically talk about the process of the exclusive rights as far as the performer's rights are concerned.

It can be concluded that the India need to make certain amendment in the existing regime of copyright law, as far as performer's rights is concerned. If they are verbatim copying WPPT, though India had not signed it, then an amendment must be made under section 38A (1) (b) of the said act so that the performer can excise its right of broadcast and communication to the public even though his/her performance has already broadcasted. There is no as such justification brought down from the above discussion held, which will substantiate this arbitrary clause 'first broadcast or one time broadcast'. There is a need to increase the threshold of the performer's rights in India form now onwards after indulging in comparative study of various Nations law of Copyright. Without prejudice to the right of the author, every effort should be to promote the performer's right in Indian legal system. India must take recourse of the recently incorporated Beijing Treaty for further amendment in our Copyright Act, 1957.

RIGHT TO BE FORGOTTEN: CAN IT BE FOR REAL?

Archana Gadekar*

Abstract

Right to be forgotten is a new right of recent origin. Today we are living in the Information age where image and reputation plays an important role. Social media and Internet has become a regular and almost an indispensible part of our lives. Now, whenever one needs any information on and about any individual or subject, that information is just a click away. 'Google it and know', is the trend. In this simple process, legally various fundamental and human rights of individuals are touched upon or are involved and interrupted. For e.g. whenever, a person is looking for information about other person, it may be available on the Google, which is the most popular search engine. However, the information that is available creates an image about the person. Secondly, there is a possibility that the information is available in the public domain without the consent of the person concerned. Thirdly, it may damage the reputation of the person if the information is no longer relevant. Thus, emerges a conflict between two rights, viz. freedom of speech and expression and right to privacy. Also, it is important to understand whether the individual has any control over such information, i.e. can he requests such information to be removed? And if yes, then does that in any way contravene the right to know and freedom of speech and expression of others? This article shall attempt to answer these questions and study the development of the new right to be forgotten in the borderless information society.

Keywords: *European Union General Data Protection Regulation, 2018, Right to Privacy, The Personal Data Protection Bill, 2018, Data Retention Directive, Informational Privacy.*

INTRODUCTION: RTF- ORIGIN AND MEANING

The right to be forgotten is a concept that has been discussed and put into practice both in

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the European Union and, since 2006, in Argentina. The right to be forgotten was originally established by an ECJ ruling in 2014 after a Spaniard sought to delete an auction notice of his repossessed home dating from 1998 on the website of a mass circulation newspaper in Catalonia.

Google Spain v. *AEPD and Mario Costeja Gonzalez*

In *Google Spain v. AEPD*[1], the Grand Chamber of the Court of Justice of the European Union (Court or ECJ) upheld a decision by the Agencia Espan˜ola de Proteccio´n de Datos (Spanish Data Protection Agency or AEPD) that the Internet search engine operator Google (Spanish Data Protection Agency or AEPD) is responsible for the processing it carries out of personal data that appear on web pages published by third parties. The ruling endorses an expansive view of the jurisdiction of the European Union (Union or EU) over those who, like Google, process data anywhere in the world and firmly establishes a "right to be forgotten" under the European data protection Directive 95/46/EC (Directive).[2]

The genesis of this case is from the 1998 publication of two announcements in *La Vanguardia*, a newspaper widely circulated in Spain, concerning a real-estate auction connected with attachment proceedings prompted by then-outstanding social security debts. The data subject, Mario Costeja Gonza´lez, was mentioned as the owner of the social security debts. At a later date, an electronic version of the newspaper was made available online by its publisher.

In November 2009, Costeja Gonza´lez informed the newspaper that, when his name was entered in the Google search engine, a reference appeared to the pages carrying the announcements on the real-estate auction. He argued that the attachment proceedings related to his social security debts had been concluded and resolved many years earlier and were now of no relevance. The newspaper replied that erasure of his data was not appropriate, since the original publication had been properly ordered by the Ministry of Labor and Social Affairs.

In February 2010, Costeja Gonza´lez asked Google Spain to delete any links to the newspaper when his name was entered in the Google search engine. Google Spain forwarded the request to Google Inc., whose registered office is in California. Google Inc. declined

1 Case C-131/12, *Google Spain SL* v. *Agencia Espan˜ola de Proteccio´n de Datos (AEPD) (Eur. Ct. Justice May 13, 2014)*. The judgment and opinion of the Court of Justice of the European Union cited herein are available at website, http://curia.europa.eu.

2 Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 [hereinafter Directive 95/46]

to take the links down. Costeja Gonza´lez then filed a formal complaint with the AEPD under the Spanish Organic Law No. 15/1999 on the Protection of Personal Data, which transposes the Directive.[3] He sought an order directing the publisher to remove or alter the pages in *La Vanguardia* so that his personal data did not appear, or in the alternative to use the tools made available by search engines to shield his personal data. He also sought an order directing Google Spain or Google Inc. to remove or conceal his data so that they ceased to be included in the search results, revealing links to the newspaper.

In July 2010, the AEPD upheld the complaint and directed Google Spain and Google Inc. to take the measures necessary to withdraw the data in question from their index and to prevent future access to that information. At the same time, however, the AEPD rejected the complaint against *La Vanguardia* on the basis that the data had been lawfully published by it.

Google Spain and Google Inc. then brought actions before the Audiencia Nacional[4] seeking annulment of the AEPD decision. It is in this context that the Audiencia Nacional referred a series of questions to the European Court of Justice.

In 2014, the European Court of Justice (ECJ) ruled in favour of Mario Costeja González[5], a Spanish man who was unhappy that searching his name on Google threw up a newspaper article from 1998. He approached the newspaper in 2009 to get the article removed as he felt it was no longer relevant. The contention of the petitioner was that he had cleared all his social security debts and the information was no more relevant in 2009. The newspaper had published this on the web. Hence, this information used to appear against the name of Costeja. So he asked the newspaper and Google Spain to remove the information. However, the newspaper felt it was inappropriate to erase the article, and Gonzalez then approached Google to not throw up the article when his name is searched.

Google appealed and the case went to the High Court of Spain. It was held that Google is a data controller. ECJ asked Google to delete "inadequate, irrelevant or no longer relevant" data from its search results, when a member of the public requests so. The power to de-list from online searches was limited to national internet domains. The ruling came to be known as the "right to be forgotten" .

3 Law on the Protection of Personal Data (Bolletin Official Del Estaado, 1999, 298)

4 The *Audiencia Nacional* is commonly referred to in English as the National Court. The ECJ in *Google Spain* translates it as National High Court. The court has jurisdiction over criminal, appellate, administrative, and labor matters.

5 *Google Spain* v. *AEPD and Mario Costeja Gonzalez* (2014)

After this judgment, Google received around 12000 applications for removal of their data and around two million similar requests later.

European Union General Data Protection Regulation, 2018

For the first time, the right to be forgotten is codified and to be found in the General Data Protection Regulation (GDPR) in addition to the right to erasure. The new GDPR, May 2018 clearly defines right to be forgotten (right to erasure) with clear safeguards. The new GDPR provides for stronger enforcement mechanism.

GDPR's Article 17 has outlined the circumstances under which EU citizens can exercise their right to be forgotten or right to erasure. The Article gives individuals the right to get personal data erased under six conditions, including withdrawal of consent to use data, or if data is no longer relevant for the purpose it was collected. However, the request may not be entertained in some situations such as if the request contradicts the right of freedom of expression and information, or when it goes against public interest in the area of public health, scientific or historical research or statistical purposes.

Right to be Forgotten: Position in Various Countries

Spain in 2018, has applied this right to search data bases and archives. The position in Netherlands is, that Criminal Record is relevant, no matter how long or how old it is. Similar is the position in Germany. In Germany, the position is, if it is about conviction, then, the record will remain in public domain and will not taken away on request. In Italy, balancing test is the exception and does not apply to journalists. In case of negative publicity, in the newspaper, it can be removed.

Right to be Forgotten and the Courts France

France's highest administrative court sought the EU tribunal's guidance in 2017 about whether the "right to be forgotten" could be extended beyond the EU. In a second case, it asked questions about the obligations of search engine operators when faced with delisting requests of links to sensitive data, such as sexual orientation, political, religious or philosophical opinions and criminal offenses, that "is embedded in a press article or when the content that relates to it is false or incomplete."[6]

6 Google wins bout in fight against 'right to be forgotten', Livemint.com available at https://www.livemint.com/Companies/tUyyXERKejWs08dnovzFJM/Google-can-limit-right-to-be-forgotten-to-EU-Top-court-ad.html (visited on 18 April 2019).

United Kingdom

- 2012- Forged documents- 293 URLs delisted.
- Royal Court of Justice, London passed a judgment in favour of a businessman who wanted Google to remove search results about his past criminal conviction. The judge held that the businessman had shown remorse and that information about his crime and punishment had become "out of date, irrelevant and of no sufficient legitimate interest to users of Google search to justify its continued availability."

United States of America

The US Courts have not dealt with RTF yet.

Data Retention Directive Declared Invalid: ECJ

On April 8, 2014, in response to requests for review by the High Court of and the Constitutional Court of Austria, the Court of Justice of the Union ("ECJ"), the highest court of the EU, declared invalid Directive 2006/24/EC[7] regarding data retention (the "Data Retention Directive").[8]

Data Retention Directive was adopted to harmonize obligations of Data Retention Directive was adopted to harmonize obligations of providers of publicly available electronic communications services or of public communications networks [such as internet service providers and telecom operators] with respect to the retention of certain data [such as location and traffic data that could used to identify subscribers and users] … to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime[9].The Data Retention Directive required retention of the data for a minimum of months and a maximum of two years[10] for fixed, mobile, or internet telephony as well as e-mail communications.[11]

The ECJ found that, even though the retained data did not include the content of the

7 Directive 2006/24, of The European Parliament and of the Council, of 15 March 2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Direc-tive 2002/58/EC, 2006 O.J. (L 105) 54 (EC).

8 Joined Cases C-293 & C-594/12, *Digital Rights Ir. Ltd.* v. *Minister for Comm. Marine < Sr Nat-ural Res.*, paras. 69-73 (Apr. 8, 2014), available at http://goo.gl/qP2ZaL.

9 Council Directive 2006/24, art. 1(1), 2006 O.J. (L 105) 54, 56.

10 Art. 6 at 58

11 Art. 5 at 58

communications, that data could allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them[12]. Consequently, the retention of data "might have an effect on.....[users'] exercise of the freedom of expression guaranteed by Article 1 of the Charter [of Fundamental Rights of the EU][13].

RTF vis-à-vis Right to Privacy and Freedom of Speech and Expression: Debate

Right to be forgotten may be a threat to speech and expression in the context of relevance and truthfulness. The "right to be forgotten" is an emblematic battle at the new frontier between privacy and freedom – both of speech and the right to know[14]. It is a case study of the dilemmas that we will face. Who gets to decide whether free speech or privacy prevails in any given case? And also, on what criteria?

Right to be forgotten throws some complicated questions. Does the right of an individual affect the freedom of expression of others? Because, broadly, right to be forgotten, deals with erasure of information in the public domain which is no more relevant. So the question that arises is, is the right to be forgotten, a right to rewrite history? Some countries have been clear that if it is about conviction, or any criminal record, it cannot be removed.

Position in India

The Personal Data Protection Bill, 2018 states that right to privacy is a fundamental right and it recognizes the need to protect personal data as an essential facet of informational privacy. According to Clause 2 (12) of The Personal Data Protection Bill, 2018, "Data" means and includes a representation of information, facts, concepts, opinions, or instructions in a manner suitable for communication, interpretation, or processing by humans or by automated means.

Data Principal Rights

12 Joined Cases C-293/12 & C-594/12,

13 At Para. 28 (citing Charter of Fundamental Rights of the European Union, art. 1 1 , 2000 O.J. (C 364) 1,11 (EC)).

14 How 'right to be forgotten' puts privacy and free speech on a collision course, George Brock available at http://theconversation.com/how-right-to-be-forgotten-puts-privacy-and-free-speech-on-a-collision-course-68997,

The Bill confers the following rights on the Data Principal.

1. Right to confirmation and access
2. Right to correction
3. Right to Data Portability
4. Right to be forgotten

As per the drafted bill, both citizens and Internet users will have the final say on how and for what purpose their personal data can be used, and they will have the right to withdraw consent. In certain conditions, there will also be the option of 'right to be forgotten' that has been included in the draft.

Clause 27- Right to be forgotten[15]

(1) The data principal shall have the right to restrict or prevent continuing disclosure of personal data by a data fiduciary related to the data principal where such disclosure—

(a) has served the purpose for which it was made or is no longer necessary;

(b) was made on the basis of consent under section 12 and such consent has since been withdrawn or

(c) was made contrary to the provisions of this Act or any other law made by Parliament or any State Legislature.

This right is subject to the satisfaction of the adjudicating officer. The instances are mentioned in sub clauses (a) to (c). For the instance in sub clause (b), the certain guiding points are enumerated for taken into consideration while deciding upon by the adjudicating officer.

(3) In determining whether the condition in sub-section (2) is satisfied, the Adjudicating Officer shall have regard to[16]—

(a) the sensitivity of the personal data;

(b) the scale of disclosure and the degree of accessibility sought to be restricted or prevented;

(c) the role of the data principal in public life;

15 Personal Data Protection Bill, 2018, Clause 27.

16 Personal Data Protection Bill, 2018, Clause 27 (3).

(d) the relevance of the personal data to the public; and

(e) the nature of the disclosure and of the activities of the data fiduciary, particularly whether the data fiduciary systematically facilitates access to personal data and whether the activities would be significantly impeded if disclosures of the relevant nature were to be restricted or prevented.

Conclusion

The newly drafted Indian legislation when it codifies right to be forgotten, confers the power to decide whether the right to be forgotten be actually granted apply the tests and criteria provided in Clause 27. It can be said that the Data Protection Bill simply provides for right to restrict or prevent disclosure. Although Clause 27 guarantees the right to be forgotten this is not the equivalent of right to erasure available at the international privacy standards like in the European General Data Protection Regulation.

There is a major unsolved problem about how far the right to be forgotten reaches. The French government thinks that it should be global, which is disproportionate as well as unfeasible. The *Gonzales* judgment saw the emergence of right to be forgotten. It is an important right in today's age of information technology because if the correct balance is not sort it can conflict with right to privacy on one hand and the right to information and freedom of information on the other !!! However, looking into the nuances involved in this balancing act, whether the right to be forgotten can be a real one is upon the judges of future to decide.

Regulatory Challenges Faced by the Coal Sector in India Vis-a-Vis Needs for an Independent Regulator: An Insight

Priya Bhatnagar*

Abstract

Coal is vital to the global structure of energy. The contribution of coal in production of world's electricity is 40% of total production of world's electricity. This validates that it is the principal source of electricity. In years to come, coal shall replace oil and become the largest source of primary energy. In context of Indian economy, it is the 3rd largest coal producing nation of the world. In spite of this fact, Coal India limited being the sole coal producer in India has repeatedly failed to meet the demand of nation thereby, pushing the imports. Also, the loss caused due insufficient supply of coal is increasing every year. These days coal is one of the most debated issue in the energy sector of India, facing many regulatory and policy changes. The irony of coal sector in India is that our country has huge coal reserves to last for decades, but unfortunately the energy enriched nation is unable to tap its potential. One of the major reason for this is the current legislations which monopolies and restricts the mining of coal in the hands of two public sector companies that is Coal India Ltd. (CIL) and Singareni Collieries Coal Ltd. (SCCL). To break this monopoly, there is a constant effort on the part of the government of India to demonopolize it by introducing competition in this sector and bringing in private players by allowing commercialization of coal. Through this step, the uprising demand of coal is expected to be met and the abuse of dominant position by Coal India limited and its subsidiaries is likely to reduce. With this, several issues of allocation of coal blocks like illegal and arbitrary allocation arises.

The following article shall highlight the competition and other regulatory

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issues at hand in the coal sector. The author shall also discuss the need of having an independent regulator to govern the coal sector in India

***Keywords**: Energy, Coal, Competition, Monopoly, Independent Regulator*

INTRODUCTION

One of the prime objectives of India's energy policy has been to provide access to energy to the entire population. Home to one-sixth of the world's population and third-largest economy of the world, India accounts for only 6% of global energy use.[1] Unfortunately the energy sector in India is incapable to supply energy to the growing population. On account of policy changes in India, there has been a shift towards the free market economy with an increase in production. Unfortunately the energy sector is unable to meet the growing demand. One of the major resource of energy in India is coal which is heavily relied upon by certain key industries like power sector, cement and fertilizer industries.

The global coal reserves which are recoverable are estimated to be over 617 billion metric tonnes (BP-2018).[2] As per the statistics given by Ministry of Coal, Government of India as on 1.4.2018, India accounts for 319.02 billion tonnes of coal. Countries like USA, China, Australia, Indonesia, South Africa and Mozambique are amongst other countries have massive resources.[3]

As per report by Indian Chambers of Commerce, coal production in the Asia Pacific region has grown enormously and accounts for over 67% of the total production globally as compared to about 27% in 1981. With coal as second largest source of energy, it is assessed that the world total consumption of coal shall increase at an average rate of 0.6% per year from 2012 to 2040. India is the second, in the ladder of consumption of coal after China and United States is the third one.[4] India has world's third largest coal reserves with major chunks concentrated in the Eastern and Central parts of Peninsular India. The Jharia coalfields situated in the east of the province of Bihar and Orissa, forms one of the most important units of the Permo- Carboniferous coal bearing area of India.

1 *International Energy Agency*, "World Energy Outlook", 2015 available at https://www.iea.org/publications/freepublications/publication/WEO2015.pdf

2 World Coal 2018-2050: World Energy Annual Report(part -4)

3 Report Presented in 8th India Coal Summit, "Bridging the gap Increasing Coal Production and Sector Augmentation," Indian Chamber of Commerce, 2016

4 *Supra* 2

Though India is second largest coal producer in the world but is unable meet the growing demand for coal. Thus, in the absence of self-reliance for coal production, India's coal imports have shown an expansion from 22 million tonnes in 2003 to 200 million tonnes in 2014[5] with an ever increasing rate of 235.24 million tonnes in 2018 as per the ministry of coal. India imports most of the coal from Indonesia and Australia. In fact, Indonesia accounting for 85% of Southeast Asia's coal production, it remains the world's top exporter of steam coal, which is one of the factor for Southeast Asia emerging as key player in the global energy system.[6]

Coal as prime fuel of energy is not a new discovery in our country. Traces of it being used for melting metals in ancient and medieval India have been found. However, the earliest records of coal industry in India are available since the middle of the 18th century. History of commercial mining of coal dates back to 220 years ago, beginning from 1774-75, when the first mines were worked in Raniganj coalfield in West Bengal along the western bank of river Damodar.[7] In India 80% mining is carried on in the coal sector as it is one of the leading repositories of this black gold. Rest 20% mining consist of other minerals, fuels and metals.India has rich dregs of bituminous and sub-bituminous coal, which rank below anthracite, the best quality of coal in the world.[8] Thus, in India mainly two types of coal are produced, coking coal which is used in metal industries and non-cooking coal used for power generation, cement paper and fertilizer manufacturing.

Also known as black gold, the coal sector in India has the history of not welcoming private players and operating under the state monopoly. With the drastically increasing demand for electricity, demand for coal is on rise. Yet this sector remains the most controlled and possibly least efficient of all energy sectors of the country.

India's 80% domestic need of coal is met by Coal India Limited, a government holding company, with currently has eight subsidiaries. It works under the direct control of Ministry of Coal, which formulates policies and develops strategies on mining, production, supply and price of coal. The regulatory activities related to coal like assessment of quality of coal, its inspection, project approvals, quality disputes and management of coal statistics is done by the office of Coal Controller, which is under the Ministry of Coal.

The coal industry in India has been confronting lot of competition and regulatory issues

5 Parakh PC, The Coal Conundrum: Failure and Judicial Arrogance, 2017

6 International Energy Agency, "World Energy Outlook," 2013 https://www.iea.org/publications/freepublications/publication/WEO2013.pdf

7 Glimpses of Coal India, CIL, Kolkata, (2006):1

8 Fox C.S., "The Jharia Coal Field," *Geological Magazine*, *Cambridge University Press,* (1931)

which are to be addressed. This is evident by the major setback of Coalgate scam[9] wherein cancellation of allocation of 214 out of 218 coal blocks by the Supreme Court of India in 2014 on the grounds of arbitrary and illegal allocation of coal mines. Lack of competition in the market, one sided fuel supply agreements, issue of price distortion, arbitrary allocation policy and abuse of dominant position by the sole coal producer Coal India Limited and its subsidiaries are some of the highlights of the sector. Issues of transparency has always been there as one of the highlights of this sector. Also, other challenges like lack of supply of coal, increase in import of coal, delayed environment clearance issues and land acquisition policies related to coal needs to be comprehensively addressed.

Coal Sector in India

Prior to the Ministry of Coal's order dated 20th February 2018, on commercialisation of coal to private sector In India, coal stood up alone as a sector not fully opened to private investment except production of coal for captive consumption by private companies. [10] Coal production at present is handled by only two PSUs, vis-a-viz Coal India Limited (CIL) and Singareni Collieries Company Limited (SCCL).[11]Coal India Limited, a government holding company, with currently has eight subsidiaries, is responsible for about 80% of coal production of the country. Singareni Collieries Company Limited (SCCL) is another government owned coal mining company in India with 51% of its stake held by Telangana government and rest by the Union Government. Both companies work under the direct control of Ministry of Coal, which formulates policies and develops strategies on mining, production, supply and price of coal. The regulatory activities related to coal like assessment of quality of coal, its inspection, project approvals, quality disputes and management of coal statistics is done by the Coal Controller's Office which is under the Ministry of Coal.

Nationalisation of the Sector

With the aim to ensure rational, coordinated and scientific development and utilisation of resources as per the growing needs of the country, coal sector in India was nationalised under the *Coal Mines (Nationalisation) Act, 1973*. The reasons for nationalisation of the coal were, need for monetary investment in the sector, problem of depletion of natural

9 *Manohar Lal v. Principal Secretary*, (2014) 9 SCC 516

10 Cabinet Committee on Economic Affairs (CCEA) available at http://www.pib.nic.in/PressReleaseIframePage.aspx?PRID=1521019

11 Conference Proceedings of BRIDGES – a Mentors' Workshop on "Bridging Development Divide for Inclusive Growth through Science, Technology and Innovation", "India's Energy Security: Challenges, Policies and Opportunities," DST-Centre for Policy Research (2015).

resources by private industries while performing mining activities, need for symmetrical plan for extraction of coal, over exploitation, arrangement for safety of labourers and environment degradation concerns.[12]

In past also the policy of nationalisation was adopted in India at the time when banks were nationalised. Available literature shows that it has benefited the banking industry and so did we expect in the case of coal industry in India. It has largely been a positive policy change in the banking sector of our country but an author of a paper on nationalisation of banks in India concludes her paper by saying, that "*the main aim of nationalisation is to control the heights of the economy and to meet progressively and serve better the needs of development of the economy, this has not been achieved yet"*.[13] The growth rates worked out in case of nationalisation of banks, indicated that on the average in case of a majority of operational variables, the performance of nationalised banks as compared to private banks was found higher.[14]

On the contrary, in case of coal, it seems that the idea of nationalisation has failed considerably due to the following reasons: -- non-revival of old mines which had potential to produce, huge investments were made in new projects and technologies which increased cost of production, which brought down the production, many technologies failed to suit the geographical locations incurring heavy losses, failure on the part of the government to fix the selling price of coal.

The scope of *Coal Mines (Nationalisation) Act, 1973* was enlarged in 1993 thereby allowing certain industries to produce coal for captive mining i.e. with end use restriction.[15] As per the *Colliery Control Order, 1945* the price and distribution of coal was completely controlled by Ministry of Coal.[16] But after the introduction of *Colliery Control Order, 2000* though the distribution policy remained same but the prices were deregulated.[17]

In 2007, New Coal Distribution Policy was formulated replacing the linkages system with

12 Udyog, Special Number, Asansol, West Bengal, *"Privatisation of Coal Industry: A Review",* (2003) available at http://www.revolutionarydemocracy.org/rdv10n1/coal.htm

13 Alka Mittal, "An Analysis of the Impact of Nationalisation on the functioning of the Commercial Banks," *International Journal of Commerce, Business and Management*, 5(4) (2016):163-171.

14 P. Prince Dhanraj, "Management of Finance of Nationalised Banks in India: A Post Liberalisation Analysis," *International Journal of Business Policy and Economics*, 4(2) (2011): 293-305

15 Ministry of Coal, Government of India, Annual Report 2010-2011 available at https://coal.nic.in/content/annual-report-2010-11

16 International Energy Agency, "Coal in the Energy Supply of India," OECD, Paris (2002b)

17 Ministry of Coal, Government of India, available at https://www.coal.nic.in/ also refer to https://coal.nic.in/sites/upload_files/coal/files/curentnotices/pricing_0_0.pdf

legally binding Fuel Supply Agreements (FSAs) and Letter of Assurances for better supply of coal. However, it came out to be rather burdening CIL than aiding its distribution policy.[18] Since 1993, 218 coal blocks have been allocated by the government to accelerate the progress of captive mining. However, in September 2014, the apex court cancelled the permit of 2014 blocks as being allocated on arbitrary grounds. Thus, to have a uniform allocation policy, the *Coal Mines (Special Provisions) Act, 2015* was enacted. It shall be interesting to study the impact of this legislation on the overall coal sector. Along with this major setback of *Manohar Lal v. Principal Secretary ("Coal Block Allocation Case")*, coal industry in India has been confronting lot of competition issues which are still to be addressed.

Challenges faced by the coal sector in India

Although there is humongous potential of coal reserves, India is unable to realise it in the absence of the supporting factors. In spite of the long lease durations of 20-30 years and huge scope for employment and other factors of production, India lags behind because of various challenges that mining sector faces today. Factors like stumpy exploration expenditure, lack of foreign investments, illegal mining activities, deficiency of adequate infrastructural facilities and regulatory challenges have caused a major downfall of the Indian mining industry especially the coal sector. The inefficient institutional framework managing the governance of these coal mining activities reveals that there is a huge scope of launching new laws and policies for the mining sector. The companies carrying on mining activities continue to struggle with either low prices or issues related to land and environment clearance. For instance, there are large number of coal mines which have been abandoned without proper closure and without any efforts of rehabilitating the area.[19]. The order of quashing 214 allocated mines as arbitrary and illegal by Supreme court of India in 2014 popularly known as the "coalgate scam "is a clear case illustrating how mine allocations are actually done thereby highlighting the lack of transparency in the system. The amended *Mines and Minerals (Development and Regulation) Act, 1957* intends to legalise the system of auction of mines to enhance the transparency in mineral allocations in India. A transformed mining era is expected to be witnessed.[20]

In India, competition is lacking in the coal market. *The Competition Act, 2002* was enacted in

18 International Energy Agency, "Understanding Energy Challenges; Policies, players and issues," (2012)

19 S K Chaulya *et.al,* "Modernization of Indian Coal Mining Industry: Vision 2025", *Central Institute of Mining and Research, Dhanbad*,67 (2008): 28-35

20 Indian Chamber of Commerce, 5th India Coal Summit, "Coal Mining: Is Private Participation is the Answer?", (2013)

order to boost competition in the national economy of India thereby setting in efficiency and novelty, providing for a wider choice for consumers at competitive prices. Any economy or any sector of the economy deprived of competition leads to abuse of economic power by entering into collusive and unfair trade practices. Also a monopoly market restricts the entry of new players in the market in a way violating the fundamental right to practice any trade and profession given by Constitution of India.

Coal India Limited is virtually a monopolistic supplier of domestic coal in India. It commands one sided fuel supply agreements, lack of effective grievance redressal mechanisms for consumers, increasing complaints from power producers about quality and quantity of coal received, and increasing profitability of CIL despite no significant productivity increase, prima facie suggest that CIL is taking undue advantage of its authoritative position .[21] Not welcoming the private players and creating entry barriers shows the insecurity of the public sector towards losing its monopoly. Privatisation to an extend leads to more corruptive environment and concentration of wealth, but if governed by robust policy and regulatory framework then it can prove to be beneficiary for the economy.[22]

In order to survive and compete with the world, India needs to improvise its manufacturing efficiency/manufacturing cost especially in the energy intensive industries like steel, aluminium, cement and fertilizers.[23] The technologies adopted for mining are not viable for maximum extraction from coal reserves. Large coal reserves in India remains unexplored due to the inefficient mining methods. These challenges might be met by the restructuring of Coal India Limited and maximum participation by the private sector which shall result in increased flow of investments.

Regulatory / Competition issues faced by the sector

Inability to meet the Rising Demand and Imports

Indian coal availability is a critical factor to achieve the targeted power generation capacity addition in India on a sustainable basis for long term. The coal requirement during 2012-13 was 773MTPA but the available Indian coal was 557MTPA.This has resulted in the import of 216MTPA during the same year. It is projected that the coal requirement will

21 Dikhsa Garg *et.al*, "Understanding India's Energy Sector: Players, Policy Framework and Challenges." *International Journal of Scientific Research and Management*, 3 (2015): 2355-2362

22 Arpita Asha Khanna, "Governance in Coal Mining: Issues and Challenges," *The Energy and Resources Institute TERI-NFA Working Paper No. 9,* (2013)

23 Jyoti Prasad Painuly, "Financing Energy Efficiency: Lessons from experiences in India and China," *International Journal of Energy Management*, 3 (2009): 293-307.

be 1373MTPA by 2020-21 and a lot of catching up have to be done to meet this demand.[24] The demand for coal in India has increased nearly to one-third in the last five years. The power sector and non-regulated sectors, both, have driven the increase in demand. The power sector remains the key consumer segment with nearly 70 per cent of the overall coal demand.[25]

Due to lack of latest technology, labour health, human resource, environmental and social issues, CIL and its subsidiaries are not being able to feed the current demand despite the fact that India has abundant reserves to satisfy the demand.[26] Subsidiaries of CIL with larger share of underground mines are having slow growth in productivity due to improper utilisation of labour, capital, and technologies.[27] Many consumers complained about the quality and quantity of coal they get from CIL which again lead to importing of coal. Approximately 82% of the coal produced by CIL is sold under fuel supply agreements (FSAs).[28] Most of the FSA are one sided and contains onerous conditions which the ultimate consumer has to abide by to get the coal supply eventually.[29] These are the few reasons for companies in India to import coal. Other reasons include, placing of coal under open general licence, liberalisation in the power sector after *The Electricity Act 2003* and reduction of import duty over a period of time are few reasons contributing to rise in import of coal.[30]

Price Distortions

With the complete autonomy to set prices, CIL and SCCL (Public sector undertakings) along with the dominant power sector hampered the deregulation of price regime. Now though the prices are being deregulated, the sector has not yet learnt to deal with the

24 Palaniappan Chockalingam *et.al*, "Review on the challenges in setting up coal based power generation capacity in India," *International Journal of Scientific & Engineering Research* 8(1)(2017)

25 Coal Vision 2030, Stakeholders available at Consultationhttps://www.coalindia.in/DesktopModules/DocumentList/documents/Coal_Vision_2030_document_for_Coal_Sector_Stakeholders_Consultation_27012018.pdf

26 Vineet Tiwari *et.al,* "Developments in Indian Energy Sector: Problems and Prospects," IOSR *Journal of Business and Management*, 5 (2013) 11-17.

27 Mudit Kulshreshtha*,* "A Study of Productivity in the Indian Coal Sector," *Energy Policy,* 29 (2001):701-713

28 Ministry of Corporate Affairs, "Report on Competitiveness of the Coal Sector*" Indian Institute of Corporate Affairs and CUTS Institute for Regulation and Competition for Ministry of Corporate Affairs* February 12, 2012

29 Singh& Bhaskar, NCL, 2010; MSPGCL, 2012;

30 Sylvie Cornot-Gandolphe, "Indian Coal Steam Coal Imports: The Great Equation," *The Oxford Institute for Energy Studies*, (2016).

inevitable volatility in global coal prices.[31]At present it's very difficult to tell the true cost of domestic coal in the presence of huge cross-subsidies in rail transport. Pricing of coal in India has always been a matter of discussion which uses an age-old method to price coal on the basis of it beneficial heat value rather than gross calorific value.[32] The overall, the pricing scheme of the energy commodities at present is not able to gather reasonable return on investments for the non-government companies, leading to the questioning of the investment decisions made by the managers on behalf of the companies in this sector.[33] Rise in prices of coal due to huge transportation cost from mines to the consuming centre, high production cost, losses due to pilferage, power shortage is another issue in the sector.

Lack of Level Playing Field

Under the current policy regime in the coal sector, the new entrants find it very difficult to enter and operate as there is a significant increase in the start-up and operating cost particularly for the private companies. Also, the latter is not able to gather reasonable return on investment because of the pricing strategy.[34]

Though private entities earlier were allowed to do captive mining, but what captive mining does is to induce inefficiency as a producer of steel, aluminium, cement or power, a far than efficient miner, is allotted mines of coals, leaving behind the experts of this field, thus, leading to inefficiency. Obtaining clearances and approvals from numerous departments have exhausted the captive miners resulting in losing their interest in captive mining.[35] So, the question is, was this even a fair play field for them?

Very recently the Ministry of coal has commercialised the mining of coal without end use restriction.[36] But it is apprehended by the private sector that the blocks that will be auctioned might be the ones which are kept non-operational by CIL due to difficulties like mines with dense population or which are buried deep underground again creating a room for an in competitive environment. Also, the auctioning process which depends more on the

31 Kuntala Lahiri-Dutt, "Coal mining industry at the crossroads: Towards a Coal policy for liberalising India," *The Australian National University, Australian South Asia Research Centre,* (2007) available at http://www.academia.edu/3141697/Coal_mining_industry_at_the_crossroads_Towards_a_Coal_policy_for_liberalising_India, Working Paper 2007

32 Nick Malyshev, "The Evolution of Regulatory Policy in OECD Countries," *Organisation for Economic Co-Operation and Development*

33 Anindita Chakrabarti *et.al*, "India's Energy Security: Critical Considerations*", Sage*, 17,16 (2016):1–17

34 *Supra* 31

35 *Supra* 24

36 Government of India, Ministry of Coal, CBA2-13011/ 1/2017-CBA2-Part (1), Dated ,27'February, 2018 available at https://www.coal.nic.in/sites/upload_files/coal/files/curentnotices/27-02-2018.pdf

price rather than the competence and expertise of the bidders is highly doubted.[37]

A number of laws and rules govern the coal sector in India. Some of these are:

- *Coal Mines (Nationalisation) Act, 1973*
- *Coal Bearing Areas (Acquisition and Development) Act, 1957*
- *Mines and Minerals (Regulation and Development) Act, 1957*
- *Coal Mines (Special Provision), Act 2015*
- *Colliery Control Rules, 2004*
- *New Coal Distribution Policy, 2007*
- *Notification under Contract Labour (Regulation and Abolition Act), 1970*

Certain provisions of these acts are in favour of the government and public-sector undertakings thereby creating a forum for differential treatment and scope of misuse of these provisions thereby defeating the objective of *The Competition Act, 2002*.

For instance, *Coal Bearing Areas (Acquisition and Development) Act,1957* provides for acquisition of virgin coal land by the government for giving it to PSU's, thereby reserving the land. But no such preference is offered to private players. Also, the act empowers government the right to acquire land for which the prospecting licence has already been issued, making the private miners susceptible to the hands of the government.[38] The provision of reserving prime coal blocks for the public sector while allowing the private sector to have blocks only through allocation process vitiates the idea of level playing field.

Also, there exist a number of issues related to land acquisition, compensation and rehabilitation which has not been addressed by the new land acquisition act, which needs to be highlighted. Differential treatment in the procedural formalities of obtaining land acquisition and environment clearance and allocation process, showcase that how these laws are inclined towards the PSU's thereby defeating the very objective of creating a level playing field and striking a balance between privatisation and nationalisation.

In the past few years there has a large number of reforms in the Indian coal sector which has helped the sector to reshape but a common legislative framework that provides an equal footing for public and private sector is yet to be introduced. Thus, in this backdrop it is

37 Debjoy Sengupta, "Is Coal India's Monopoly really going to end?" *Economic Times*, February 22, 2018 available at https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/is-coal-indias-monopoly-really-going-to-end/articleshow/63019787.cms

38 *Supra* 2

important to streamline the coal sector which can only be done by eliminating the existing policy biases that prima facie is against the competition. Therefore, the above mentioned laws and policies which have the potential to affect the competition in sector needs to be re-examined.

Allocation Policy in India

The allocation of natural resources has always been a matter of concern and controversy entailing judicial scrutiny invoking Article 14, 19 and 21 of the constitution of India. This is evident from a number of cases in the past decades questioning the constitutional validity and authenticity of allocation of mines and reserves. Cases ranging from *M/S Kasturi Lal Laxmi Reddy v. State of J&K and another,*[39] where allotment for extraction of resins was alleged to be defective for the want of fairness till the latest "Coalgate Scam",[40] there are plethora of precedents which adjudicated on methods and basis of distribution of natural resources by the government.

The Indian Constitution mandates that no action of the government should be eccentric as arbitrariness is antithesis to equality. The public trust doctrine[41] lays down that government of India is the custodian of natural resources and is bound to protect the same, prohibiting the transfer of these to private persons. Expounding the meaning of arbitrariness, it was also observed by the apex that an enactment shall not be quashed just because court thinks it to be unjust and unreasonable. But the boundaries of doctrine of arbitrariness shall be said to have crossed only when some constitutional frailty is found and there is an apparent violation of equality clause. In case of coal, it is alleged that the scarcity of coal is artificial and with the present system of coal distribution, any of the methods of allocation, allotment or auction is not favourable. In the past few years, the pressure on imports of coal has amplified due to insufficient supply.[42] To enable the coal industry to boom its production levels, ministry of coal needs to work in synchronization with other ministries like petroleum, environment and forest, railways, shipping on the issues of pricing, allocation, clearance etc.

Coal India limited was unable to achieve its past supply commitments made through Letter of Assurances and Fuel Supply Agreements with different consumers, in the absence of

39 1980 AIR 1992, 1980 SCR (3)1338

40 *Supra* 9

41 *M.C. Mehta v. Kamal Nath* (1997)1 SCC 388 --The principle that certain natural and cultural resources are preserved for public use, and that the government owns and must protect and maintain these resources for the public's use.

42 MP Ram Mohan et.al, ", Constitution, Supreme Court and Regulation of Coal Sector in India," *National University of Juridical Sciences Law Review*, 11 (1) (2018)

any new contracts. In such a scenario, CIL being the sole repository of coal in India could route its escape and feed the hungry consumers only through allocation of coal blocks for captive consumption. To actualise this, The Coal Mines (Nationalisation) Act, 1973 was amended to permit captive mining and guide allocation activities in the coal sector. In order to govern captive mining, Captive Coal Mining, 1993 was enacted and National Coal Distribution Policy, 2007 was formulated by Ministry of Coal, which laid the modus operandi of the allocation and distribution process. But unfortunately the coal sector was spanked by CAG's allegation of conducting allocation process in an arbitrary and opaque manner, which led to cancellation of allocation of as many as 204 coal blocks by Supreme Court of India in 2014 in the major Coalgate scam. Due this again the coal production was affected as during 2004-09 only few blocks were put to production.[43] The procedure for distribution of coal mines was not regulated comprehensively before 2010. It was only in 2010 when the 1957 Act was amended to introduce sec 11A allowing competitive bidding.

From settling of disputes between centre and state related to land acquisition for mining in *West Bengal Case,*[44] till the latest Coalgate scam judiciary has played a proactive role in developing the regulatory framework of allocation of coal mines.[45] The current legal regime is inclined towards the public sector for instance the Coal Bearing Act 1957 allows the central government to possess virgin lands and thus the PSUs are not required to obtain lease for land acquisition for mining of coal. However private players do not get such advantage.[46] Therefore, after introduction of *Coal Block Allocation Rules, 2017* there is a need to examine the impact of these in the competition regime of the sector while highlighting the concept of distributive justice in allocation of coal.

Governance of Issues related to Environment Management, Land Acquisition and other Social Concerns

The Indian Constitution mandates wholesome environment to its citizen under Article 21.[47] But there exists an endless conflict of achieving sustainable development. The coal mining

43 Pooja Dasgupta *et.al,* "Coal is Gold: The 'Coalgate' Scam," *Global journal of Commerce and Management Perspective,*2 (2016): 16-21

44 *State of West Bengal v. Kesoram Industries Ltd. And Ors* (2004) 10 SCC 201: AIR 2005 SC 1646

45 *Supra* 42

46 Molshree Bhatnagar, "Competition and Regulatory Issues in Coal Sector in India," CIRC Working Paper No. 11. New Delhi: *CUTS Institute for Regulation & Competition.* (2014).

47 Art. 21: Constitution of India, No person shall be deprived of his life or personal liberty except according to procedure established by law.

activities and combustion of coal leave the environment damage irreversible.[48] From legislative perspectives, the environmental concerns related to coal mining process are multi-fold, namely clearance and approvals, regulation for safety, environment pollution and land degradation. To illustrate the number of coal-based power projects pending for environmental clearances is 78 which amounts to 103GW.[49] The acts of subsidence have left most of the area barren and unstable. No coherent efforts have been made to make these lands reusable. Many countries have laws that deals with subsidence but in India there no legislation specifically dealing with this issue.[50]

Coal also called "the dirty fuel"[51] is more pollutive and harmful for the environment as compared to other fossil fuels. Indian coal has a lower Gross Calorific value but higher ash content, reducing the amount of heat produced, which when transported over long distances causes environment pollution. Since coal is extracted through opencast mining, it has resulted in damaging the ecosystem on the whole by causing air and water pollution, deforestation, removal of topsoil and vegetative cover thereby causing imbalance in the biodiversity.[52] To exemplify the effects of coal washing on water resources, a single coal washery discharges about 45 tonnes of fine coal in the river Damodar, which has become the most polluted river in that particular coal mining belt. The region consists of 11 washeries, so the effect cannot be even imagined.[53] Between 1973 and 2007, the forest cover in the Angul-Talcher region in Odisha reduced to 11% because of coal mining.[54]

Not only mining activities harm the environment but also the non-mining activities like burning of coal in open stock, active fires and road transport of the coal have added a new dimension to the atmospheric pollution of the region[55]. Though there are numerous laws dealing with environment protection and conservation. But there is no single comprehensive

48 Sujata Upguta *et.al*, "Impacts of Coal mining: a Review of Methods and Parameters Used in India," Current World Environment 12,(1) (2017): 142-156

49 *Supra* 23

50 Sribas Goswami, "Challenges of Environmental Management in Indian Coal Mining Sector," *Universal Journal of Environmental Research and Technology,* 6 (2013):616-629

51 Gurdeep Singh, "Environment and Social Changes Facing the Coal Industry," *Proceedings of International Coal Congress & EXPO* (2006)

52 Niharranjan Mishra *et.al,* "Coal Mining and Local Environment: A Study in Talcher Coalfield of India" *Air, Soil and Water Research, Sage* 10 (2017):1-12

53 Nitish Priyadarshi, "Effects of Mining on Environment in the State of Jharkhand," *Environment and Geology,* (2012) available at http://nitishpriyadarshi.blogspot.in/2012/05/effects-of-mining-on-environment-in.html

54 R. Singh *et.al* "Evaluation of land degradation due to coal mining-A vibrant issue" First International Conference on MSECCMI, New Delhi, India. (2007).

55 *Supra* 23

act policy dealing with environment challenges stemming from coal exploration.

Despite of a having numerous environment policies and regulations, the environment condition around the mining area is depleting because of ineffective implementation of these laws. In a report by CAG in 2011 it was found that most of the coal mining companies specially CIL and its subsidiary have been found in violation of national environment standards with no closure plans of mines.[56] Another concern is that related to lack of coordination across various government departments.

Due to the current laws and policies, getting environment clearances and land acquisition has become complex. In spite of efforts to simplify the clearance process there has been consistent delays in getting approvals. The cause of this delay is majorly attributed to non-submission of required information. [57] Fear of not getting environment clearances and land acquisitions on time not only creates entry barriers for prospective miners but also drives the existing players out of the market, thereby affecting the overall competitiveness of the sector.

The need for an Independent Regulator

Coal India limited as a public-sector undertaking is responsible for the production and distribution of in India is under the control of Ministry of Coal. Coal quality inspection, resolving quality disputes, providing approval of projects and performing a role of an arbitrator is done by the Coal Controller's Office which is subordinate to the ministry.[58]

According to the *Coal Regulatory Authority Bill, 2013* which is still pending in the parliament, the impact of monopolistic market structure has exponentially increased due to the absence of an independent regulatory oversight.

Independent regulators with defined powers and functions and a certain degree of autonomy separates its role from the government and politics influence. Most of the OECD countries are trending towards having an independent regulator. It acts as armour preventing market interference from political and private interest.[59] The Telecom sector in India is can be cited

56 Lubna Fairoze, "Cartelization in the Indian Competitive Market," *International Journal of Law and Legal Jurisprudence Studies* 3(1) (2016) :366-377

57 G. Raghuram *et.al*, "Mega projects in India Environmental and Land Acquisition Issues in the Road Sector," Indian Institute of Management Ahmedabad Research and Publication Department IIMA Working Papers, (2009).

58 Coal Controller's Organization, Ministry of Coal, Government of India 2015 http://www.coalcontroller.gov.in/

59 *Supra* 20

as an example where the monopoly structure transformed to a competitive one followed by the emergence of an independent regulator in the form of Telecom Regulatory authority of India (TRAI) to control the deregulation mechanism.[60]

Without a regulator, the public sector upholds the monopolistic structure barring new entrants.[61] The auction process is also expected to improve with more transparent and effective allocation by introduction of an independent regulator.[62] Thus, an Independent regulator with a more practical regulatory approach, technical capacity and institutional legitimacy in their dealings is necessary in various sectors is essential for economic development.[63] The Trend of having sector wise independent regulator started in United States early in 20th century to check abuse of monopoly powers. The US regulatory agencies are relatively autonomous with almost zero political interference with proper accountability and supervision by the US Congress.[64] Thus, Independence without accountability is a bane than a boon.

The establishment of an independent regulatory body without any interference from the government and ministry shall definitely be able to answer the challenges in the sector including that of competition.

Conclusion

Thus, in order to inject competition in the sector the government has taken the right step viz-a-viz allowing commercialisation of coal mining. But again that does not seem to be so easy task keeping in mind the allocation of coal blocks and deep rooted CIL's hold in the sector is not easy to loosen. Also the current regulatory regime of coal sector in India is not ready to welcome such a major policy change of introducing commercialisation. We need to have a governance system with autonomy and minimum interference from the stakeholders in the form of an independent regulator or modify the existing powers and functions of office of Coal Controller.

60 R.U.S. Prasad, "The Impact of Policy and Regulatory Decisions on Telecom Growth in India," *Stanford Centre for International Development*, Working Paper No. 361, July (2008).

61 Anurag Sehgal *et.al,* "Coal Requirement in 2020: A Bottom-up Analysis" *Brookings India Quality. Independence. Impact* ,2016

62 Molshree Bhatnagar, "Competition and Regulatory Issues in Coal Sector in India," New Delhi: *CUTS Institute for Regulation & Competition*, CIRC Working Paper No. 11. (2015)

63 Navroz K. Dubash, "Independent Regulatory Agencies: A theoretical Review with Reference to Electricity and Water in India," *Economic and Political Weekly* 43, 40 (2008).

64 V.Paratab Kumar *et.al,* "Public-Private Partnerships in Infrastructure: Managing the Challenges", Springer, 2017.

Crime of Rape and Laws: Need of Gender Neutral Approach

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Abstract

'Law' is a measure to provide sense of security but seldom has the measure become a weapon to target innocents. It is when the protected section starts misusing the security given to them to fulfill their unjust demands or to satisfy their ego hunger in cases where their only purpose is just to harass the other party. Use and misuse of law are two sides of a coin and can never be ignored. So, it becomes the duty of the constitutional machineries to consider the fact while framing and enforcing laws, that the prospective offenders can be victims too. Hence, equal protection must be provided to tackle misuse of the law against the innocents.

Laws should be futuristic enough to cover all the contingencies. It should not be biased towards one. Gender specific laws would fall flat on the face with the test of time. Women are not the only category which can be regarded as vulnerable section. Any marginalized person can be vulnerable irrespective of which gender they belong to.

The present paper is an attempt to highlight the need for gender neutral law on rape along with effective measurements that should be taken against false allegations of rape.

Introduction: Women and their Vulnerability

Despite the fact that the ancient Indian scripture and commentaries described women as 'Goddess' or 'Shakti' the position of women in India had been considerably unpleasant. For long she has been treated as a 'property' capable of being owned by man. Her very existence was thought to be for 'pleasing' the Mankind. Her personality was to be controlled within limits by one or the other person at different stages of her life like initially by her

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father, after marriage by her husband and then by her son. Her independence was always shadowed by someone.

Uneducated mothers in poor families who lived their own life's struggling and juggling with the household works and child rearing never took stand for their girl child. It was mainly because they never realized the actual importance of education in the directionless life of a girl child. They just saw it as an additional unfruitful expenditure in addition to the inevitable expenditure for her marriage.

On one hand where the beauty of nature 'motherhood' was celebrated with the birth of a son; it was thought to be curse with the birth of a girl child. Birth of a girl child was thought to be a curse because of the social consequences which were inevitably going to follow such as expenditure in her marriage, dowry and lifelong obligations towards her in-laws. Hence, parents preferred to uproot this very reason of unnecessary expenditure in the family. They ended up aborting the fetus if it was diagnosed to be a girl child. Some parents under the trauma of consequences of a girl child even ended up killing the girl child mercilessly.[1]

The vulnerability of the women left them as an easy prey in the male dominated world. It was mainly because of the economic and social dependency of women over men. It was not only the case with uneducated economically backward women but also with educated and economically independent women. As soon as women stepped out of their homes they were exposed to abuse ranging from outraging their modesty to rape, at work they were abused ranging from Sexual Harassment at Workplace to being underpaid for the same job as men. The story did not end there. Females were not completely safe behind the closed doors of their house they were continuously abused in silence ranging from domestic violence to matrimonial offences. Women were harassed irrespective of their age. Girls of tender age were sexually exploited at schools, public places by known or unknown people.

When it comes to inheritance women have been discriminated against men from ages. It was only after the amendment in the Hindu Succession Act 2005 that daughters were given equal rights as sons. This positive step taken by the Indian legislature still is stumbling between the rigid mindsets of the society where the daughter once married doesn't belong to her maternal home or maternal family.

It was not only in India that women are given inferior position as compared to men but rather it is globally that women face in-equalities. Women have always been suppressed

1 Harapriya Mohapatra, 'Status of Women in Indian Society', Quest Journals Journal of Research in Humanities and Social Science, Volume 3, Issue 6 (2015) pp:33-36 ISSN (Online) : 2321-9467, available at http://www.questjournals.org/jrhss/papers/vol3-issue6/F363336.pdf, last visited on 18th Aug 2019.

and have faced many atrocities. Even in Colonial America, women were granted 'chattel status' as she was the legal property of her father or her husband. "A married woman could not own property, for she herself was someone's property. Her personal "belongings," her reproductive rights to decide the number of children she wants to have etc, her sexual rights, even her own body was legal possessions of the man she wed. In the eyes of early post-revolutionary law, a woman, as a freely determined individual, simply did not exist."[2]

On analysis, it can be stated that since ages women, across the globe are considered as vulnerable when compared with men, the main reason behind the compounded position of women in India and abroad is the lack of 'independence' being given to her. This resulted in major gender in-equalities. A need for the upliftment of the weaker section of women was felt immensely. Their uplifment was only possible by means of proper laws for their protection. Other parameters like education and awareness about their own rights was also necessary to bring about change in their self outlook and their outlook by other genders. A collective effort of the society at large could strengthen and change the inferior position of women. However, while uplifting and empowering the then inferior section of the society have we created an imbalance in the equilibrium between both the Genders?

Constitutional and Legal protection for Women in India

After Independence in the year 1947 and with the coming into force of the Indian constitution on 26th Jan 1950 major efforts were made to uplift the position of women.

The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic, education and political disadvantages faced by them. Fundamental Rights, among others, ensure equality before the law and equal protection of law; prohibits discrimination against any citizen on grounds of religion, race, caste, sex or place of birth, and guarantee equality of opportunity to all citizens in matters relating to employment.

2 Kevin C. Paul, 'Private/Property: A Discourse on Gender Inequality in American Law', Law & Inequality: A Journal of Theory and Practice, Volume 7, Issue 3, Article 3, available at http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1461&context=lawineq, last visited on 18th Aug 2019.

Articles 14[3], 15(1)[4], 15(3)[5], 16[6], 39(a)[7], 39(d)[8], 39(c) and 42[9] of the Constitution are of specific importance in this regard.

The 'Torch of Hope' for the empowerment of the Women lit by the Constitution of India could only be ensured by the support of proper legislative enactments. Hence the State has enacted various legislative enactments for empowering and protecting women. Along with all other general crimes like 'murder', 'theft', 'robbery' which can be committed against women there are certain specific crimes which are targeted only against women. For such crimes women are given even more protection by enacting even more stringent laws. Such as Dowry death[10], Assault of criminal force to woman with intent to outrage her modesty [11], Sexual harassment and punishment for sexual harassment[12], Assault or use of criminal force to woman with intent to disrobe[13], Voyeurism[14], Stalking [15], Rape[16], Husband or relative of husband of a woman subjecting her to cruelty [17] of Indian Penal Code, 1860.

With this positive picture of having various laws for the protection and empowerment of women it was thought that these laws would be successful in uplifting women in the society. But it wasn't the case as society has many shades to be unfolded every now and then.

December 16, 2012

It was the unfateful night of 16th December 2012, when the tragic incident occurred on the

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

4 The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

5 Nothing in this article shall prevent the State from making any special provision for women and children.

6 There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

7 The State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood;

8 The State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women.

9 The State shall make provision for securing just and humane conditions of work and for maternity relief.

10 Section 304, IPC 1860

11 Section 354, IPC 1860

12 Section 354A, IPC 1860

13 Section 354B, IPC 1860

14 Section 354C, IPC 1860

15 Section 354D, IPC 1860

16 Section 375, IPC 1860

17 Section 498A, IPC 1860

streets of National Capital of the country that shook the nation and propelled a public outcry for need of stringent actions against such heinous acts[18]. In an attempt to serve justice the Government of India constituted a three-member judicial committee headed by the former Chief Justice of India, Justice J.S. Verma, to submit a report on legal reforms required to tackle violence against women. The key objective of the Commission was to review for possible amendments to the criminal law and suggest measures for faster trials and harsher penalties for vicious offences against women.

The Commission submitted its recommendations by identifying 'lack of good governance' as the central cause of offences against women. The report criticised the government, the abysmal and old-fashioned police system alongside public apathy in tackling offences against women, and thereby, recommended an ardent need for amendments in legislations. The recommendations were based on more than 70,000 suggestions received from stakeholders, social activists and public comprising of eminent jurists, legal professionals, NGOs, women's groups and civil society through varied methods: emails, posts and fax. Based on some of the recommendations of the Commission report, an anti-rape ordinance was drafted. The Criminal Law (Amendment) Bill, 2013, passed by the Parliament of India received the assent from the President and was enacted as the Criminal Law (Amendment) Act in April 2013.

The Criminal law (Amendment) Act 2013 (hereinafter referred to as the Act) amended the Indian Penal Code (IPC), 1860, the Code of Criminal Procedure (CrPC), 1973, the Indian Evidence Act (IEA), 1872 and the Protection of Children from Sexual Offences Act, (POCSO), 2012. The Act provides for penal provisions for those police officers who fail to register First Information Report (FIR) in cases of offences against women. The Act also addresses penalties for other forms of crime like stalking, touching, sexually coloured remarks, voyeurism, human trafficking and acid attacks, awarding a minimum 10-year jail term to the perpetrators and reasonable fine to meet the medical expenses of the victim.

18 On the dark night of 16 Dec 2012 a 23 year old paramedic student along with her male friend boarded a private charted bus to reach their home. Six men travelling in the bus, who were drunk, began molesting her. The male friend was knocked down when he opposed the molesting. The drunken men gang raped the girl, when she tried to oppose, one of the attackers inserted an iron rod in her private parts, puling and ripping her intestines apart. The medical reports later revealed that she had septic injuries on her abdomen and her genital organs also. The attackers then threw the half-naked blood soaked bodies the two on the road and ran away.

Effect of the Criminal Law (Amendment) Act 2013: A Critical Analysis

The enactment of the stringent laws did give some relief to the scared mindsets of the mob but was it the solution of the problem or was it just closing the doors tight enough to believe that the thief won't be able to break the doors now when the fact of the matter was that the thief was hiding inside the house only.

Due to the barbaric India's daughter gang rape case which shook the masses, the laws were made more stringent which was thought to have a deterrent effect on the future crimes of such nature. But a study[19] showed that there has been a sharp increase in sexual violence after the heinous incitement took place in Dec 2012. Though the sex crimes where not completely deterred away but these stringent laws[20] surprisingly gave more scope of misuse.

Another angle to the story is that the misuse of the laws initially made for the protection and empowerment of women is becoming the talk of the town. In the absence of the gender neutral approach, it is observed that there are many reported cases where the innocent men have been harassed by women filling false cases against them.

An evaluation of the Criminal Laws (Amendment) Draft 2013, the Criminal Laws (Amendment) Ordinance 2013 and the final Criminal Laws (Amendment) Act 2013 clarified that at its inception the Justice Verma Committee formulated a gender neutral draft in many aspects such as it contained gender neutral rape laws and gender neutral sexual harassment at workplace laws. However when the final Act came, its gender neutrality was ignored as unimportant and didn't become the part of the final Act. The need of the hour in our dynamic society is to take a broader view on gender neutral laws.

The concept of false allegations of rape charges filled by revengeful women is not new as it runs parallel to the now more stringent rape laws under Sec 375 of the Indian Penal Code 1860. The root cause of putting false allegation against an innocent man might run from seeking revenge, providing alibi or obtaining sympathy and attention. Whatever might be the root cause of false allegations but what grows from it is unredeemable for an innocent man.

According to the National Crime Records Bureau 2015 data, there were 1583 cases of rape which were dismissed due to mistake of fact or mistake of law out of the total 13460 cases.

19 'Sexual violence in Delhi: what the numbers say', Sep 23, 2017, available at http://www.thehindu.com/data/sexual-violence-in-delhi-what-the-numbers-say/article10938327.ece, last visited on 18th Aug 2019.

20 Criminal Laws (Amendment) Act 2013.

Therefore, in total of 11.76 % reported cases of rape were imsy.[21]

The Delhi Commission of Women (DCW) revealed shocking statistics that between April 2013 and July 2014 only 1287 cases were true out of the 2753 and in total of 1464 cases were found to be ill-founded. The data showed 53.2% of the total reported cases were found to be false.[22]

Judiciary on False Allegation of Rape

The Supreme Court recently, on 31st March 2017 in *Vineet Kumar & Ors* v. *State of U.P*, quashed a rape charge and aptly observed that the legal provisions cannot be allowed to become an instrument of harassment at the hands of the mis-user of law. The accused in the case had lent some money to the complainant, her son and her husband which they were not able to return. The cheques they gave for the repayment bounced in September 2010 and the very next month the complainant filed a rape case against the accused.

The Bench comprising of Justice A.K. Sikri and Justice Ashok Bhushan while throwing light on the powers of the High Court under Sec 482 Cr.P.C to make such orders to prevent abuse of the process of any Court held, "*The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material.*"[23]

The court observed that law should not be allowed to be misused as to fulfill the ulterior motives of anyone and held that "*Inherent power given to the High Court under Section 482 Cr.P.C. is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court*

21 National Crime Records Bureau, Crimes Statistics 2015, available at http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/CrimeInIndia2015.pdf, last visited on 18th Aug 2019.

22 '53.2 per cent rape cases filed between April 2013-July 2014 false, says DCW', Dec 29, 2014, available at http://indiatoday.intoday.in/story/false-rape-cases-in-delhi-delhi-commission-of-women/1/409320.html, last visited on 18th Aug 2019.

23 *Vineet Kumar & Ors* v. *State of U.P. & Anr* Slp(Crl.) No.287 Of 2017, Para 20

has to thwart the attempt at the very threshold."[24]

The Delhi High Court is taking a stand on the misuse of Rape Laws against Men. On 7th July 2017 in *State (Govt Of Nct Of Delhi) Vs Jitender Kumar*, Delhi High Court directed the Trial Court to proceed against the complainant of false allegations of Gang Rape against two Delhi based Doctors. The complainant alleged that she worked with the doctors as an Assistant. Her services were terminated in March 2013. She alleged that she was raped by both the doctors on the pretext of giving her the job back. The Double Bench consisting of Justice G.S Sistani and Justice A.K Chawla aptly highlighted the following that "*… It seems the whole criminal machinery was put in force just to extract revenge from the respondents…*"[25] Highlighting the sensitivity involved in offences of sexual nature it is presumed that a woman would never lie as regards commission of any offence of sexual nature because of the stigma attached to it. The court correctly acknowledged that "*… though ordinarily no woman would falsely implicate someone in a rape case owing to social stigma attached to the offence, at the same time, this Court has come across cases where false charges of rape were leveled when someone tutored a gullible daughter or a disgruntled employee leveled false allegations to seek vengeance…*"[26]

Considering the damage a false allegation would cause for an innocent man the court held that "*…it is clear that the Courts must not be blind to the rights of the accused. A false accusation of rape may be as damning to an accused as to a victim of rape. The accused may be shunned in the society and by his own family, spouse and children for no fault of his own only because one woman has leveled false allegations of rape in pursuance of her evil design…*"[27]

The Constitution of India guarantees fundamental right to dignity, under the ambit of Article 21 to all the citizens of the country without discriminating against anyone on the basis of one's sex. The laws enacted by the legislature should run in conformity to the same but ironically these laws are made instruments giving more weightage to the dignity of a women than to the dignity of men.

The purpose of the law of the land is to protect all the individuals against any kind of frivolous complaint or malice. The damage that results from a false allegation of rape is beyond simple defamation because it effects and distorts different aspects of the accused

24 *Ibid*, Para 39

25 *State (Govt of NCT of Delhi)* v. *Jitender Kumar & Anr* Crl. M. A. 10404/2017, Para 38 of the Judgment

26 *Ibid*, Para 42

27 *Ibid*, Para 46

person's life such as his self respect, his self esteem, his career, his family life, his social standing.

The High Court of Delhi even has acknowledged the fact that *"There is no doubt that rape cause's great distress and humiliation to the victim of rape but at the same time false allegation of committing a rape also causes humiliation and damage to the accused" in Rohit Bansal and Ors. v. State. "An accused has also rights which are to be protected and the possibility of false implication has to be ruled out."*[28]

The subordinate Delhi Courts have also been taking steps for protecting the dignity of a Man. In *State Vs Mr Pherudin khan* a lawyer was acquitted in a rape case by a Delhi court, which said it was time to take a stand to protect men from such false implications. The court, which said the lawyer may file a case for damages against the complainant, made the observation in the rape case lodged by the woman after she retracted from her complaint. The woman had alleged that she was repeatedly raped in the chamber of the accused at a court in New Delhi from 2010-2012. The woman, however, turned hostile before the court saying accused was innocent and she lodged a complaint out of anger.

The Judge Ms. Nivedita Anil Sharma, ASJ, Delhi empathetically observed in favour of the falsely accused person that "His plight may also continue after his acquittal as his implication may have caused an uproar in society but his acquittal may not even be noticed. He would continue to suffer the stigma of being a rape case accused."

Very correctly it was further observed that "It may not be possible to restore the dignity and honour of the accused nor compensate him for the humiliation, misery, distress and monetary loss. However, his acquittal may give him some solace. He may also file any case for damages against the prosecutrix, if advised. No one discusses about the dignity and honour of a man as all are only fighting for the rights, honour and dignity of women. Laws for protection of women are being made which may be misused by a woman but where is the law to protect a man from such a woman where he is being persecuted and implicated in false cases, as in the present case. Perhaps, now it is the time to take a stand for a man." [29]

Another matter where the true face of 'Allegation of Rape' can be seen as being used as a tool is in the case of Yogesh Gupta who is a 44 yesr old Delhi estate agent. He had caught one of his employees embezzling money so wanted to report it to the police. The scared revengeful employee coerced a woman to pose as a potential house buyer who after viewing

28 *Rohit Bansal and Ors.* v. *State* 2015 VI AD (Delhi) 566, Para 47

29 *State* v. *Mr Pherudin Khan*, Feb 12, 2016, Available at https://indiankanoon.org/doc/137982073/?type=print, last visited on 18th Aug 2019.

the property asked for a lift to metro station form Yogesh. Later she accused him for raping her.[30] But when the woman registered her complaint to the police, Gupta found himself caught up in a system that seemed to care little about the evidence and a lot about branding him a criminal. For the next eight months as the police investigation continued, Gupta had to endure the public disgrace of being accused of rape. "I can't even begin to explain the ordeal that my wife, kids, my father and brother had to go through," he said. When the case finally went to court, the woman confessed she had made up the accusation and Gupta was acquitted, but much damage had already been done." The allegation of rape has affected my social status, even if one is acquitted, one cannot regain that status. You can't prove your innocence to each and every person. People are quick to judge in a rape case without even knowing whether the person is guilty or not" he said."[31]

Need of Gender Neutral Rape Laws

The High Court of Delhi recently sought reply from the government on plea for gender-neutral rape law. The Court has sought the government's response on a plea seeking to declare the "gender-specific" sections related to rape and its punishment under Indian Penal Code (IPC) as unconstitutional. A Bench of former Acting Chief Justice Gita Mittal and Justice C. Hari Shankar asked the government to reply promptly.[32]

A social activist and a budding lawyer Mr Sanjiv Kumar has filed a writ petition in the High court of Delhi under Art 226 of the Constitution of India demanding Gender neutral Rape Laws. In his petition he alleges that the Criminal Laws (Amendment) Ordinance 2013 which was published in the official gazette was gender neutral as regards Sec 375 of the Indian Penal Code which talks about Rape and Sec 354A of the Indian Penal Code which talks about Sexual Harassment At workplace but when the Criminal Amendment Act 2013 came, the gender neutrality of these Sections was removed.

He also argued that the nine- Judge bench leading judgment[33] on 'right to privacy' ruled that 'right to privacy' which includes consent and bodily integrity is now a part of the fundamental right available under right to life and liberty under Article 21 of the Constitution of India. This right to privacy not only includes right to privacy of a woman but also includes right

30 'Does India have a problem with false rape claims?',8 February 2017, available at http://www.bbc.com/news/magazine-38796457, last visited on 18th Aug 2019.

31 Ibid

32 'HC seeks govt reply on plea for gender-neutral rape law', The Hindu, Sep 28 2017, available at http://www.thehindu.com/news/cities/Delhi/hc-seeks-govt-reply-on-plea-for-gender-neutral-rape-law/article19765638.ece, last visited on 18th Aug 2019.

33 *Justice K S Puttaswamy (Retd.), And Anr.* v. *Union of India* W.P.(C) No.000372/2017.

to privacy of men.

The petition alleged that "IPC Sections 375 and 376 in the current form, which are gender-specific and not gender-neutral, don't secure males and thus don't stand the constitutional test and fail in right to privacy." The petition further argues that 63 countries have gender neutral rape laws; "if the [rape] victim is male, he has right to equal protection, equal to that of a female in like circumstances. The petition also claimed that the notion of patriarchy was the reason why men refused to come out in the open to report sexual crimes against them. "If a male alleges that a female raped him, he is not seen as a real man because the stereotypical patriarchal assumption of men are superior and stronger than women comes into the picture," the petition said.

Under gender-neutral laws, all genders are equal in the eyes of law, either by explicitly stating every gender in law or by making the language of law gender neutral. For instance, under the POCSO Act, 2012, a child has been defined as "any person below the age of eighteen years," without specifying any gender and using the word 'any' denotes equality to all genders.

The Justice Verma Committee, 2012 underlined the need for India to recognise different sexual orientations and recommended inclusion of the third gender along with other genders, i.e. men and women while drafting gender-neutral laws. "However each of these requires to be codified distinctly and separately as victims and not clubbed together in a gender-neutral term, 'person'," said Vrinda Grover, a lawyer and a human right activist, while speaking to Indian express.[34]

Recently Mr. K T S Tulsi, Senior Advocate while highlighting the need of "Gender Neutral laws" in our country introduced a Bill in Rajya Sabha calling for amendments in Indian Penal Code 1860, Code of Criminal Procedure 1974, and India Evidence Act 1872. According to him it is not only the women class who are vulnerable and needs protection even the men and transgender should be acknowledged as vulnerable and should be provided due protection in law. The bill proposes gender neutrality in all offences which are sexual in nature. As sexual offences are against the social morality they need to be punished respective of the gender of the victim. The lack of acknowledgement of men as a victim of sexual offences we have impacted the ability of this class to recognize their own victimization.

K T S Tulsi further clarifies that the objective behind putting forward this gender neutral approach is nowhere to undermine the women class as rape victims rather its main objective

34 'Is India ready for gender-neutral laws?', Oct 18, 2017, available at http://indianexpress.com/article/india/is-india-ready-for-gender-neutral-laws-4895122/, last visited on 18th Aug 2019.

is to empathies all the classes of victims which can include men and transgender too.

Conclusion

Ever since the inception of the Society there has been inception of certain crimes which can be committed against the prospective victims. Crimes against women are one such category which predominantly are a subject of fierce debate now a days. There are endless crimes which can be committed against a women but a sexual offence is the most heinous one which invades the very soul of the victim. It can be correctly said that the offence of Rape is not only an offence against the body of the victim but it's an offence against the soul of the victim.

Due to the excessive vulnerability of the women towards offences of sexual nature it has been the tendency of the legislature to provide overly adequate protection for them. It is while going through these roads of the providing cathodic protection for women the legislature somewhere made paths for despotism. The excessive protection that has been provided to the women in the name of empowerment can be used by them as 'Hammer of Revenge' against men at large. Several laws have been passed in the last 60 years in the name of protection of women and their empowerment. However, there are no laws to protect men from any form of abuse or harassment within or outside home.

After the enactment of the Protection of Children from Sexual Offences Act 2012 a male child under the age of 18 years is protected from any kind of Sexual Offences. But the irony is that as soon as this male child is going to turn 18 years and one minute old he is going to be thrown out of the protection against any form of sexual offences. It is because suddenly this male child has turned into an 'Adult Man' who according to our Indian society doesn't need any protection.

The vulnerability of the women has now converted into the vulnerability of the men at the hands of overly empowered women misusing the laws to fulfill their vindictive desires. Thousands of men are becoming victims of "legal terrorism" unleashed through laws like Section 498A IPC[35], Domestic Violence Act 2005[36], Adultery laws[37], laws against Rape[38]

35 Sec 498A, Indian Penal Code, 1860.

36 Protection of Women from Domestic Violence Act, 2005.

37 *Ibid*

38 *Ibid*

and Sexual Harassment[39], and even Divorce[40] & Maintenance[41] Laws.

Men are being subjected to severe discrimination under law, and their basic human rights are being violated every day in the name of more and more legal provisions that claim to empower and protect women.

Thus after analyzing the situation the researcher feels that there is a striking need of looking into the matter once again. We will have to keep our pre-biased notions, in favor of women and against men, aside and think indiscriminately.

When countries like United Kingdom can take strict actions against a false accuser of rape where a women is jailed for 10 years for time and again filling false allegations against people.[42] Even in India proper actions should be taken setting an example for women at large that law cannot be used as a tool of harassment.

Laws should be futuristic enough to cover all the contingencies. It should not be biased towards one gender. Gender specific laws would fall flat on the face with the test of time. While countries like United States can have Gender Neutral Rape laws then why not India? As women are not the only category which can be regarded as vulnerable section. Any marginalized person can be vulnerable irrespective of which gender they are. Thus laws should be neutral as laws should be made against a crime and not against the gender. The time has come when legislature should come out from prejudices and should think independently, neutrally and impartially.

A man goes through a traumatic experience when he is falsely implicated in allegations of sexual offences which has no merit. It is because what he loses is what he has spent a lifetime in earning 'respect'. In the true sense it can be called as a 'Social Assassination'. The Constitution of India provides a fundamental right to life & liberty through its Article 21 which also covers under its ambit 'right to dignity'. This Right to Dignity covers both the 'Dignity' of women as well as man. Then why is that some laws[43] suggest that 'Dignity of a Man' is weighed less than the 'Dignity of a Woman'.

39 *Ibid*

40 *Ibid*

41 *Ibid*

42 'Woman jailed for 10 years for making series of false rape claims', Aug 24, 2017, available at https://www.theguardian.com/society/2017/aug/24/woman-jailed-10-years-false-rape-claims-jemma-beale, last visited on 18th Aug 2019.

43 *Supra* note 34 – 40.

GLOBALISATION: AN ANALYSIS IN THE CONTEXT OF SUSTAINABLE JUSTICE

Kanchan Lavania*

Abstract

This article makes an effort to study and analyze the impact of globalization on achieving the sustainable development goals of decent work and economic growth. The article revolves around these critical issues:

i. Whether the lives of people from the "nasty, brutish and short" state of nature of Hobbes has progressed in the wake of Globalisation and so called diverse developmental agendas?

ii. Whether deprivations and inequities can be addressed by the Global Institutions?

iii. Whether the "difference principle" of Rawls concerned with distributive equity and overall efficiency which takes the form of making the worst off members of society as well off as possible applies in the global context of globalization and development?

iv. Whether the New Industrial Division of Labour theory which has arisen in the globalization era in contrast with the developmental agendas of third world countries and thus destructing the very idea of justice?

Keywords: *Washington Consensus, classical economic theory, Millennium Development Goals, Sustainable Development Goals, Job Security, North South divide, Global Capitalism*

INTRODUCTION

Globalization which seems just a thirteen letter word has called the entire global community

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to debate on its merits and demerits. It has various dimensions to it: social, economic, political, cultural etc. An anti- globalization movement is again on the rise and questions as to whether it is dead or alive are asked in the light of events like trade war and the significance of WTO dispute resolution process, Brexit, the formation of African Trade Agreement etc. The other stream of arguments flow from the perceived tension between the national institutions, agencies or governments and the International institutions, groups or organizations to achieve various goals enshrined in the welfare policies, programmes, legislations of the countries and the International agreements, conventions, declarations, negotiations and agendas. Thus it becomes pertinent to analyze whether the Hobbesian and Rawlsian claim that there is a need of sovereign state to attain principles of justice through a set of institutions holds true or is it possible to achieve the global sustainable justice even without a world government.

From Washington Consensus to Sustainable Development Goals: A Reflection

The time of Second World War can be exactly described in the imagery of Hobbes State of Nature: "solitary, poor, nasty, brutish, and short; warre of every man against every man." After the end of Second World War there was an onus on the newly independent colonies to put into order the economy of their nations, which had been poorly wrecked by the war and the colonialism era. The economic revival at that time was in the hands of the nation states. The developing countries then, Latin America or elsewhere with low per capita income were mainly agricultural economies. Thus the need was felt for the investment in manufacturing sector and industrialization with import substitution. But the decade of the 70's and 80's was a stormy challenge before the development economists due to the oil crisis of 1973 and then in 1979, with the apprehension of same in early 80's (ending with the fall of the Berlin wall) and the debt crisis of Latin American countries. Most importantly we had a new term coined 'Washington Consensus' by John Williamson in 1989.

Thus, the approach of a planned economy questioned the viability and efficiency of the Government policies to cope up with the economic crisis. In this perspective, it was obvious to look at the alternatives and the environment justified that the well trained, well intentioned economists to utter the obvious truths of their profession- "getting macro balance in order, taking the state out of business, giving markets free rein. 'Stabilize, privatize, and liberalize' became the mantra and John Williamson's Washington Consensus inspired a wave of reforms in Latin America and Sub Saharan Africa that fundamentally

transformed the policy landscape in these developing areas."[1]

The conception of Washington Consensus was different for everybody; its relevance and impact also differed significantly according to various authors and economists. As Williamson also mentions that it was only to get everyone on the same page as he was in the Institute of International Economics where the conference was organized so as to know from the authors what was actually happening in their countries. However the set of ten policy[2] considerations laid down by him became a bone of contention in ideological debates for more than a decade. It was generally understood in terms of "market fundamentalist" or "neo liberal" approach which advocates for the minimal state intervention except for maintaining macro- economic stability, law and order and to ensure proper distribution of public goods. However it is still debated as to whether the concept constructed by the "Bretton Woods Institution"- IMF, WB and WTO has been successful or failure, and to analyse the possible line of arguments, it is important to divert our attention on the question of whether it was a comprehensive code for all the developing economies to prosper or was it only a kind of "shock therapy" given to emerge out of the economic crisis? Was there a need to amend the approach of looking at the global economy and development process?

Though there is a general consensus about the repercussions of the reforms that they haven't worked well to the extent expected and intended and rather "ill- suited" especially in Sub Saharan Africa where there was a public health emergency, still these Adam Smith's "invisible hands" framework prevailed from 1970's to mid 1990's. In fact this policy frame was concretized in the form of SAP (Structural Adjustment Programmes) to help the countries in getting rid off their prior debts on certain 'conditionalities', especially the governments of developing countries. This was again questionable because this idea of giving financial assistance by the International Financial Institution as based on the said 'conditionalities' was market oriented and had significant impact on the social sector. Thus creating a divide between the economic priorities and social considerations/growth rather than aiming at inclusive growth.

Further, technically why the Washington Consensus failed can be understood from the critique of Stiglitz when he says that the Adam Smith's laissez faire concept would have been relevant for the industrial economies of that time but may not hold true for the developing

1 Dani Rodrik, "Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's "Economic Growth in the 1990s: Learning from a Decade of Reform"(2006) 44 Journal Of Economic Literature, 973,987

2 "Fiscal Discipline, reordering public expenditure priorities, tax reform, liberalization of interest rate, competitive exchange rate, trade liberalization, liberalization of inward foreign direct investment, privatization, deregulation and property rights".

countries today. He believes that the preconditions for working of a market economy are the robust working institutions like courts to enforce property rights, competition and perfect information but none of them are achievable as yet. Rather if reforms happen then it is not possible that they happen simultaneously which will then make the matter worse. He refers to this as "issue of sequencing" which if ignored can lead to disastrous results.[3]

He further criticises the approach of IMF and World Bank on the note that "it does not take acknowledge that development requires a transformation of society. Even it completely ignored the fairness concept."

Thus, the failure of this concept led to emergence of new approach known as Post Washington Consensus. It was different from the former as the latter focuses on "social growth and welfare" as well leading to sustainable development. Further the Washington Consensus was based on the premises of "classical economic theory" and "Instrument rationality". The latter implies that an individual will take the decision based on maximum utility to create perfect markets. However, the Post Washington Consensus does not reject the role of a State and focuses on economic as well as non- economic factors. The Post Washington Consensus gives us a balanced approach whereby market as well as the state has a role in the economy. However, how far this new consensus has been successful is again a point of various deliberations and thoughts. As Alfredo Saad points out the lacunae even in the new consensus approach as:

> getting institutions right' has sometimes been exaggerated to the point of becoming mantra, just like 'getting the prices right' was the mantra of the WC. An excessive emphasis on institutions suffers from problems at three levels. First, the literature has been unable to establish strong links between institutional design and long term economic performance. Second, the institutional reforms demanded by the new consensus are rarely new; for example, the World Bank has for several decades has advised the poor countries to improve the investment climate, invest in infrastructure and agriculture and educate girls. Third, even if these relationships could be demonstrated, their implications may be disabling for the poor countries, because institutions are context specific and rigid over time, suggesting that poor countries with weak institutions would be unable to implement rapidly the institutional reforms necessary for 'development'.[4]

3 Joseph Stiglitz, *Globalisation and its discontents*,(Penguin Press, U.S, June 2002).

4 Alfredo Saad- Filho, "Growth, Poverty and Inequality: Policies and Debates from the (post) Washington

Thus, there was a shift in thinking - from Washington Consensus and post Washington Consensus to realizing that more needs to be done and other efforts need to be taken - is reflected in the Millenium Development Goals. MDGs came about to show the commitment of global institutions towards inclusive growth and take many other steps towards removing poverty, illiteracy, hunger, fighting diseases, ensuring women empowerment, maternal health, and protecting the environment.

The shift from the purely economic approach of WC to MDG and further to SDG reflects the change in the approach of the international community towards the economic- social problems faced by the 'global citizens'. Most importantly there was convergence of development agenda of UNDP, UNICEF, UNEP, WHO and UNESCO. It was not something confined to International Financial Institutions only. Whereas MDG were framed particularly by some experts in the UN the framing of SDG was more comprehensive with the involvement of civil society, general public working groups, specific country consultations, face to face meetings.[5] Thus, at this stage it can be concluded that brutish state of Hobbes has been 'replaced' or rather improved by a sense of global community concept and the initiatives taken both by the "imagined community" and global in the form of MDGs and SDGs.

Globalization: Economic Vulnerability or Enhanced Security?

Globalization and Employment: Antithesis?

"Promoting jobs and enterprise, guaranteeing rights at work, extending social protection and promoting social dialogue are the four pillars of the ILO Decent Work Agenda with gender as a cross-cutting theme."[6]

Security is for most people closely connected with the security of work. In this light many supportive and opposing views are developed on the impact of globalization on employment opportunities and related matters. Much of the debate has centered on job security that is whether or not global capitalism is providing, or can provide, waged positions for everyone in the world workforce who needs or wants them. Some experts believe that globalization has created major job losses. Others including neoliberals have mainly attributed problems of unemployment to other factors such as new labour saving technologies, inadequate education and training, or unsustainable levels of wages and benefits. When neoliberals

Consensus to Inclusive Growth", (2011) 5 Indian Journal Of Human Development 1,14

5 17 Goals to Transform Our World available at http://www.un.org/sustainabledevelopment/(July 2,2019 10:30 PM).

6 Guy Ryder, ILO Director General

accept that a link could exist between globalization and unemployment, they usually regard job losses as a temporary pain of economic restructuring in response to the liberalization of the world trade and investment.[7]

The Washington Consensus as well as the MDG did not address the issue of unemployment and definitely the concerns of working conditions or wages were not even addressed in both the important global economic policy documents. However, the 'promotion of inclusive and sustainable economic growth, employment and decent work' is one of the agendas of Sustainable Development Goals. It is also mentioned in the Agenda of ILO that "putting job creation at the heart of economic policy-making and development plans, will not only generate decent work opportunities but also more robust, inclusive and poverty-reducing growth. It is a virtuous circle that is as good for the economy as it is for people and one that drives sustainable development."[8] Still the question remains whether poor state of job creation trends, violation of human rights of the labour force and degrading wage pattern is the result of globalization?

Over 201 million – with an additional rise of 2.7 million The number of unemployed persons globally in 2017 is forecast to stand at just expected in 2018 – as the pace of labour force growth outstrips job creation.[9] As the ILO Director mentions, "Economic growth continues to disappoint and underperform – both in terms of levels and the degree of inclusion. This paints a worrisome picture for the global economy and its ability to generate enough jobs. Let alone quality jobs. Persistent high levels of vulnerable forms of employment combined with clear lack of progress in job quality – even in countries where aggregate figures are improving – are alarming. We need to ensure that the gains of growth are shared in an inclusive manner." As a result, the number of workers in vulnerable employment is projected to grow by 11 million per year, with Southern Asia and sub-Saharan Africa being the most affected.[10]

Taking the other side of the story, two assertions are generally made. First, there was unequal distribution of productive resources across the country. Second, the low skilled labour of the world was mainly concentrated in underdeveloped or developing countries and the skilled or capital labour was concentrated in the developed countries. Globalisation

7 Jagdish Bhagwati, *In Defense of Globalization*(Oxford University Press, New Delhi, 2004).

8 Goal #8: Decent work and economic growth available at http://www.ilo.org/global/topics/sdg-2030/goal-8/lang--en/index.htmJuly 3, 2019, 11:00 PM)

9 Dani Rodrick, *Goodbye Washington Consensus, Hello Washington Consensus?* (2006) 44 Journal Economic Literature, 973

10 http://embargo.ilo.org/global/about-the-ilo/newsroom/news/WCMS_541128/lang--en/index.htm (July 20, 2019, 05:30 PM).

was thought to be a panacea of this issues but it has no clear evidence of the same because the problem of brain drain and low investment even in emerging economies remains a problem.[11]

Looking from the North- South divide taking employment as criteria some connection is inevitably reflected. For example some losses in the North have occurred when the firms have extensively looked upon the possibility of global organization, global communications, global production and global finance to move their manufacturing plants to low wage sites in the South and the East. However it would be wrong to simply accept this argument as many enterprises in the South and East are not only a part of relocation strategy but established for expansion purpose. Further, many layoffs in the North are the result of the introduction of labour saving technologies such as digital computers and robotics.[12]

Standards of Employment and Impact of Globalization

Today, the idea of human rights dominates the discourse on the morality of globalization. As boundaries erode and connexions multiply, it no longer seems naively utopian to hope humanity may at last be embarked on the road to an international order in which basic human rights could in practice matter more than state centric realpolitik and the avarice of multi nationalized capitalism.[13] In this regard it is essential to analyze whether the basic human rights prevail in the employment sector and whether they have improved or worsened with the process of globalization.

"A common view is that heightened international competition as a result of globalization increases the pressures to cut costs, including labour costs, and to achieve greater flexibility in the production system. This would necessarily imply a negative impact on acquired levels of labour standards. Problems of child labour in inhuman conditions, of bonded labour, of physically taxing work processes, of discrimination in access to employment and in the workplace, and inadequate returns to work still prevail."[14]

There is the argument that not only in the South but even in the North there is decline of

11 Ajit K Ghose, *Globalization and Employment in Developing Countries*, (2008) The Indian Journal Of Labour Economics, 51

12 Ed. Patrick Hayden and Chamsy el- Ojeili, Confronting Globalization: Humanity, Justice and Renewal of Politics, 2005.

13 Patrick Hayden And Chamsy El- Ojeili , *Confronting Globalization: Humanity, Justice And The Renewal Of Politics*,(International Political Economy Series, Palgrave Macmillan, 2005).

14 Eddy Lee, (1997) 6"Globalisation and Labour Standards: A review of Issues", International Labour Law Review,136 .

working conditions referred to as Occupational Health Security due to outflow of capital leading loss in the jobs as well. Further in the South the argument against labour standards is that they are inimical to the economic growth of developing countries.

Even the Background paper submitted by Alejandro *Teitelbaum*, American Association of Jurists on the *"Implementation* of *The International Covenant On Economic, Social And Cultural Rights*: *Globalization And The Human Rights Set Forth In Articles 6 To 8 Of The International Covenant On Economic, Social And Cultural Rights*", mentions that due to internationalization of goods and services in the light of globalization has limited the bargaining rights of employees and thus affects the trade union rights.

Other aspects of life are also affected due to increased insecurity in jobs. Insecurity may at times lead to instability in relations. It has been observed that the transnational firms in the South and the East have led to long working hours, no guarantees, weaker health and safety standards and poor collective bargaining. Even the works agree to these terms and conditions of work thinking that some employment is better than nothing or in prospects of comparatively high salary or wages they may get for a short period. This phenomenon has been rightly described as "race to the bottom" of labour conditions.

On the contrary, the World Bank Group Report[15] mentions that it is not every kind of FDI that affects the working conditions. "For example, FDI that produces for the domestic market may increase competition for firms causing them to lower costs by making working conditions worse. In contrast, FDI that produces for export may increase the demand for workers, which may cause firms to improve working conditions as a way to attract or retain workers."[16] However, it finally concludes that there is a shift of workers from sectors with low wages and poor non- wage working conditions to sectors with relatively high wage and better non-working conditions due to globalization. Thus, the focus must shift to polished labour having better training, remuneration, security because it will in reality enhance the productivity of labour.

15 *World Bank Employment Policy Primer*, The Effects of Globalization on Working Conditions in Developing Countries: An Analysis Framework and Country Study Results, March 2008, No.9.

16 The effects of globalization on working Conditions in developing countries available at https://openknowledge.worldbank.org/bitstream/handle/10986/11765/429910BRI0EPP010Box327342B01PUBLIC1.pdf?sequence=1&isAllowed=y(July 12, 2019, 04:50 PM).

Role of International Labour Organization in the Era of Globalization

One of the reforms of globalization is improve in the security of people in work. For example, the ILO could acquire greater capacity to monitor and enforce compliance with its core conventions. These legal instruments provide for freedom of association, the right of collective bargaining, the abolition of forced labour, the prevention of discrimination in employment, and a minimum age for employment. Moves could also be started towards the establishment of a global regime of minimum wages, whose levels might for the time being be weighted in relation to the per capita of a country.

Even the language of SDG 8 is very comprehensive and attractive. The dual idea of development (including economic growth) and global justice is reflected in the words "Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all."

This goal itself is comprised of many other sub- goals like promoting sustainable tourism that creates jobs, which is another facet of globalization. Recently the Addis Ababa Action Agenda was adopted by the General Assembly for devising implementation mechanism for SDG 2030. More importantly ILO is playing a prominent role with respect to Goal 8.

- In its 105th session on International Labour Conference it passed a Resolution " Advancing Social Justice through Decent Work." It emphasizes on the guiding role that ILO will play in implementation of 2030 Agenda.
- ILO's End to Poverty Centenary Initiative also emphasizes on the role that the private sector can play as well as the importance of national integration of SDG 2030 as Decent Work Country Programmes.
- It also calls for ratification of 2014 ILO Protocol at national level for abolition of slavery and forced labour.
- For improving working conditions and ensuring the health, safety of workers, ILO recommends for adoption of ILO fundamental rights and standards at national level.
- ILO Global Jobs Pact and ILO 2012 Resolution on youth employment provides for successful examples of job creation, which has been adopted by many governments, employers and workers. The commitments to the same are also shown by G-20 countries.

Thus, it can be said that supranational bodies like ILO are no more instruments of state policy and are a means of transforming international society or at least, a reflection of a pluralistic world community.[17]

State and the International Organization: Cohesion or Conflict?

By the traditional understanding of the term sovereignty it meant that the state had all comprehensive, supreme e, unquestioned power over its territory. Today, in the wake of unprecedented globalization it is not possible to assert sovereignty in its traditional sense. There has now been emphasis on multilateralism reflecting that states are less inclined to the system of unilateral initiatives in modern day world of globalization. Regional organizations like EU, ASEAN, AU, SAARC etc.; global organizations like UN, IMF, WB; coalition or groups of nations like G8, G8+5, G20 etc. are all reflection of globalization trend where these institutions are response to the common issues like labour standards, environmental protection, economic growth, terrorism etc. Thus, there is no hegemony of the nation state in the world affairs today. As far as the SDG 8 is concerned, it is not possible to achieve the goal without the support and active role of the nation states. Along with the standards developed by ILO and appreciating work done by UNDP (like its report on "Rethinking Work for Human Development" there is a need to work harmoniously with the states .As the director of ILO mentions "the report highlights that pressing global challenges require that growth must be accompanied by policies and actions that also tackle unemployment, underemployment, inequality and the denial of voice and rights."

Presently even the nation states are taking welcoming steps to bring in some labour reforms although not truly from the perspective of doing justice to working class but for attracting more FDI and making markets attractive for that. For an example, one of the emerging economies like India has recently taken the initiative of codifying the labour laws as: "code on wages, code on social security, Code on industrial relations and code on occupational safety, health and working conditions"[18]. The Code on Wages Bill, 2017 has been introduced in Lok Sabha and the striking feature is that along with ensuring ease of doing business the code ensures universal minimum wage for all. Further, National Skill Development Mission started by the Government of India in 2015[19] is a remarkable step which reflects convergence of globalisation and development. In fact, the Niti Aayog Report[20] on "Decent

17 BOB DEACON et al. GLOBAL SOCIAL POLICY: INTERNATIONAL ORGANIZATIONS AND THE FUTURE OF WELFARE, 1-27 (Sage Publications, London, 1997).

18 http://labour.gov.in/labour-law-reforms (July 15, 2019, 8:30 PM).

19 http://www.skilldevelopment.gov.in/(July 20, 2019, 8:45 PM).

20 http://niti.gov.in/writereaddata/files/Report_SDG-8.pdf (July 28, 2019, 7:50 PM).

Work and Economic Growth" mentions the programme like "Make in India", "Startup India", "Skill India" and "Digital India" support the initiative of employment generation for youth which will ultimately help in achieving the SDG 8 and as all the SDG are interlinked, other SDG are not too far a dream.

Thus, it can be said that states and International Organisations are working in the same direction though use of different tools and so there is no conflict but harmonious approach of the global agencies as well as nation states to achieve SDGs.

Conclusion

Center for Sustainable Justice define the term as "the approach to justice that aims to improve social harmony, wellbeing, the general feeling of safety within society, and further personal and societal development, within a framework of human rights and principles securing legal uniformity and equality. The general principle of sustainable judging is to turn bad into good, contributing to social harmony, and personal and societal development."[21] This highest ideal of sustainable justice can be attained in a globalized world where increased association of people around the global economy makes credible claim that these persons have duties of justice to one another and even though there are evils of globalization but the same can be addressed. Author concludes on the following observations:

- Globalization and welfare: Today at the global level international organisations or groups meet to discuss the major issues which are in essence involve 'social and environmental' questions. For example the G 20, 2016 summit discussed the issue related with climate change in Hangzhou (China) with the President of the IMF, President of World Bank, Director General of FAO, ILO, WTO and Secretary General of the UN and OECD. "socialization of global politics" best describes the impact of globalisation on the working and direction of International Institutions which is not contrary but in conformity with idea of development at national level.
- Employment Creation: There has been a considerable shift from the approach of neo-liberalism or market domination to the era where market forces and global as well as state institutions work together to aim for 'justice' to all in all respects. From the idea that exploitation was though deplorable but it was a 'necessary evil' for material advance of humanity, today we aim for sustainable justice which imbibes economic growth as well as decent work and employment opportunities for

21 http://sustainablejustice.org/(July 21, 201, 9:30 PM).

people without exposing them to exploitation. For example, the SDG fund which is an international mechanism to support SDG, in Bangladesh (where extreme poverty is a serious issue) has started a programme SWAPNO[22] ("Strengthening Women's Ability for Productive New Opportunities") whereby women from poor houses will be given employment for 18 months to construct or improve the community resources. The significant feature of this programme is that it is well aligned with the national policies and planning of the Bangladesh Government. This is harmonious model which refutes the arguments that globalisation and development are antithesis to each other.

- Wages: Free Trade has rather helped the workers in raising the wages because it has moderated the decline that would have occurred mainly due to labor saving techniques and if there is any depressing effect on wages then it is too insignificant.
- Labour Standards: The fear that labour standards will decline in the North due to investment made in the South in search for cheap labour and based on the premise that there are weak protection laws, is baseless. The argument against these are: lower wages may not always reflect discrimination rather it may reflect low labour productivity, MNC not always resort to dumping the waste in the country of investment in the light of global media like CNN/ BBC or activist NGOs, having moral consideration of their reputation and the international political pressure to impose higher standards in poor countries has rather caused "a race to the top."[23]

SUGGESTIONS

From our experiences we have learnt that what we require at this point of time is not the "shock therapy" but consistent efforts to achieve social, economic and political agendas in the race of globalization. Few suggestions in this regard are:

- With greater openness in the market and trade there comes a sense of economic insecurity from the fear that more openness will lead to volatility of prices and hence of jobs. Though the fear is not compelling yet some additional adjustment assistance must be provided to the laid off workers by the national as well as international institutions like ILO and UNDP.
- To achieve the aims of sustainable justice in the modern world, we can resort to some measures other than imposing unilateral sanctions or embargoes on the

22 http://www.sdgfund.org/(July 21, 2019, 5:30 PM).

23 Jagdish Bhagwati, "*In Defense Of Globalization*", (Oxford University Press, New Delhi, 2004).

countries or MNC violating norms of justice. Active involvement of civil society and media coverage is a useful strategy to put moral pressure on the nations.

- Strengthening of review and monitoring functions of the international institutions that have been created to address these agendas can also result in translation of international norms into effective domestic legislations and enforcement with judicial activism. This offers greater promises of accelerating achievement of social goals.

Student Section

CHILD LABOUR IN INDIA: UNHEARD SCREAMS

Neha Jain*

Abstract

Children are the future of nation. Their mental health and physical development is of utmost importance to any nation. Child labour is the most prominent evil that stands in the way of the all-round development of a child and is in practice since ancient times. Recognizing the detrimental nature of child labour, the government has enacted several provisions and laws to curb this menace. This research article aims to analyze and examine the various provisions incorporated in the Constitution and various other legislations in the country. Additionally, the article also elaborates upon the provisions and flaws of the Child Labour (Prohibition and Regulation) Act, 1986. The Amendment Act of 2016 has introduced major changes in the legislation which have, in a way, actually made the practice of child labour relatively easier. The impact of this and the suggestions for improvement have also been incorporated in the article.

Keywords: *Child Labour, Child Labour (Prohibition and Regulation) Act, 1986, Fundamental Rights, Constitution, Child Education*

INTRODUCTION

Children are considered to be the incarnation of innocence in a human embodiment. Unperturbed by materialistic considerations, children are the purest forms of mankind. To a certain extent, it is also believed that the fate of a country can be well determined by the condition of its children and women. However, the childhood innocence, purity and morality get snatched away from them when they are forced to work and earn a livelihood. Child labour is one of the oldest and most prominent problems that India, the home to the world's largest youth population, faces. Even though several legislations have been put in place by the law makers of the country, child labour is still rampant in a number of areas, especially the rural areas in India.

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As per Article 1 of the United Nations Convention on Rights of the Child, 1989, "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."[1] However, in India, under the Child Labour (Prohibition and Regulation) Act, 1986, a child is defined as "a person who has not completed his fourteen years of age"[2]. Child Labour is the act of employing any child in any establishment to work so as to enable him/her to earn wages and a livelihood. By doing so, the child is deprived of his childhood, a time that he can never get back and relive. It takes away his/her chance to have peace of mind, get education and live a decent and dignified life.

According to the data collected by UNICEF, an estimated 150 million children are involved in child labour worldwide of which about 33 million children employed in various forms of child labour in India itself[3]. The ratio of male and female child labourers is 2:1. Approximately 6.6% of the entire population of child labour is found in Andhra Pradesh.[4] While male child labour is most prevalent in Orrisa (ratio of 13 males per female), female child labour is predominantly found in Sikkim (ratio of 89 females per 100 males).

The menace of child labour is not a recent phenomenon. The dark ages of industrial revolution revealed this concept during the 1780s. Approximately 60% of those employed in the textile mills in England and Scotland were children. During that period, children were not just employed in factories and industries, but instances of child trafficking, bonded labour, child prostitution, etc. were also reported. In India, since times immemorial, children have been accompanying their fathers and mothers to the fields, agricultural lands and other workplaces. Child labour, therefore, has existed in several different forms in several different parts of the world.

Causes of Child Labour

Child Labour, as discussed earlier, is not a new concept. It has been in practice since ancient times for various different reasons. The primary cause behind the origin of this menace of child labour is poverty and the unavailability of basic necessities of life. In earlier times, due to the rapid increase in population of the country, families did not have enough money to send their children to school and give them education. Rather, owing to

1 Article 1, United Nations Convention on Rights of the Child, 1989

2 Section 2 (ii), Child Labour (Prohibition and Regulation) Act, 1986

3 Unicef Data: Monitoring the Situation of Children and Women, January, 2018, Available at https://data.unicef.org/topic/child-protection/child-labour/

4 *Ibid.*

the large family size, they sent their children to the fields and agricultural lands. This not only increased the number of helping hands they had on the fields but also helped them produce more which then could be sold in the markets to generate more disposable income. This is still the situation in many developing countries where parents are unable to generate sufficient income due largely to the lack of intellectual, social and cultural capital which would have enabled their gainful employment. They lack the requisite competencies as, during their childhood, their parents, instead of sending them to schools, sent them for work to supplement family income. Faced with the situation of insufficient income and resources, these parents send their children too for work and thus continues the vicious cycle of poverty and child labour uninterrupted. Thus the practice of child labour is more prevalent in areas marked by poverty & lower standards of living where factories and industries are set up to exploit the cheap labour.

Child labour is also practiced by many families across the country as a matter of tradition. It is believed that it is a cultural practice and destiny to send their children to work at an early age. Such families are under the impression that this employment will lead to development of their child's personality. However, they are unaware of the fact that this actually strips the children off of their chance to lead a normal life with an ordinary childhood like other more fortunate children. Contrary to what those parents believe, beginning to work at an early age actually interferes with the wholesome development of the personality of the child.

In many situations social and educational backwardness also contribute to the incidence of child labour. The parents, in such cases, are unaware of the negative impact of child labour on the development of children in the initial years. The parents, themselves uneducated, fail to realise that education and literacy can play a very significant role in improving the quality of life and the future of their children. Reeling under the incidence of poverty, they send their children to work instead. These children, when they grow up continue to send their children to work on similar logic resulting in continuation of an unending vicious cycle of child labour.

Tackling the Menace of Child Labour

Taking cognisance of the extent of child labour plaguing the country, the framers of the Constitution incorporated specific provisions in the Constitution for preventing incidence of child labour. Article 24 of the Constitution of India specifically states that the employment of any child under the age of 14 years in any factory or mine or any other hazardous

employment is prohibited[5]. Also, the Right to Free and Compulsory Education Act, 2009, has added Article 21 (A) to the Constitution making it the fundamental right of every child in the age group of 6-14 years to receive education irrespective of the financial and social conditions of his/her family. Apart from the Fundamental Rights guaranteed above, the Directive Principle under Article 39(e) of the Constitution states that the government shall endeavour to make and formulate policies "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."[6]

In order to further strengthen the Government's resolve to prohibit child labour, the legislature also enacted The Child Labour (Prohibition and Regulation) Act, 1986. The object of this Act clearly states that the Act seeks to "prohibit the engagement of children in certain employments and to regulate the conditions of work of children in certain other employments"[7]. Along with this legislation, there are several other legislations that have been put in place to curb rampant child labour, including the Factories Act of 1948, the Mines Act of 1952, Juvenile Justice Act of 2000, etc. However, these legislations suffer from several deficiencies/loopholes. Coupled with this, the lack of effective implementation of the provisions ensures that the child labour is still prevalent in India. This paper seeks to critically analyse the various provisions and subsequently proposes suggestions for improvement.

The Child Labour (Prohibition and Regulation) Act, 1986

The Child Labour (Prohibition and Regulation) Act, 1986 was enacted on the recommendations of the Gurupadaswamy Committee which was the first committee constituted, way back in 1979, to deal with the problem of child labour in the country. According to the Committee, the main cause behind child labour is poverty and without reducing poverty, eliminating child labour would merely be a dream. However, since it is not possible to remove poverty only through legislative measures, the Committee recommended enactment of a specific law banning child labour in hazardous occupations and regulating it in other employments. Consequently, the Child Labour (Prohibition and Regulation) Act, 1986 was enacted. The main provision of the Act are discussed in the following paragraphs.

First and foremost, this Act seeks to establish uniformity in the definition of child across

5 Article 24, Constitution of India.

6 Article 39(e), Constitution of India.

7 Preamble, The Child Labour (Prohibition and Regulation) Act, 1986

the legislations in India. It defines a child as "a person who has completed his fourteenth year of age."[8] The Act specified that no child would be employed in the employments and occupations listed in the Schedule to the Act. The Schedule consisted of 83 occupations and processes which were prohibited. These occupations include employment in slaughter houses, port authorities, handloom and textile industries, mines, etc. The list of prohibited processes include *bidi* making, dye making, carpet weaving, cloth printing, etc. However, in a Supreme Court judgement it was held that children could be employed in the process of packing but the place of that packing has to be away from the place of manufacture to avoid the exposure to the hazardous process.[9]

The Act also provides for the establishment of an Advisory Committee called the Child Labour Technical Advisory Committee which is primarily concerned with giving advice to the Central Government on issues relating to the list of occupations and processes prohibited.[10] In pursuance of the objective with which the Committee has been set up, the Committee has made special provisions in the Factories Act, 1948 as well as the Mines Act, 1952 so as to ensure that *firstly*, employment of children in hazardous occupations does not take place, and *secondly*, where the children are already employed, the conditions of work are regulated.

Part III of this Act calls for regulation of the conditions of employment for the children. It establishes that the period of work may be fixed for every day and such schedule shall not involve a child working for more than 3 hours at a stretch. No night shift (working between 7 p.m. to 6 a.m.) or overtime is permitted for the children. It also states that in every week the child has to be given one complete day of rest (weekly holiday).[11] The Act also appoints an Inspector who has to be informed about the employment of any children in any establishment by the employer within 30 days of such employment. This provision has been incorporated so that someone outside the employment is kept aware of the presence of a child employee or worker in that occupation and he is able to keep a check on the working conditions.

The Act also prescribes "Penalties" for the breach of the provisions provided against child labour in not only this Act, but also the other legislations dealing with curbing child labour.[12] The punishment under the Act ranges from 3 months to 1 year of imprisonment

8 Section 2 (ii), The Child Labour (Prohibition and Regulation) Act, 1986

9 *M.C. Mehta vs. State of Tamil Nadu*, (1991) SC 417

10 Section 5, The Child Labour (Prohibition and Regulation) Act, 1986

11 Section 8, The Child Labour (Prohibition and Regulation) Act, 1986

12 Section 14 and 15,

and/or fine ranging from Rs. 10,000 to Rs.20,000. Repeat offenders may be punished with imprisonment ranging from 6 months to 2 years. These penalties have been enforced in several situations. In the case of *Hayath Khan v. The Deputy Labour Commissioner*[13], a child of about 12 years was employed in a motor cycle shop. This was found to be in contravention of Section 3 of the Act. Thereafter, a criminal case was lodged against the petitioner and the Deputy Commissioner imposed a fine of Rs. 20,000 to be deposited in the District Child labour Rehabilitation and Welfare Fund.

Amendment of 2016

In order to further pursue the objective of completely eliminating the practice of child labour, the Central Legislature has promulgated the Child Labour (Prohibition and Regulation) Amendment Bill, 2016. These changes and amendments have been made effective and enforceable with effect from 30th July, 2016. Some of the major changes introduced by this amendment have been discussed below.

This Amendment Act, for the first time introduced the concept of adolescent labour. In other words, this amendment aims at increasing and widening the scope of this legislature. It changed the name of the legislation from "the Child Labour (Prohibition and Regulation) Act, 1986", to "the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986." This Act led to the creation of a new category of adolescents, i.e., children between the age of 14 to 18 years. It imposed a complete ban on the employment of any child under the age of 14 years. This was done in consequence of the provisions stipulated under the Right of Children to Free and Compulsory Education Act, 2009 and consequently, Article 21 A of the Constitution of India.

However, on the other hand, this Amendment Act also reduced the list of prohibited occupations and processes from 83 occupations to merely 3 such occupation. These occupations are mines, inflammable substances or explosives and hazardous process as provided in clause (cb) of the Factories Act, 1948. This is, infact, extremely disadvantageous to the children as they can be employed in the other 80 occupations earlier considered hazardous or unsuitable for employment of the children. The Amendment Act also allowed the employment of children and adolescents in family enterprises or working from home subject to two conditions: firstly, it should not be any hazardous occupation or process, and secondly, the work should either be after school hours or during vacations.

Legalising family employment is detrimental to the welfare of the children primarily

13 *Hayath Khan v. The Deputy Labour Commissioner* 2006 (1) KarLJ 365

because even though it stated that the children cannot be employed during school hours, it did not limit the number of hours for which the children could be employed in a day and at a stretch. Also, family enterprise was defined as "any work, profession, manufacture or business which is performed by the members of the family with the engagement of other persons". This could also result in forced and bonded labour. The definition of family was also expanded to include not only parents and siblings but also the siblings of either parent. These changes, instead of curbing the menace of child labour, would help the practice thrive.

In addition, the child could be employed even in audio-visual industries (advertisements, television serials, etc.), entertainment industries or sports activities (except circus) provided that such employment shall not, in any circumstance, effect the school education of the concerned child.[14] Also, such employment in family enterprises and audio-visual industries was also going to be subject to the health and safety requirements to be met in that particular occupation.

With respect to the criminalization of the offence, the Amendment Act stipulated that child labour and the employment of children in any other occupation other than those allowed and permitted would be a cognizable offence. The penalty originally laid down under the Act has been increased. Earlier, where the employment of children below 14 years was punishable with imprisonment between 3 months to 1 year, the latest Amendment Act increased the same to between 6 months to 2 years. The fine which was initially upto Rs. 20,000 was raised to between Rs. 20,000 to Rs. 50,000. In case of repeat offenders, the imprisonment would be for a term which could be 1 year to 3 years (earlier 6 months to 2 years). Additionally, this Act also stipulated that if the offender is the parent or guardian, the fine may be extended upto Rs. 10,000.

The Amendment Act made provisions for rehabilitation of the victims of the evil of child labour. It provided for the setting up of a fund in every district or two which would be called "Child and Adolescent Labour Rehabilitation Fund". The Fund would comprise of contributions in the form of fines paid by the employers of child labourers. The appropriate Government in whose jurisdiction the Fund is located shall contribute Rs. 15,000 for every child for the employment of whom a fine has been levied. The rehabilitation of the child rescued from the clutches of child labour has to be done in accordance with the existing laws at the time of the rescue. Also, the money that is paid as fine for employment of such child should also be given to him for his welfare.

14 Section 5, Child Labour (Prohibition and Regulation) Amendment Bill, 2016

The primary point of criticism of this legislation is the inclusion of family employment within the limits of permissible employment for children. This provision, along with the extended definition of family, creates a scope of child labour, unrestricted and unregulated. In his article "A Law against Children", Harsh Mander opines,

> *...on closer scrutiny, we discover the same pattern as many other pronouncements of this government vis a vis the poor: The reality of what is being offered is the reverse of what appears on paper. The ban on hazardous adolescent work is accompanied by changes in the schedule of hazardous work in the statute, bringing these down from 83 prohibited activities to only three. Apart from mining and explosives, the law only prohibits processes deemed hazardous under the Factories Act 1948. In other words, the amended law prohibits only that child work which is considered hazardous for adult workers, without recognising the specific vulnerabilities of children.*[15]

The claim of the government that this provision was also present in the original Act and that it is based on economic reality and seeks to leave behind the idealism of the law, thereby making it more practical, is irrelevant. Curbing all forms of exploitative child labour and regulating child employment is the basic objective of the legislation and in order to achieve the same, exclusion of family enterprises from permissible employment and increase in the number of prohibited occupations and processes is extremely essential.

Another reason why complete prohibition is necessitated is that the regulation of more number of permitted occupations for children will be comparatively difficult. The creation of an additional category of adolescents also increases the burden on the government. Keeping a check on and regulating the employment and working conditions of the adolescents along with the children require more number of hands at work. Therefore, more officials have to be put in place by the appropriate government and such officials have to be trustworthy and actively working towards the cause.

Conclusion and Suggestions

The importance of the well-being of children is recognised across the globe. It has been established in *Sheela Barse and Others v. Union of India*[16] that "The Nation's children (are) a supremely important asset. Their nurture and solicitude are our responsibility. Children's

15 Harsh Mander, *"Law Against Children",* Indian Express, July 29, 2016.

16 *Sheela Barse and Others v. Union of India*, (1995) 5 SCC 654

programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skill and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our purpose of reducing inequality and ensuring social justice."

In order to effectively protect and nurture this asset of the country, the Government has enacted several laws and legislations, the most prominent one being the Child Labour (Prevention and Regulation) Act, 1986. These laws have been repeatedly amended so as to remove any lacunae that may develop with time. However, like all coins have two sides, even the amendments so enacted have a progressive as well as regressive side as has been elaborated in the above paragraphs. In spite of various Acts & provisions, the menace of Child labour still continues to prevail and flourish.

It is also essential to realise that merely debating and discussing and formulating laws will not curb the menace of child labour. The problem lies not in having suitable laws but in poor & ineffective implementation of the same. It is speedy, swift and effective implementation of the laws that will help us finally to attain the objective. The officials and police personnel need to take active steps when dealing with situations involving presence of child labourers. Lodging complaints immediately and following up with effective investigation in such matters should be the main goal of implementing and monitoring agencies.

The first step that needs to be taken in the direction of eradicating child labour from root is progressive amendments in the law. In addition to increasing the scope of the prohibited list of occupations and processes, severe and more stringent punishments need to be stipulated for violation of any of the provisions for child labour. This will not only punish the offenders and violators but will also subsequently create a deterrent effect for the others. This new amendment of 2016 has actually worked against this and resulted in more room for child labour to flourish by reducing the entries in the prohibited list.

It is well established that the main cause of child labour is the increasing incidence of poverty. This needs to be tackled by the Government through various social welfare schemes with targeted beneficiaries. These schemes need to be sustained over a long period of time. If the government is able to reduce poverty and improve the standards of living of the population, it will be able to nip the menace of child labour in the bud. Once the wages of the families rise they would no longer be required to send their children to work thereby directly reducing child labour. Additionally, instead of working, the children could be sent to schools and educational institutions for a better and all-round development of

their personality which will consequently improve their lives and make them independent.

Education is the only key which can break the vicious cycle of poverty and child labour. Once educated, the children can build a better life for themselves, improve their standards of living. They can also contribute to the betterment of the lives of their parents, who would have undoubtedly struggled financially to educate them. These children, as adults would have to struggle comparatively lesser to educate their children. Knowing the fruits of education, their children will also get education and thus, a new world will be ushered in.

To aid the government in such an uphill task, it is important that various NGOs and Business Organisations are incentivised to take up such welfare schemes and measure and would help the government extend its reach. Merely the legislators or the police personnel and other concerned officials cannot bring about the required change in the society on their own. Active participation from the public is also necessary. On the knowledge of employment of a child in any occupation, there should be no hesitation from the side of the individuals in coming forward and reporting the same. This can be achieved only through increasing and spreading awareness about the ill effects and detrimental nature of child labour.

Furthermore, the public also needs to be discouraged from employing children as domestic help. Coming to those children who are already employed, they can be substituted with the unemployed adult labourers who are available in plenty. This is an area where media can play a very important role. Mediums such as Print & electronic media as well as motion pictures need to be galvanised and made more sensitive to the issue. They would help spreading awareness which would in turn have a positive impact on human psyche.

Once all the concerned associations and people in the society collectively pool in their efforts, the dream of elimination of child labour could turn into reality. India has seen a massive reduction in child labour in the last 2 decades. For instance, there was a marked 45% reduction in child labour between 2004-05 and 2009-10, due to schemes like Right to Education, MNREGA, Mid-Day Meal, which gave children an incentive to study. Then further on, more optimistic signs were sign in 2014 by which the number of child labourers had decreased by 65%, i.e., from 1.26 crore in 2001 to 82.2 lakh.[17] It was also revealed that Delhi alone had seen over 1500 Child labour rescues between 2013-2014.[18]

Therefore, it has become increasingly evident that with participation of the society and government, this number can be considerably reduced further in the coming years.

17 *Statistic of Child Labour in India State Wise*, https://www.savethechildren.in/articles/statistics-of-child labour-in-india-state-wise, 4th May 2016

18 Answer to a question in the Rajya Sabha.

Preservation of the tender age of children, their innocence and childhood, is essential in this day and age of technological innovations and scientific advancements. Every child deserves to grow up playing with games and friends rather than working with machines or serving tea to customers. The capabilities that a child may have can be explored only if he or she is given adequate opportunities and that cannot happen if they are forced to work or be employed. Therefore, it is the absolute need of the hour that the people join hands with the Government and fight against the menace of child labour and everything that seeks to encourage it, including the 2016 amendment. The dream of eliminating child labour from the country can be achieved only if steps are taken towards this together and only then can each child live the life he or she dreams of.

RESERVATION IN PRIVATE SECTOR AND RIGHT TO EMPLOYMENT: CRITICAL ANALYSIS

Diksha Dubey*

Abstract

India is the biggest democracy and is a home to many communities. Among which few have always been subjugated and suppressed. The government thus in order to ensure the interest and benefit of the backward classes, initiated the affirmative action plans for them. The Constitutional provisions provide for reservation in public sector only. The paper will try to study the impact on the society and economy if the reservation policy in employment is extended to private sector in four parts. Part I of the paper will briefly discuss the milieu and history of introduction of reservation policy in India. Part II will study the impact of reservation policy on public sector and will further study the pros and cons of reservation policy. Part III of the paper will delve upon the introduction of the reservation policy in private sector and will discuss the probable causes of the same like LPG policy and further discuss the disadvantages of introducing the same in private sector like sluggish economic growth of private sector, low foreign investment etc. Part IV of the paper will discuss the suggestions that can be followed if the policy is extended to private sector like corporate social responsibility, apprenticeship act and skill India mission and will also discuss the right to employment. Finally concluding the paper with a few suggestions like investment must be done in training and skill development of the employees hired through reservation policy.

Keywords *– Constitution, Corporate Social Responsibility, LPG, Reservation, Sluggish Growth, Skill India Mission.*

INTRODUCTION

India is the biggest democracy and is a home to many communities. Among which few have

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always been subjugated and suppressed. The government thus in order to ensure the interest and benefit of the backward classes, initiated the affirmative action plans for them. It is the duty of the state to ensure that everyone is given equal opportunity, Article 16 of the Indian Constitution, states that there should be equal opportunity in matters of public employment, and the state can make special provisions for the employment for the backward classes who are not adequately represented. Further Article 46 of the Indian Constitution also states that it is the duty of the state, that it shall promote the educational and economic interest of Schedule Caste, Schedule Tribe and backward classes. So reservation in Public sector has been ensured by these provisions.

With the liberalization, privatization and globalization policy that was being adopted in 1991, most of the Indian economy turned to private sector, many of the public sector undertakings were sold out to private sector. As a result of this policy, the employment opportunities in the Public sector got reduced. Thus employment opportunities in the public sector are continuously shrinking, whereas it is increasing in private sector. This is one of the factors that the present private sector is also facing jobless growth.[1] Private sector does not follow any kind of reservation policy for recruitment. Therefore in the current scenario, there is no meaning of reservation in public sector, as there are no or very fewer job opportunities.

Reservation Policy in Indian Economy – Need and Implementation

India is an abode to various communities, and it is a diverse country. Being home to various communities, there have been cropped up issues like caste and class discrimination. Thus, with the prevalence of the rigid caste system, some communities from ages are being denied their inalienable and constitutional rights. Therefore, in order to secure the rights of depressed classes, provisions are being made from time to time in our country. Recognition of their rights has been started from the British period, for instance the Simon commission suggested for reservation of seats for depressed classes in constituencies. The famous Poona Pact between Dr. B.R. Ambedkar and Gandhiji, provided for reservation of seats for SC's and ST's in provincial legislature.

Thus, with these initial steps, people got conscious about the protection of their rights and as a consequence of the same Independent labour party was formed in 1936 and when Dr. Ambedkar became a member of Viceroy's executive council he used his position and

1 Vikram Singh, Social *Justice Incomplete without reservation in Private Sector,* Vol. XLI No. 32, August 06, 2017 People's democracy, available at http://peoplesdemocracy.in/2017/0806_pd/social-justice-incomplete-without-reservation-private-sector accessed on 6th April 2018.

demanded reservation in education and government.[2] On the same lines, India formulated its policy of reservation in public employment.

The objective resolution passed by Pandit Nehru and the ideals laid in the constitution and preamble, promoting the idea of equality and social justice gave way to the reservation policy framed for backward classes. The need for introducing the policy was firstly the social backwardness and lack of proper representation of such communities. Secondly, the economic conditions of such communities, most of the family among such communities are a part of BPL categories. Even today, they are not in an economically viable situation. For instance, Economic census of 2005 indicates that the share of SCs in the country's enterprises was 10%, which is lower than their share in the population. In 2011, the percentage of SC households without drinking water facilities at home was 68% as compared with 57% for others/ In addition, 77% of the SC households had no latrines in their homes. [3]

Thus in order to fulfill constitutional objectives of equality and social justice, and to promote the backward classes socially and economically, government made the provisions for reservation in public employment as provided in Indian Constitution.

The categories decided for reservation were segregated in three heads i.e. Schedule Tribes, Schedule Castes [Article 341 and 342][4] and Other Backward Classes [Article 15 (4) and 16 (4)][5]. The key provision which provides for reservation in employment is Article 16[6] which states that there should be equality of opportunity in matters of Public employment and Article 46[7] which states responsibility of state (DPSP) for promotion of educational and economic interests of Scheduled Castes and Schedule Tribes and other weaker sections.

Kaka Sahib Kalelkar Commission gave the suggestion of the inclusion of economic backwardness as a criteria, Nehru refuted the same as he stated that it will cause confusion. It was further observed in Indra Sawhney[8] case that the fraternity assuring the dignity of individual is having special relevance in India, as many backward classes in India has been subjugated for years and thus to undo the atrocities committed on them they must be given

2 *'Reservation policy in India: Origin, Growth and Recent Trend'* available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/27131/10/10_chapter%204.pdf accessed on 7th April 2018.

3 Sukhadeo Thorat, Nitin Tagade, Ajaya K Naik, '*Prejudice against Reservation Policies How and Why?' (2016) Economic and Political Weekly, Volume 8.*

4 Article 341, 342, Constitution of India

5 Article 15(4), 16(4), Constitution of India

6 Article 16, Constitution of India

7 Article 46, Constitution of India

8 *Indra Sawhney v. Union of India* AIR (1993) SC 477.

a share in administrative apparatus through the mechanism under Article 16 (4) of the Constitution.[9] Mandal Commission recommended 27% reservation in favour of backward classes not only applicable to technical and professional institutions but to all government services in centre as well in all the states.

Review of Reservation Policy- Pros and Cons

The affirmative action policy was initiated by the government for the upliftment and betterment of the backward classes. The policy covered only government sector and government aided institutions. It covered three spheres - government jobs, admission to public educational institutions and seats in central, state and local legislatures and bodies. The reservation policy's had both the positive and negative impact –

Pros of the Reservation Policy

The policy to a certain extent was able to fulfill the objectives and aim for which it was created. The reservation quota in the public employment provided the targeted group and backward classes with jobs which were better than the alternative employment opportunities, as the jobs provided them with more salary and job security. Employment quotas though do not increase wages or per capita household expenditure on average, but less educated scheduled caste members do experience significant increase in their household consumption expenditure, probably due to their greater probability to have a salaried job.[10]

Employment quotas or the reservation provided in the public sector for minorities have the effect on their children's well being and their education, as due to reservation policy the parents are entailed into salaried jobs and there is a sense of job security and financial back up for them. That is, an employment quota policy for minorities can raise parents' expectations about economic returns from their children's education, and thereby provide very strong incentives for parents for investment in children's schooling and not to send them to work.[11]

There was an increment in the number of jobs with the introduction of the policy, for instance –in 1960, there were 2,18,000 SC employees which increased to 6,41,000 in 1991 and 5,40,000 in 2003. The corresponding increase in the percentage of SC employees to

9 Durga Das Basu, *Shorter Constitution of India (2014)* 14th ed., Lexis Nexis,11.

10 Nishith Prakash, '*The Impact of Employment Quotas on the Economic Lives of Disadvantaged Minorities in India*' available at: https://pdfs.semanticscholar.org/0edf/38a5e05162611838535832a880613ebd7204.pdf accessed on 8th April 2018.

11 Ibid.

total government employees increased from 12 per cent in 1956 to about 16 per cent in 2003.[12] The same increment was observed in ST community employees, In the case of ST, the number of employees increased from about 3,80,000 in 1960 to 2,03,000 in 1991 and further up to 2,11,000 in 2003.[13]

Indian economy is shifting from agriculture to service sector, and with the reservation policy, the unskilled group among the backward communities are given place in service sector. Today services account for more than 50 per cent of the output, with the rest being shared roughly equally by the primary sector (including agriculture) and industry. The share of agriculture over the past years has seen a decline of around 30 percentage points in terms of its GDP share but only around 10 percentage points in terms of its share in employment.[14]

Cons of Reservation Policy

Despite the positive effects of the reservation policy, the policy was not able to pull out the cause for which it was really created. It carries with it certain criticism as –

In India, the labour force participation ratio (i e, the proportion of the working age population [15-64 years] is either working or seeking work) is low even when compared with other developing countries such as China, Korea, Brazil or Mexico.[15] Still the benefits of the reservation policy have not been per located to actual beneficiaries.

Given the changed patterns of employment generation and educational attributes, SCs and STs are more likely than ever to be over-represented in casual labour employment, particularly in urban India. With the current education and employment attributes Upper class are most likely to be concentrated in high end service sector urban jobs and SCs, STs and OBCs are most likely to be in low-paying casual labour jobs.

With the LPG (liberalization, privatization and globalization) policy, there has been a shrunk in the jobs of public sector, and therefore the reservation policy does not have an effect in improving the conditions of backward classes, as they are mostly deprived of jobs in private sector, where there is plethora of opportunities as compared to public sector.

12 *A critical analysis of the impact of reservation as a policy of empowerment of Dalits* available at http://shodhganga.inflibnet.ac.in/bitstream/10603/37478/12/12_chapter%205.pdf accessed on 8th April 2018.

13 Ibid.

14 Mritiunjoy Mohanty, *'Social Inequality, Labour Market Dynamics and Reservation'*, (2006) Economic and Political Weekly Volume 41 (35).

15 Ibid.

Further if going by the concept of merit, many eligible and competent people are denied jobs because of reservation policy.

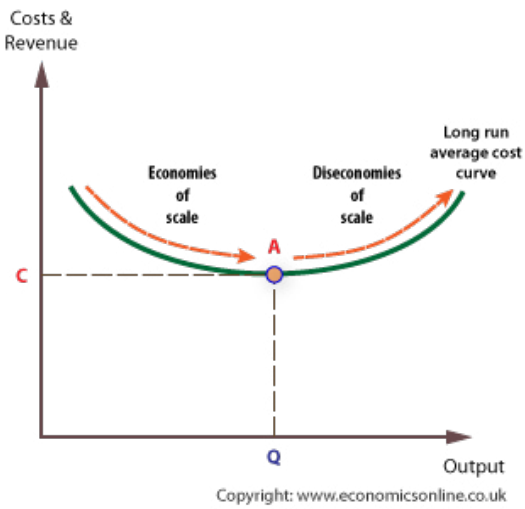
Reservation in Private Sector

To extend the reservation in private sector is being the constant demand coming from state officials. The major reasons for extension of jobs in private sector are firstly the shrinking of jobs in public sector and increasing job opportunities in private sector due to the implementation of LPG policy (Liberalization, Privatization and Globalization policy of 1991 was a result of economic crisis/ balance of payment dilemma faced by India. The said policy was adopted by India for stabilizing Indian economy and for structural reforms) and secondly the discrimination faced by the backward communities in private sector, as many a times they are denied jobs because of their caste and since there is no reservation for them in the private sector therefore they are deprived of such ludicrous opportunities. Several economic surveys indicate that discrimination in the hiring of SCs and STs for low-wage jobs are rampant in the Indian private sector. To compensate for falling public sector jobs and discrimination in the private sector, SC and ST's are calling for private sector reservations.[16]

Extending reservation to private sector will have some negative and detrimental effect. Firstly the companies will face problem in achieving economies of scale (economic situation where more goods can be produced at a larger scale with fewer inputs) and they will have to face the extra cost or burden of hiring unskilled workers instead of which they would have hired more competent people if the policy would not have been applicable for them.

16 Sumeet Jain, '*Tightening India's "golden straitjacket": how pulling the straps of India's job reservation scheme reflects prudent economic policy*' (2009) Washington University Global Studies Law Review 567.

[17]



Companies achieve the economies of scale at point A i.e. when LAC (long run average cost curve represents the total average cost at which the firm can produce any given level of output in the long run) is tangent to the minimum points of short run average cost curves. One of the reasons of economies of scale is division of labour and specialization which results in the long run cost per unit declines.[18] Hiring unskilled workers will reduce the efficiency of the company and will also increase their cost, as wages paid to the workers will form part of variable cost and which will eventually form part of TVC (Total variable cost – it is the cost paid for all the variable factors like – laborers, raw material etc.).

The learning curve by Kenneth Arro or learning by doing curve represents a downward sloping long run average cost curve, which implies low cost and high productivity of the firm. Kenneth Arro propounded through the learning curve that the firm can increase their productivity by improving their current techniques of production, technology and through innovations without introducing any new technology or labour. Technology is not the only prime mover for reducing the cost. As stated by Stonier and Hague 'even with given technology, a firm can learn to produce at a lower unit cost.[19] So, in order to raise efficiency, the companies have to invest in the training of the hired unskilled workers, otherwise, it will lead to loss of efficiency.

17 Diagram represents the economies of scale along the long run average cost curve.

18 H L Ahuja, *'Advanced Economic Theory'* (2017) 21st ed., Vikas Publishing House, 511.

19 Ibid.

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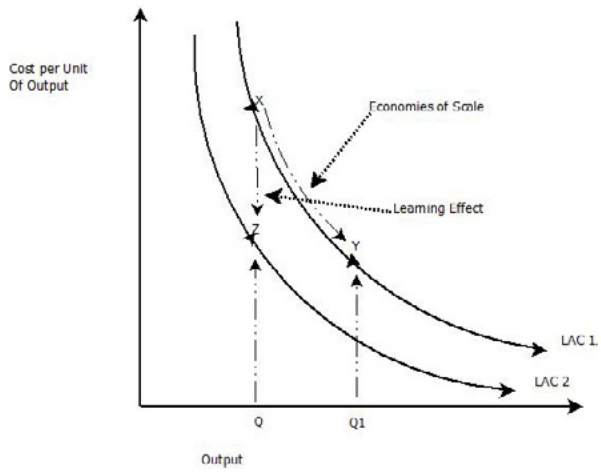

There are certain disadvantages in providing for reservation in private sector –

Reservation to private sector will repel foreign investment. In today's economic environment, 'the free market is the only ideological alternative left.' After the implementation of LPG policy, India has paved way for the phenomenon of Golden Straitjacket, i.e. surrendering to free market economy and loosing the regulation over market economy. Thus, Golden Straitjacket i.e. a set of free market policies implemented by national governments, 'is the defining political-economic garment of this globalization era.' Tightening the Golden Straitjacket requires deregulation of domestic economies so as to facilitate higher profits. Thus, if India introduces reservation in the private sector labour market, then it will repel foreign investors, thereby putting India in a jeopardizing position.

Even if the private sector reservation program is framed and implemented perfectly, given the fact that it accounted for only 2.5% of the entire workforce in 2001[21], its scope will be extremely limited, far narrower than that of the current public sector reservation policy.

Incorporation of Reservation in Private Sector

Though many are suggesting that the reservation policy should be extended to private sector but there are certain issues attached with the implementation of reservation policy in private sector like decrease in foreign investment and lack of skilled workforce as discussed in the previous part of the paper. Thus, extending the policy to private sector is not the most viable option, but if it is extended then there has to be secured a proper balance between

20 *Diagram is of learning by doing curve; it shows the effect on LAC 1 and LAC 2 due to enhancement in knowledge and adaptation of technology.*

21 Supra 14.

the social welfare and companies profit.

Reservation is not the only solution for curbing the inequalities, but it is certainly is one of the way out. The Oxfam report states that In India, specifically among people who think they are poor, seeing where they actually sit in the national income distribution resulted in almost 15% more respondents agreeing it is difficult for a person to increase the amount of money they have despite working hard.[22] So curbing such inequality is tough.

So, if the reservation is introduced in the private sector, the first thing the company has to deal with is the unskilled labour. The unskilled labour raises the cost and burden of the company, in order to lessen such cost companies can concede to investing for the training and development of the unskilled labour. Government can also help the companies in the same, i.e. government can take the burden of the cost of investment, and can finance the training and skill development of the employees. Government can also provide the companies with subsidies, if they invest in the training and development of the employees.

Government has also made efforts to provide for training and skill development. The Apprentice Act of 1961, the primary aim of which is to provide experimental training to the people in their crafts. Almost all the industries fall under this Act. Further to check the effect of the training after successful completion of the apprenticeship training, every apprentice shall appear for an exam held by the National Council to evaluate his/her capabilities in related trade in which he/she has taken an apprenticeship training. With the amendment in the Act, now contractual and agency workers are also to be taken into consideration under the definition of workers.

Government of India has also come up with the *Skill India Mission*. The national skill development mission was launched in 2015 the mission has been developed to create convergence across sectors and States in terms of skill training activities.[23] Key institutional mechanisms for achieving the objectives of the Mission have been divided into three tiers, which will consist of a Governing Council for policy guidance at apex level, a Steering Committee and a Mission Directorate (along with an Executive Committee) as the executive arm of the Mission.[24] The flagship initiative of this mission i.e. *'Pradhan Mantri Kaushal*

22 Oxfam India, *15 Shocking facts about inequality in India*, (2018) available at https://www.oxfamindia.org/blog/15-shocking-facts-about-inequality-india also refer to : https://m.box.com/shared_item/https%3A%2F%2Foxfam.box.com%2Fs%2Feosi27xj7nxuyywysr06d734ct1xyuev/view/267209867301 accessed on 9th April 2018.

23 Ministry of Skill development and entrepreneurship and National skill development Mission available at http://www.skilldevelopment.gov.in/nationalskillmission.html accessed on 9th April 2018.

24 *Ibid*.

Vikas Yojana' is being allocated 3000 crore and sector skill councils are being set up by NSDC in order to achieve the aim of the mission.[25]This initiative of the government will help the youth to get blue collar jobs and this will lessen the burden of the companies to train the unskilled labour hired through the reservation policy.

Further the existence of the concept of *corporate social responsibility* requires the companies to balance their profit motive and welfare of the society. The idea of making corporate participate in the development scheme in India got a shot in the arm in 1978 after the inclusion of many provisions in the Income Tax Act to incentivise corporate for good behavior, provisions such as Section 35(cc): 100% tax deduction in expenses incurred on approved programs of rural development. Section 35 (b): deduction for conservation of natural resources. Section 35A (c): Deduction for those development projects approved by National Committee for Promotion of Social and Economic Welfare. Laws should be introduced and amended to penalise those corporate which do not comply with the CSR provisions or misuse it. Any law is as good as the people who work it, Section 135(3) of the Companies Act, 2013 provides for the role of CSR committee, it would have been more effective if it was an autonomous regulatory body.[26] Now the times have changed, corporate houses are involving themselves in much more activities which lie beyond improving the balance sheet.

Thus, if the companies invest in the training and skill development of the unskilled labour, then the private sector can remain intact even after the implementation of reservation policy.

Sluggish Growth Rate of Private Sector and Reservation Policy

Reservation policy seems to be a way out and an important way to increase employment and upliftment of the weaker sections. But with India's jobless growth implementation of such policy is a farfetched thing. India's GDP growth has starkly fallen from 9.7 % in 2016 to 5.7% in 2017.[27] Further investment in private and corporate sector has fallen after the Global financial crisis of 2007, from 16% in 2008 to 10% in 2016.[28] This weakened

25 *Skill councils told to ensure jobs by industry* (2018), Economic Times, India available at economictimes.indiatimes.com/articleshow/62343121.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst accessed on 9th April 2018.

26 Nolan Committee Report.

27 Sashi Sivramkrishna,' *Is India's Economic Growth Slowdown Temporary or Technical?(2017)*, The Wire, 4th October,2017 https://thewire.in/economy/indias-economic-growth-slowdown-temporary-technical accessed on 16th April 2018.

28 Pravakar Sahoo, *Why private investments continue to be sluggish in India, (2017)* Hindustan Times, https://www.hindustantimes.com/opinion/why-private-investments-continue-to-be-sluggish-in-india/story-CPJLB6FGeb8el6gAQljrxK.html accessed on 16th April 2018.

the balance sheets of the companies and public sector banks and, in turn, limited private investment and banks capability to lend. Though government has introduced bankruptcy code and GST, to smoothen the working of private sector, there is thus a need for proper implementation of the same and revival of the stalled projects. There is a need for private investment in the economy for India to remain on a high growth trajectory. Sluggish growth is one of the reasons which prevent the implementation of the reservation policy, further the workforce is also mostly employed in informal sector, and therefore to increase the proportion of them in formal sector, there is need of investment in training, which is quite difficult from the private sector side. For instance, about 90% of the work force employed in the informal sector and the working poverty rate at 35% (less than $3.10 per day), expecting formal sector jobs for the masses seems nothing less than a farfetched dream. [29]

Demographic Dividend and Right to employment

Demographic dividend is the growth in the economy due to the resultant change in age structure. It occurs when the working population proportion is more in the total population. As the 12th Five Year Plan (2012-2017) document pointed out:

"One hundred and eighty-three million additional income seekers are expected to join the workforce over the next 15 years." [30]

This essentially means that a little over 12 million individuals will keep joining the workforce every year, in the years to come.[31] This is the demographic dividend of India. Prima facie, higher population growth pays off automatically in rapid economic growth, but in real sense it pays off only when there are good economic conditions and policies in the country which attract jobs and investment. India has educated youth and we are not able to create jobs for them. Highest unemployment is among the women graduates i.e. 60%.[32] Agriculture's share in GDP is declining, but the employees from the agriculture sector are moving towards odd jobs and not towards manufacturing sector. Thus leading to an increase in informal employment, about 92% among the 470 million workers are informal

29 *Ibid*.

30 Vivek Kaul, *India and the Fallacy of the Demographic Dividend*, 2016 available at https://www.equitymaster.com/diary/detail.asp?date=06/17/2016&story=2&title=India-and-the-Fallacy-of-the-Demographic-Dividend accessed on 16th April 2018.

31 *Ibid*.

32 Rema Nagarajan, Without *jobs, India's demographic dividend will be a disaster: Alakh N Sharma (2014)*, The Times of India, available at: https://timesofindia.indiatimes.com/interviews/Without-jobs-Indias-demographic-dividend-will-be-a-disaster-Alakh-N-Sharma/articleshow/30233665.cms accessed on 16th April 2018.

workers.[33]

The demographic dividend can be stopped from becoming a disaster for the country, if India absorbs the workforce that is leaving agriculture sector into manufacturing and service sector. If the jobs can be increased in the formal sector, then the standard of living of the workers and economic growth can be conceded to. Reservation Policy certainly creates a platform to raise the employment in the formal sector of the weaker sections. But the reservation policy cannot be simply implemented, there are other factors which need to be considered, i.e. the private sectors sluggish growth and the disadvantages as discussed above. Reservation policy should also be implemented when there is proper investment in the training of the workforce, otherwise the efforts to uplift the weaker section and to increase the economic growth will go in vain.

Right to Employment

Right to work has occupied as a central place in human rights discourse. It is increasingly being acknowledged as inextricably linked with human dignity, life, identity and privacy among a host of other fundamental rights.[34] The right itself finds direct mention in major international human rights treaties. The Universal Declaration of Human Rights ('UDHR') 1948 recognized it as one of the universally applicable human rights. Later, this right was transformed into an obligatory norm through Article 6(1) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), which mandates every State Party to recognize everybody's/everyone's right to work.

Right to work or employment in India has not so far being declared as a fundamental right. So far India has many cases, the two important case laws with regard to the same - The first decision was handed down in *Delhi Transport Corporation. v. DTC Mazdoor Congress*[35] The second is the one reported in *Delhi Development Horticulture Employees' Union v. Delhi Administration.*[36] In the first case, the Apex Court has held that income is the foundation of many fundamental rights and when work is the source of income, the right to work becomes as much fundamental. In the case of Delhi Development Horticulture Employee's Union a two-Judge Bench has observed that this country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution.

33 *Ibid.*

34 Saurabh Bhattacharjee, *Situating the Right to Work in International Human Rights Law: An Agenda for the Protection of Refugees and Asylum-Seekers*, (2013) Volume 6 NUJS Law Review available at: http://www.scconline.com/Members/SearchResult2014.aspx> accessed on 9th April 2018.

35 *Delhi Transport Corporation. v. DTC Mazdoor Congress* (1991) Supp (1) SCC 600.

36 *Delhi Development Horticulture Employees' Union v. Delhi Administration* (1992) 4 SCC 99

This is because the country has so far not attained the capacity to guarantee it, and not because it considers it any-the-less fundamental to life.

Right to Work and Reservation in Private sector

Since Right to work is no less than fundamental right of an individual, therefore government introduced reservation or affirmative action plans to insure protection and Right to equality to the backward classes. The reservation policies are equally criticized as the purpose for which they were framed is not achieved in the long run. Thus the policies are to be extended to private sector.

Reservation in private sector is needed to ensure right to work, as the jobs in public sector have shrunken. According to the 2011 Census of the country's rural ST population of 1.96 crore households, 8.60 lakh — or 4.37% — are in government jobs, as compared to 3.96 per cent (13 lakh of 3.3 crore) among the SCs,[37] the statistics clearly depicts that many from backward classes are not able to avail the benefits of the reservation policy in public sector. Further corporate firms are also given many benefits and government aid, therefore there rests responsibility on them to facilitate the government in achieving the economic justice and equality for the backward classes. For instance, in 2004, 218 leading corporate houses and their associations had given a letter to the then prime minister saying that they would implement in letter and spirit affirmative action to empower persons who are socially and educationally backward.[38]

India does include right to work under Article 41 of the Constitution but it is a directive principle of state policy and not a fundamental right. Many competent people and youth in India are unemployed and even after the creation of reservation quota for the backward classes; they are mostly unskilled and thus are not able to enhance the efficiency of the company. Government has to focus on proper implementation of schemes like MGNREGA, and missions like Skill India Mission. India requires an employment guarantee act which enshrines a system by which work could be channeled to the most productive avenues in a socially accountable manner.[39]

37 Mahim Pratap Singh, *Census Counts just 4% SC, ST's families with a member in government job (2015),* The Indian Express available at: https://indianexpress.com/article/india/india-others/census-counts-just-4-sc-st-families-with-a-member-in-a-govt-job/ accessed on 2nd July 2018.

38 *Why I support 27% reservation in private sector jobs (2016)* available at: http://www.rediff.com/money/interview/why-i-support-27-reservation-in-private-sector-jobs/20160211.htm accessed on 2nd July 2018.

39 Mihir Shah, *A workable right to employment*, The Hindu (24th August,2004) available at: http://www.thehindu.com/2004/08/24/stories/2004082402251000.htm accessed on 9th April 2018.

Social Justice Incomplete without Reservation Policy in Private Sector

Principle of social justice and social welfare are enshrined in Preamble to the Constitution and Directive Principle of State Policy. Reservation policy in public sector was introduced with the aim of uplifting the deprived sections of the society and giving them an equal opportunity. The Policy was not able to fulfill the cause for which it was made especially due to the implementation of LPG policy as discussed earlier parts of the paper. Though the jobs had shrunk in the Public sector but it led to the increase in job opportunities in Private Sector, thereby opening up prospectus employment opportunities. Therefore, there is a need for reservation in Private Sector as the circumstance of joblessness in the nation is grim to the point that even very qualified youth have neglected to get work. Millions who graduate each year, particularly the young having a place with the Scheduled Castes and the Scheduled Tribes are jobless inspite of getting reservation benefits

Implementation of the reservation policy will play great role in the development of society and will help India in achieving the millennium goals.[40] Further, it will lead to the wholesome development of the backward classes i.e. making them socially and economically viable. There is a need for the same because they face discrimination on both the grounds i.e. social and economical. For instance a study revealed that the discrimination in labour markets operates through exclusion in hiring, and lower wages. In about 36 percent of the villages, the SCs were denied casual employment in agriculture.[41] In about 25 percent villages, the SCs faced discrimination in terms of wage payments. The SC wage labour thus, received daily wage at a rate, which was less than the market wage rate, or wages paid to the non-SC workers.[42]

Though the policy will lead to wholesome development of the deprived sections but the policy will have a negative impact on the Indian Economy that is the reservation in private sector will dent investment climate. The same can be explained from the words of Assocham Secretary *General DS Rawat* –

> He said there is already a dearth of private sector investment with capacity utilization in several sectors not going beyond 72-75 per

40 *Millennium Goal* - In September 2000, the Assembly of United Nations proclaimed the goals like eradication of poverty and hunger; promote gender equality and empowerment of women etc. for establishing a dignified society by establishing a system of accountability.

41 Sukhadeo Thorat, *Labour Market discrimination – Concept, forms and remedies in the Indian Situation*, IJLE, 51 (1), 2008 available at: http://www.isleijle.org/ijle/issuepdf/a894fabe-5e92-4ab9-8957-dc0ec430224d.pdf accessed on 27th July 2018.

42 Ibid.

> cent. "On top of it, if the political economy of the country is geared to populist sentiments, the environment for growth could be vitiated badly," [43]

Thus a balance needs to be struck between social and economic positions or stance of the country.

Conclusion

Reservation policy started with the aim of enhancing the status of the backward classes is an important initiative of the government. The policy is currently only applicable for public sector and there is a demand to extend the same to private sector. The implementation of the policy to private sector has its own pros and cons.

Reservation is not the only solution for upliftment of the backward classes; there need to be an inclusive development approach to be conceded to. Right to employment is not a fundamental right, but still it is an important right and it occupies a central place in human discourse. Currently Indian economy is gripped in inequality, therefore even after providing jobs to the people the economy is run by a few hands. As per Oxfam report on inequality, 73 percent of the wealth generated last year went to the richest one percent, while 67 crore Indians who comprise the poorest half of the population saw one percent increase in their wealth.[44]

Nisha Agarwal CEO of Oxfam India said –

> "It is alarming that the benefits of economic growth in India continue to concentrate in fewer hands. The billionaire boom is not a sign of a thriving economy but a symptom of a failing economic system. Those working hard, growing food for the country, building infrastructure, working in factories are struggling to fund their child's education, buy medicines for family members and manage two meals a day. The growing divide undermines democracy and promotes corruption and cronyism."[45]

43 Reservation in Private Sector to dent investment climate, The Hindu Business Line (India, 13th November 2017) available at: https://www.thehindubusinessline.com/economy/reservation-in-private-sector-to-dent-investment-climate-assocham/article9956138.ece accessed on 27th July 2018.

44 Oxfam report on inequality available at: https://m.box.com/shared_item/https%3A%2F%2Foxfam.box.com%2Fs%2Feosi27xj7nxuyywysr06d734ct1xyuev/view/267209867301 accessed on 9th April 2018.

45 Ibid.

The growing inequality is the result of the new liberal capitalism policy, because of the same there is a slack in the labour market, which keeps the wage rate low even if their productivity increases. Since the ratio of wage-rate to labour productivity is nothing else but the share of wages, this share decreases, and the share of those who live on the surplus (i.e. non-wage income), typically the rich and the professional classes, increases.[46]

The author thinks that extension of the reservation policy in the private sector is not a good option for the current Indian scenario. Investment in the training and in private sector cannot be forced to bear the cost of hiring unskilled people and there comes the need for investment in training and skill development of the employees so the output of the company can be enhanced and the profit motive be kept intact while promoting the social welfare. Still no consensus has been drawn and there is no clear policy as to who will take up the task of doing the same. It is difficult for private sector to invest in the same, as it is already facing a sluggish growth and there is low corporate investment as discussed in the project. Further, there are different options available with the government to enhance the status of the weaker section; government can invest in the higher education and health of the weaker sections. The weaker section population should enter the formal sector only if they are properly trained and are competent to work in the formal sector, otherwise it will be a burden on the corporate sector and there will not be any economic growth and development of the country.

46 Prabhat Patnaik, *Why is India's wealth inequality growing so rapidly?*, Aljazeera 2018, available at: https://www.aljazeera.com/indepth/opinion/india-wealth-inequality-growing-rapidly-180125084201143.html accessed on 9th April 2018.

The DNA Technology (Use and Application) Regulation Bill, 2019 and its Effectiveness in Upholding the Principles of Privacy

Udhaya Karthika* and Tanisha Verma**

Abstract

The recent progress in biotechnology has marked a new beginning in the extent and scope of performance of law. One such widely expanding area of technology is the DNA Fingerprinting and DNA Profiling Technologies. It is pertinent to structure law in line with new forms of science. The infusion of new technology with law requires extensive research to circumvent any abuse on both the law and technology and still upholding the facets of justice. The first requirement is to see whether these technology laws will be in consonance with the constitution of the land. The second obligation is to ensure the negation of any fortuitous concomitant of the implementation of such laws.

This paper aims to critically analyse the perseverance of the fundamentals of privacy as per the decision in K.S Puttaswami v UOI, 2017 while implementing the law on DNA. Thus, the objective of the paper is to analyse the DNA Technology (Use and Application) Regulation Bill, 2019, its loopholes and suggest corrective measures, so that it can be brought at par with the facets of privacy.

DNA, being a storehouse of sensitive information can convict as well as acquit a person from any crime and therefore it becomes exigent for lawmakers to be fair without giving an opportunity for discrepancies to creep in.

***Keywords**: DNA Technology, DNA Fingerprinting, DNA Profiling Bill, DNA Analysis, Privacy, Puttaswami Judgment*

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Introduction - Privacy, Criminal Laws and the Emerging Technology: Formation of an Equilateral Triangle

Even the slightest variation made in the length and angle of an equilateral triangle collapses its whole structure. Similarly, in a society, law should be framed in such a way that there is absolute consistency and balance between these three elements – Privacy, Criminal Laws and Emerging Technologies, so as to achieve the desired results. In order to ensure an equilateral balance between the three, there is a need to understand the denotation of the word 'privacy'.

Privacy as a Right and Privacy as a Fundamental Right

Privacy means the right to be free from any kind of surveillance. Privacy refers to a state wherein the liberty of the citizen is free from the ascendency of the state.[1] It is the "absence or avoidance of publicity or display; the state or condition from being withdrawn from the society of others, or from public interest; seclusion."[2]

The Right to Privacy has been given the status of a human right. It is a right that protects interests that pertains to the physical realm and the mind.[3] However, it was not a fundamental right. Since the 1960s, the Indian judiciary has dealt with privacy, as a fundamental right under the constitution of India, as well as common law right. It was only recently in the year 2017, that the 'Right to Privacy' got incorporated as a fundamental right under Article 21 of the Constitution of India.[4]

However, expanding the scope of fundamental rights to include the right to privacy wasn't a low hanging fruit to grab for the Supreme Court. The issue in hand in the said historic decision wasn't one of a kind. The same had cropped up in a number of instances before but couldn't see the light of the day. For instance, in *M.P. Sharma v. Satish Chandra*[5] the issue arose regarding the constitutionality of 'search and seizure' and the same was seen as being violative of Article 20(3). The court refused to recognise a right against search and seizure to be violative of the fundamental rights as the right to privacy wasn't seen as a fundamental rights by the courts. In fact, the court held that recognising privacy as a fundamental right is unknown to the Indian Constitution. Similarly, in *Kharak Singh v. The State of U.P*,[6] it

1 John Stuart Mill, *On Liberty,* (1859)
2 New Oxford English Dictionary
3 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1.
4 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1.
5 *M.P. Sharma v. Satish Chandra* (1954) SCR 1077
6 *Kharak Singh v. The State of U.P* (1964) 1 SCR 332

was stated that the right of privacy is not an assured right under our Constitution and thus ascertaining the movements of an individual which is done in a manner similar to in which privacy is invaded is not an infringement of a fundamental right.

As seen, the trend that was being followed up till now was based on the sole idea that fundamental rights were undivided and absolute and had to be read in isolation. But the said view was given up via the upcoming precedents and it was seen that Article 14, 19 and 21 must not be read in isolation but in toto and by interlinking one with the other.

The above view was first upheld in *R. C. Cooper Case*[7] where the court discarded the idea that the fundamental rights can be classified in water-tight compartments, agreeing with the dissenting judgment in Kharak Singh. Further, in *Maneka Gandhi v. Union of India*[8] the court stated that a right that has been included under Article 19 is not per se deprived from being included under the ambit of article 21. A state cannot suspend a particular right just based on the reasoning that it was not included under Article 21 initially.

It was only after the 2017 judgment[9] that the right to privacy was regarded as a fragment of Article 21. Nonetheless, the Right to Privacy as a Fundamental Right is also not absolute. It is conditional to certain tests and can be overridden by the state for larger interest of an individual. Now, privacy is no more an elitist construct. It has three facets namely-

a) *Repose* i.e. the freedom from unwanted stimuli,

b) *Sanctuary* i.e. protection from intrusive observation

c) *Intimate decision* i.e. autonomy to make personal life decisions.[10]

The judgment aims at highlighting the need of protection of certain kind of data from the state actors and the non- state actors.[11] Where a citizen is required to make a choice between privacy and social welfare schemes, then surely he would choose basic amenities like food and shelter first.[12]

7 *R. C. Cooper Case* (1970) 1 SCC 248

8 *Maneka Gandhi v. Union of India* (1978) 1 SCC 248

9 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1

10 *Justice K.S Puttaswami v. UyOI* (2017) 10 SCC 1

11 Kaul J., *ibid*

12 Shraddha, *What impact the recent Right to Privacy judgment will have on existing law?,* ipleaders blog, available at, https://blog.ipleaders.in/right-to-privacy-judgment-impact/, last seen on 20.10.2018 at 12:15 AM

Efficacy of the Privacy Judgment

The 2017 judgment[13] has brought in a paradigm shift in the jurisprudence of privacy in India. The right has given protection to the citizens from intrusive hindrance from state and non-state actors. Privacy forms an integral part of "personal liberty" under the Constitution, which cannot be denied except through a "procedure established by law".[14] The procedure that the law prescribes must essentially be "just, fair and reasonable". However, the state can anyway impose reasonable restrictions on the right to privacy. The restrictions however, must solely be "on the basis of social, moral and compelling public interest in accordance with law."[15]

There are certain laws that may at times put the right to privacy in a compromising situation. But now that it is a fundamental right, ensuring the same becomes all the more important. Mere creation of a right cannot be considered to be sufficient. The right must be protected not only from direct violation of the same but also indirect violation.

The nexus between the right to privacy and the DNA Technology (Use and Application) Regulation Bill, 2019 is so strong that it cannot be ignored at any cost. The Right to Privacy also includes under its ambit the right not to be compelled to speak anything or give self-incriminating evidences against one self. The rationale behind this right is that a person in whom the right to privacy is embodied, he cannot be asked to give out information that goes against him. Where paternity is in question, taking of DNA samples is a very sensitive issue. The court in *Bhabani Prasad Jena v Orissa State Commission for Women* has held it to be violation of right to privacy of an individual and is prejudicial to the rights of the parties as well as, it may cause tremendous effect on the mind of the child[16]. Thus, the judgment focuses on right to privacy as a multi-dimensional aspect. Having a proper legislation will strengthen the national ethos with respect to privacy in India. What is required at the moment is to strike a balance as to how the benefits of emerging technology can be gleaned while keeping the privacy of an individual intact.

Human DNA: The puzzle as well as the solution

DNA is Deoxyribonucleic Acid that is also regarded as a thread of human life and 'the' point of origination of every DNA based organism's life in this universe. It is an identity,

13 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1

14 Constitution of India, Article 21

15 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1

16 *Bhabani Prasad Jena v Orissa State Commission for Women* (2010) 8 SCC 633

so strong, that it can neither be created nor destroyed, but of course be duplicated via advance genetic technologies but can still never be the same. Even in case of Identical twins, studies have shown that twins 'share similar genes' which means, their DNA need not be identical.[17] It is proven that 99.9 % of base sequence is same in all humans and the uniqueness arises due to the 0.1 per cent of variation in it.[18] This 0.1 per cent of variation is the beauty of nature, which can be put to use by mankind to solve crimes and disputes arising from the brutality of mankind itself.

Evolution of DNA as Evidence

In 1953 Dr. J.D. Watson from U.S and Dr. Francis Crick from Britain, published in *Nature* an essay on the basic forms of life.[19] It depicted a model on the process of the transfer of genetic information between generations of the same organism.[20] Then it was Mendel who made remarkable discoveries in the field of biology. From then we have been successful in unlocking some of DNA's secret, which is not only a genetic advancement but has sustained the criminal law justice system by providing it with remarkable accurate evidence though it is yet to be regularised in the field of law.

In 1985 Dr. Alec J. Jeffreys, first proposed DNA Analysis which was used in the *Lynda Mann Case (1987),*[21] where a 15 year old girl was abducted, raped and murdered. The 'genetic fingerprinting' technology was applied in which the body samples taken from the accused, Colin Pitchfork matched the samples that were collected from the deceased victim and in 1987 he became the first murderer convicted by DNA.

Then in late 1980's, law enforcing agencies started performing DNA Analysis. The same was also being conducted by the Federal Bureau of Investigation (FBI) and other commercial laboratories.

DNA Fingerprinting has provided with higher odds of determining the identity of offenders as well as is unlike the regular blood sample and therefore remains usable endlessly on proper preservation and can be extracted from human remains even years later. This makes DNA a much reliable and authentic mode of finding proof. Even in case of disintegration of

17 Anahad O'Connor, *The Claim: Identical Twins Have Identical DNA*, The New York Times, available at https://www.nytimes.com/2008/03/11/health/11real.html

18 *Biology, Textbook for Class XII, NCERT*, NCERT Campus, 120-123 (2015)

19 J D Watson and F H C Crick, *Nature vol. 171*, 737 (1953)

20 *Human Genome News,* 9 (1998)

21 Ashok Bhan, *DNA and Indian Legal System,* Greater Kashmir Blog, available at https://www.greaterkashmir.com/news/opinion/dna-and-indian-legal-system/265178.html

blood, DNA remains stable unless it is burnt by fire.[22] Owning to its high level of utility, it is the need of the hour to recognise the admissibility of DNA as evidence. Globally, DNA evidence is being used by only some countries however, in a very efficient and effective way which has been analysed in the next section.

Comparative Status of DNA Profiling

Though only few countries around the world have adopted DNA profiling as a means of investigation in the criminal matters, they have been well established in these countries to an extent which utilise DNA samples to bring out justice for the victims.

i. *United Kingdom:* The first government database for DNA was setup in *United Kingdom in 1995*. The crime scene profile is compared with a profile in the database, and a match between the two helps the police to identify a possible suspect. For cheek swabs no consent is required however for intimate samples, it requires consent and authorisation. Profiles of individuals can only be retained up to three years if they are not convicted. The Forensic Information Database Strategy board and the Forensic Science Regulator govern and ensure standards in the DNA base services respectively.

ii. *New Zealand:* The second database after UK was set up in *New Zealand in 1995*. There are two databank operation involved which are called the DPD which contains the profiles of individuals and the Crime Sample Database which contains the profiles from unsolved crimes. Both these databanks are compared and then possible suspects are identified and then the crimes are linked.

iii. *France:* The Fichier National Automatisé des Empreintes Génétiques (FNAEG) database was set up in 2001 only.

iv. *United States of America:* In the *USA*, the DNA is collected for criminal investigations and identification of missing and deceased persons. The DNA samples can be taken when a person is charged with federal offences and the process varies across states. If conviction of the individual does not occur or the arrested person is dismissed, then his DNA profile has to be removed. FBI has organized the Combined DNA Index System (CODIS) database. The data base was originally to be used for prosecuting the sex offenders but now extends to include other criminal offender also with a holding over 9 million records as of 2011.

22 *Dharam Deo Yadav v. State of Uttar Pradesh* 2005 DNR (HC) 675

v. *South Africa:* Here the DNA profile management is similar to that of United Kingdom. The profiles of person acquitted are to be removed and cannot be retained beyond three years. One most impressive feature here is that the profile cannot include physical or medical details.

iv. *Ireland:* The DNA database in *Ireland* is operated by the Director of Forensic Science Ireland (FSI). It provides a much stringent law which requires removal of profile in three months in case of acquittal. It also envisages that only that part of DNA will be profiled which provides for the identity.

Setting up of DNA database has brought up different issues in different countries. Not all countries are desirous of sharing the data internationally as there is still a lot of potential for strengthening the privacy concerns. It needs great infrastructure for sharing data internationally which brings with it huge costs for setting up the same.

Admissibility and Need of DNA as Evidence in India

Currently, there is no specific legislation on DNA as a subject however; in 1989 DNA testing got its legal validity. There are only few sections in the Indian Evidence Act, 1982 which create at least a scope for the possibility to ask for or order a DNA Analysis or Test where required though it is not mandatory for the court to order one and highly depends upon the case and circumstances.

The case, *Kunhiraman v. Manoj*[23] is the first case where the paternity dispute arose and required DNA evidence as a proof. Slowly, DNA evidence became a requirement in many cases however, was only given the status of an expert opinion as per Section 45 of the Evidence Act.[24] Then in *Marada Venkateshwara Rao v. Oleti Vara Lakshmi*[25] the court ordered a DNA test to solve a dispute whether the plaintiff and defendant were born to the same woman. In *State of Uttar Pradesh v. Amaramani Tripathi*[26] the former UP Minister, Amaramani Tripathi was sentenced to life for the murdering one Madhulikha Shukla where they relied upon DNA fingerprinting as evidence. Even after such serious cases, the Apex court has been strict in ordering DNA Tests as a matter of routine and has limited it to only deserving cases.[27] When such DNA Test is ordered, it cannot be held to be in violation

23 *Kunhiraman v. Manoj* (1991) 3 Crimes 860 (Ker)

24 The Indian Evidence Act, 1872

25 *Marada Venkateshwara Rao v. Oleti Vara Lakshmi* AIR 2008, AP 195(196) (Para 9)

26 *State of Uttar Pradesh v. Amaramani Tripathi* AIR 2005 SC 3490

27 *Banarasi Das v Teeku Dutta* (2005) 4 SCC 449

of the rights guaranteed under Article 21 of the Constitution of India[28]and also the court has to record reasons as to why the test has been made necessary and to resolve what controversy.[29]

Section 112 of Evidence act is based on the Latin phrase '*pateris est quem nuptiae demonstarnt'* means, 'he is the father whom the marriage indicates'. It upholds the presumption of legitimacy of a child born to a married woman and where the child is deemed to be legitimate then the burden of proving the contrary lies upon the person who wants to prove the child's illegitimacy. What is required to prove illegitimacy is a strong preponderance of evidence and not an indefinite balance of probabilities[30], but this 'strong preponderance' of cannot be the DNA Test and can be only the proof of non-access. Though scientifically strong, DNA test is not substantial enough to escape the conclusiveness of Section 112.[31] In *H.M Prakash alias Dali v. State of Karnataka*[32] the court held that ordering of a DNA Test is neither a breach of his right to privacy or will invoke the provision of protection from self-incriminating statements. Thus, DNA analysis still stays as expert evidence and not a conclusive proof, in spite of the court observing in few cases that the ordering of DNA text does not violate Article 21. In the case of *Ramesh Thakur v NCT*[33] Hon'ble High Court of Delhi, for the purpose of investigation and on the request of the police, ordered the use of DNA Profiling technique to identify the body samples found on a bed sheet by virtue of Section 54 A of the IPC.[34]

Though Indian courts have started relying upon DNA evidence, there is still a fluctuation in the way the courts treat and use such evidence as it is evident, from the approach of courts towards individual cases. The various forensic materials like enzyme typing, fingerprints, serum-protein, dental impressions, blood-grouping, striations on bullets, hair and fiber comparisons, voice spectrograms, neutron-activation analysis, as well as DNA profiling[35], have an ability to match samples with reasonable accuracy which helps to differentiate one source from another thereby aiding criminal investigations, civil disputes such as parentage related disputes, family disputes which requires establishment of biological connection

28 *B. Vandana Kumari v. P. Praveen Kumar* AIR 2007 AP 17(20)

29 *Sunil Eknath Trambake v. Leelavati Sunil Trambake* AIR 2006 Bom 140

30 *Gautam Kundu v. State of West Bengal* AIR 1993 SC 2295 (2301)

31 *Kamti Devi v. Poshi Ram* (2001) 5 SCC 311

32 *H.M Prakash alias Dali v. State of Karnataka* 2004(3) Cr.C.C 322

33 *Ramesh Thakur v NCT* CRL.M.C. 3182/2011

34 Indian Penal Code, 1860

35 The Evaluation of Forensic DNA Evidence - National Research Council (US) Committee on DNA Forensic Science: An Update. Washington (DC): National Academies Press (US); 1996.

between individuals, identification of victims of natural and man-made disasters.[36] It is worth to take note of the role played by DNA Technology in identification of victims of terrorist attack of 2001 on the World Trade Centre and disasters such as the Asian tsunami that took place in 2004.[37]

There is no doubt that such evidence would be useful to the court, especially in an era where the amount of litigation pending is increasing in an alarming rate than that of the increasing population. However, scientifically acceptable procedures may be used to extract information required from such DNA evidence, without compromising the privacy of the individual.

In this regard, an attempt has been made by the introduction of the DNA (Use and Application) Regulation Bill, 2019 to lay down a formal set of rules and procedures for use of DNA evidence for deciding crimes and disputes.

Analysis of the DNA Technology (Use and Application) Regulation Bill, 2019

The DNA Technology (Use and Application) Regulation Bill, 2019 was introduced in Lok Sabha by Mr. Harsh Vardhan, Minister for Science and Technology, on 8 July, 2019. The Bill was previously introduced in Lok Sabha in August 2018, but it lapsed. The Bill provides for regulation of use of DNA technology for establishing the identity of certain persons[38]. However, the Bill has a faced a lot of criticism on several grounds for arbitrarily assigning wide ranging discretionary powers to the state and it poses a great threat to the privacy and gives rise to several data security issues. Over the years several amendments were made to make the Bill full proof with regard to privacy concerns. They were introduced time and again in the years 2015, 2017, 2018 and 2019.

Key Features of the Bill

The DNA Technology for identification of individuals in not regulated as of now. Hence the need of a law arises to utilise this dimension of law effectively without violating the core human rights. A lot of research has been conducted by experts and especially the Law

36 "Report No. 271: Human DNA Profiling- A draft Bill for the Use and Regulation of DNA-Based Technology", Law Commission of India, July 2017, http://lawcommissionofindia.nic.in/reports/Report271.pdf.

37 *"Nothing to Hide, nothing to fear?"*, Human Genetics Commissions, United Kingdom, November 2009

38 *DNA Technology (Use and Regulation) Bill, 2019*, PRS Blog available at https://www.prsindia.org/Billtrack/dna-technology-use-and-application-regulation-Bill-2019

Commission in the use and regulation of DNA Technology. The draft Bill of 2018 was a result of the report submitted by the Law commission in July 2017. The current active Bill of 2019 aims to regulate the use of DNA technology for the purpose of identification of persons in criminal and civil matters. The key features of the Bill that are essential to protect and regulate the use of DNA Data have been discussed below:

It is important to first understand the purposes for which DNA Data can be used. This has been laid down in the schedule of the Bill. DNA evidence can be used for establishing offences under the Indian Penal Code, 1860, Immoral Traffic (Prevention) Act, 1956, the Medical Termination of Pregnancy Act, 1971, the Protection of Civil Rights Act, 1955, the Motor Vehicles Act, 1988, and other such laws and for deciding various civil issues like parentage disputes, pedigree, immigration, or emigration, assisted reproductive technologies, transplantation of human organs, and for establishing individual identity.[39]

Further, the bill requires consent for collecting the bodily substances.[40] In an offence with punishment up to seven years, the authorities are required to obtain written consent of the arrested person before collecting his bodily substances. Where accused does not give consent, the authorities will have to approach a Magistrate who may order for collecting the bodily substances from the individual. Provided, the Magistrate should be satisfied that such DNA testing will approve or disprove the individual's involvement in the alleged offence. In an offence with punishment of more than seven years of imprisonment or death, there is no need to take consent from arrested person to collect his bodily substances. In case of a victim or a missing person the authorities are required to obtain written consent from their relatives to collect the bodily substances and in case of a minor or disabled person, the written consent of the parent or guardian is taken and where such consent is not given by them, the authorities may approach a Magistrate for ordering the collection of such required DNA sample.

The next focus of the Bill is on the DNA Laboratories used for DNA testing. The Bill lays down such DNA Labs conducting DNA testing will have to obtain accreditation from the DNA Regulatory Board, with validity of two years. Such accreditation can be revoked by the board for reasons like failure to undertake DNA testing, or complying with other provisions of the Act. The DNA laboratories need to follow quality assurance standards in collection, storing, testing, and analysis of the DNA samples. Further, the Central Government will set up National DNA Data Bank and Regional DNA Data Banks. These DNA Data Banks have to maintain crime scene index, suspect index, under-trial's index,

39 The Schedule, The DNA Technology (Use and Application) Regulation Bill, 2019

40 Section 21, The DNA Technology (Use and Application) Regulation Bill, 2019

offender index, missing person's index and unknown deceased person's index.[41]

Existence of Data Banks raises the issue of sharing of DNA data with such Data Banks. The Bill lays down that the DNA laboratories have to share the DNA data prepared by them with the National and Regional DNA Data Banks. In cases of criminal nature, the laboratory has to return the body sample to the investigating officer after depositing the DNA profile with the DNA Data Banks and in other cases, the labs are required to destroy the sample and inform the person concerned with the same.[42] The Bill also lays down the procedure to remove DNA profiles from DNA Data Banks. DNA profiles index will be removed from DNA Data Banks after a written request is made by the individual. In case of suspects the DNA Profiles will be removed after the police report is filed or as per the order of the court. In case of an under-trial the DNA Profile will be removed after the court orders for the same. The one-time keyboard search provision says that DNA samples can be compared with information provided in the index of the Data Bank, without the information being included in the index.

Chapter VII of the Bill lays down provisions on DNA Regulatory Board. It says that the DNA Data Banks and DNA laboratories will be supervised by DNA Regulatory Board. The board performs the functions of supervising DNA laboratories and DNA Data Banks for quality control, granting accreditation to DNA laboratories, training manpower, make recommendations to the central government on use and analysis of DNA samples. Further the board has to keep confidential the information relating to DNA profiles in Data Banks, DNA laboratories, and use it only for identification purpose only.[43]

The chapter on 'Offences and Penalties' of the Bill has prescribed a penalty of imprisonment up to three years and a fine up to one lakh rupees for unauthorised disclosure of information or obtaining information from Data Banks or using them without authorisation. Further, a penalty of imprisonment up to five years and a fine of up to two lakh rupees for intentional tampering or destruction of biological evidence has also been prescribed.[44]

Issues and Legal Lacunae in the Bill

There are certain lacunas in the Bill that are required to be amended before it becomes a law. The *Puttaswami Judgment*[45] upheld the right to privacy as a fundamental right under

41 Chapter III and Chapter IV, The DNA Technology (Use and Application) Regulation Bill, 2019
42 Chapter V and Chapter VI, The DNA Technology (Use and Application) Regulation Bill, 2019
43 Chapter VII, The DNA Technology (Use and Application) Regulation Bill, 2019
44 Chapter VII, The DNA Technology (Use and Application) Regulation Bill, 2019
45 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1

Article 21 of the Constitution of India and overruled the verdicts given in *the M.P. Sharma case*[46] of 1958 and the *Kharak Singh case*[47] of 1961. Right to privacy is now intrinsic to life and liberty and thus comes under Article 21 of the constitution.

The 2019 DNA Bill[48] has not defined on how DNA profiling can be used. It is missing a "number of safeguards that would enable individual rights". Thus the lacuna in data protection is highly likely to violate the *ratio decidendi* given by the Hon'ble Supreme Court in the judgment.[49]

The 2017 Law Commission Bill claims that it has used the 13 CODIS (combined DNA index system) profiling standard in the drafting of the Bill as a way of protecting privacy, but it has left the "defining of privacy and security safeguards to actual regulation"[50] meaning that CODIS standard is not in the text of the Bill. Further, the following issues have not been answered by the Bill effectively:

The first issue is *whether the scope of the Bill covers the Disease Diagnostic Laboratories or not*. It is not clear if the intention of the Bill is to also regulate the DNA laboratories that conduct DNA testing for medical and diagnostic purposes. This issue has arisen because of the non-synchronous objective of the Bill as given in the Long Title, the Schedule and the other provisions of the Bill. The Bill requires DNA testing labs to get accreditation from the DNA Regulatory Board. There are also Labs that carry out DNA testing for other purposes such as medical or research, like a diagnostic lab for testing various diseases. The confusion arises because the DNA testing conducted in these labs can also be used to establish identify of an individual.

The second issue is *whether the consent of individuals in civil matters is taken into consideration or not while collecting the bodily substances*. For purpose of civil matters, the requirement to obtain the consent of an individual has not been specified for DNA profiling. This raises concern about the privacy of the bodily substances collected in civil disputes.

Thirdly, it is also not clear as to *whether the mandate of DNA Data Bank applies to civil matters as well*. The Bill does not lay down any provision which says that the storage and

46 *M.P. Sharma v. Satish Chandra* (1954) SCR 1077

47 *Kharak Singh v. The State of U.P* (1964) 1 SCR 332

48 *DNA Technology (Use and Regulation) Bill, 2019*, PRS Blog available at https://www.prsindia.org/Billtrack/dna-technology-use-and-application-regulation-Bill-2019

49 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1.

50 271st , Law Commission of India Report, *Human DNA Profiling,* 2017

removal of DNA profiles in the DNA Data Bank applies to DNA Data collected in civil matters also. The lack of such a provision raises concern of privacy in matters of civil disputes and hence, there may be a violation of the right to privacy. The Supreme Court in the *Puttaswami Judgment* has observed that right to privacy is a fundamental right and the right will be infringed only when there is a law and the law aims to achieve a public purpose and the public purpose is proportionate to the infringement of privacy.[51] The storage of DNA profiles in civil matters may not necessarily serve a public purpose and hence it may violate the right to privacy.

The next issue is regarding the fate of *additional information provided by DNA during profiling has not been made clear*. DNA samples are potential enough to provide additional information other than the identity, such as the medical and physical characteristics of the individual. But on the contrary, the Bill nowhere explicitly mentions that such other will not be included in the DNA profile. Thus, if this provision is not brought in the Bill, it may lead to violation of privacy. However, this issue can be resolved with stricter profiling of the requisite part of DNA which does not reveal the additional information. The United States of America and United Kingdom follow this practice to protect the privacy of individuals[52]. Further, Ireland and South Africa specifically mention that the DNA profile will not contain additional information other than the identity of the individual.[53] It is important to note here that the Law Commission has also mentioned in its report on the Human DNA Profiling that only portions of DNA that provide information related to identity of the individual shall be used. It raises concern because this provision has been not specified in the Bill.

Further, the Bill neither provides for the *removal of DNA profiles of unknown deceased persons*, as provided for the case of a suspect, under-trial and missing persons nor it discusses about the *removal of the DNA Profiles stored by DNA Laboratories*. According to the Bill, the DNA Data stored in various index will be removed, however, the Bill does not require DNA laboratories to remove DNA profiles and it has been left to regulations. Further, the Bill does not provide for a *mechanism for redressal of grievances* when the DNA profile is not removed from the data banks by the National DNA Data Bank.

Lastly, the issue, that *whether there is any need of Photographs and Video Recording under the Bill* has not been answered by the Bill. The Bill surprisingly lists photographs and video recording of body parts as a source for sample collection; however, it does not mention or

51 *Justice K. S. Puttaswamy and Ors. v. Union of India and Ors*, AIR 2017 SC 4161.

52 *Maryland v King, Supreme Court of the United States*, October 2012.

53 Section 36A(1)(fC), Criminal Procedure Act, 1977, South Africa and Section 2(1), Criminal Justice (Forensic Evidence and DNA Database System) Act, 2014, Ireland.

explain the purpose of the same.

Challenges for the Implementation of the DNA Technology Bill, 2019

After considering the key features and the lacunae of the Bill, it is pertinent to discuss the challenges in enforcing and implementing such a Bill. It depends upon the resource available with the country to enforce a DNA Technology Bill, which requires high costs and high standards of technical support from the government.

i. *India's Law Enforcement System:* India lacks proper infrastructure and technical know-how thereby restricting use of DNA Analysis in an effective manner. There are risks of contamination of the sample, and risks in how the crime site is treated and analysed by the so called experts.

ii. *Installation Cost Analysis:* The Bill provides for setting up a DNA data base at national level and state level for recording the DNA of persons arrested in criminal offences. The Indian government has analysed a cost of twenty crores ($3.3 million)[54] only which is a very less amount to maintain a perfect database. In UK, an amount of three thousand million euros ($450 million) has been spent to just setup a database.

iii. *Reliability:* In cases such as blood transfusion or bone marrow transplant, persons will have the donor's DNA in their body for some time. Here, the percentage of reliability of the DNA evidence collected may not be satisfactory. In other cases such as when DNA data is recovered from a crime scene but is not enough to produce a correct match for the algorithms[55], then also the reliability factor of DNA sample goes down. Here, the DNA samples may not be put to use and an alternative mechanism has to be devised.

iv. *Unlimited Use of Data:* A positive note about India's DNA Bill is that it is wider in nature as compared to the law in other countries which use DNA sample for only criminal matters. But India has attempted to include both civil and criminal matters to be resolved through the available DNA samples. However, the same can be a negative aspect as well because the wider is the use of data extracted from DNA more will be the risk of breach of privacy.

54 Gowrishankar, Director, CDFD.

55 Mark Jobling, professor of genetics at the University of Leicester.

Conclusion

DNA is an exact science having prominent use in matters of evidence. However, in India the collected evidence is affected by lack of professionalism keeping the evidence under a question mark. Proper training must be imparted to the concerned authorities, for collection of the DNA from the site of crime along with legally valid guidelines. Moreover, the composition of the DNA regulatory board is also a matter of concern. The Board must also incorporate members from legal fraternity, for instance, a retired judge or a senior advocate of privacy laws. Incorporation of civil societies and human right activists will go a long way to ensure the privacy of the individuals.

It is important to ensure that the board does not assume unauthorised power over the years. The role of the board must be limited to licensing, safeguarding privacy and developing norms for ensuring public transparency. Also, the data protection laws must be made more stringent so that they confirm with the OECD guidelines. Arbitrary use of power by the Government with respect to personal information of the people should be avoided and a just and transparent system of DNA evidence should be built.

The issue of assurance of personal data before the birth of the legislation is very important as only then, the DNA Profiling Bill could be seen as a powerful tool in detecting crimes without compromising with the privacy of the individuals.

DR. SUBHAS KASHINATH MAHAJAN V. STATE OF MAHARASHTRA: A CRITIQUE: AIR 2018 SC 1498

Indrajeet Dey*

Abstract

Section 18 of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, has created a great deal of controversy by disallowing anticipatory bail, and in pursuit of challenging this section it appears that a lot has happened. The Supreme Court was expected to have cleared many grey areas in the legislation; it has rather caused a greater degree of uncertainty in the areas of every day practice in connection with this Act. This Article aims at finding the implications of the dictum passed by their Lordships in view of this judgment.

Keywords*- Supreme Court, Cognizance, Magistrate, Special Courts, Anticipatory bail, 438 of the Code of Criminal Procedure, false implications, trial.*

INTRODUCTION

The Supreme Court vide its judgment and order dated March 20, 2018 in connection with Criminal Appeal 416 of 2018[1] seems to have stirred up the questions pertaining to the extremely harsh Section 18 of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, which puts a bar on anticipatory bail as envisaged under Section 438 of the Code of Criminal Procedure, 1973.

The facts of the case in short are that the complainant was an employee in the Government College of Pharmacy, Karad. Some persons made an adverse remark against him in the annual confidential report. Thus, the complainant chose to lodge a complaint against such persons. Upon filing of a Charge sheet, when the Magistrate went to take cognizance, he was prevented to do so, owing to the embargo under Section 197 of the Code of Criminal Procedure, 1973. The said sanction was refused by the said Dr. S. Mahajan. Thus, the

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1 *Dr. Subhas Kashinath Mahajan Vs State of Maharashtra*, (2018) 6 S.C.C 454.

complainant felt aggrieved against Dr. Mahajan, who was the Director of Technical Education. Hence, upon registration of the said FIR, Dr. Mahajan wanted to apply for pre-arrest bail but was prevented owing to the restriction as per law.

Some of the major guidelines that were given by the Supreme Court can be summarized as:

- That there is no absolute bar against the grant of anticipatory bail under the said Act if no prima facie case is made out or if it appears to the Court that the complaint is mala fide;
- The decisions in *Manju Devi's case*[2] and *Balothia's case*[3] have been clarified, where they said *Balothia's case* was ignorance of the Judgment of the Constitution Bench;
- Public servants can only be arrested after obtaining a sanction form their appointing authorities, if such a sanction is obtained then the Magistrate must scrutinize the reasons before authorizing further detention;
- To avoid false implication of any person, a preliminary enquiry may be conducted by the Deputy Superintendent of Police concerned to find out whether such allegations make out a case under the said Act and also, he is to look into the fact whether such allegations are not frivolous and motivated;
- Any violations of the said actions could lead to an action for contempt.

The judgment has dealt with various aspects including the scope of the Notice under Section 41A, read with the landmark *Arnesh Kumar's Judgment*[4], however in this regard a question arises is that when a notice under Section 41A of the Code is issued the arrest would not ordinarily take place unless there are compelling reasons to take him into custody. However, at the practical level very few persons would be willing to surrender before the Court and make his prayer for bail instead of being certain about his fate.

However, this is where the judgment of the Supreme Court comes into question, the real controversy arose when the Supreme Court while deciding on the position of Uttar Pradesh, where there is a statutory bar on Section 438 of the Code, observed that the powers under Article 226 of the Constitution cannot be used liberally in order to substitute Art 226.[5] This

2 *Manju Devi v. Onkarjit Singh Ahluwalia*, (2017) 13 S.C.C 439.
3 *State of M.P v. Ram Krishna Balothia*, (1995) 3 S.C.C 221.
4 *Arnesh Kumar v. State of Bihar*, (2014) 8 S.C.C 273.
5 *Hema Mishra v. State of U.P*, (2014) 4 S.C.C 453.

meant that the restriction under Section 18 of the Act could not be passed by the provisions of Art 226 or Section 482 of the Code. Now, in the present position of law where the words of their Lordship's are "if *no prima facie case is made out or when on judicial scrutiny the complaint is found to be prima facie mala fide*" would undoubtedly be a huge cause for affecting the autonomy of the Special Courts.

When any constitutional Court makes a very strong observation as to the merits of the case, the trial courts may not be keen on taking a different view. This an order of anticipatory bail would be effectively as good as a colorable use of the powers of quashing of a case by a High Court as read with Section 482 of the Code. Where one of the essential ingredients in the *Bhajan Lal's case*[6] is that mala fide intentions are a good ground of quashing of a FIR, such an observation, while granting the anticipatory bail may seriously affect the investigation and the trial. It is a sine qua non that while hearing of an application under Section 438 of the Code, the de facto complainant or the victim would not have access to the materials in the case diary.

Thus, when an observation is being made against him it would be of grave injustice to him. In other cases, while hearing of the application under section 438 or 439 of the Code the courts generally prefer to limit their observations only to the extent that whether such a person is entitled to bail or not, so that such an observation may be kept limited to the purpose of disposing of the bail application only. The other aspect that cannot be ruled out is that often the investigating officer, whether on purpose or not tends conducts an improper investigation. In such cases, any neutral person may be inclined to opine that no such prima facie case is made out. It is for this reason that the de facto complainant has the scope of preferring a protest petition under Section 190 of the Code. If, the constitutional Courts, who are also Courts of record were to opine that "no such prima facie case is made out", it may seriously prejudice the rights of the de facto complainant.

Their Lordships also said "Such reasons must be scrutinized by the Magistrate for permitting further detention." The amendment to the Act in 2016[7] makes it clear that as per Section 14 of the Act the Hon'ble High Court observed that "*In view of the above provision of the Act which inter alia provides that the Special Court may act as the Court of original jurisdiction and take cognizance of the offences under the said Act without the case being committed to it in terms of Section 193 of Criminal Procedure Code*"[8]. Thus, where such Special Court

6 *State of Haryana v. Ch. Bhajan Lal*, A.I.R 1992 SC 608.

7 The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 (enforced in 2016).

8 *Biman Chakraborty v. State of West Bengal*, CRR 3923 of 2016, Calcutta High Court, Appellate Side.

is a Court of Sessions being presided by Judge who is of the rank of Additional District and Sessions Judge or District and Sessions Judge, the question that would arise is that how can a Magistrate play any role in allowing or disallowing detention. One may find inspiration form the Prevention of Corruption Act where the Judge plays different roles but in this Act there is no statutory provision or a judicial pronouncement by which we can say that the Judge presiding at the Special Court may act as a magistrate. The Act before the amendment of 2016, though had the concept of establishment of Special Courts yet the Full Bench of the Rajasthan High Court *Bhura Singh's case* observed that the process of commitment was required in this case just like any other penal provisions as prevalent in the Indian Penal Code.

The other interesting aspect is that the judgment is that the dictum states as: "*To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated*" It goes without saying that as per Rule 7 of the Prevention of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Rules 1995, states *"Investigating Officer: (1) An offence committed under the Act shall be investigated by a police officer not below the rank of a Deputy Superintendent of Police. The investigating officer shall be appointed by the State Government /Director General of Police/Superintendent of Police after taking into account his past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time."* Thus, it becomes clear that officer other than a DSP may be the investigating officer, and moreover the DSP ipso-facto does not become the investigating officer but he is required to be specially appointed as in terms of Rule 7. The Hon'ble Apex Court, however decided to limit their dictum to only the term DSP. The real issue is that even the High Courts would not be able to interpret the meaning of DSP to be any officer investigating because of the fact that it is only the Supreme Court which can clarify or modify its judgment, by the powers as enshrined under Art 141 of the Constitution.

Moreover, the dictum states that the "*DSP may enquire*" hence it is completely a discretionary function of the state / investigating agency. The more confusing part arises because it is in contrast with the *Lalita Kumari's Judgment*, though the Hon'ble Division Bench while passing the judgment has considered it. The *Lalita Kumari's case*[9] clearly lays down where preliminary enquiry may lie and where there is no scope of preliminary enquiry. In such a circumstance, a bench comprising of a lesser strength may have effectively modified the

9 *Lalita Kumari v. Govt of U.P*, (2014) 2 S.C.C 1.

judgment of a five-judge bench. The other aspect that remains is that if an application under 156(3) of the Code is preferred, and the Court allows such an application then would there be any scope of preliminary enquiry. Though passing an order under 156(3) of the Code is different from taking cognizance, yet when such an order is passed the state has no other option but to lodge an FIR and proceed with the investigation, thus in such circumstances a conflict arises as to whether the preliminary enquiry is to be conducted or the FIR is to registered and the investigation is to commence.

One can never overlook the fact that even the Deputy Superintendent of Police is some police personnel who may indulge in either submitting a bloated Charge Sheet or even tutor witnesses, in order to get departmental credence or he may perform a perfunctory investigation, thus there is adequate scope of misuse of the power of the DSP to conduct the preliminary enquiry.

It is trite law in criminal jurisprudence that a delay in either recording of an FIR or even a delay in sending the FIR to Court or a delay in examining of a witness by the police can put serious aspersions to the prosecution case.[10] The reason behind the same is that it would give the investigating officer a scope of manipulating materials or even manufacturing materials against the accused persons. Where the delay is unexplained or not satisfactorily explained, the accused person becomes eligible for a benefit of doubt, however the irony of this judgment is that the investigating officer now has enormous scope of manipulating materials or even manufacturing materials against the accused persons and he can cover it all up by taking a plea of preliminary enquiry.

The other notable aspect is that this judgment has not given any directions as to informing the victim or the de facto complainant at the time of hearing of the anticipatory bail application. Generally, no such scope is offered to the victim or the de facto complainant but Section 15A of the Act makes it mandatory for the state to inform the victim, in order to give him a right of hearing, with regards to matters bail, discharge and acquittal. Thus, where the Act was not in a position to consider the right of hearing to the victim at the time of anticipatory bail, must be dealt with by the Courts, because there would be no point in allowing an application for anticipatory bail and then giving the victim a right of hearing at the time of hearing of the bail application, which would be a mere formality.

10 *State of Rajasthan v. Hakam Singh*, (2011) 15 *S.C.C* 171.

Conclusion

Thus, where this judgment aims at protecting innocent people may actually be used as a means of convicting innocent persons, which is far worse than not having access to use the rights of anticipatory bail. Moreover, the very applicability of this judgment is questionable as it is evident that an offence under Section 3(1)(IX), however such penal provisions were replaced by the amendment of 2016[11], thus it is possible that their Lordships had not considered the amended Act. Hence, the judgment may suffer by being *per incuriam*. Thus, the Courts may not be bound by such a judgment.

11 *Supra* Note 11.

SHAYARA BANO v. UNION OF INDIA
AIR 2017 SC 4609

Adarsh Pandey* and Arunaditya Singh Parihar**

Abstract

Triple Talaq, also known as talaq-e-biddat or talaq-e-mughallazah, is a form of Islamic dissolution of marriage, which has been practiced by Muslims in India since a long time, peculiarly by followers of Hanafi Sunni Islamic schools of jurisprudence.[1] It permits any Muslim man to legally pronounce an irrevocable divorce against his wife by stating the word "talaq" three times, under any circumstances, in written, oral or more recently, electronic form, and it becomes binding and effective immediately. The practice though legally sanctioned pursuant to Section 2 of the Shariat Law[2] and followed by Sunni Muslims who constitute majority of India's Muslim population, does not finds its place in the Holy Quran. The issue faced a huge controversy and with the increasing rate of cases of such divorce, it became matter of national importance.

However, there was no finality to the fate of victims of this practice until one amongst themselves, Shayara Bano, instituted a Public Interest Litigation (PIL) in Supreme Court in 2016. On 22nd August, 2017, Apex court, by a majority of 3:2 declared triple talaq illegal, unconstitutional and void. The research work has been given a shape by deep study and analysis of news articles and precedents. It is a humble attempt to study the case law in light of various principles of Indian Constitution, Holy Quran and commentaries on the same. The aim was to clearly throw light on the whole journey of the Triple Talaq case and every attempt

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1 Syed Mohammad, *Hanafi jurisprudence sanctions triple talaq*, The Times of India (Apr. 9, 2018, 09:29 PM) available at : https://timesofindia.indiatimes.com/city/hyderabad/hanafi-jurisprudence-sanctions-triple-talaq/articleshow/60182584.cms

2 Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Parliament, 1937 (India).

was made not to leave any single stone untouched in giving a precise yet meaningful touch to the venture.

***Keywords**: Talaq-e-biddat, Sunnis, Quran, Equality, Constitution*

Introduction

"Triple talaq is a 1,400-year-old practice among Sunni Muslims."[3] Prior to Muslim Personal Law (Shariat) Application Act, 1937, the personal and religious matters of the community were administered by Anglo-Mohammedan Law which was enacted by British. Unless registered under Special Marriage Act, 1954, marriage is also considered to be a private matter governed by Muslim Personal Law.

The Ulama (Muslim legal scholars) of Hanafi Sunnis believed talaq-e-biddat binding provided that the proclamation was made in presence of Muslim witnesses and afterwards confirmed by a sharia court. But this was not the case with ulamas of Ahl-i Hadith, Twelver and Musta'li persuasions.

The issue of triple talaq came into light for the first time in 1985 in *Mohd. Ahmed Khan v. Shah Bano Begum and Ors*[4] (hereinafter referred as Shah Bano case). In addition to seeking alimony from her spouse who pronounced triple talaq against her, the victimised wife also challenged the long-established practice of triple talaq, halala nikah and polygamy.

However, the first noteworthy judgment concerning the issue saw its light in 2002 in case of *Shamim Ara v. State of UP*.[5] This case though not invalidated the practice of triple talaq but put certain restrictions on it. In the same year the Aurangabad Bench of Bombay High Court nullified the practice by giving reference from *Dagdu S/O Chotu Pathan, Latur Vs. Rahimbi Dagdu Pathan, Ashabi*[6]. In this case, court held that Muslim male cannot revoke his marriage at his will and is required to prove various grounds and stages for the same. These judgments aided in creation of framework of ruling that invalidated the long-run patriarchal practice of Triple Talaq.

3 Outlook News Scroll, *SC strikes down 1400-yr-old Islamic practice of 'triple talaq'*, OutlookIndia (Apr. 7, 2018, 9:48 PM) available at: https://www.outlookindia.com/newsscroll/sc-strikes-down-1400yrold-islamic-practice-of-triple-talaq/1129346.

4 *Mohd. Ahmed Khan v. Shah Bano Begum and Ors* 1985 SCR (3) 844.

5 *Shamim Ara v. State of UP* 2002 (7) SCC 518.

6 *Dagdu S/O Chotu Pathan, Latur v.. Rahimbi Dagdu Pathan, Ashabi* 2003 (1) BomCr 740.

Facts of the Case

The historic battle against triple talaq, though was supported by plethora of women rights activists and media, but it was finally triggered by the victims of the tradition themselves. Shayara Bano, a 36-year-old native of Kashipur, Uttarakhand, emerged as a spark, as defining persona in the legal battle against the patricentric tradition which ruined the lives of thousands of muslim women.

"Ms. Bano was the original and main petitioner in the case after she knocked the doors of the court in 2016 demanding that the talaq-e-biddat pronounced by her husband be adjudicated as void, after her 14-year marriage terminated abruptly in October 2015. *"She also contended that such unilateral, abrupt and irrevocable form of divorce be declared unconstitutional, arguing that the practice of triple talaq violated the fundamental rights of Muslim women."*[7]

Rizwan Ahmad, the husband of Shayara Bano, pronounced "*Talaq, Talaq, Talaq*" in the presence of two witnesses and delivered "*Talaqnama*" dated 10-10-2015 to her by speed post.

The primary writ petitions which led to this landmark judgment were the ones filed by Shayara Bano and Ishrat Jahan, respectively. They and the other petitioners had questioned the constitutional legitimacy and therefore the validity of continuation of '*talaq-e-biddat*', '*nikkah halala*' and polygamy which are purportedly permitted under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937. The challenge was based on Articles 14, 15, 21 and 25 of Indian Constitution. The Apex Court decided to only deal with the issue of triple talaq, considering the factual aspect of the case. *On this, CJI Khehar, observed that the other issues "would be dealt with separately".*[8]

Consequently, constitutional legitimacy of talaq-e-biddat was called into question before a Constitution bench comprising of 5 judges of Supreme Court.

Views of Judges

Then Chief Justice of India, Jagdish Singh Khehar and Justice S. Abdul Nazeer, together

7 Omar Rashid, *who is Shayara Bano, the triple talaq crusader?* The Hindu (Apr. 7, 2018, 10:04 AM) available at: http://www.thehindu.com/news/national/who-is-shayara-bano-the-triple-talaq-crusader/article19611402.ece.

8 Dr. Sandhya Ram, *Judicial Dichotomy: Analysis of The Majority Judgments in Triple Talaq Case,* LiveLaw (Apr. 7, 2018, 10:09 AM) available at: http://www.livelaw.in/judicial-dichotomy-analysis-majority-judgments-triple-talaq-case/.

held the dissenting view. In formulating the judgment, they held that the, practice of triple talaq, was a customary practice and it is backed by the sanction and favour of the religious denomination which practiced it and there could be no ambiguity as to the referred practice being a part of their personal law. According to them, the restricted purpose of Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 was to prevent the superseding effect of usages and customs over the Muslim personal law. Shariat Act recognizes the Muslim 'personal law' as the 'rule of decision' similarly as Article 25 recognizes the supremacy and enforceability of personal law of all religions and faiths.

The judges were of the view that fundamental rights enlisted under Articles 14, 15 and 21 are available against State actions. Muslim 'personal law'- 'Shariat', is a matter pertaining to 'personal law' of Muslims, to be discovered from ancient sources, it could not be tested on parameters of being act of state. Talaq-e-biddat is practiced by Sunni muslims, a practice which was part of the religious belief of those pertaining to that school and therefore their personal aspect and hence there was no question of its being violative of the tenets of Constitution, more precisely, the provisions relied upon by the Petitioners to assail the long-followed practice of talaq-e-biddat. The judges however agreed that the practice of triple talaq has been corrected by legislation in many Islamic states and therefore were in favour of drafting a similar legislation.

The majority view held by Justices Kurian Joseph, U.U. Lalit and Rohinton Fali Nariman was antithetical to the aforementioned one.

Justice Joseph and Justice Lalit were of the concurring view that to freely profess, practice and propagate one's religion is a fundamental right sanctioned under the Indian Constitution. But on the other hand, State is also having the power under Article 25(2) of the Constitution, to make law in two eventualities in spite of the freedom granted under clause 1, and hence the practice of talaq-e-biddat suffers disqualification under Article 25(2). The judges also analyzed that the practice of triple talaq could not be discovered in Quran. Merely because a practice had seen its continuance for a long duration of time, that by itself could not make it sound if it had been overtly declared to be impermissible. Complete objective of the Act of 1937 was to proclaim Shariat as the Rule of decision and to terminate anti- Shariat practices concerning subjects mentioned in Section 2, which included talaq. Therefore, in any condition, after the inception of the 1937 Act, no practice against the principles of Quran was permissible. Hence, such practice could not get any Constitutional protection under the umbrella of Article 25(1) also.

Justice Nariman was also of the similar view. He stated that after the emergence of Islam,

divorce was allowed to a man only in conditions if his wife by her indocility or substandard character disturbs the piousness of marital life. *"Indeed, Prophet had declared divorce to be one of the most disliked of lawful things in the eyes of God."*[9]

"Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place."[10] This form of dissolution of marriage was arbitrary in the sense that marital bond could be broken at the whims and caprices of the muslim man without any attempt at compromise or reconciliation so as to preserve it. He therefore, concluded this form of Talaq to be held to be violative of the fundamental right enumerated under Article 14 of the Constitution. Also 1937 Act was held to be within the meaning of the expression 'laws in force' under Article 13(1) and therefore must be demolished as being void to the extent it acknowledges and enforces practice of Triple Talaq.

Ratio Decidendi

The ruling of 397 pages, on one hand saw two judges upholding the validity of Instant triple Talaq whereas on the other hand the rest three declaring it void, illegal, unconstitutional and against the basic tenets of Quran, hence finally barring the practice by 3:2 majority. The bench issued directions to the union government under Article 142 to draft appropriate legislation within 6 months governing the practice of marriage and divorce in Muslim community and till then, an injunction would be there against muslim males pronouncing instant triple talaq.

Critical Analysis of Issues

Issue 1: Is talaq-e-biddat Islamic in nature?

"A distinctive feature of talaq-e-biddat is that it is immediately effective and is irrevocable."[11] Furthermore, it can be only pronounced by a husband against his wife and not vice versa. According to Ameer Ali, this form of talaq was introduced by the Omeyyade monarchs. Since then it was prevalent among the Sunni Muslims.

9 *Ibid*.

10 LiveLaw News Network, *This Is What Supreme Court Said in Triple Talaq Judgment*, LiveLaw (Apr. 7, 2018, 10:45 AM), http://www.livelaw.in/supreme-court-said-triple-talaq-judgment-read-judgment/.

11 Prof. Kusum, Family Law – I, pg. 390 (4th Ed. 2015).

There are four sources of Islamic Law, namely, Hadith, Quran, Qiyas and Ijma. Quran which is believed to be the word of god, is the most fundamental and primary source of law, supplementary to which is Hadith, which are the traditions of Prophet, and the latter two are not of much relevance. *There is no mention of talaq-e-biddat in the holy Quran***.** It can only be found in Hadith. *"Such talaq is although sinful but lawful in Hanafi law, but in Ithna Ashari and Fatimi laws it is not permissible."*[12]

In words of Prophet Mohammad, *"Talaq is the most detestable before god of all the permitted things"*[13] Quran only permits talaq under exceptional and justifiable conditions and that too *talaq-e-hassan* and *talaq-e-ahsan,* which are revocable. No verse in Quran validates instantaneous triple Talaq.[14]

Justice Kurien's judgement hugely relies upon the aforementioned relationship of Quran and triple talaq. This is specifically interesting as it does not dwell upon constitutional legitimacy of triple talaq but rather throws light upon its Quranic legitimacy.

Issue 2: Whether talaq-e-biddat comes under the protection of Article 25?

In order to get the most precise answer to this question, the essentiality test needs to be applied. The test determines if a particular practice is crucial part of a religious faith or not. "*In the case at hand, both the minority and the majority judgments reside on this issue and rely on different judgments to reach their conclusions.*"[15] In the light of *Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay,*[16] CJI Khehar recited that essentiality of a religious practice must be assessed from the belief of members belonging to that community. On the other hand, Justice Nariman relying upon one of the landmark judgements on Article 25 in *Commissioner of Police v. Acharya Jagdishwarananda Avadhuta*[17]**,** stated that "*essential practice is the one on which core beliefs of the religion are founded; a cornerstone upon which the superstructure of the religion is built, without which the fundamental character of the religion would change*".[18]

12 Asaf A.A. Fyzee, Outlines of Muhammadan Law, pg. 122 (5th Ed. 2012).

13 Dr. Mohammad Najmi, Mohammadan Law, pg. 73 (3rd Ed. 2012).

14 Ismat Ara, *What Does the Quran Actually Say About Triple Talaq?*, Feminism in India (Apr. 8, 2018, 10:16 AM), https://feminisminindia.com/2017/08/23/quran-triplee-talaq/.

15 Vedant Churi, *Case Commentary on Shayara Bano v. Union of India*, Magazine Committee of Government Law College (Apr. 8, 2018, 11:16 AM) available at: http://glcmag.com/2017/09/13/case-commentary-on-shayara-bano-vs-union-of-india/#_ftn1.

16 *Sardar Syedna Taher Saifuddin Saheb Vs. The State of Bombay* 1962 SCR Supl. (2) 496.

17 *Commissioner of Police Vs. Acharya Jagdishwarananda Avadhuta* 2004 (12) SCC 770.

18 *Supra* Note 10.

If view of Justice Nariman is taken into consideration, then Triple Talaq is unambiguously outside the purview of Article 25. However, abiding by interpretation of essentiality test as laid down by CJI Khehar, a question arises whether talaq-e-biddat can be regarded as an essential part of their religion by Muslim community in India. A large population of Muslim community in India is Hanafi Muslims and respondents in the case too were the same and they themselves asserted that such a practice is considered to be sinful and AIMPLB has issued directions to curb such practice. Thus, it may be concluded that the operation of talaq-e-biddat is not regarded as an essential part of their religion by Muslim community in India.

Further if it is assumed to be a religious practice, it triple talaq suffered the disqualification from the protection of Article 25 on the grounds of it being violative of other fundamental rights enshrined in Part III of constitution and morality. Article 25 of our constitution being basis of secularity of India, it does not guarantee unrestricted freedom to religion for it could have worst consequences. Such freedom is subject to public order, morality, health and other provisions of Part III of constitution.[19] The practice of triple talaq in addition to violating other fundamental rights was an eclipse on morality. Muslim males were using even mobile texts to terminate the sacred bond of marriage within few seconds without assigning any reason and most of the times for contracting another marriage. Their impulsive decision ruined the entire life of female, leaving her under the bare sky and annihilating the future of children born of such marriage.

Issue 3: Whether Muslim Personal Law (Shariat) Application Act, 1937 bestows statutory status to the subjects governed by it or is it still sheltered under "Personal Law" which is not within the meaning of word "law" under Article 13 of Constitution?

As per the interpretation of Section 2 of Shariat Act, 1937 given by Justice Nariman, customs and usages which are erratic with Shariat are invalidated and rest other are valid. Just literal understanding of the section does not provide much to conclude about it. This is where opinions of Justice Nariman differ with that of CJI Khehar as Justice Nariman, by his interpretation puts emphasis on the object of the Act and concludes that Muslim Personal Law should be made applicable over the whole country while CJI emphasizes legislative debates to get the true intention of legislature behind the act. Here, it may be concluded that it was inconsistency between drafting the objects of the legislation that led to bifurcated and varied conclusion by the judges.

Analyzing the judgment which Justice Nariman gave, he held 1937 Act to be within the

19 Constitution of India. Article 25(1)

meaning of expression "laws in force" under Article 13 of constitution, thereby void to the extent of inconsistency with provisions of Part III. "*This may open a completely new door to litigation against the regressive and oppressive practices continuing under the shelter of Muslim Personal Law as such practices will have to satisfy Part III, now.*"[20]

Recent Developments

As per the directions issued in the case at hand, on 28th December, 2017, The Muslim Women (Protection of Rights on Marriage) Bill, 2017 was passed in Lok Sabha. The Bill made triple talaq in any form void and illegal, with up to three years of imprisonment for husband and included several other remedial provisions. An ordinance of 2018, Bill of 2018 and ordinance of 2019 were also passed in the meanwhile, but none could survive for long and it all lapsed with the dissolution of the 16th Lok Sabha.

The newly elected NDA government re-introduced the Bill in the Parliament and the Bill was passed by Lok Sabha on 25th July, 2019 and further by Rajya Sabha on 30th July, 2019 and is now awaiting the assent of President and after that would replace 1986 Act. Amongst huge dissent by opposition on the legality and rationality of the Bill nationwide, it finally managed to take its place as a formal law.

Conclusion

Indian society, since the ancient times has witnessed plethora of gender discriminatory practices targeted against females. The ancient Hindu practice of *Sati* serves as a best example of the same. But with the advancement of time and enhancement of education amongst the population, many of these unjust norms have been done away with, triple talaq now being the one of them.

22nd day of August, 2017 was the landmark day in the history of India which saw conclusion of an unjust patriarchal practice which destroyed the life of thousands of Muslim women. Triple Talaq or talaq-e-biddat wasn't even permitted by the holy book of Quran but was being exploited by Muslim male to end up their marital tie any time at their whims and caprices without assigning any reason. This practice was gradually advancing towards its more pathetic state with divorce being pronounced by mobile texts, letter and anytime even in state of anger or intoxication and it became binding and effective immediately and wasn't revocable too. In words of All India Muslim Personal Law Board (AIMPLB), *"Sharia*

20 *Supra* Note 10.

grants right to divorce to husbands because men have greater power of decision-making."[21] It was none other than the victim of the practice itself, Shah Bano, who initiated the battle and finally led it to the doors of success.

The 5-judge constitutional bench heard the controversial case of Triple Talaq, a matter of religious belief of Hanafi Muslims, and declared the practice as unconstitutional. The bench gave directions to the union government to draft an appropriate legislation for the same.

"The judgment has been widely celebrated throughout the country, as many consider it the beginning of a long overdue overhaul of archaic and discriminatory personal laws."[22] But one thing is for sure - This is a minor victory, the fight for gender equality still has a long way to go.

21 Times of India News Network, *Centre seeks apology from AIMPLB for filing 'misogynistic' affidavit in Supreme Court*, The Times of India (Apr. 8, 2018, 10:59 AM), available at: https://timesofindia.indiatimes.com/india/centre-seeks-apology-from-aimplb-for-filing-misogynistic-affidavit-in-supreme-court/articleshow/58689813.cms.

22 Malcolm Katrak, *Shayara Bano v. Union of India: A Watershed Moment in the Battle for Women's Rights in India*, Feminist Law Professors (Apr. 8, 2018, 10:50 AM), http://www.feministlawprofessors.com/2017/09/shayara-bano-v-union-of-india-a-watershed-moment-in-the-battle-for-womens-rights-in-india/.

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