KASHMIR JOURNAL OF LEGAL STUDIES

Statement of ownership and other particulars

KASHMIR JOURNAL OF LEGAL STUDIES

Place of Publication	:	Srinagar
Publisher	:	Kashmir Law College
Address	:	Khawajapora, Nowshera Srinagar – 190011 J&K India
Ownership	:	Kashmir Law College

Acknowledgement

The College acknowledges with great appreciation the financial support by ICSSR for the publication of the previous VII 2017-18 & VIII (2018-2019) of Kashmir Journal of Legal Studies.

I, Altaf Ahmad Bazaz, Chairman of the College, do hereby declare that the particulars given above are true to the best of my knowledge and belief.

Cite this volume as IX KJLS [2021-22]
ISSN: 2250-2084
Annual subscription
Inland: Rs 500.00
Overseas: $50

Kashmir Journal of Legal Studies is a peer reviewed/refereed Journal and published annually, **Approved by UGC.** Contributions to the Journal are invited in the form of articles, notes and case comments which should reach the editor of the journal by ending June of the year. Contributors are required to follow the mode of citation and footnoting of the journal of the Indian Law Institute. The Paper(s) already published elsewhere will not be considered for publication in this *Journal*. The author shall at the time of submission furnish a certificate to effect that the research paper has neither been published in any other journal nor has he/she resorted to any sort of plagiarism. Articles with more than two or more authors will not be entertained. The paper should not exceed 10,000 words and must also contain an abstract in not more than 150 words followed by key words. The manuscripts must be typed in double space on one side of the A-4 size paper and sent in compact disc (CD) or as an attachment with e-mail at *kashmirlawcollegesgr@gmail.com.*

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

E-mail:- kashmirlawcollegesgr@gmail.com
Website: - www.kashmirlawcollege.edu.in

Published by: **Kashmir Law College**
Nowshera, Srinagar, Kashmir – 190011(India)
Ph: - 0194-2405901 Mob: - 9419017397
Computer Design By: **Mr. Omer Javeed Zargar**
E-mail:- umerjaveed99@gmail.com

Editorial

The changing nuances of law demand a continuous process of reappraisal, mapping, documenting and dissemination in order to answer the emerging challenges of technology & dynamic society in the domain of legal research. Main objective of every academic work remains the same. However some endeavors become distinct on account of their quality. The Kashmir Journal of Legal Studies has been contributing substantially in the field of legal research, resulting in accreditation of the journal as UGC approved listed journal which is a great achievement for a Private Law college of the Valley. The journal is being indexed by Indian Citation Index (ICI) as a sequel to its quality of content in the field of legal education. It gives us immense pleasure to note that the ICI has authorised the college to use their Logo in this Journal which is duly acknowledged...

The present issue of the Journal has twelve articles and five notes and comments which are delineated as under:

Prof. Fareed Ahmad Rafiqi & Ryhana Farooq in their article *"The Protection of Forests in India: A Legal Perspective"* have highlighted the contemporary legal measures involved in the forest protection and their efficacy.

Dr. Kshitij Kumar Singh in his article '*Patenting of Animal Biotechnology: Ethical, Legal and Social Implications'* has analyzed the ethical, legal and social implications of the patenting of animal biotechnology in USA, EU, Canada and India in the back drop of economic growth, and animal rights.

Dr. Nayeem Ahamd Bhat in his article '*An Empirical Study of Various Labour Welfare Provisions pertaining to Women Workers in Jammu and Kashmir'* has highlighted the efficacy of labour laws pertaining to welfare of female workforce in J and K and the issues concerned.

Dr. Seema Singh in her article **'***Forensic Techniques: An Essentiality for Existing Criminal Justice System'* has highlighted the need of

adopting new scientific techniques of criminal investigation in the background of their authenticity, utility and constitutionality.

Dr. Syed Asima Refayi in her article *'DNA Technology and Right to Privacy: An Indian Perspective'* has highlighted the importance of DNA technology and its relation with right to privacy by contextualizing the new laws relating to the issue

Dr. Narender Kumar Bishnoi & Amit Raj Agrawal in their article "*Impact of Technology on*
Human Lives: A Human Rights Perspective' attempts to make analysis of existing legal framework about the need for the increased use of technology and its impact on human well-being globally

Khusboo Malik in her article *'The Comparative Analysis of Legal Framework for Privacy Protection vis-à-vis Telemedicine in U.S.A, U.K, Malaysia and India'* has done a comparative analysis of laws of Telemedicine and its scope in India.

Dr. Nisha Dhanraj Dewani in her article *'The Doctrine of Precedent in Constitutional Decision Making'* has highlighted the significance of precedent as a source of law and its impact on evolution of constitutional decision making.

Syed Shahid Rashid in his article *'Inheritance Rights of Women: A Comparative Overview of Islamic law and Customary Laws of Kashmir'* has attempted to simplify an overview of inheritance rights of women under Islamic Law and customary law which dominated the inheritance matters in J and K..

Dr. Mohd Yasin Wani & Ashfaq Hamir Dar in their article *'Dynamics of Indian Federalism'* elaborated different contours of federalism operative in India and its impact on Constitutional framework.

Dr. Rubina Iqbal in her article *'Protection of Children from Sexual Offences Act: An Overview'* has evaluated the contribution of the POCSO Act, 2012 regarding sexual offences against children.

Romisa Rasool in her article *'Non-Performing Assets(NPAs): An Analysis of SARFAESI Act'* has attempted to trace out the legislative measures enacted from time to time to curb NPAs and to figure out loopholes in the SARFAESI law.

Notes and Comments

Debajit Kumar Sharma in his article '*Investigation under the Code of Criminal Procedure'* has highlighted the various mechanisms involved in the process of investigation and its impact on the overall administration of criminal justice system

Dr. Unanza Gulzar in her article *'An appraisal of Jolting Insertion of Mediation under Consumer Protection Act, 2019'* has highlighted the scope of mediation under the consumer law and issues and challenges it face.

Dr. Suman Yadav in her article *'Hindu Female Intestate Succession: An Epitome of Discrimination'* has evaluated the succession matters among the Hindu women and the constitutional implications of legal provisions governing succession and its impact on society.

Shahnawaz Sadiq in his article '*National Educational Policy-2020: Impact on Gujjar & Bakerwal Tribe'* has attempted to highlight the potential impact of the new education policy on the educational rights of Gujjar and Bakerwal community.

Dr Imran Ahad & Touseef Hamid in their article '*Reservation under the Constitution of India: An evaluation of correctness of 50% ceiling'* have evaluated the issue of 50% ceiling limit on reservation under the Constitution of India and its impact on the objectives of equality

The present issue is the combined contribution of the editorial board and the legal experts who have directly or indirectly helped to bring out the issue in the best possible presentable form. The efforts made by the team of editors has remained quite immense and laudable which is duly acknowledged. The editor wants to put on record the contribution of **Omer Zargar** for layout and the design of the Journal.

Last but not the least, all credit goes to Mr. Altaf Ahmad Bazaz, Chairman of the College for his unfailing commitment to academic excellence and financial support to make the publication of this journal possible.

Dr. Sheikh Showkat Hussain.

Kashmir Journal of Legal Studies

Volume-9 (2021-22)

CONTENTS

NOTES & COMMENTS

The Protection of Forests In India: A Legal Perspective.

Prof. Fareed Ahmad Rafiqi*
Ryhana Farooq**

Abstract

Forests are considered as the 'green gold' for any country. These provide huge habitat for wildlife of the country. The areas with mountainous landscape and vast lush green forests add up to the natural beauty of India making it the richest reservoir of flora and fauna throughout the world. However, the natural and non-natural interventions often impact not only the forest capital but its impending consequences as well. The phenomena of regional political movements, unplanned development, deployment of military and security establishments, rehabilitation of displaced, overexploitation of construction materials due to increasing population, increasing number of national and multinational companies are some of the factors which have caused huge footprints in the forest areas. The answer perhaps lies somewhere in legal wherewithal and its effective implementation. This paper is a humble attempt to evaluate the forest protection in India, challenges involved and the efficacy of legal measures involved for the protection of forests.

Keywords: *Forest wealth, Human environment, Tribal Population, conservation, flora and green-gold*

* Former professor of Law, University of Kashmir
** PhD scholar, Mewar University of Rajasthan

Introduction

The UN Conference on Human Environment and Development at Stockholm in 1972 is considered as the ***Magna Carta*** of environment protection where the world community got together to discuss environmental concerns related to human development. This conference resulted in the "Stockholm Declaration on the Human Environment." The Principle 1 of Stockholm Declaration succinctly stated that "man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing, and he bears a solemn responsibility to protect and improve the environment for present and future generations".[1] The Montreal Protocol, 1987(ozone treaty),[2] the Bruntland Commission Report of 1987 on sustainable development,[3] the Earth summit of 1992 at Rio De Jenario,[4] the UN framework Convention on Climate Change of 1992,[5]

---

1 Jaiswal, P.S. *Environmental Law*, p:16, (3rd edition, Allahabad Law Agency, 1559 Outram Lines, Near Kingsway /Camp, Delhi 110009)

2 The Montreal Protocol on Substances that Deplete the Ozone Layer(a protocol to the Vienna Convention for the Protection of the Ozone Layer) is an international treaty designed to protect the ozone layer by phasing out the production of numerous substances that are responsible for ozone depletion. It was agreed on 16 September 1987, and entered into force on 1 January 1989, followed by a first meeting in Helsinki, May 1989.

3 Our Common Future, also known as the Brundtland Report, from the United Nations World Commission on Environment and Development (WCED) was published in 1987. Its targets were multilateralism and interdependence of nations in the search for a sustainable development path. The report sought to recapture the spirit of the Stockholm Conference - which had introduced environmental concerns to the formal political development sphere. Our Common Future placed environmental issues firmly on the political agenda; it aimed to discuss the environment and development as one single issue.

4 The United Nations Conference on Environment and Development (UNCED), also known as the Rio de Janeiro Earth Summit was a major United Nations conference held in Rio de Janeiro from 3 to 14 June 1992. An important achievement of the summit was an agreement on the Climate Change Convention which in turn led to the Kyoto Protocol and the Paris Agreement. Another agreement was to "not to carry out any activities on the lands of indigenous peoples that would cause environmental degradation or that would be culturally inappropriate".

Earth summit of Johannesburg in 2002,[6] the Kyoto Protocol on climate change 2005,[7] are some of the significant international initiatives towards the environmental protection and preservation at global level. Forests form the major component of the overall environmental graph in terms of maintaining the ecological balance. However, the forests are increasingly seen as Commercial Avenue rather than natural habitat and source of ecological balance for human beings along with the flora and fauna. Tribal populations feeding upon forests are also under the threat of displacement. Besides these environmental and ecological benefits, forest bring revenue to the state, supply raw material to industries, and act as a source of natural resources and minerals.

Forest Wealth: Conceptual Background

As per the India State of Forest Report (ISFR) 2019, forest cover is 21.67% or 0.13% more than ISFR 2017(21.54 % in ISFR 2017). Forest and tree cover is 25.56% (24.39 % in ISFR 2017).[8] However, Forest is not equally distributed all over India. The Forest Survey of India (FSI) is a premier national organization under the Union Ministry of Environment and Forests, responsible for assessment and monitoring of the forest resources of the country regularly[9]. According to the survey, the laws on forests and environment in India are more focused on revenue, rather than preservation and conservation of forest wealth. The

---

5 The objective is to "stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system"

6 The World Summit on Sustainable Development, WSSD or ONG Earth Summit 2002 took place in Johannesburg, South Africa, from 26 August to 4 September 2002. It was convened to discuss sustainable development by the United Nations.

7 The Kyoto Protocol is an international agreement linked to the United Nations Framework Convention on Climate Change, which **commits** its Parties by setting internationally binding emission reduction targets.

8 Available at : https://www.onlyiasexam.com/2020/06/give-account-of-forest-wealth-of-india.html#:

9 **India has 2% of the Global forest area, standing at 10th position among the top ten countries in respect of forest area.** Russia Federation tops the list with 20% of the global forest cover.

laws have become defunct being less effective. The local communities' accessibility is very restricted to forest areas. The perpetual lease and license mechanism which has been adopted vis-à-vis forests and activities related to them have also hurt the forest protection. The main legislation for the protection of forests in India happens to be the Indian Forest Act 1927 which is comprehensive and consolidating. The States have also over the period of time come with legislation relating to forests imposing Governmental control over forests by demarcating them into reserved forests, protected forests and village forests. Based on a revenue-oriented policy, its main object was to regulate dealing in forest produce and augment the public exchequer by levy of duties on timber. The Indian Forest Act gives the state jurisdiction over both public and private forests and facilitates the extraction of timber for profit. It is to be remembered that at the inception of Constitution 'forests' were placed under State List. However, in 1976 the field was placed in Concurrent List, thus enabling both Parliaments, as well as, State to make laws on the preservation of forests[10].

Indian Forest Act, 1927

Indian Forest Act, 1927 is a comprehensive legislation which also consolidated the previous laws relating to forests. The Act consists of 86 sections divided into 13 chapters. The main objects of the Act have been: to consolidate the laws relating to forests; Regulation of and the transit of forest produce; to levy duty on timber and other forest produce. The term **"forest"** has not been defined in the Act. According to the Food and Agriculture Organization (FAO) forest means:

All lands bearing vegetative association demarcated by trees of any size, exploited or not, capable of producing wood or other food products.

10 The Forest law is proposed to be amended in tune with the modern challenges to ecological wealth, for example see, Forest Policy Division, MOEF&CC, GoI [Proposed Indian Forest (Amendment) Act, 2019].

Once the Forest Settlement Officer settles all the rights either by admitting them or rejecting them, as per the provisions of the Act, and has heard appeals, if any, and settled the same, all the rights with the said piece of land, with or without alteration or modification of boundaries, vest with the State Government. Thereafter, the State Government issues notification declaring that piece of land to be a Reserved Forest.[11]

The Government may assign to any village community the rights over a land which may be a part of a reserved forest for use of the community. Usually, forested community lands are constituted into Village Grazing Reserve. Parcels of land so notified are marked on the settlement revenue maps of the villages.[12]

Protected forests are an area or mass of land, which is not a reserved forest, and over which the Government has property rights, declared to be so by a State Government. It does not require the long and tedious process of settlement, as in case of declaration of a reserved forest. However, if such a declaration infringes upon a person's rights, the Government may cause an inquiry into the same; but pending such inquiries, the declaration cannot abridge or affect such rights of persons or communities.[13]

Drawbacks of the Indian Forest Act, 1927

The Act does not thrust upon forests as a source of ecological balance and life habitat. Rather more focus is on generating of revenue rather than preservation of forests. No elaborations have been made upon conservation of forests to protect biodiversity. This enactment paves way for the Government to gain more power over the forest produce rather than its conservation and protection of vegetation. The Act mainly focuses on the forest land, its produce and the officers whereas there are no detailed provisions for the fauna under the Act. There is no mention of protection of wild life, flora and fauna in the Act.

11 Section 20
12 Section 28
13 Section 29

However, a separate legislation[14] for the protection of wild life was enacted later on after a long time. Cutting of timber is facilitated by this Forest Act, even though taxes are levied on them. The Act though wanted to protect the rights of the forest dwellers, it failed to meet the expectations of the local inhabitants as they were denied the occupancy and property rights even after residing in the forests for years. It can be inferred easily from the reading of the Act, that it regulates the cutting of trees and earning of revenue from such cutting of the trees and the forest produce. The interests of nomads and tribal indigenous people living in forest areas from centuries have not been taken care of. They have been deprived of their rights to use the forest and forest produce. It mainly aimed at supplying raw material for forest based industries though forest was accepted as a significant factor in eco-balance and environmental preservation. It is necessary to point out here that revenue oriented attitude towards the forest has continued even after independence. Therefore, this Act of 1927 has failed miserably to protect the forest from unscientific and unplanned exploitation. The Act denied common ownership or occupancy rights or property rights to the occupants of land/tribal. These forest dwellers living there for generations were not given any right over the forest land and forest produce, thereby denying them the valuable right of benefit sharing. Since the Forests were declared to be the property of the government and in case of disputes the Forest settlement officer would have all the rights to decide the claim.

Forest Conservation Act, 1980

In 1980, the Parliament, in response to the rapid decline in the forest covers in India, and also to fulfill the Constitutional obligation under Article 48-A, enacted a new legislation called the Forest Conservation Act, 1980. The basic aim of the Act was to provide for the conservation of forests and for matters connected therewith or ancillary or incidental thereto. Under the provisions of this Act, prior approval of

14 Wild Life Protection Act, 1972

the Central Government was essential for diversion of forest lands for the non-forestry purposes. The basic objective of the Act avowedly was to regulate the indiscriminate diversion of forest lands for non-forestry uses and to maintain a logical balance between the developmental needs of the country and the conservation of natural heritage. The, guidelines have been issued under the Act from time to time, to simplify the procedures, to cut down delays and to make the Act more user friendly. Prior to 1980, the rate of diversion of forest lands for non-forestry purposes was about 1.43 lakh hectare per annum. However, with the advent of the Forest (Conservation) Act, 1980, the rate of diversion of forest lands was controlled to a certain extent.

The Act allowed the diversion of forest land only for certain purposes, such as, to meet the developmental needs for drinking water projects, irrigation projects, transmission lines, railway lines, roads, power projects, defense related projects, mining etc. For such diversions of forest lands for non-forestry purposes, compensatory afforestation was stipulated and catchment area treatment plan, wildlife habitat improvement plan, rehabilitation plan etc. are being implemented, to mitigate the ill effects of diversion of such vast area of green forests.[15]

Compensatory Afforestation

To monitor the effective implementation of the compensatory afforestation in the country, an authority named as *"Compensatory Afforestation Management and Planning Authority (CAMPA)"* has been constituted at the national level[16]. To buttress said scheme a monitoring

15 M F Ahmed, "In-Depth Country Study-India", Asia-Pacific Forestry Sector Outlook Study Working Paper Series, Working Paper No: APFSOS/WP/26, October 1997 last visited on 01/12/2021

16 The Compensatory Afforestation Fund (CAF) Act., 2016 has been notified by Ministry of Environment, Forests and Climate Change, Government of India vide Gazette notification 45, dated 3rd August, 2016. The Act has been enacted to provide for the establishment of funds under the public accounts of India and the public accounts of each State crediting thereto the monies received from the user agencies towards compensatory afforestation, additional compensatory afforestation, penal compensatory

cell is envisaged to be set up in the Ministry of Environment & Forests to monitor the movement of proposals at various stages and the compliance of the conditions stipulated in the forestry clearances by the user agencies.

Clearance from Central Government for de-reservation of Reserve Forests, for use of forestland for non-forest purpose and for assignment of leases has been made mandatory under Forest Conservation Act, 1980. The prior approval of Central Government has to be obtained by the State Government or other authority for undertaking any of the above mentioned activities.[17] For this purpose, the proposal has to be sent to the Central Government in the form specified in The Forest Conservation Rules, 1982. In case the proposal for clearances are rejected, a person aggrieved by an order granting environmental clearance can appeal to National Environmental Appellate Authority set up under National Environmental Appellate Authority Act, 1997 within thirty days from the rejection of the proposal.[18]

Forest Protection & Role of Judiciary

The courts in India have played a dynamic role in preserving the environment and eco-system. The Constitutional Provisions like Article 21 and 14 have been widely interpreted and invoked by the Supreme

afforestation, net present value and all other amounts recovered from such agencies under the Forest Conservation Act, 1980. Based on the Act., the Ministry of Environment, Forests and Climate Change, Government of India had also notified the Compensatory Afforestation Fund Rules, 2018 vide Gazette Notification No. G.S.R. 766 (E), Dtd. 10th August, 2018. Further, the Ministry of Environment, Forests and Climate Change, Govt. of India has notified the National Compensatory Afforestation Fund Management and Planning Authority vide notification No. S.O. 4855 (E), dtd 14.09.2018 and State Compensatory Afforestation Fund Management and Planning Authority vide notification No. S.O. 4856 (E), dtd 14.09.2018.

17 Section 2 of the 1980 Act

18 Rekha Singhal, "Changing Modes of Forest Governance in India: Evolution or Revolution?" Indian Institute of Forest Management, pp56-72, http://awsassets.wwfindia.org/downloads/forest_governance.pdf.

Court and High Courts for the protection and restoration of glory of forests.

The *Dehradun Valley Litigation*[19] is significant case requiring Supreme Court to balance environmental and ecological integrity against industrial demands on forest resources. The case arose from haphazard and dangerous limestone quarrying practices in the Missouri Hill Range of the Himalayas. The State failed to stop illegal mining in the Dehradun Forests resulting in huge landslides and other environmental disasters like drying up of springs and shortage of otherwise abundant water supplies. Illegal mining leases were renewed and created havoc in the Dehradun valley full of lush green forests. This all happened with the covet support of government authorities. The Apex Court played an activist role in this litigation, essentially conducting a comprehensive environmental review and analysis of the national need for mining operation located in the Dehradun Valley. It is to be noted that Dehradun Valley mining operations occupied eight hundred hectares of reserved forests. The court concluded in this case in 1988 that continued mining in the Valley violated the Forest Conservation Act, 1980.

T. N. Godavarman Thirumulkpad V. Union of India[20] case has been instrumental in forest conservation in India. Famously known as the "forest conservation case", it is an example of the judiciary overstepping its constitutional mandate. The Court has effectively taken over the day-to-day governance of Indian forests leading to negative social, ecological and administrative effects. This case was initially instituted to address timber felling in the Nilgiri range of Tamil Nadu. But subsequently, when several cases of similar nature were brought before the Court, they were combined with the Godavarman case. This case emerged as the holistic one dealing with all aspects of forest management including definition of forest, working plans, saw mills, dams, mining, infrastructure projects, use of forest land, encroachment,

19 Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh AIR 1985

20 AIR 1997 SC 1228.

across the country and is not limited to any specific location or State. In this case, the Supreme Court reinterpreted and expanded the scope of the Forest (Conservation) Act, 1980. The word 'forest' was limited only to government declared forests irrespective of whether it had tree cover or not. Likewise, areas with significant tree cover were not regarded as 'forest' simply because in government records it was not declared as 'forest'. Due to this, large areas under good forest cover were outside the purview of the Forest (Conservation) Act, 1980. However, by its order, the SC expanded the term which now included within its scope not only forests as mentioned in government record but all areas that are forests in the dictionary meaning of the term irrespective of the nature of ownership and classification thereof. The case provided momentum to the environment and forest preservation movement across county.

Bhagwan Bhoi V. State Of Orissa[21] In this case the land was shown as forest and in possession of the Forest Department. The only question was as to whether petitioner can carry on Saw Mill on the forest land. It was stated that since the petitioner was not granted license for Saw Mill after 1997, so cannot be renewed. The Supreme Court while considering the question about the object and purpose of the enactment of Forest (Conservation) Act, 1980 issued some guidelines which are as follows:

"In view of the meaning of the word "forest" in the Act, it is obvious that prior approval of the Central Government is required for any non-forest activity within the area of any "forest". In accordance with Section 2 of the Act, all ongoing activity within any forest in any State throughout the country, without the prior approval of the Central Government, must cease forthwith. It is therefore, clear that the running of Saw Mills of any kind including veneer or ply wood mills, and mining of any mineral are non-forest purposes and are, therefore, not permissible without prior approval of the Central Government. Accordingly, any such activity is prima facie violation of the provisions

21 *2003 SCC*

of the Forest Conservation Act, 1980. Every State Government must promptly ensure total cessation of all such activities forthwith."

The Government of India has initiated a process of revitalizing the law and policy to conserve and protect the forest resources by seeking public response to the proposed amendments in the current law which may bring a substantial change in the law and policy on forests.[22]

Forest Rights Act 2006: A Myth or a Reality

Indian government enacted the Forest Rights Act in 2006[23] to correct the historic injustice done to tribal people and forest dweller[24].

---

22 See the notification of environment, forests and Climate change available at : http://environmentclearance.nic.in/writereaddata/OMs-2004-2021/263_OM_02_10_2021.pdf

23 The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Rights) Act, 2006, also known as the Forest Rights Act (FRA), has been in force for the last 15 years. See for details : https://science. thewire.in/ politics / rights/15-years-forest-rights-act-claims-recognition-trends/

24 The Forest Act gives number of rights to forest dwellers which inter alia include:

(a) right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;…

(c) right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;

(d) other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;

(e) rights including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities;

(f) rights in or over disputes lands under any nomenclature in any State where claims are disputed; (g) rights for conversion of Pattas or leases or grants issued by any local authority or any State Government on forest lands to titles;

(h) rights of settlement and conversion of all forest villages, old habitation,unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages; (i) rights to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use; …

Since its enactment in 2006, the Forest Rights Act (FRA) has been hailed as a step to correct the historic injustice meted out to tribal people and forest dwellers in India, but even over a decade later, its implementation "has been uneven since its inception and remains incomplete," finds a recent study.[25] The Supreme Court on February 13, 2019 had asked authorities of 21 states to file affidavits explaining why evictions, wherever ordered, under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, had not taken place. The law remains orphaned, there is little enforcement, the nodal tribal ministry and departments remain under-resourced with no adequate budget for FRA implementation. There was no effective defence of the law in the ongoing SC case for the last four years by the Centre or state governments.[26]

Conclusion

The existing laws relating to forests need to be more proactive and holistic keeping in view of the overall components of environment into consideration. There need to be coordination between different agencies of the government who are at helm of preserving the environment via air, water, forests, wildlife etc. The reorientation of existing legislations on environment and forests is the need of the hour to make them more stringent in their implementation. While implementing the forest laws the old colonial policy of exploitation need to be substituted with benefit sharing and feasible blend of sustainable development and ecological balance.

25 Lee J.I., and Wolf S.A. (2018). Critical assessment of implementation of the Forest Rights Act of India. *Land Use Policy*, Vol. 79, 834-844.

26 Maynek Agarwal, **Forest Rights Act: A decade old but implementation remains incomplete,** Available at : https://india.mongabay.com/2018/12/forest-rights-act-a-decade-old-but-implementation-remains-incomplete/#:~:text=Forest%20Rights%20Act,13%20December%202018.

Patenting of Animal Biotechnology: Ethical, Legal and Social Implications

Dr. Kshitij Kumar Singh*

Abstract

Recent advancements in animal biotechnology have created enormous possibilities for increasing the livestock nutrition value of animal products and improving animal health. To encourage investment and promote innovation in this field, countries worldwide provide patent protection to animal biotechnology. Since animal biotechnology involves use of animals in whole or in part along with microorganisms, it raises serious ethical, legal and social issues touching upon the dignity of animal life. Countries vary in their approaches to patent law dealing with animal biotechnology based on their social, political and cultural setup. The debate pertaining to patenting of animal biotechnology is entangled between two continuums: first, innovation and economic growth and second implications of animal patenting on animal dignity, animal and human health, environment, biodiversity and agricultural structure. Against this backdrop, the present article undertakes an analysis of ethical, legal and social implications of the patenting of animal biotechnology in USA, EU, Canada and India.

Keywords: *Animal biotechnology, patent, Harvard oncomouse, microorganism, genes,*

Introduction

Biotechnological advances relating to animals made colossal growth in the animal livestock by having better yields both in terms of quality and quantity. Animal biotechnology promises more productivity with less feed consumption and ensures healthy nutritional content

* Assistant Professor of Law, Campus Law Centre, Faculty of Law, University of Delhi (ksingh@clc.du.ac.in).

through this productivity. Animal biotechnology creates an enormous potential to yield commercial results, attracting investors to invest heavily in this field. Investors see patent as an efficient tool to reap the benefits of their investments. Animal biotechnology does not focus only on enhancing and improving livestock but on enhancing animal health and using animals for experimental purposes to improve human health. The use of animals for experimental purposes raises ethical and moral issues to be dealt with within the IPR regime. Countries vary in their patent approaches to animal biotechnology despite the harmonisation provided by the TRIPS Agreement. Against this background, the present chapter analyses the ethical, legal and social implications of animal biotechnology patents, focussing on three jurisdictions, the USA, European Union, Canada and India.

Animal Biotechnology

Animal biotechnology has its roots in animal breeding, which is not new. It has been in practice for a long time; the only distinction between traditional animal breeding and animal biotechnology is that the former was restricted to selective breeding, while the latter involves recombinant technology, genetic engineering and gene-splicing techniques that can transform and tailor genetic traits.[1] It is defined as "a branch of biotechnology in which molecular biology techniques are used to genetically engineer (i.e. modify the genome of) animals to improve their suitability for pharmaceutical, agricultural or industrial applications."[2]Animal biotechnology yields significant results in increasing the livestock with products having good nutritional value with lower food input than that for the traditional breed of cattle. Transgenic cattle produce more milk as compared to traditional ones.Animals are also used as experimental models for human diseases such as hypertension and AIDS, for which no natural animal model

1 Shobita Parthasarathy, *Patent Politics-Life Forms, Markets & Public Interest in the United States & Europe*" 81 (The University of Chicago Press, Chicago 2017).

2 Animal biotechnology, nature portfolio, accessed from https://www.nature.com/subjects/animal-biotechnology.

exists.[3]Given the high demand and consumption of animal products in the diet in many countries, the improvement of livestock is always preferred. Animal biotechnology promises to enhance and improve livestock.[4]In the biomedical research context, it has a twofold purpose: "to produce animals that can be employed in basic biological research into biological development and function, and to produce disease models that mimic human diseases and can therefore be utilised both in the study of disease (such as Parkinson's, cancer, cystic fibrosis, etc.) and to test new drugs."[5]It has been used to produce genetically modified animals that synthesise therapeutic proteins, have improved growth rates or are resistant to disease.[6]

Countries value the potential of animal biotechnology and have provided legal, policy and regulatory framework. India also recognises the potential of animal and livestock biotechnology. The Department of Biotechnology, Ministry of Science and Technology, Govt. of India has started an animal biotechnology programme, focusing on "improving animal health by developing newer vaccines and diagnostics, development of newer reproductive technologies genomics and genetic characterisation, production of biopharmaceuticals through transgenesis and animal products."[7] (DOB) Given India's largest animal husbandry sector and livestock population, animal biotechnology impacts the lives of rural households and small farmers. Animal health directly impacts

3 Reid G. Adler, "Controlling the Applications of Biotechnology: A Critical Analysis of the Proposed Moratorium on Animal Patenting" 1 (Spring Issue) *Harvard Journal of Law and Technology* 1-61 (1988) available at https://jolt.law.harvard.edu/assets/articlePDFs/v01/01HarvJLTech001.pdf. (last visited on May 10, 2021).

4 *Ibid.*

5 M. Gjerris,A. Olsson*et.al.*(2006): Animal biotechnology and animal welfare. In: *Animal welfare*, Strasbourg: Council of Europe Publishing, 89-110 (2006) available https://forskning.ku.dk/soeg/result/?pure=files%2F99223308%2FAnimal_biotechnology.pdf(last visited on May 10, 2021).

6 *Supra* note 2.

7 Department of Biotechnology, Ministry of Science and Technology, "Animal and Livestock Biotechnology" available athttps://dbtindia.gov.in/schemes-programmes/research-development/agriculture-animal-allied-sciences/animal-and-livestock (last visited on May 12, 2021).

the health of the people and the environment; therefore, the application of animal biotechnology is of great significance. With this realisation, the programme aims at "the sustainable growth of livestock and poultry for nutritional security and economic prosperity as well as enhance production and productivity of livestock through biotechnological interventions."[8]

Animal Models

Animal model is a non-human animal used for research to better understand human disease. It avoids the added risk of causing harm to human being during the entire drug discovery and development process. Animal models are used to better understand a disease, its diagnosis and its treatment. An animal model exhibits the pathological condition or disease present in a particular animal or human. Based on different characteristics, animal models are of different kinds including spontaneous model, induced models and transgenic models:

Spontaneous models shape up as a result of naturally occurring mutations. Such disease models have been identified, characterised and preserved for investigative purposes. Induced models are produced by laboratory procedure like administration of a drug or chemicals, feeding of special diets or surgical procedure. The third category includes transgenic models. Transgenic animal models are created by the insertion of a particular human DNA into fertilised mouse oocytes, which are then allowed to develop to term by implantation into the oviducts of pseudopregnant females.[9]Animal models can be used as a research tool by the researchers along with cell lines, monoclonal antibodies, reagents, genes and gene fragments etc. In this regard, access to these tools is vital for biomedical research.[10]

8 *Ibid.*

9 Amit D. Kandhare, Kiran S. Raygude *et.al.,* "Patentability of Animal Models: India and the Globe" 2(4) International Journal of Pharmaceutical & Biological Archives 1024-1032 (2011)available at fromwww.ijpba.info (last visited on May 12, 2021).

10 *Ibid.*

Animal Patenting in the USA: Setting the Stage

The wide interpretation of Section 101 of the US Patent Act by the US Supreme Court in *Diamond v. Chakrabarty*[11] not only held genetically modified bacteria patentable but extended the scope of patentable subject matter to "anything under the sun that is made by man."[12]Microorganisms expressing recombinant DNA were first produced in 1974 but the first genetically modified bacteria were granted patent in 1980 in *Diamond v. Chakrabarty*. After the Chakrabarty decision, genetically modified plants and animals were granted in 1985 and 1987. The traces of transgenic plants went back to 1982 when the FDA approved the first human recombinant DNA pharmaceutical (insulin). It was followed by the incident when A foreign gene was first expressed by a transgenic plant in 1982and a transgenic mouse expressing a rat growth hormone gene was also reported in that year.[13]

The USPTO issued the first animal patent in April 1988. It involved a transgenic non-human mammal, i.e. an oncomouse that has been genetically modified to increase susceptibility to carcinogens.[14]*Ex parte Hibberd*[15], which gave way for patents on genetically modified plants, involved a patent application involving modified maize plants. Based on the wider interpretation given in *Diamond v. Chakrabarty*, the PTO Board rejected the Commissioner's narrow construction of Section 101 of US Patent Act and allowed patents on transgenic plants.[16]It is noteworthy that despite granting patents on genetically engineered microorganism and plants, the Commissioner of Patents has been refusing the patents till the USPTO Board decided *Exparte Allen*[17]*, which allowed patents on* polyploid (*i.e.,* containing multiple sets of

11 447 U.S. 303.
12 *Id*., at 309, referring S Rep. No 1979, 82d Cong., 2d Sess., 5 (1952); H.R.Rep. No. 1979, 82d Cong., 2d Sess., 6 (1952).
13 *Supra* note 3.
14 *Ibid.*
15 227 U.S.P.Q. 443 (Bd. Pat. App. & Int. 1985).
16 *Supra* note 3.
17 2 U.S.P.Q.2d 1425 (Bd. Pat. App. & Int. 1987).

chromosomes) oysters. Following this, the Commissioner announced that genetically modified animals are also patentable.[18] The USPTO issued this patent on Harvard Oncomouse in April 1988. The term oncomouse was given to the mouse since it was created for the study of breast cancer. The patent claim was directed to "the activated oncogene sequence in the animal's germ cells and somatic cells because the scope of the claim included the offspring of any mammal having the oncogene."[19] Following this patent, a significant number of patents were granted on animals, and majority of which were related to disease models.[20]

Opponents to animal patents argued that it might enhance animal experiments, increasing animal suffering and posing risks to ecological balance and biodiversity. It may also disrupt the structure of agriculture. They asked for the moratorium till the full understanding of the effects of animal biotechnology.[21]Few critics maintained that due to the overproduction of products, there is no need for transgenic animals and plants that are even more productive.[22]They argued that sufficient economic incentives are available without animal patents for agricultural biotechnology to do business. Rather, transgenic animals would also be available to farmers with greater competition.[23]

On the other hand, the proponents of animal patenting asked for the same, given the potential value of patents for biotechnological research. Developed and developing countries started providing support to animal biotechnology through legislative and policy frameworks to secure human health and animal productivity.[24]Patent proponents further justified patents on animal biotechnology on the ground that it accelerates the innovation process by enabling potential inventors to

18 *Supra* note 3.
19 Kshitij Kumar Singh, *Biotechnology and Intellectual Property Rights-Legal and Social Implications* 33 (Springer, New Delhi 2015).
20 *Id.*, at 33-34.
21 *Supra* note 3.
22 *Ibid.*
23 *Ibid.*
24 *Ibid.*

invent around and encouraging investors to invest. They maintained that patent works as a technological information pool and advance the information system, induce an investor to invest and take commercial risk expenditure, encourage competition to "invent around" or improve upon a patented invention, and further advance the technology and stimulate innovation. The enablement requirement was challenging as it was difficult to set a more realistic standard.[25]They further contends that the combination of biotechnology and information technology creates more precision in the agriculture sector as a genetic engineer may predict more precisely than a traditional breeder. In the absence of scientific assessment of the technology, the emotional quotient may cloud significant developments and put on hold the pace of innovation.[26]The identification of disease-resistant genes into livestock species is very important. Transgenic mouse reflects as a powerful tool for research on the immune system, genetic disease mechanisms of embryonic development.[27]It is worth noting that except for the argument that the act of patenting living organisms was unethical, the rationales advanced by opponents of plant and animal patents were not patent law issues *per se*.[28]

As a policy US values the animal research and experimental use of animals for human and animal treatment, yet it disfavours the unnecessary use of animals in research. Rather it favours faster, less expensive, and more accurate non-animal testing methods.[29]In the United States, animal welfare committees were eastablished at all research facilities to promulgate guidelines for reducing pain and distress in these research animals. The Humane Society of the United States (the "Humane Society") believes that the patenting of animal conceptually "reflects human arrogance toward other living creatures that is contrary to the concept of the inherent sanctity of every unique being and the recognition of the ecological and spiritual interconnectedness of all

25 *Ibid.*
26 *Ibid.*
27 *Ibid.*
28 *Ibid.*
29 *Ibid.*

life."[30]The Society assumes that patent protection for animal inventions will lead to a "dramatic increase in the suffering of animals resulting from agricultural, biomedical and other industrial research. However, it did not offer any scientific rationale to establish the general belief that genetic manipulation is necessarily harmful to an animal's welfare.[31]

Critics expressed their concerns regarding the implications of animal biotechnology on the environment and biological diversity. They contended that the introduction of genetically engineered organisms in the environment poses an unacceptable risk to the environment. However, in due course of time, scientists understood how these organisms could be safely introduced and handled in the environment. They further contended that patenting of animals may reduce genetic diversity, particularly in commercial animals. On the contrary, the House Committee on Agriculture found that "three times more wheat, three times more soybean, and six times more cotton varieties were developed during the 10-year period after enactment of the PVPA as compared to the same time period prior to its enactment."[32] Though such patents may affect breeders' access to plant and animal germplasm, with proper policies in place, it could stimulate the quality of germplasms.[33]On the religious front, the National Council of Churches, while not opposed to genetic engineering *per se,* believed that the "[r]everence for all life created by God may be eroded by subtle economic pressures to view animal life as if it were an industrial product invented and manufactured by humans." Moreover, the Council feared that the "rapid pace of this technology is outstripping society's capacity for considered moral judgment."[34]

However, those who oppose the patenting of animals on ethical grounds have not demonstrated that applying the patent system is harmful to society or animals. It is also noteworthy that public opinion is

30 *Ibid.*
31 *Ibid.*
32 H.R. REP. NO. 1115, 96th Cong., 2nd Sess. 4 (1980) (House Committee on Agriculture Report to Accompany H.R. 999).
33 *Supra* note 3.
34 *Ibid.*

not opposed to the genetic engineering of plants and animals.[35]There is no evidence that Congress intended the patent system to exclude categories of inventions such as transgenic animals.[36]Concerns about the applications of transgenic research will continue to exist regardless of patents. Such concerns are much more reasonably addressed by existing agencies having appropriate experience and sufficient regulatory jurisdiction *(e.g.,* the EPA and the USDA for environmental risks, and the USDA and the NIH for animal research).[37]

The United States granted 45 animal patents from 1995 to 2001. It includes patents on genetic markers for genetic improvement, statistical methods for genetic improvement, transgenic and cloned animals, expressed sequence tags.[38] The US makes a reservation regarding human cloning while allowing cloning of animals is acceptable (at least for research purposes).[39] Animal rights activists oppose patenting any invention derived from animal research; however, individuals who believe that "animal rights are subordinate to those of humans, but that they deserve proper care and welfare then the issue of patenting is much less of a concern."[40]As regards to xenotransplantation, it was slowed down due to the fears of retroviruses and diseases like mad cow disease and AIDS, nevertheless, it is likely that "will be development of transgenic lines of animals for biomedical research (not food production) and applications that do encompass genes from other species."[41]Many believed that patent favours quality of research and securing funding from investors, it can also promote technology transfer and predicted that "in the 21stcentury sequenced genomes, transgenic livestock and

35 *Ibid.*
36 *Ibid.*
37 *Ibid.*
38 Max F. Rothschild, "Patenting of Genetic Innovations in Animal Breeding and Genetics" available athttps://www.semanticscholar.org/paper/Patenting-of-genetic-innovations-in-animal-Rothschild/8add8e0007136ac6311cf4fe173452621052b510(last visited on May 14, 2021).
39 *Ibid.*
40 *Ibid.*
41 *Ibid.*

cloned animals will become the norm."[42]Commenting on the US patent approach to animal biotechnology, Shobita Parthasarathy maintains that the USA endorsed a very technical meaning of patents by restricting its meaning to include stimulating innovation and market and excluding any further implications in itself. This interpretation allowed only decision-makers and traditional market players in the discussion by precluding civil society groups. Furthermore, they justified their stand that patents are in social benefit in line with the argument that the government's role was to facilitate the creation of the market by identifying the inventions through objective patent decisions. Only market players and their representatives were deemed relevant and legitimate to the discussion.[43] Moreover, the USA does not pay much attention to categorising an invention based on life forms and considers genetically modified organisms as technologies.[44]

Animal Patenting in European Union: The Weighing Up Test

Patentability of a subject matter is governed by the European Patent Convention 1973 (EPC), along with the Legal Directive 98/44/EC of the European Parliament and the Council of European Union on the Legal Protection of Biotechnological Inventions (hereinafter Biotech Directive) and the national laws of the European states. The Biotech Directive explains the actual scope of the EPC. To bring more clarity, the Administrative Council of the European Patent Organization amended the Rule 23 of the Implementing Regulations of the EPC on 16 June 1999.[45]In the European Union (EU), the legal framework does not allow patents on plants and animal varieties. Article 53 (b) of the EPC provides: "European patents shall not be granted in respect of (b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision shall not apply to microbiological processes or the products thereof." Discoveries are not patentable unless

42 *Ibid.*
43 *Supra* note 1 at 113.
44 *Id,* at 114.
45 *Supra* note 19 at 66-67.

produced by a technical process. Article 3 (2) of the Biotech Directive provides: "Biological material which is isolated from its natural environment or produced by means of a technical process may be the subject of an invention even if it previously occurred in nature." Therefore, both the Biotech Directive and EPC prohibit pants on plants and animal varieties and essentially biological processes for the production of plants and animals; however, neither make it explicit if the products derived from those processes are excluded from patenting. Given this situation, the Enlarged Board of Appeal of the EPO has, in practice, allowed patents on products derived from using essentially biological processes (product-by-process claims).[46]The situation has been changed in 2017, when the European Patent Office has changed its regulations, clarifying that "plant and animal varieties obtained through essentially biological process (such as genetically modified plants) will not be considered patentable."[47]To this effect, the Administrative Council of the EPO has added a second paragraph to Rule 28 of the Implementing Regulation of the EPC explicitly stating that European patents will not be granted in respect of plants or animals exclusively obtained through an essentially biological process.[48]It has put to the rest the previous practice of the EPO of granting patents on the products derived from essentially biological processes.

Regarding the Harvard Oncomouse case, the European Patent Office (EPO) issued patent on this invention in the year 1985. Still, this decision was challenged in 2005 on ethical and moral grounds as well as on the ground of being violative of *ordre* public clause.[49]EPO developed a utilitarian balancing test, aimed at making a risk-benefit analysis,

46 Tobias Cohen, Jan-Jap Kuiperset. al., "European Patent Office Amends Rules for Plants and Animal Patents *Mondaq* 15 August 2017 available athttps://www.mondaq.com/patent/619876/european-patent-office-amends-rules-for-plant-and-animal-patents(last visited on May 14, 2021).

47 *Ibid.*

48 *Ibid.*

49 Tetyana V. Komarova, 'The Patentability of Biotechnological Inventions in the EU: An Impact on Therapeutic Practice' 73:8 *Wiadomości Lekarskie* 1747-1751 (2020) available at https://www.researchgate.net/publication/344811265 (last visited on May 14, 2021).

"weighing the suffering of the oncomice against the expected medical benefits to humanity."[50]In addition to this, a few other factors could also be considered in conducting this balancing test, including "environmental risks (neutral in this case), or public unease (there was no evidence in European culture for moral disapproval of the use of mice in cancer research, i.e. no moral disapproval of the proposed exploitation of the invention in this case)."[51]Based on these considerations, EPO concluded that the use of oncomouse could provide a substantial medical benefit and outweigh 'moral concerns about the suffering caused to the animal.'[52]Notably, the EPO came up with a different conclusion in Upjohn Pharmaceutical Company Case, where the company filed a patent on a transgenic mouse, 'into which a gene had been introduced such that mouse would lose its hair.'[53] The patent involved techniques aimed at curing human baldness. After weighing the claimed benefits, i.e., usefulness in research to cure hair loss against the harm suffered by the mice, the EPO concluded that the harm outweighs the benefits in the present case, and 'the exploitations of the invention was contrary to morality and therefore, not patentable.'[54]It was also due to the fact that the European Patent Convention excludes the patentability of animal species but not the patentability of animals. The patent, however, was revoked on other grounds i.e., non-payment of registration fee.[55]

The common concern between the USA and the European Union about the patenting of animals was that first, it leads to the commodification of life forms and second, that it may lead to an area of research, which is usually considered by others as unethical.[56] Both in Europe and USA, civil societies organised their efforts on the same line

50 "Bioethics and Patent Law: The Case of the Oncomouse" Issue 3 WIPO Magazine (June, 2006) available athttps://www.wipo.int/wipo_magazine/en/2006/03/article_0006.html (last visited on May 14, 2021).

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 *Ibid.*

55 *Supra* note 49.

56 *Supra* note 1 at 113.

to raise an objection against the patenting of biotechnology. However, both the jurisdictions are convinced with the potential economic contribution of patents permitted animal patents.[57]Unlike the USA, EU doesn't take the help of techno-legal justification; however, it recognised maintaining moral standards of society in the patent discourse and therefore gave space for civil society groups and individual citizens as official observers and opponents. To establish a balance, the EPO inculcated the weighing up test in the patent system, giving bioethicists, philosophers, and social scientists to have their say. Though EPO has rarely involved these considerations and mainly relied upon the abstract interpretation of ordre public clause to conduct ethics assessment.[58]EU recognises that animals have dignity, and they should be treated fairly against the process of patenting and commodification. It recognises the principle of weighing up to preserve the dignity of animals. However, it is not clear how many times EPO utilises this exception to reject the patents on animals. This test can be seen as a justification for applying narrow patents, as was clear in the Harvard oncomouse case. At least one example has been cited by high-ranking EPO officials where a patent application on a mouse genetically engineered to suffer from baldness.[59]

Animal Patenting in Canada: Higher and Lower Life Forms

Despite having a similar patent law to the USA, the Supreme Court of Canada, in a 5-4 decision[60], overturned the decision of the Federal Court of Appeal and held that a genetically modified non-human mammal (i.e., Harvard Oncomouse) was not patentable under the current Canadian Patent Act. In this case, the majority expressed legal and ethical concerns regarding patenting higher life forms in the absence of any explicit legislative direction from the Canadian Parliament. On the

57 *Ibid.*
58 *Id*., at 114.
59 *Ibid.*
60 *Harvard College v. Canada (Commissioner of Patents),* 2002 SCC 76, [2002] 4 S.C.R. 45.

contrary, the minority believed that the patenting of biological inventions was necessary to encourage research and development in new technologies.[61] Referring to the direction from the Parliament regarding the patentability of higher life forms, the majority observed that "the patenting of higher life forms under the current Canadian Patent regime would be a 'radical departure' from the traditional patent regime and would, therefore, require 'an un- equivocal direction from Parliament'."[62]Though the majority agreed that the Patent Act does not explicitly differentiate between lower and higher life forms, it explained that making such a distinction "is nonetheless defensible based on common sense differences between the two."[63]Though various social groups, including civil society groups and animal rights groups, welcomed this decision, the biotechnology industry expressed great disappointment. In the absence of a clear line of distinction between higher and lower life forms provided by the Supreme Court, "this distinction thus far has been presumably left to the Canadian Patent Office, which currently equates patentable 'lower life forms' with matter that is essentially unicellular."[64]

Patenting animal biotechnology under the TRIPS Agreement

Article 27.3 (b) of the TRIPS Agreement throws light upon the patentability of animals and maintains:

Members may exclude from patentability:

(b) plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The

61 *Supra* note 19 at 88.
62 *Id.*, at 89.
63 *Supra* note 60 at para. 188.
64 *Supra* note 19 at 88.

provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

TRIPS Agreement allows Members to exclude patents on plants and animals and biological processes for the production of plants and animals as an option while mandating patents on microorganisms, microbiological and non-biological processes. It also mandates that the Members shall provide protection to plant varieties either through patents or by an effective sui generis system or by any combination thereof. Though it does not mandate the same protection to animal varieties.

Patenting of Animal Biotechnology in India

The provisions of the Patents Act 1970 directly relating to the patenting of animals are Sections 3(b) and 3(j). Section 3 (b) provides what is not an invention: an invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment;[65]

In the light of section 3 (b) of the Patents Act 1970, the most probable implications of animal patents would be on animal life, animal and human health and the environment. Public order and morality could be strong grounds for rejecting patents on animal-related inventions. Section 3(c) prohibits patents on "discovery of any living thing or nonliving substances occurring in nature."[66] By implication, naturally occurring living things including animals, animal parts or genes are not patentable. IPO Guidelines on the Examination of Biotechnology Applications for Patents, 2013[67] expressly state that sequences isolated directly from nature are not patentable. Section 3(i) excludes from patenting "any process for the *medicinal, surgical, curative,*

65 Section 3(b) of the Patents Act 1970.

66 Section 3(c) of the Patents Act 1970.

67 Guidelines on the Examination of Biotechnology Applications for Patents, 2013 available at https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_38_1_4-biotech-guidelines.pdf (last visited on May 14, 2021).

prophylactic, diagnostic, therapeutic or other treatment of human beings or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their products."[68] Though the IPO has granted patents for **"**in vitro diagnostic methods" performed on tissues or fluids, which had been permanently removed from the body, however, the Biotechnology Guidelines brought in vitro diagnostic methods under the remit of Section 3(i). Hence, the IPO is unlikely to grant such patents in the future. Much depends on how the courts interpret this provision.[69]Section 3(j) of the Patents Act, 1970 is directly related to the animal patents. It provides that "plants and animals in whole or any part thereof other than microorganisms but including *seeds*, *varieties* and *species* and *essentially biological processes* for production or propagation of plants and animals."[70] The scope of *'microorganism', 'microbiological process' 'essentially biological process'* and *'non-biological process'* are enormously contentious in India and depends on the court's interpretation of these terms. Section 3 (p)is a distinct addition to the Patents Act 1970, which excludes traditional knowledge from patentability. It precludes from patentability "an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of a traditionally known component or components."[71] To pass the traditional knowledge bar set by section 3(p), patent claims are examined against searches of traditional knowledge databases, including the Traditional Knowledge Digital Library.[72]

Based on the Patents Act 1970 and IPO Guidelines for Examination of Biotechnology Applications for Patent, recombinant nucleic acid sequences, gene sequences, amino acid sequences with delineated

68 Section 3(i) of the Patents Act 1970.

69 "Biotechnological inventions in India: law, practice and challenges" Remfry & Sagar, *Lexology* available athttps://www.lexology.com/library/detail.aspx?g=8405b078-b301-4672-8850-84f74ea23aa7 (last visited on May 14, 2021)

70 Section 3(j) of the Patents Act 1970.

71 Section 3(p) of the Patents Act 1970.

72 *Supra* note 69.

function or utility specified; method for expressing the sequences, plasmids; vector containing the sequences/ cDNA sequences; expression vectors containing the particular sequence; recombinant gene probes/ primers**;** recombinant microorganisms are patentable. While living entities of natural origin such as animals or its parts, plants or its parts, seeds, genes., any process of manufacture of production of living entities; any method of treatment of human beings and animals, any method of diagnosis of disease affecting human beings and animals; transgenic plants and animals per se or their parts; biological materials such as organs, tissues, cells per se; essentially biological process for production of plants and animals. Any biological material or process causing serious prejudice to human, plant, health, or the environment; cloning human beings or animals is not patentable. This description is not exhaustive but illustrative to reflect how India could promote animal biotechnology. Indian patent law gives due regard to animal life and dignity through numerous safeguards, yet India needs to strategise patent policies to trigger innovation in agriculture and medicine.

Conclusion

Patenting animal biotechnology has been contentious and evolved in due course of time that witnessed changes through legislative and judicial approaches. Every jurisdiction has recognised animal biotechnology's economic potential and provides patent protection to animal biotechnology. Though the ethical and social aspects are broadly considered relevant to patenting, countries overlook the same practically. The dignity of animal life has been raised and pushed by animal rights groups, civil society groups, for example, in the EU and India, which contains several provisions safeguarding animal life and health. The issue of patenting animal biotechnology is contentious. The principal argument placed in favour of patenting is that it encourages investment, promotes innovation, quality of research and technology transfer in this field, and no country can afford to avoid it.Nevertheless, causing unnecessary suffering to animals must be avoided in the name of innovation. The ethical and social concerns are as important as the

economic concerns and it should not be avoided as non-scientific concerns. Europe's utility criterion based on weighing the benefits of animal models for experiments seems appealing in tune with the dignity to animal life. However, it should be examined to what extent it is followed in practice while granting patents on animal biotechnology. Distinction should be made if the ethical and social objections to the patenting of animal biotechnology are routed to the patenting or to the technology itself. Patent law is based on policy levers set by the state, and it could not be devoid of ethical, social and cultural ethos. Patent practices must be guided by the ethical, social, cultural ethos and economic requirements. Efforts are required to be made through scientific advancements that animal sufferings are minimised.

An Empirical Study of various Labour Welfare Provisions pertaining to Women Workers in Jammu and Kashmir

Nayeem Ahmad Bhat*

Abstract

Every society or country has its own values, traditions, culture and with the passage of time changes do take place in these existing traditions, culture and values. For a researcher, the caution given by Julius Stone is of extreme significance; "Attention came to be increasingly directed to the law's effects on the complex of attitudes, behaviour, organization, environment, skills and powers involved in the maintenance of particular society or kind of society and conversely on the effects of these upon the particular legal order in which it raises, the interrelation involved include the influences of extra-legal elements of the social order on the formation, operation, change and disruption of the legal order, as well as the influences of the legal order (or particular posts, kinds and states of the legal(order) on that extra-legal elements."[1] *In the words of Paton, "Legal research consists of analysis of rules, concepts, and institutions of law as well as the legal system itself and if the law lags behind popular standards, it fails into disrepute. If the legal standards are too high; there are great difficulties of enforcement."*[2]*Judged by the standard attained by the advanced countries in this field, the various labour welfare schemes in India may not be a satisfactory one. Our critical examination of various labour welfare legislations will testify that our National Government having taken a bold step immediately after independence to introduce some important social security legislations by way of Employees State Insurance Act, 1948, Factories Act, 1948, Maternity Benefit Act 1961, Equal remuneration Act, 1976, Sexual Harassment at Workplace, Act, 2013 etc. has turned its attention to a right direction. It is gratifying to note that these labour welfare laws for the industrial employees were the*

---

* Lecturer, Vitasta School of Law and Humanities, Nowgam, Srinagar.

1 Julius Stone.*Social Dimension of Law and Justice*.1966, ch.I, p.6.

2 Paton. *A text book of Jurisprudence*.1951, (2nd Ed.).p.54.

first of its kind in South East Asia. But even though these laws were passed long time back, the implementation of the underlying schemes more particularly for women employees was very slow at the initial stage.

Keywords: *Socio-Economic, Unorganised, Wages, Employment, Work Participation Rate, Labour Welfare.*

I. INTRODUCTION

In India, *Jammu and Kashmir* is least developed regions in the field of industrial development as the majority of Government factories/ establishment have become defunct due to scarcity of financial resources available to the State. But since the last decade there has been a gradual increase in the number of factories and other establishments in both the divisions of J&K. So quite apparently, there has been an increase in the number of working population along the length and breadth of J&K along with a major chunk of migrant workers influx form outside the state coming to Jammu and Kashmir. Time and again, a number of labour welfare legislations have been implemented in order to provide social security to the working class in J&K, especially to the women workers both in organised and unorganised sectors of employment. However, the working of these welfare measures especially the measures relating to women workers in J&K on careful examination reveals that there are many loopholes and impediments in their proper implementation and enforcement. The empirical study on the working of these welfare schemes in J&K reveals the inadequate enforcement and implementation of the provisions of the Act.

Keeping in view the aforesaid discussion, the empirical part of this study consists of the data collected from the women employees working in Government and Private factories/ establishments in Jammu and Kashmir. The information was collected from both organized and unorganized sectors of employment. However, due to paucity of time and lack of financial resources, district *Srinagar and Jammu* was selected as locale of the study which is representative of the whole J&K.

Thus, the female employees working in factories/establishments in the district *Srinagar and Jammu* and in the unorganised sectors of employmentwere selected for the purpose of carrying out this study. In order to make the study more useful, the female employees working in both the above mentioned districtswere selected through the random sampling method.

In order to gather the required information and to know the actual working of various labour statutes pertaining to women, a systematic and comprehensive questionnaire cum interview schedule was framed. The questionnaire cum interview schedule consisted of 40 questions and was developed on the basis of official reports and data related to the employees in general in Jammu and Kashmir. For administering the questionnaire, the female employees working in twenty industrial units in district *Srinagar* and *Jammu* were chosen randomly. The industrial units selected from the district Srinagar and Jammu are outlined in the following table:

Table 1.0

Industrial Units Selected for the Study

Srinagar	Jammu
JamkashVehicleades Pvt. Ltd	*FIL Industries Pvt. Ltd*
K.C Hyundai Pvt. Ltd	*White House Industries Pvt. Ltd*
I.A Enterprises Pvt. Ltd	*K.C Industries Pvt. Ltd*
Auto Wings Ford Pvt. Ltd	*S.K Enterprises Pvt. Ltd*
Peaks Auto Pvt. Ltd	*U. Flex Pvt. Ltd*
Khyber Agro Industries Pvt. Ltd	*Raven Bhel Healthcare Pvt. Ltd*
Saifco Cements Pvt. Ltd	*Lakshmi Engineering Works Pvt. Ltd*
JK Cements Ltd	*Arotek Industries Pvt. Ltd*
Handloom Development Corporation	*SaraswatiPlasto-tech India Pvt. Ltd*
Silk Factory, Rajbagh	*Bari-Brahmana Silk Factory*

Thus 250 sample respondents were chosen randomly from these units. To give weightage to the unorganised sectors of employment 250 female respondents were administered questionnaire which were mainly

associated with construction works (particularly in *brick kilns), street vendors, domestic help, agricultural jobs (especially for harvesting) and fruit packaging* in the districts of Srinagar and Jammu respectively. Most of the women workers employed were in the age group of 20 to 40 years. The other variables of the respondents were chosen on the basis of educational qualification, monthly salary and designation and type of employment. Further, as far as practicable equal representation was given to all the segments of employees working in factories and establishments of the study area. In order to find out the applicability of the questionnaire for the purpose it was designed, the questionnaire was pre-tested and was suitably rephrased to elicit responses from respondents.

Apart from the above method, data and information were also collected by way of the detailed discussion with the officials concerned with the implementation labour welfare schemes for women. A detailed informal interaction with the field level respondents also formed part of the methodology. This method proved highly useful in the sense that some important information which did not come through the formal questionnaire came out during the course of informal discussion as the respondents were not supposed to respond to our pointed queries. They simply represented their overall impression in regard to the functioning of labour welfare scheme for female workers and the relevant points were noted down by the researcher.

Analysis: In this study, 500 respondents in relation to the women employees working in various factories & establishments and in the unorganised sectors of employment falling within the municipal limits of district *Srinagar* and *Jammu* were put under investigation and analysis. Each question was numbered separately in the questionnaire and put under its respective heading. Simultaneously, the responses of the respondents to questions was categorized and then transferred to tabulation sheets. Statistical techniques like tables and pie-charts were used for illustrating the various data collected. These statistical figures made the tabulation of data possible. A number of tables were made question wise and identical responses were counted and placed in tabular

form. The similar as well as dissimilar responses for a particular question were aggregated. After tabulation and aggregation, each table was explained on the basis of the aggregate of responses provided by the respondents. A detailed analysis of the findings of each table was given. Finally, this led to the analysis, explanation and interpretation of the responses given by the sample respondents.

Limitations: Srinagar and Jammu are districts, vast in area, extending to 1979 sq.kms and 167 sq.kms which compelled the researcher to use random sampling technique. Besides due to paucity of time and lack of financial resources also constrained the researcher to reduce the size of sample. Many of the respondents, more particularly the low salaried and less educated employees, took this exercise as altogether monotonous, meaningless and a futile one. They refused to give their responses to the questionnaire administered. Moreover, the employees had the fear of victimization at the hands of officials if they disclosed the real picture of the conferment of benefits under the various schemes. The employees became ready to answer the queries only after repeated requests and persuasions of not disclosing their identities.

In the last resort, it is worth mentioning that this study should still be regarded as only an approximation of the reality of labour laws pertaining to women. To portray the real picture of the working of labour welfare schemes that too in Jammu and Kashmir is very difficult, but certainly it is an attempt towards the perfection.

II. DATA ANALYSIS AND INTERPRETATION

To see the actual working and analyze the proper implementation of various labour welfare provisions, the data collected has been analyzed with respect to the five indicators on the basis of empirical study. The indicators mentioned above are discussed below:

I. Characteristics/Socio-Economic Status of Sample Respondents.
II. Awareness level about the Women Welfare Laws.
III. Administration and Implementation of Wages under Labour Laws.
IV. Benefits provided by various Labour Welfare Measures.

V. Conditions of the Employment.

VI. Redressal Mechanism under Labour Welfare Provisions.

VII. Suggestive measures to enhance *WPR*, improve conditions of Employment and proper enforcement of Labour Welfare Laws.

The main focus of the Study centers on one aspect- whether the principal benefits provided under the various labour welfare statutes has been fully realized by the working class in Jammu and Kashmir. This forms one of the most important aspects of the Study since it serves as a basic premise for other assumptions and assessments.

I-Characteristics/Socio-Economic Status of Sample Respondents.

The Socio-economic profile is vital to any study as it helps in building a comprehensive and complete picture of the respondents. The individual profile is derived by looking at factors such as age, caste, religion, marital status, type of the family, educational level, occupation and annual income of the respondents or their family. As shown in table 2.0, the questionnaire was administered to five hundred sample respondents out of which 50% were the women workers in unorganized sector and 50% were the female employees working in various factories/establishments located within the limits of district Srinagar. So far as the educational qualification of the employees/workers in organized sector were concerned, majority of them were graduates and under graduates. The monthly salaries of employees/workers mostly belonged to the lower income group. With regard to the designations, majority of them were technicians and helpers. Furthermore, 30% of these employees were permanent while as only 20% of those were working on casual basis, while as 40% employees/workers were serving in contractual capacity.

Table 2.0.: Percentage distribution of respondents by characteristics

Gender	**Female (Organized Sector)**	**Number (Srinagar and Jammu)**	**Gender**	**Female (Unorganized Sector)**	**Number (Srinagar and Jammu)**
Age	18-25yrs 25-35yrs 35-45yrs 45yrs & above	28 112 86 24	**Age**	18-25yrs 25-35yrs 35-45yrs 45yrs & above	57 93 85 15
Educational Qualification	Illiterate Matric 10+2 Graduate Post-Graduate	57 93 49 31 20	**Educational Qualification**	Illiterate Matric 10+2 Graduate Post-Graduate	155 45 27 17 06
Monthly Wages	<10000 10000-15000 15000-25000	57 148 45	**Monthly Wages**	<10000 10000-15000 15000-25000	172 66 12
Designation	Helpers Technicians Clerks Managers	66 83 59 42	**Designation**	Construction Workers Brick-Kiln Workers Agricultural Workers Domestic Maids Street Vendors	24 65 24 20 117

Type of Employment	Casual Permanent Contractual	102 40 108	**Type of Employment**	Casual Permanent Contractual	144 20 86
Total		**250**	**Total**		**250**

II-Awareness Level about the Women Welfare Laws.

Under this sub-heading, the awareness level, knowledge of various labour welfare provisions for women workers have been examined in detail on the basis of data collected and responses furnished by the respondents.

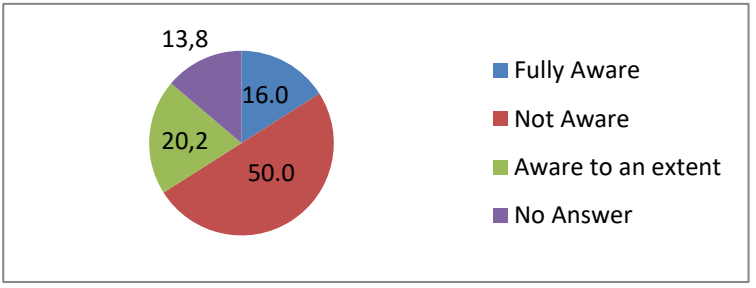
Table 3.0: Awareness Level of various Labour Welfare Laws

Female	Number	Fully Aware	Not Aware	Aware to some extent	No Answer
Organized workers	250 (50.0)	52 (20.8)	114 (45.6)	64 (25.6)	20 (8.0)
Unorganized workers	250 (50.0)	28 (11.2)	136 (54.4)	37 (14.8)	49 (19.6)
Total	500 (100.0)	80 (16.0)	250 (50.0)	101(20.2)	69 (13.8)

Source: Field survey data.

Note: Numbers in brackets show the percentage.

Figure: 3.1: Awareness Level of various Labour Welfare Laws



The idea of welfare state has prompted India to provide socio-economic protection to the working women through the passing of various labour welfare legislations such as Minimum Wages Act, 1948, Employees State Insurance Act, 1948, Factories Act, 1948, Maternity Benefit Act 1961, Equal remuneration Act, 1976, Social security for Unorganized workers Act, 2008 and Sexual Harassment at Work Place, 2013 etc. as amended from time to time. Table 3.0 shows that only 16.0% of the sample respondents are fully aware about the various labour welfare legislations in vogue in the state of J&K whereas 50.0% of the respondents are unaware of those laws. The table also shows that 20.2% of the respondents were aware to some extent about those labour welfare schemes applying to both organized and unorganized sectors of employment whereas 13.8% of the respondents did not give any answer to the question asked. These figures ultimately led us to a conclusion that though the majority of these legislations were passed in pre-constitutional era with some exceptions on women specific areas coming into force after independence and have been in vogue for over 65 years, still there is lack of complete awareness/information among the working class about the various welfare schemes which occurs from those Acts and are the soul of these legislations.

III- Administration and Implementation of Wages under Labour Laws.

Under this sub-heading, satisfaction level of the amount of Wages being paid by employer for women workers have been examined in detail on the basis of data collected and responses furnished by the respondents.

Table 4.0: Satisfaction level of the amount of Wages being paid by Employer

Female	Number	Satisfied	Not Satisfied	Satisfied to an Extent	No Answer
Organized workers	250 (50.0)	56 (22.4)	157 (62.8)	23 (9.2)	14 (5.6)
Unorganized workers	250 (50.0)	61 (24.4)	165 (66.0)	20 (8.0)	04 (1.6)
Total	500 (100.0)	117 (23.4)	322 (64.4)	43 (30.4)	18 (3.6)

Source: Field survey data.

Note: Numbers in brackets show the percentage.

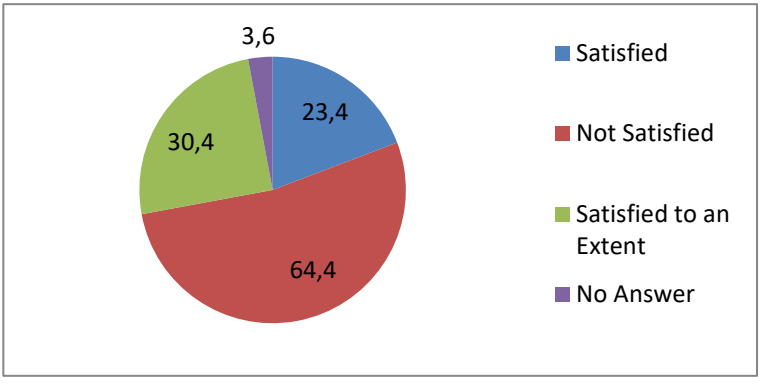


Table 4.1: Satisfaction level of the amount of Wages being paid by Employer

Wage Discrimination is a problem all over the world, especially in the third world countries, where the process of industrialisation is still going on. A double standard on pay still plagues women workers everywhere according to ILO report. Also, Indian women are often deprived of promotions and growth opportunities at work places but this doesn't apply to all working women. A majority of working women continue to be denied their right to equal pay, under the Equal

Remuneration Act, 1976 and are underpaid in comparison to their male colleagues. This is usually the case in factories and labour-oriented industries. Table 4.0 on analysis reveals that only 23.4% of sample respondents are satisfied with the amount of wages being paid whereas a large number (64.4%) of respondents are not satisfied with the amount of wages being paid by the employer. The table also figures out that only 30.4% of respondents are satisfied to an extent with the amount of wages being paid whereas a mere 3.6% of respondents declined to answer this question. These figures lead us to the conclusion that even though the female folk is working day-night to ensure better future for them and contribute to their families economy but still there is lack of satisfaction level among them owing to different reasons which will be discussed in other questions asked hereafter.

IV- Benefits provided by various Labour Welfare Measures.

Under this sub-heading, knowledge of principal benefits being provided during the course of employment at workplaces have been examined in detail on the basis of data collected and responses furnished by the respondents.

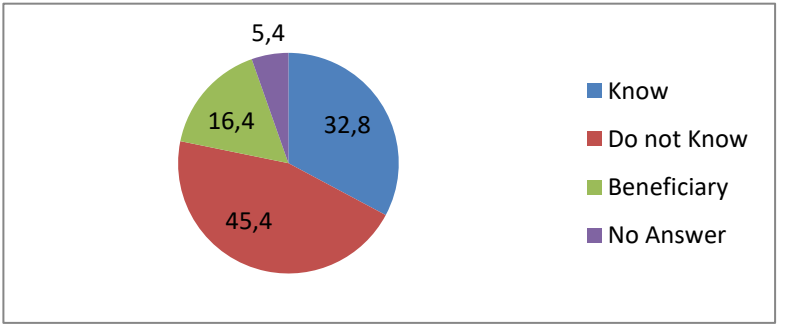
Table 5.0: Knowledge of principal benefits accruing from Labour laws

Female	Number	Know	Do not Know	Beneficiary	No Answer
Organized workers	250 (50.0)	111(44.4)	67 (26.8)	56 (22.4)	16 (6.4)
Unorganized workers	250 (50.0)	53 (21.2)	160 (64.0)	26 (10.4)	11 (4.4)
Total	500 (100.0)	164 (32.8)	227 (45.4)	82 (16.4)	27 (5.4)

Source: Field survey data.

Note: Numbers in brackets show the percentage.

Figure 5.1: Knowledge of principal benefits accruing from Labour laws



The incorporation of social security legislations before and after independence primarily meant to confer benefits on the employees in various factories/establishment across the length and breadth of country and also being exclusively applicable to the state of J&K. These employees, particularly the female workers can avail the benefits when they have the full knowledge of benefits accruing from those schemes and the procedure as to how they can avail these benefits. Table 5.0 shows that only 32.8% of the sample respondents know about all the principal benefits accruing from various labour statutes, whereas the 45.4% of the respondents do not know of all the benefits under these welfare schemes embedded in those statutes. The table also shows that only 16.4% of the employees have availed benefits under the various labour welfare schemes whereas 5.4% of employees gave no answer to this question. These figures lead us to the conclusion that even though a number of employees/workers are covered under those schemes in both organized and unorganized sectors of employment, having knowledge about the accrual of principal benefits and availing the same but still this is a meager percentage as compared to the total female working population in J&K.

V- Conditions of the Employment.

Under this sub-heading, compliance with statutory working hours for women workers have been examined in detail on the basis of data collected and responses furnished by the respondents.

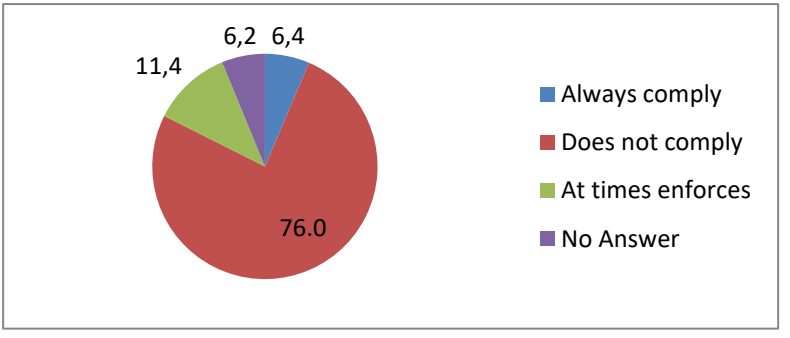
Table 6.0: Compliance with statutory working hours under the Labour Welfare Laws

Female	Number	Always comply	Does not comply	At times enforces	No Answer
Organized workers	250 (50.0)	19 (7.6)	181 (72.4)	36 (14.4)	14(5.6)
Unorganized workers	250 (50.0)	13(5.2)	199 (79.6)	21 (8.4)	17 (6.8)
Total	500 (100.0)	32 (6.4)	380 (76.0)	57 (11.4)	31 (6.2)

Source: Field survey data.

Note: Numbers in brackets show the percentage.

Figure 6.1: Compliance with statutory working hours under the Labour Welfare Laws



The Minimum wages Act 1948, the Factories Act 1948 and the Mines Act 1952 etc., applicable in J&K lay down statutory working hours for women workers ranging from 8 to 10 hours of work a day and failure to comply with them to enhanced penalties as amended from time to time. The table 6.0 on investigation reveals that only 6.4% of sample

respondents believe that their employers comply with necessary statutory working hours whereas 76.0% of respondents agree on the fact that their employers never comply with the working hours as allowed. The table 6.0 also shows that 11.4% respondents at times enforce the working hours clause as provided in the statute books whereas 6.2% respondents did not respond to this question. These figures lead us to conclusion that even though the legislature has mandated not more than 8 hours working period per day through various labour welfare laws but still these laws lack the enforceability on the administrative as well as implementation front.

VI- Grievance and Redressal Mechanism under Labour Welfare Provisions.

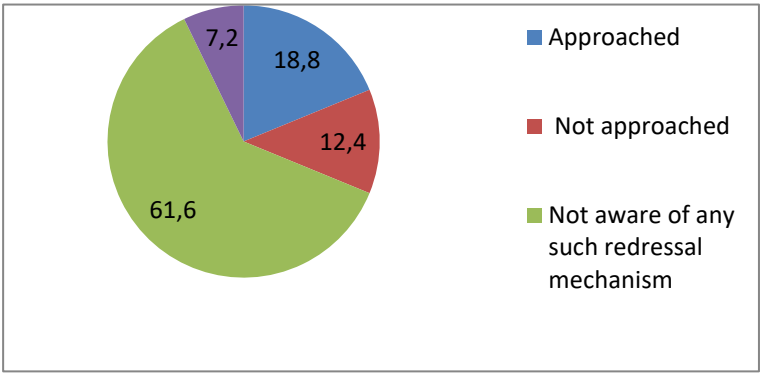
Under this sub-heading, redressal mechanism and procedure adopted like the awareness about the judicial action being taken against the unjust action/decision of employer of unit/establishment and the harassment being met out with respect to wages and complaints being made to the authorities concerned have been analysed in detail on the basis of data collected and responses deduced from the respondents.

Table 7.0: Whether you have ever approached any Court/Tribunal against the unjust and biased action/decision of the employer

Female	Number	Approached	Not approached	Not aware of any such redressal mechanism	No Answer
Organized Workers	250 (50.0)	66 (26.4)	37 (14.8)	136 (54.4)	11 (4.4)
Unorganized Workers	250 (50.0)	28 (11.2)	25 (10.0)	172 (68.8)	25 (10.0)
Total	500 (100.0)	94 (18.8)	62 (12.4)	308 (61.6)	36 (7.2)

Source: Field survey data.

Note: Numbers in brackets show the percentage.



In order to settle the disputes and claims between the employees/workers and the employers and various statutory bodies like ESI corporation, Provident fund commissioner and other authorities constituted under various labour welfare legislation from time to time, the machinery provided for the adjudication should be adequate and known to all. For this purpose, various labour courts, conciliation officers, adjudication board, industrial tribunals especially the national industrial tribunal and ESI courts under the Industrial Disputes Act of 1947 and Employees State Insurance Act of 1948 has been constituted by the central government and the state governments in India for the amicable settlement of all the disputes of such nature. The table 7.0 on detailed analysis shows that hows that a mere 18.8% of sample respondents have approached the various courts and tribunals for the resolution of their claims/disputes whereas 12.4% of the respondents have never approached any such forum despite having certain grievances. The table 7.0 also shows that 61.6% of the respondents are not aware about any such redressal mechanism being in vogue for the redressal of their issues whereas 7.2% respondents did not gave answer to this question. These figures ultimately lead us to the conclusion that there is lack of knowledge and awareness about the legal machinery or redressal mechanism being available to the working class especially the women workers in J&K.

VII-Suggestive measures to enhance *WPR* of women, improve conditions of Employment and proper enforcement of Labour Welfare Laws.

Under this sub-heading, the suggestive measures to enhance the work participation rate (WPR) of women by implementing various labour laws, suggestions for improvement and effective implementation of availing various benefits and schemes meant for empowerment of women, as to how the government can effectively regulate the functioning of various labour welfare measures for women have been analysed in detail on the basis of data collected and responses deduced from the respondents.

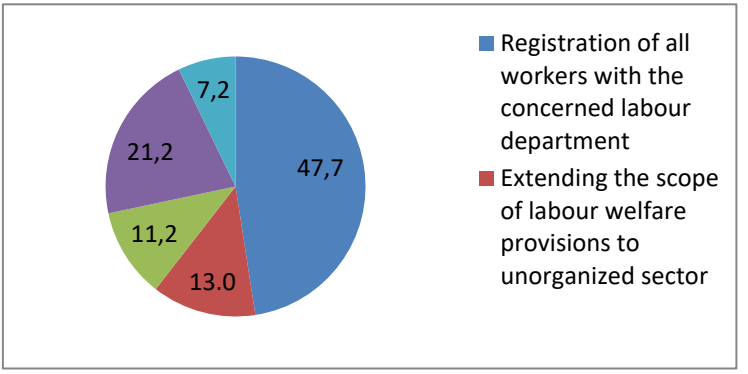
Table 8.0: Suggestions to to enhance work participation rate (WPR) of women by implementing labour laws

Suggestions to to enhance work participation rate (WPR) of women by implementing labour laws	**Number (Out of 500)**	**Percentage***
Registration of all workers with the concerned labour department	237	47.7
Extending the scope of labour welfare provisions to unorganized sector	65	13.0
Active involvement of NGO's in safeguarding rights of women workers	56	11.2
Role of trade unions in protecting labour interests	106	21.2
Highlighting the necessity of collective bargaining	36	7.2
Total	500	100.0(approx.)

Source: Field survey data.

*Percentage could not be equal to 100 due to multiple choices

Figure 8.1: Suggestions to to enhance work participation rate (WPR) of women by implementing labour laws



Organising women in groups is the best way to encourage them for taking part in any socio-economic activity and more particularly the job sector dominated by male counterparts for thousands of years which will ultimately play a vital role in empowerment of women folk. The table 8.0 presents suggestions of sample respondents about the query and reveals that 47.7% of respondents suggest that there should be compulsory registration of all workers with the concerned labour department whereas 13.0% respondents suggest that the government should come with a concrete policy to extend the scope of labour welfare provisions to the unorganised sector and 11.25% respondents suggest that there should be active involvement of NGOs in safeguarding the rights of women employees. The table 8.0 reveals that 21.2% of respondents suggest the active role of trade unions in protecting labour interests whereas 7.2% of respondents highlighting the necessity of collective bargaining to enforce their rights at workplace. It is evident from above table that vast majority of respondents suggest that there should be compulsory registration of all workers with the concerned labour department and active role should be played by the trade unions to highlight the miseries and sufferings of working women so that they can live with dignity, honour and gender justice in J&K.

III- CONCLUSION

From the foregoing analysis of the responses deduced from "women workers/employees in factories/establishments and in unorganized sectors of employment" in the state of Jammu and Kashmir to various questions, it becomes clear that the essential idea that a uniform set of labour laws applicable to each category of working class has not yet been achieved. The state government and the employers in particular do not have the capacity to take up implementation tasks of various women oriented provisions under labour welfare legislations and this has led to the dominance of the male counterparts, more particularly the employers and officials associated with enforcement machinery under those Acts. Technically speaking, the employers do not have adequate resources, expertise and skill to plan and implement developmental schemes and projects for the welfare of women workers, thereby, increasing further their dependence on the State apparatus. In such circumstances women in general and working women in particular cannot participate effectively at the places of employment or increase their work participation rate. Numerous factors are responsible for such a large number of respondents who are not aware of the labour welfare laws/schemes like Factories Act, ESI Act, Maternity benefit Act, Minimum wages Act, Sexual harassment at workplace Act, Industrial disputes Act, Social security for unorganised workers etc., and such factors are: illiteracy, poverty, non-availability of information, absence of infrastructure at the grassroots level, and inadequacy of officials to enforce different schemes for women. It is the responsibility of government functionaries (representatives and officials) to apprise the people of various programmes/schemes and submit the list of the women working population for availing assistance under any labour welfare legislations/scheme for economic empowerment of women including working women.

Forensic Techniques: An Essentiality for Existing Criminal Justice System

Dr. Seema Singh*

Abstract

Law Governing Forensic Techniques and the Admissibility of Modern Techniques in India is very important in today's context. It is also important to talk about the Effective model of Criminal Justice System which is one of the basic and essential aspects for the existence of the peaceful society. In India even by after a century we are substantially relying of the substantive and procedural criminal laws enacted in the British era. But by the passage of time criminals have changed the method of commencing crime. They are using their intelligence immensely for the wrong doing and cannot be tamed effectively in the technologically advanced era with old practices. This paper deals with the rising need of adopting new scientific techniques of criminal investigation in the background of their authenticity, utility and constitutionality. The emphasis is on understanding the Necessity of Application of Forensic Science.

Key Words:- *Forensic technique, DNA Testing, DNA Profiling, Narco-Analysis, Criminal system.*

Introduction

A peaceful society is a dream of every law abiding citizen but the violation of this right by miscreants cannot be denied. Law should always be ready to take up such challenges to ensure law and order in the society. In this regard the observation of Justice Salmon, in the case of *Jennison v. Baker*[1] is so relevant where he says -"Law should not sit limply, while those who defy it go free and those who seek its protection lose hope".

---

* Dr. Seema Singh, Assistant Professor, Campus Law Centre, University of Delhi. (ssingh10@clc.du.ac.in).

1(1972) 1 All ER 997.

An effective Criminal Justice System is the need of hour for every country and for every civilized society. But the present Criminal Justice System of India is facing serious challenges in the changing socio-economic scenario. Specially after the liberalization of 1991 new tyes of challenges are being faced due to technological advancements. But the Indian Criminal Justice System which was created more than a century away is not able to face these new challenges efficiently. Though the modification of existing substantive and procedural laws are immensely required but then too we are largely relying upon old legislations and techniques of criminal investigations.India is among those countries which follow adversarial justice system. This system already favours the accused a lot. Under the system the burden of establishing the guilt of accused lies upon the prosecution and law believes in the presumption of innocence of accused[2]. Due to accused friendly legal system, lengthy legal procedures and higher rate of acquittals people are loosing their faith in the existing criminal justice system[3]. To restore the faith of victims and to enhance the efficiency of the Criminal Justice System several Law Commissions and Committees suggested to amend the existing criminal laws. These suggestions received equal amount of opposition by the human rights activists. No one can say that the rights of accused should be compromised but we should not forget that protecting the rights of victim is our equal responsibility and should not be jeopardized on any technical or legal ground.

It is undisputable that most important fundamental right enshrined in our constitution is Right to Life given under art.21[4]. But does our criminal justice sytem is able to give adequate protection to these rights? Perhaps not…the rising crimes in different areas is an indication of the

2 The Indian Evidence Act, 1872 s.101, Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

3 National Crime Record Bureau Report 2012.

4 The Constitution of India, art. 21"No person shall be deprived of his life or personal liberty except according to a procedure established by law."

same. Mentioning the plight of our Criminal Justice System, Justice Malimath says [5]–

"when a crime has been committed in front of so many eyewitnesses and all the evidences are against the accused then too his silence and denial of the charges, gives him the benefit of the presumption of his innocence. Similarly, if he is confessing before the police and on the basis of his confession the police has recovered the weapon used in crime or any other material relevant for the case, like the dead body or stolen goods, then too his confession is not admissible, merely because it is addressed to the police. If accused gives any statement which is self incriminatory in nature, that too is inadmissible".

Need of New Techniques of Investigation

No one would be disagree on this point that the criminal trial in adversarial system relies completely upon the quality of investigation[6]. Most of the crime takes place in deserted places where it is always difficult to get an eyewitness. In such blindfold cases investigations depends upon the evidences collected from crime scene and the information given by the suspect. As per the existing International Conventions[7], provisions of the Contitution and established judgments using third degree method upon suspect or accused is unconstitutional[8]. As per the recent judgment of Smt. Selvi v. State of Karnataka [9] honorable Supreme Court has held that even scientific techniques like polygraph, brain mapping and narco analysis can not be used on the accused without his consent. Such circumstances and orders of the Supreme Court have left limited options with the investigating agencies

5 The Malimath Committee Report-2003.

6 The adversary system, *available* at: https://moodle.pmaclism.catholic.edu.au/pluginfile.php/18972/mod_resource/content/1/hsc_legal_chapter3.pdf (last visted on 30 june 2021).

7 Internatiol Covenant and Civil and Political Right,1966- s.7

8 *D.K.Basu v. State of West Bengal* (AIR 1997 SC 610) This is a landmark judgment given by the Apex court in the case of an increasing number of custodial deaths in India.

9 *Selvi and Ors.v. State of Karnataka*, A.I.R 2010 S.C. 1974.

like relying upon direct or circumstantial evidences. In absentia of effective witness protection program[10] in most of the cases either eye witnesses do not turn up or turn hostile subsequently. This results into acquittal of the accused in most of the cases. These infirmities in the existing system indicates the overhauling of the investigation mechanism. Some most key factors responsible for poor performance of criminal justice system are -

a) Delay in registering the First Information Report and non scientific investigation of the criminal cases.

b) Lack of training of police personnels in collecting and preserving physical evidences from the crime scene.

d) Lack of forensic science experts which are resulting into delayed or inaccurate forensic reports.Majority of the above mentioned reasons are primarily connected to scientific evidences and their mismanagement contributes significantly to the woes of prosecution in establishing the guilt of the accused person.

Challenges of 21st Century

Undoubtedly in 21st century the crime scenario has become very complex. The 'modus operandi' of the criminals is becoming scientifically and technically more and more advanced. Crimes like bomb explosion, terrorism, cyber crimes, murder, rape are becoming more and more rampant in the present society. The Criminal Justice System of India is primarily based upon "demonstrable evidences" which are found in the form of material, medical and circumstantial evidences. The Indian Criminal Justice System, emphasizes more upon direct evidences where the eye witness ca be influenced by several extraneous factors. Seeing the similar types of shortcoming of the existing system many developed countries brought phenomenal changes in their manner of investigation and started using more scientific techniques of investigation which helped them in solving the most

10 The Witness Protection Scheme in 2018, is the first legal enactment set up by the Indian Government, but its effectivity is still debatable.

difficult and clueless cases.In India also at different point of time different Criminal Justice Reform Committees acknowledged the importance of scientific techniques in changing scenario and recommended their use in criminal investigations. Justice Malimath Committee, 2003 and Madhav Menon Committee,2007 both gave several suggestions to revamp the criminal justice system and observed the necessity of scientific treatment of offenders and crime scenes in criminal investigation.

Arrival of New Scientific Techniques of Criminal Investigation

In past decades several advancements in the field of forensic science has taken place, which may form the backbone of the criminal justice system and sometimes their findings may be considered as conclusive proof. Material evidences and medical evidences like fingerprint, hair, semen, blood, firearms, and skeletal remains etc. found at the scene of the crime can provide useful information. They help not only establishing the manner of crime committal but also provide great help in identifying the real perpetrator. In modern day crime world forensic science is the most effective way of investigation.New techniques based on scientific research like DNA profiling and gene data bank are pivotal for the convictions of criminals and for the prevention of would be criminals[11].

Forensic sciences is sharing the best and most unique partnership with law enforcement agencies. It is a multidisciplinary subject which has several specialized branches. These branches provide great assistance to investigating agencies by helping them in gathering evidences, which is used by prosecutors against offenders during the trial. Forensic experts also play the role of communicator and interpreter

11 Strengthening Forensic Science in the United States: A Path Forward, *available at*: https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf (last visited on 20Nov.2021).

about the techniques and their findings before the court[12].Scientific techniques have several advantages like they can never turn hostile, they can't be pressurized, they can't be terrified , thus are undoubtedly more reliable. A missing link of crime can be successfully established or a weak chain can be further strengthened by furnishing these impartial evidences. The area of forensic science is full of diversity and deals with material exhibits pertaining to various nature of crimes such as murder, rape, firearms, ammunitions, explosives and explosive substances, blood, saliva, adulterated petrol, liquor, diesel, etc. Examining the forged documents or signature along with the photographic analysis of all material exhibits is also the part of work of forensic scientists. The most distinguished features of forensic science is that even if the quantity of analytical forensic material is limited it gives effective results. Thus, forensic science provides greater assistance to the court in reaching a logical conclusion in criminal cases.

Law Governing Forensic Techniques and the Admissibility of Modern Techniques in India

Forensic Science is not new for India though hasn't received sufficient push in independent India. Though in India the pace of growth of forensic science is comparatively slow but it keeps some space in certain laws in the form of 'Expert Evidence.' These laws can be primarily categorized into:

(1) Legislations (2) Case laws

Main legislations governing the expert evidence-

- The Indian Evidence Act, 1872
- The Code of Criminal Procedure,1973

12 Loene M Howes, "*Science & Justice by Project: Communication of forensic science,2014*".
The communication of forensic science in the criminal justice system: A review of theory and proposed directions for research.

Under the Indian Evidence Act,1872 Sec.45[13], 46[14], 51[15] and 73[16] are relevant provisions in dealing with utility of scientific evidences/expert opinion.Similarly Sec.53[17] and 53A[18] of Cr.P. C. 1973 also deals with Expert Opinion. Section 292 and 293 of The Code of Criminal Procedure, 1973 are also related to expert evidence. But surprisingly this list of experts under Sec.293(4) does not includes the Experts of most advance scientific techniques like Experts of DNA Profiling, Polygraph, Narco-analysis or Brain Mapping test.In India laws related with the relevancy and admissibility of opinion of forensic experts are not very clear, but time to time courts have expressed their support to the importance of the scientific techniques and scientific proofs through their judgments. In the case of *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee*[19] , the honorable Supreme Court expressing its views over the relevance of forensic evidences mentioned that;-

"Court is not bound by the evidence of the experts which is to a large extent advisory in nature. The Courts have full powers to derive its own conclusion upon considering the opinion of the experts which may be adduced by both sides, cautiously and upon taking into consideration the authorities on the point on which he deposes. It has been further emphasized that in the cases involving Medical Science, complex questions are involved and therefore expert evidence is very assisting. However, the court for the purpose of arriving at a decision on the basis

---

13 *Ibid*. Sec.45 of the Act deals with expert opinion. Relevancy of expert opinion is prescribed in section 45 of the Act. It also defines that who is "Expert".

14 *Ibid* Sec.46-Facts bearing upon opinions of experts- Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

15 *Ibid.* Sec.51-Grounds of opinion, when relevant- Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

16 *Ibid.* Comparison of signature, writing or seal with others admitted or proved.

17 Examination of Accused by Medical Practitioner at the Request of Police Officer.

18 Examination of Person Accused of Rape by Medical Practitioner.

19 (2009) 9 SCC 221.

of the opinions of experts must take into consideration the difference between an 'expert witness' and an 'ordinary witness".

In some cases courts have shown very positive response towards the Expert Opinin and Scientific Evidences and upheld their constitutional validity as well. Like in the case of *Sham Sunder v. State of Haryana*[20]in which the crime of robbery and murder was committed. The Police have taken the fingerprints of the accused, during the investigation, when he was not under arrest and that too without the permission of the Magistrate. The Court held that there was no illegality and no violation of the fundamental rights of the accused..

In another case of *Ramchandra Ram Reddy v. State of Maharashtra*[21] the High Court examined the conflict between latest narco-anlysis test and art. 20(3) [22] of the Indian Constitution and concluded that;-

"…such a statement given under the narco test will attract the bar of Art.20(3) only if it is incriminating to the person making it. Whether it is or not can be ascertained only after the test is administered and not before".

Again in the case of *Rojo George v. Deputy Superintendent of Police* [23] , the Kerla High Court favorednarco-analysis test on the parameters of fundamental rights and held that "Narco-analysis test does not amount to a deprivation of personal liberty or intrusion into privacy". The High Court held that "Narco analysis test does not require judicial sanctions, because it is a recognized test for an effective investigation".

In this case of *Dinesh Dalmia v. State*[24], again the Madras High Court gave a historic and comprehensive opinion about scientific methods of investigation and ruled that;-

"Narcoanalysis testimony was not testimony by compulsion because the accused may be taken to the laboratory for such test against

20 2005(3) RCR (Cri.)975 (P&H).
21 2004 All MR (Cri)1704.
22 Right against self incrimination.
23 2006(2) KLT 197.
24 2006 Cri LJ 2401.

his will, but the revelation during such test is quite voluntary. The court also held that, there is a hue and cry from the public and the human rights activists that the investigatory sleuths adopt third degree method to extract information from the accused. It is high time that the investigating agency took recourse to scientific methods of investigation and this does not lead to violation of Art.20(3)".

In another famous and sensitive case of *C.B.I. v.SurendraKoli&Mohinder Pander*[25] , there were serial murders of women and children. Two suspects of this case were a rich Businessman and his servant, who was arrested after tracing the EMI no. of the mobile of a deceased. During the investigation debris of different body parts of deceased children were recovered from the backyard of the house. Both the subjects were referred for Brain Mapping test and other Psychological tests. The test result of BEOS[26] was positive for one of the subjects and was corroborated subsequently by the confession of that subject. During the trial test results of BEOS were accepted.

In another most famous case of *Abdul KarimTelgi*'[27]which is also known as Stamp Paper Scam case,the kingpin Telgiwas tested positive in the P-3OO brain mapping test. The report on the Telgi brain mapping test said;-

"The major findings reported by the brain mapping tests are indicative of the possession of knowledge about the activities by KarimTelgi. The brain activation during preparation, processing, while evoking primary encoding, indicates active participation of KarimTelgi in all these activities".

In another case of *ArunGulabGavli v. State of Maharashtra and Others*[28] Bombay High Court favoured the constitutionality of modern scientific techniques by saying that;-

---

25 (2006) 838/2006.

26 Brain Electrical Oscillation Signature Profiling is an EEG technique by which a suspect's participation in a crime is detected by eliciting electrophysiological impulses.

27 http://www.scribd.com/doc/169975555/Brain-Mapping-Test (last visited on July20,2021).

28 2006 Cri LJ 2615.

"The only guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law. So when a procedure is properly described even for the use of scientific

techniques like Polygraph and Brain mapping, it cannot be said that the rights of accused provided under Art.21have been violated".

In the recent high profile case of murder of *SunandaPushkar* Magistrate ordered to conduct Polygraph test on three suspects[29]. This test played a key role in giving clues to the Police to investigate and to crack most clueless cases.

In India another modern technology which is used for criminal investigation is DNA profiling. It helps in solving the most serious problems of crime investigation and other relevant cases. *Gautamkundu v. State of West Bengal*[30] *, Sajeera v. P.K.Salim*[31]*, PriyadarshniMatoo's* case etc. are some cases in which DNA testing was taken into consideration for solving the problem of law enforcement.

Now DNA Profiling has become an integral part of our Criminal Justice System and in last ten years, this technique played a key role in solving many cases. In *Raghuvir Desai v. State*[32] , the Bombay High Court noted that DNA test is clinching piece of evidence and it can make a virtually positive identification when two samples match.

In case of *GeetaSaha v. NCT of Delhi*[33] the Delhi High Court ordered that a DNA test can be conducted on a foetus of a rape victim. In another recent case of *Bhabani Prasad Jena v. Convener Secretary, Orissa State Commission for Women*[34] , the honorable High Court gave order for DNA test of the child and appellant.

Necessity of Application of Forensic Science

29 Times of India, 21May, 2015, pg.3
30 A.I.R. 1993 SC 2295.
31 2000 Cri LJ 108.
32 2007 Cri LJ 829.
33 1999(1) JCC 101.
34 AIR 2010 SC 2851

In the past, through different judgments, different courts raised concerns about the use and utility of forensic techniques in criminal investigation.Expressing its views in the support of forensic science the Madras High Court in the case of *Muniammal v. The Superintendent of Police, Kancheepuram District, Kancheepuram*[35] has said that:

"This High Court is much desirous and concerned about expressing that the branch of science of Forensic Medicine is an effective scientific method, which plays a vital role in assisting the Justice Delivery System to render justice to the society, in the administration of Criminal Justice. In order to make this particular subject more viable, more teeth have to be provided by the legislature and the authorities concerned, to make it trendsetting".

After going through the materials available in this case and in the backdrop of the authorities on the subject, the honorable High Court gave some suggestions for the consideration and implementation, to enhance the capabilities of the forensic experts and forensic science, which are as follows:

a. Periodical training of the Medical Officers should be organized to make them more updated and efficient in the field of Forensic Science.

b. To evolve a uniform procedure of medical certification, there should be a standardized format of noting down the injuries and their signs.

c. For every doctor posted in government hospital, periodical forensic training should be mandatory.

d. Not only medical but also Para medical staff should be trained periodically in the field of forensic science.

e. Right from the undergraduate level every student of medicine should get familiarized with the intricacies of Forensics.

35 Criminal Original Petition No.12582 of 2007*in the High Court of Judicature at Madras,* Order Dated: Febraury 16, 2008.

f. There should be a compulsory posting of all intern House Surgeons in the Department of Forensic Medicine for a reasonable time period.

g. The government should develop such an educational structure where medical experts could get sufficient knowledge of not only Health Delivery System but also of the Justice Delivery System.

h. Number of seats in PG Courses in Forensic Medicine should be increased.

In another relevant case, a Supreme Court Bench, comprising of Justice K.S.Radhakrishnan and A.K.Sikri in a Criminal Appeal No.369 of 2006 in *Dharam Deo Yadav v. State of U.P*[36]*.,* emphasized the need to adopt scientific methods of investigation to save the judicial system from low conviction. The Apex Court stated that:

"*Hardened criminals get away from the control of law as reliable and sincere witnesses to the crime rarely come forward to depose before the court. Therefore the investigating agency has to find some other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidences. There is a need to strengthen forensic science for crime detection and judiciary needed to be equipped to understand and deal with such scientific materials".*

In a recent case of Uttar Pradesh a 12 year old girl Noor-Un-Nisha was raped by appellant Akhtar on 4 April 2012. Honorable Allahabad High Court, showed its grave concern over the poor condition of the investigation. The honorable Court stated and I quote:

"The Criminal Justice System in this country is at crossroads. Many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and a host of other reasons. The investigating agency has, therefore, to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. In this age of

36 (2014) 5 SCC 509.

science, we have to build legal foundations that are sound in science as well as in law. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our Criminal Justice System. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like the power of observation, humiliation, external influence, forgetfulness, etc.,whereas the forensic evidence is free from those infirmities. The Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasizing the necessity of promoting scientific evidence also to detect and prove crimes over and above the other evidence".[37]

The honorable High Court further stated that in the State of U.P. ,there is the absence of an adequately equipped D.N.A. Laboratory, having advanced mitochondrial DNA analysis facilities, comparable to the CDFD, Hyderabad. In this case the High Court ordered to send the sample to Hyderabad, after unsuccessful DNA matching in an earlier case, *Bhairovs. StateofU.P*[38]. where this Court had sent the sample of vaginal smear slides and swabs and appellant's underwear to the U.P. DNA laboratory, viz. Forensic Science Laboratory, Agra, and directed that such a DNA center comparable to the CDFD, Hyderabad, should be established in the State of U.P. at the earliest, so that the Courts and the investigating agencies are not compelled to send DNA samples at high

37 *Ref;*(http://elegalix.allahabadhighcourt.in/elegalix/WebShowJudgment.do) (CAPITAL CASES No. 574 of 2013 Judgment/Order Dated - 28/8/2014 at Allahabad.Title - *Akhtar v. Stae of U.P.* Coram- Hon'ble Amar Saran J. and Hon'ble Vijay Lakshmi J.).

38 Criminal Capital Appeal (Jail) No. 2531 of 2010] decided on 6.9.11.

costs to the specialized facility of the CDFD at Hyderabad.[39] In recent past on Feb.4, 2014 Delhi High Court, while dealing with DhaulaKuaan Rape case, expressed its displeasure over the disappointing position of Forensic Techniques in India. The High court of Delhi, expressed its serious concern over the time taken by the Delhi Government's forensic laboratory in examining criminal evidences. A bench of Chief Justice NV Ramana and Justice Manmohan said, "if the forensic lab takes years to examine a case and send a report, how do you expect the courts to dispose of the criminal cases timely." The court's observation came after Delhi Government, through an affidavit, said that the only state-run Forensic Science Laboratory (FSL) in the city, at Rohini, gets a large number of cases for examination, leading to backlogs. As per the affidavit filed by the government on Police statistics show forensic reports in 7,135 cases sent to Delhi's forensic science laboratory (FSL) in Rohini between 2006 and 2018 (till June 30) are still pending, which means investigation in these cases is incomplete and their number is constantly increasing as manpower, space and other infrastructure had not increased commensurately.[40] The court also asked the Centre to explain by way of affidavits how much time the Central Forensic Science Laboratory takes in furnishing reports in each case.[41]Thus, it is clear that deteriorating condition of the Criminal Justice System of India compelled the courts to play a pro-active role for the development and use of different branches of forensic science.

Conclusion and Suggestions.

Thus it is evident poor investigation and under use of forensic science in criminal investigation is mainly hampering the growth and effectiveness of the Criminal Justice System of India. Now on the basis of the above discussion, the importance of the role of forensic science

39 *Ibid.*

40 *Ibid.*"HC unhappy with govt forensic lab's slow work", Press Trust of India , New Delhi February 4, 2014(Last visited, 5th June 2021)

41 *Available at* (http://timesofindia.indiatimes.com/city/delhi/ Big-backlog-staff-crunch-ailing-forensic-lab Govt/articleshow/23475944.cms), (Last visited, 5th June 2021)

can be undisputedly accepted. The forensic science is used properly. It can be a boon for Criminal Justice Delivery system of India. Forensics Experts can play a key role not only in collecting biological samples with necessary precautions, but also in delivering the best test results, which can be extremely helpful for courts to draw an appropriate conclusion.

On the basis of overall analysis the following suggestions may be taken into consideration to strengthen the Criminal Justice Delivery System of India-

- For the collection of physical evidences investigators must be properly trained and their training programs must be organized periodically in association with forensic experts of scientifically advanced countries like US, UK, Germany etc.
- The investigators should be periodically attached to the forensic science laboratories to develop better scientific temperament about forensic science.
- Besides investigators Judges and public prosecutors should also be trained to develop a better understanding of forensic science and law. It will also be helpful in reducing the trust deficit prevailing between court and investigating agencies.
- More and more forensic science laboratories should be established with modern equipment. It will help in lowering down the delay and uncertainty in criminal investigation.
- If an expert is supporting a relevant conclusion, then that should be respected by the court, unless there are other concrete reasons of exclusion.
- Our procedural laws especially Evidence law is not very clear about the admissibility of forensic evidences. These procedural laws should be amended to bring uniformity in investigation throughout the country.
- Under Section 293 (4) of the Criminal Procedure Code DNA experts should be included. Along with DNA Experts, Polygraph Experts, Brain Mapping Experts and Narco-Analysis Experts should also be included.

At the end it is concluded that Scientific evidence has to be given greater probative value. As of now the vague provision gives ample discretion, to the court to mark any value to the outcome of expert opinion ranging from 1-100. Thus it is high time to classify the outcome of these techniques, on the basis of their reliability, in the categories of 'May Presume', 'Shall Presume' and 'Conclusive Proof'. Scientific techniques are the most human righ friendly techniques for investigation. They give authentic result also so they should be made admissible as "Substantive Evidence" rather than "Opinion evidence". Now the greater use of scientific technique can provide an effective mechanism to provide speedier and effective justice. This is the best possible method in present circumstances to restore the faith of the people in our Criminal Justice System. These techniques can be used effectively within the purview of the Constitution and can protect the rights of the accused and the victim both.

DNA Technology and Right to Privacy: An Indian Perspective

Dr Syed Asima Refayi*

Abstract

DNA profiling is ascientific method of recording the almost unique characteristics that are present in every individual's DNA. DNA – Deoxyribonucleic Acid – is the building block of our basic genetic information that is stored in all the cells in our bodies. DNA profile is like a fingerprint, and hence the technique is also called DNA fingerprinting. Current technologies are able to read the sequences from even a very small fragment of a person's DNA. Using a technique called PCR (Polymerase Chain Reaction) the information in a small fragment of a DNA molecule can be amplified over a million times, making detection of the unique sequences much easier.The technique is used in criminal investigations and identification purposes. If a crime suspect's DNA is found to match with DNA present at the scene of a crime, then this is seen as evidence that the suspect was present at the crime scene. But at the same time,DNA profiling has raised many issues of privacy than does ordinary fingerprinting. In addition, potential privacy threats arise from the fact that the original DNA samples are generally retained as well as the DNA profiles held on the databases. Privacy implications are also raised through the retention of DNA samples and profiles. This paper is an attempt to highlight the importance of DNA Technology and how it goes in hand in hand with Right to Privacy.

Keywords: *Right to Privacy,DNA Technology,*

Introduction

The Deoxyribonucleic Acid (DNA) is a set of instructions found in a cell. These instructions are used for the growth and development of an organism. The DNA of a person is unique, and variation in the sequence

* Asst Professor, School of Law. University of Kashmir

of DNA can be used to match individuals and identify them[1].DNA technology, therefore allows for accurate establishment of an individual's identity.DNA-based technology can be used to aid criminal investigations. For example, the identity of a criminal offender may be determined by matching DNA found at the crime scene with the DNA of a suspect[2]. In addition, DNA-based technology helps in identification of victims in the event of terrorist attacks or natural disasters such as earthquakes. For example, DNA technology has been used to identify victims of terrorist attacks on the World Trade Centre in 2001, and disasters such as the Asian tsunami in 2004[3]. Further, DNA profiling can be used in civil matters, such as parentage related disputes. Currently, the use of DNA technology for identification of individuals is not regulated. In the past, several expert groups including the Law Commission, have looked at the use and regulation of DNA technology[4]. The Commission submitted its report as well as a draft Bill in July 2017.[2]In this context, the DNA Technology (Use and Application) Regulation Bill, 2018 was introduced in Lok Sabha on August 9, 2018. The Bill regulates the use of DNA technology for the purpose of identification of persons in criminal and civil matters.

Position in India

The right to privacy is an element of various legal traditions to restrain governmental and private actions that threaten the privacy of individuals. Over 150 national constitutions mention the right to privacy[5]. There is now a question as whether the right to privacy Act can co-exist with the current capabilities of intelligence agencies to access and analyse virtually every detail of an individual's life. A major

1 "DNA Technology in Forensic Science", Committee on DNA Technology in Forensic Science, United States of America, 1992.

2 "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

3 "Nothing to Hide, nothing to fear?", Human Genetics Commissions, United Kingdom, November 2009.

4 Statement of Objects and Reasons, DNA Technology (Use and Application) Regulation Bill, 2018.

5 Since the global surveillance disclosures of 2013, initiated by ex-NSA employee Edward Snowden, the inalienable human right to privacy has been a subject of international debate. In combating worldwide terrorism, government agencies, such as the NSA, CIA, R&AW and GCHQ, have engaged in mass, global surveillance.

question is that whether or not the right to privacy needs to be forfeited as part of the social contract to bolster defence against criminality.

The right to privacy which was recognised as a fundamental right emerging primarily from Article 21 of the constitution of India, in *Justice K.S. Puttuswamy (Retd.) vs. Union of India*[6]. To make this right meaningful, it is the duty of the state to put in place a data protection framework which, while protecting citizens from dangers to informational privacy originating from state and non-state actors, serves the common good. It is the understanding of the state's duty that the Committee must work with while creating a data protection framework. The relationship between the individual and entities with whom the individual shares her personal data is one that is based on a fundamental expectation of trust. Notwithstanding any contractual relationship, an individual expects that her personal data will be used fairly, in a manner that fulfils her interest and is reasonably foreseeable. This is the hallmark of a fiduciary relationship. The proposed data protection framework is true to the ratio of the judgement of the Supreme Court of India in Puttuswami's case. The Supreme Court held that the right to privacy is a fundamental right flowing from the right to life and personal liberty as well as other fundamental rights securing individual liberty in the constitution. Privacy itself was held to have negative aspect, (the right to be let alone), and a positive aspect, (the right to self-development). The sphere of privacy includes a right to protect one's identity. The right recognises the fact that all information about a person is fundamentally her own, and she is free to communicate or retain it to herself. The core of informational privacy, thus, is a right to autonomy and self- determination in respect of one's personal data.

The court observed the following-:

"Formulation of a regime for data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of the requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the State."

Privacy too can be restricted in well-defined circumstances.

6 *2017 (10) SCALE 1*

1. There is a legitimate state interest in restricting the right.

2. The restriction is necessary and proportionate to achieve the interest.

3. The restriction is by law.

The use of scientific genetic-based evidence (DNA profiling) in legal case investigation processes brings into collaboration the disciplines of science and law, which have their own institutional needs, standards and imperatives. The widespread use of DNA data to detect offenders and protect the rights of the innocent is one of the most notable examples of such advancements and revolutionary impact of DNA technology, which makes the justice delivery system more efficient and accurate. However, the use of this new technology is not completely risk free. DNA fingerprinting has mostly remained dicey, surviving among two opposite poles of attaining the truth or respecting individual privacy.

DNA profiling may reveal very sensitive information about an individual and their family which may affect them adversely if not properly guarded against potential misuse — accidental or deliberate. The most common form of such misuse resulting in serious violation of privacy and human rights could be unauthorised disclosure of sensitive information with regard to a person's predisposition to disease and their ancestry, for instance, which can be obtained from their DNA samples. Therefore, it is important to adopt a balanced approach in the use of DNA information, so the risk of the violation of privacy and human rights remain at an acceptable level. The identification of offenders and the protection of innocent suspects are two of the main goals for ensuring justice. DNA samples and profiles are very useful for identification purposes, for example, in identifying victims of disasters, as well as suspects (including rapists and murderers). It is also useful for conducting parentage testing and for resolving immigration cases, where a familial relationship (or identity) is in question. In many instances, suspects who are actually innocent are relatively quickly acquitted or excluded from legal proceedings. This technology is, in effect, upholding the principles of 'presumption of innocence', which requires that 'guilt must be proved beyond reasonable doubt', upon which each and every criminal justice system is based. Therefore, every accused person irrespective of his or her status has a right to a fair trial. This

legal right even applies to those who have been convicted of similar offences committed in the past. The right of a 'fair trial' is derived from the principles of natural justice[7].

The Constitution casts a duty on every citizen of India to develop the scientific temper, humanism and the spirit of inquiry and reform and to strive towards excellence in all spheres of individual and collective activity[8].

Underthe Union List, Parliament is competent to undertake legislations which encourage various technological and scientific methods to detect crimes speedup investigation and determine standards in institutions for higher education and development in technical institutions[9] .

The other relevant provisions of the Constitution guarantee a right against the self-incrimination[10] and guarantees protection of life and liberty of every person[11].

The Indian Evidence Act, 1872[12]deals with facts necessary to explain or introduce a fact in issue or relevant fact. It also provides as to how the Court has to form an opinion upon a point of foreign law or of science or art, or identity of handwriting or finger impressionsetc[13].

The Act also refers to grounds when opinion becomes relevant[14]. And provides that birth during the continuance of a valid marriage is a conclusive proof of legitimacy with only exception thatthe parents had no access to each other during the period of conception[15].Also,the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course ofnatural events

---

7 During the mid-1980s, the potential application of DNA typing or profiling was initiated by laboratories in the United Kingdom (UK), the United States (US), and Canada. The modern forensic DNA typing invented by Professor Alec Jeffrey was first used in the***Colin Pitchfork*** **case in 1985 in UK.**

8 Article 51A(h) and (j) of Constitution of India

9 Entry 65 & 66

10 Article 20(3)

11 Article 21

12 Section 9

13 Section 45

14 Section 51

15 Section 112

human conduct andpublic and private business, in their relation to the facts of the particular case[16].

If the evidence of an expert is relevant under section 45, the ground on which such opinion is derivedis also relevant underSection 51.

Section 46 deals with facts bearing upon opinions of experts. Theopinion of an expert based on the DNA profiling is also relevant on the same analogy. However, whether a DNA test can be directed or not has always been a debatable issue.

The Criminal Procedure Code,1973, provides that an accused of rape can be examined by a medical practitioner, which will include taking of bodily substances from the accused for DNA profiling. It is noteworthy that, the said Amendment substituted the Explanation to sections 53 and 54, and made it applicable to section 53A as well to clarify the scope of „examination", especially with regard to the use of modern and scientific techniques including DNA profiling[17].Section 53 authorises the police officials to get medical examination of an arrested person done during the course of an investigation by registered medical practitioner.

The Explanation provides that "Examination shall include the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hairsamples and finger nail clippingsby the useof modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case. A provision was also added to empower the Magistrate to order a person to give specimen signatures or handwriting[18].

Judicial Response

A judgmentrendered by an eleven-Judges Bench of the Supreme Court in *Stateof Bombay v. Kathi Kalu Oghad & Ors*[19].dealt with the issue of self- incrimination and held Self-incrimination must mean conveying information based upon the personal knowledge of the person

16 Section 114
17 Section 53-A was added vide the Code of Criminal Procedure (Amendment) Act, 2005 w.e.f 23-6-2006
18 Section 311-A of CRPC
19 AIR 1961 SC1808:91962) 3 SCR 10

giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. Example was cited of an accused who may be in possession of a document which is in his writing or which contains his signature or his thumb impression. It was observed that production of such document with a view to comparison of the writing or the signature or the impression of the accused is not the statement of an accused person, which can be said to be of the nature of a personal testimony.

In Smt. Selvi & Ors. v. State of Karnataka[20], three-Judge Bench of the Supreme Court considered whether involuntary administration of certain scientific techniques like narco-analysis, polygraph examination and Brain Electrical Activation Profile (BEAP) tests and the results thereof are of a 'testimonial character' attracting the bar of Article 20(3) of the Constitution. The Court held; it was observed that the scope of 'testimonial compulsion' is made clear by two premises. The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to 'personal testimony' thereby coming within the prohibition contemplated by Article 20(3) of the Constitution of India.

In *Ritesh Sinha v. State of U. P*[21], the questions arose as to whether a Voice Spectrographic Test without the consent of a person offends Article 20(3) of the Constitution and in case the said provision is not violated, whether a magistrate, in absence of any statutory provision or inherent power under the provisions of the Criminal Procedure Code 1973 (Cr. P.C.) has competence to direct a person to be subjected to such a test without his consent. The Court held that taking such test would not violate the mandate of Article 20(3) of the Constitution as has been held by the Supreme Court in Selvi.

The Supreme Court in *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for women*[22] whilst pressing upon the

20 AIR 2010 SC 1974: (2010) 7 SCC 263
21 (2019) 8 SCC 1 para 27
22 Air 2010

significance of DNA testing in the process of administration of justice held when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter DNA test is eminently needed.

DNA Technology (Use and Application) Regulation Bill,2019

- The Bill regulates the use of DNA technology for establishing the identity of persons. These include criminal matters (such as offences under the Indian Penal Code, 1860), and civil matters such as parentage disputes, emigration or immigration, and transplantation of human organs.
- The Bill establishes a National DNA Data Bank and Regional DNA Data Banks. Every Data Bank will maintain the following indices: (i) crime scene index, (ii) suspects' or undertrials' index, (iii) offenders' index, (iv) missing persons' index, and (v) unknown deceased persons' index.
- The Bill establishes a DNA Regulatory Board. Every DNA laboratory that analyses a DNA sample to establish the identity of an individual, has to be accredited by the Board.
- Written consent by individuals is required to collect DNA samples from them. Consent is not required for offences with punishment of more than seven years of imprisonment or death.
- The Bill provides for the removal of DNA profiles of suspects on filing of a police report or court order, and of undertrials on the basis of a court order. Profiles in the crime scene and missing persons' index will be removed on a written request.

Conclusion and Suggestions

The Bill necessitates the consent of the individual for DNA profiling in criminal investigation and for identifying missing persons. However, the Bill is silent on the requirement for consent in all civil matters that have been brought under the scope of the Bill.

The omission of civil matters in the provisions of the Bill that are crucial for privacy is just one of the ways the Bill fails to ensure privacy safeguards. The civil matters listed in the Bill are highly sensitive (such as paternity/maternity, use of assisted reproductive technology, organ

transplants, etc.) and can have a far-reaching impact on a number of sections of society. For example, the civil matters listed in the Bill affect women not just in the case of paternity disputes but in a number of matters concerning women including the Domestic Violence Act and the Prenatal Diagnostic Techniques Act. Other matters such as pedigree, immigration and emigration can disproportionately impact vulnerable groups and communities, raising raises concerns of discrimination and abuse.

Another issue with respect to collection with consent is the absence of safeguards to ensure that consent is given freely, especially when under police custody.

Apart from the collection, the Bill fails to ensure the privacy and security of the samples. One such example of this failure is Section 35(b), which allows access to the information contained in the DNA Data Banks for the purpose of training. The use of these highly sensitive data—that carry the risk of contamination—for training poses risks to the privacy of the people who have deposited their DNA both with and without consent. The Bill needs to be revised to reduce all ambiguity with respect to the civil cases, and also to ensure that it is in line with the data protection regime in India. Following Suggestions are made in this regard

- There are still studies and cases that show that DNA testing can be fallible. The Indian government needs to ensure that there is proper sensitisation and training on the collection, storage and use of DNA profiles as well as the recognition and awareness of the fact that the DNA tests are not infallible amongst key stakeholders, including law enforcement and the judiciary. And the need is to have better draft legislation where right to privacy is not violated unnecessarily.
- Processing (collection, recording, analysis, disclosure, etc) of personal data should be done only for "clear, specific and lawful" purposes. Only that data which is necessary for such processing is to be collected from anyone.
- The personal data may be processed by the government if it considered necessary for any function of Parliament or State Legislature.

It includes provision of services, issuing of licenses, etc. On the face of it, it looks extremely vague and could lead to misuse.

- In criminal matters "data principles" (persons whose personal data is being processed) the 'right to be forgotten' is applied. This means they will be able to restrict or prevent any display of their personal data once the purpose of disclosing the data has ended, or when the data principal withdraws consent from disclosure of their personal data. And it should be extended in civil matters also.
- Explicit Consentis necessary in criminal matters and that "sensitive" personal data should not be processed unless someone gives explicit consent in civil matters also.
- Authority which is supposed to "protect the interest of data principals", prevent misuse of personal data and ensure compliance with the safeguards and obligations under the data protection.
- The Authority shall have the power to inquire into any violations of the data protection regime, and can take action against any data fiduciaries responsible for the same.
- The amendment of Section 8(1)(j) of the RTI Act that pertains to the disclosure of personal information in the larger public interest. The old Section 8(1)(j) said there would be no obligation to reveal personal information which was not related to "public authority or interest", or would be an invasion of privacy. The new 8(1)(j) looks at a balancing act between the public interest in accessing the information on one hand, and the harm that could be cause to the data principal on the other.
- Private Laboratories should be also given the authority for DNA testing for the purpose of cross checking the DNA test Reports.
- There should be the requirement for presenting an application in DNA laboratories for removing DNA profiles from it.
- It should alsoprovide mechanism for redressal of grievances in cases where the DNA profile is not removed from the data banks by the Director of the National DNA Data Bank.
- And most important a comprehensive privacy legislation should be enacted prior to the passing of this Bill.

Impact of Technology on Human Lives: Human Rights Perspective.

Dr. Narender Kumar Bishnoi*
Amit Raj Agrawal**

Abstract

Amidst the fear that that increased use of advanced technology will undermine the status of humans as it would have potential to replace the human with machines autonomy, the relevance utility and demand for technology in digitalized global era is exponentially expanded than ever before. Indubitably, the Fourth Industrial Revolution (Industry 4.0) offers the possibilities of billions of people connected through online devices, with unprecedented processing power, storage capacity, and access to knowledge, are unlimited. Indeed, it is changing the way we live, work and interacts with one another, however at the same time, because of the excessive use of technology, the distinction between private and public spheres is blurring and the individual's right to privacy is being threatened. In the context of human rights, it has tremendous potential to both challenge and uphold human rights. The present research paper attempts to capture the significant discussion with comprehensive analysis of existing legal framework about the need for the increased use of technology in digitally advanced era and the impact of it on human well-being globally.

Key Words: - *Human Rights, Technology, Legal Framework, Right to Privacy, Human Well-being.*

* Assistant Professor of Law, Campus Law Centre, Faculty of Law, University of Delhi (nkbishnoi@clc.du.ac.in).

** Assistant Professor of Law, GD Goenka University, Gurugram (amitraj.agarwal4@gmail.com).

Introduction

The basic and distinctive characteristics of new industrial society were based on division of labor and systematic application of new scientific technologies which had included within its ambit the new image of man and society. This new image was based on important document such as constitution of Virginia, Article 1(1776), the Bill of Rights as part of the Constitution of the United States of America (1788) and the *Declaration des droits de l'homme et du citoyen* (1789). Those documents brought to the fore the pivotal idea of human rights as universal rights, grounded on the recognition of the inherent dignity of all members of the human family.[1] Human rights are those minimum basic rights which are indispensable for every human being for the development of his/her personality and the realization of the dignity among themselves by virtue of the fact that they are the members of human fraternity. Being as birth rights of people, their fulfilment does not lie in the reproduction of institutions of the advanced world, but on the consciousness in the developing world, to ensure the respect and protection of human rights.[2] But the essential question has always remained in abeyance that how far we have achieved the goal of those international instruments in protecting and promoting human rights. Today, there is one single ideology which is widely accepted round the world, is the concept and ideology of Human Rights. Out of the traumatic experience and shock of the dark days of the two world wars in the first half of this century, when human dignity stood compromised as never before in human history, was born the human rights movement.[3]

With the advancement, science has transformed the impossible into possible. Undoubtedly modern medical and technological advancements have the potential of altering the fate, freedoms and the very life of human beings across the world. Man's quest for knowledge and his desire to lead a long and healthy life propels him to undertake scientific

1 Technological impact on Human Rights: Models of Development, Science and technology, and Human rights, *available* at http// www archive.unu.edu

2 Justic Palok basu, *law relating to protection of Human Rights under the Indian Constitution and Allied laws* 7 (Modern Law Publications, New Delhi,2nd edn 2011)

3 AIR 1992 Journal section 113 at p. 113.

research and experiments in medical science.[4] In the late 1960's, it was realized by the United Nations about the potential danger posed to human rights by recent advances in technology. The International conference on Human Rights, held in Tehran in 1968, was first to address this issue. The proclamation of Tehran stated that; while recent scientific discoveries and technological advances have opened vast prospects for economic, social, cultural progress, such development nevertheless endanger the rights and freedoms of individuals and will require continuing attention. A human right based approach to science and technology and development seeks to place a concern for human rights at the heart how the international community engages with urgent global challenges. It entered the UN's lexicon in 1997 with Kofi Annan's call for human rights to be integrated into UN's mandates, management and methodology for development and international cooperation.[5] A human rights perspective also affirms that access to scientific information is a human right. Article 27(1) of the Universal Declaration of Human Rights implies that the benefits of scientific advancement should be shared openly, free from restrictions by social groups, corporate entities or states. Above all, a right-based approach to science seeks to create the conditions for equitable participation in the global science community and fair access to scientific information and goods.[6] Article 7 of ICCPR also advocates for the protection of human rights as it reads as no person shall without his consent be subjected to scientific or medical experimentation. Article11(2)(a), and article 15 of ICESCR 1966 also advocate for it.

Conceptualizing Technology in Scientific Age

Technology provides people with the knowledge and tools to understand and address many worldly challenges. The study of technology includes both processes and bodies of knowledge. Scientific processes are the ways scientists investigate and communicate about the

4 Reshma Arif Human rights, "Ethics and science: Exploring the ethical issues In Human Cloning" in Syed Mehartaj Begum, *Human rights in the new Millennium* 26 (2012).

5 S.Romi mukherjee outlines human-rights based approaches to Science technology and development, and what they mean for policy and practice, *available at*: http// www.scidev.net.

6 *Ibid.*

natural world. The scientific body of knowledge includes concepts, principles, facts, laws, and theories about the way the world around us works. Technology includes the technological design process and the body of knowledge related to the study of tools and the effect of technology on society. [7] Science and technology merge in the pursuit of knowledge and solutions to problems that require the application of scientific understanding and product design. Solving technological problems demands scientific knowledge while modern technologies make it possible to discover new scientific knowledge. In a world shaped by science and technology, it is important to learn how science and technology connect with the demands of society and the knowledge of all areas. [8] Thus, science and technology provide for rational, critical means for the appreciations of facts and data, indeed it demands proper investigation into the subject matter so as to give complete analysis of the issue unlike priori method of reason which relates to acceptance of things without investigation and inquiry. Application of science and technology in the field of human rights has created altogether a new platform at international and national level.

Need For Technology

In modern industrialized society, government works on the principle of welfairism, which takes into consideration multiplicity of functions such as Health, education, employment, economic development, infrastructure, transportation, and communication, the success of all these depends upon the effective and efficient application of science and technology. The realization of Human rights to a large extent in a modern industrialized society depends upon the systematic application of scientific means and mechanism for example, right to information is a basic human rights which is in most of the countries has endowed with the status of fundamental right, the realization of right to information depends upon the technology we are using. To ensure the systematic flow of goods and money into modern economy and market we need new technological measures, these technological measures encompass product design and techniques, complex calculations. The

7 Science and technology, *available at* http// www.maine.gov (visited on September 21, 2013).

8 *Ibid.*

science affects the way we live in, science indeed has provided us with the better conditions of life. Science is much more than a body of knowledge. It is a way of thinking. Science counsels us to carry alternative hypothesis in our heads and see which best match the facts. It urges on us as fine balance between no –hold- barred openness to new ideas, however heretical, and most rigorous skeptical scrutiny of everything, new ideas and established wisdom, it is an essential tool for a democracy in age of change, the task is not just to train more scientists but also deepen public understanding of science.[9]

An Interrelationship of Technology and Human rights

One of the fundamental characteristics of modern age is that it has the strength of science and technology; the application of science and technology has regulated the circumference of human environment, human society, the human body and human mind. With these regulations everything is now said to be dominated by the principles of science and technology. But the fundamental question has always been there whether the application of science and technology is boon or bane for human civilization? Protection of human life is one of the non-derogable fundamental rights recognized by various international conventions as also constitution of almost all states including India. There are various other supportive human rights which enable human beings to live life and enjoy it as well. For example, right to development, right to education, right to work and many more one of such human rights is right to develop and enjoy scientific and technological benefits. The same has been identified under various international instruments such as UDHR, ICCPR etc.[10] But the other side of the story is that science and technology has been used and is being used as a means to violate human rights including right to life, right to survive, right to health and so on and so forth. It is in the late1960's United Nations realized the danger posed by the technology to human dignity and the issue was addressed

9 Carl Sagan "why we need to understand Science, ignorance of science threatens our economy, well-being, national security, and the democratic process, we must do better" *available at* http// www.plaza.ufl.edu (visited on September 29, 2013).

10 Rashmi Salpekar : Science and technology: Is it for protection or destruction of Human life? " in Syed Mehartaj Begum, *Human rights in the new Millennium* 26 (2012).

by way of the international conference on human rights, held in Tehran 1968. The conference recommended to the organizations of United Nations family that they undertake studies with regard to the respect for privacy in view of recording techniques; Protection of the human personality and its physical and intellectual integrity in view of the progress in biology, medicine and biochemistry; The use of electronics which may affect the rights of the person, and the limits which should be placed on its uses in a democratic society; the balance which should be established between scientific and technological progress and the intellectual, spiritual, cultural and moral advancement of humanity. [11]

Once the issue has been addressed, United Nations went on to concern itself with a varied range of threats from new technology, and both the secretary- general and various specialized agencies prepared a series of reports upon the subject. Among the subjects studied were computerized data systems and electronic communications which might affect rights of privacy; biochemical and medical advances, such as artificial insemination and psychotropic drugs; and the harmful effects of automation and mechanization of production.[12] On 10 November 1975, the General Assembly, by its declaration on the use of Scientific and Technological progress in the interests of peace and for the benefit of mankind, called on all states to prevent the use of scientific and technological developments to limit or interfere with human rights and basic freedoms. The declaration further noted that science and technological developments provide enough opportunities for better condition of life of people and nations, but at the same time in a number of instances they can give rise to social problems, as well as threaten the human rights and fundamental freedom of individual.

The United Nations soon realized that in order to make inroads upon this problem, extensive thought and international cooperation are required. The UN commission on Human Rights by resolution 9/1986 of 10 March 1986, entitled 'Use of Scientific and Technological

11 United Nations, *Final Act of the international conference on Human Rights*, Tehran 22 April to 13 May 1968 at 5.

12 C.G Weeramantry : Human Rights and scientific and technological progress in J Symonides *New Dimensions and challenges For Human Rights* 2003.

Developments for the promotion and protection of Human Rights and fundamental freedoms' it invited the United Nations University to study both the positive and negative impacts of scientific and technological development on human rights and fundamental freedoms. The university undertook said study looked at the problem from a global perspective and examined the normative and institutional responses to it by the international community.[13]

For the proper understanding of the subject matter, the interrelationship of technology and human rights may be divided into:

A. ***Technology with reference to human beings***

International Safeguards: -

I. **Universal Declaration of Human Rights**

1. Preamble – Inherent dignity of all members of human family.
2. Article 1 - All human beings are born free and equal in dignity and rights.
3. Article 5 - no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
4. Article 6 –that everyone has a right to recognition everywhere as a person before law
5. Article 29(1) free and full development of Human personality.

II. International convention on civil and political rights: -

Article 7-No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

III. International convention on Economic, Social and Cultural rights: -

1. Article 11(2)(a): To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve then most efficient development and utilization of natural resources.

2. Article 15: It includes for the benefits of scientific progress and its applications; To benefit from the protection of the moral and material

13 C.G Weeramantry (ed.), *The Impact of Science on Human rights: global case Studies*, Tokyo, UNU Press 1993.

interests resulting from any scientific, literary or artistic production.The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. The States to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

National Safeguards: -

1. Constitution of India
   a. Fundamental Rights (part III)
   b. Directive Principles of the State policy (part IV)
2. Human Rights Act, 1993
3. National Human Rights commission (procedure) Amendment Regulations,1997

Impact of technologies on Human Rights and ethical issues.

With the advancement in science and technology many issues such as Biotechnological development, Human Experimentations, Foetal experimentation, Sale and hire of organs, torture techniques, Psychosurgery, Personality tests, the use of untested drugs, Genetic engineering, Selective breeding, Preselection of sex, In vitro fertilization, Embryo transplantation, Foetus farms, have witnessed the gross violation of human rights of the individual across the globe. In the name of research and development in the medical field, pace of science and technology is the need of the hour, but at the same time it has raised serious issues regarding human rights violation as new technological advancement has altogether witnessed a monster world, where in the name of medical treatment human organs are removed without the consent and knowledge of the patients, new drugs have been manufactured to affect the torture techniques, etc.

Key Issues

Research on human body for therapeutic and preventive purposes is the need of the hour but the concern is that how to overcome the problem of unethical use of such scientific and technological advancement.

1. Cadaveric organ donation involves removing organs from a recently deceased donor.

2. Living organ donation involves the donation of one of a paired organ (such as kidneys)

or a portion of an organ (such as a lobe of the liver or lung).

Transplantation of human organs and tissues which saves many lives and restores essential functions for many otherwise untreatable patients can be well said to be one of the greatest scientific achievements. It's true that science and technology has given a new dimension to medical world resulting into the saving of many lives but at the same time it raises human rights, ethical and health care policy issues. However, there is also another dimension of organ trafficking where it intersects with the organ transplantation and ethical issues. [14] The exploitation of poor and other vulnerable individuals who serve as the primary sources of transplantable organs in some countries; The failure of health authorities to ensure that all living organ donors are provided with sufficient information about the nature, health significance, risks and consequences of organ removal for transplantation; The unjust exposure of living organ donors in some countries to unnecessary or disproportionate risks to their physical and psychological health as a consequence of their involvement in organ transplantation and similar circumstances are involved in this issues.

B. **Technology with reference to Society**

International Instruments: -

1. Universal Declaration of Human Rights (1948): -

Article- 19 Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

2. International convention on Civil and Political Rights: -

Article 19 (1) everyone shall have the right to hold opinions without interference. Article 19(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. The impact of science and technology on

14 Asian Task force on organ Trafficking, *available at* http // www.apm.org (visited on September 24th 2013)

human society can be observed with the observations of the U.S President Mr. Nixon (1972), the president has expressed his concern regarding the vast amount of information held in computer concerning 150 million US citizen. He has the opinion that adequate safeguards must be provided so that man remains the master and never becomes the victim of computer.[15] A pooling of data contained in Income tax records, credit records, customs records, police records, health records, motor registration records in addition there are records held by public authorities, such as universities or national insurance schemes which can add to the information available, providing many details which the individual concern may prefer to keep private.[16] Another important aspect of this is the growth of commercial organisations operating multi-nationally, where thousands of employees and customers also run the risk of a pooling of data concerning themselves in a central data bank which is often beyond control of national laws of the individual employees or customer. [17]

Key Issues

1. How to protect the citizens against the misuse of data and abuse of information? And Issue relating to trans-border data flow.

2. To what extent does the creator of the drug have the right to fix exorbitant price levels, placing the drug beyond the reach of global public?

3. How to balance the interest of the community and the rights of the inventor.

These issues have posed grave human rights problems, sometimes summarised in the term "the new information tyranny". The real threat comes from the quality of information one is getting in the running of their daily lives. There are many other human rights which are directly affected through right to information, such as right to health, right to education, right to vote, right to work, right to participate in the governmental functions etc. These problems have raised serious human rights issues such as infringement of privacy. The major threat of the misuse of the technology comes from the terrorist movements. The

15 *Supra notes* 12 at 5.
16 *Ibid.*
17 *Ibid.*

devices available to terrorist organisations keep increasing in sophistication and some organisations even maintain their own research laboratory for furthering and refining their weapons of attack. Terrorist organisations enables a pooling or exchange of technical knowledge in their possession. The important area which technology impacts is related to perfection of methods of psychological and physical torture. New techniques are being perfected and new forms of psychological and physical torture are being devised. Amnesty International has considered this as an "epidemic of torture" practices which is sweeping the world. The new techniques relate to drugs which induces certain psychological reactions such as horror or fear of disorientation, and finally graded electrical shock.[18]

National Safeguards: -

1. Article 19(1)(a) of the Constitution of India.
2. Information Technology Act 2000
3. Right to information Act, 2005
4. Unique Identification Authority of India (2009)

In India right to information is a legal right, and most importantly it has also been guaranteed under the chapter of Fundamental Right particularly under article 19(1)(a) which covers the fundamental right of media as well. These rights are subject to reasonable restrictions, but nonetheless with the advancement of technology, the exercise of these rights has faced new challenged and even government is facing problems. The project, first called UID of India was renamed ADHAAR, which aims to create unique identification number for every resident of the country authenticated by fingerprints and iris scams. As coin has two sides, similarly ADHAAR has both advantage and disadvantage sides. ADHAAR has eliminated the multiple bureaucratic layers that the people of the country, particularly the rural people are confronted with and the multiplicity of documents that they have to present in order to access their legitimate entitlements. It will help in elimination of corruption. After authentication by a centralised database of biometric and demographic information to which service providers will be linked, this UID number alone will enable every individual to

18 *Supra note* 12 at 7.

access services and entitlements everywhere in the country and at any time. On the other hand, the major issue involved is related to Privacy of the individuals which shall be at stake, since government has complete information regarding the individual; therefore, there is every possibility of government intruding into the privacy of the individual. The UIDAI claimed that enrolment is voluntary and not mandatory, therefore it is inclusive. However, this particular aspect is still debateable.[19]

C. *Technology With Reference To Environment*

International Safeguards: -

1. The Antarctic treaty, 1959
2. Convention for the International Council for the exploration of Sea (ICES) 1964
3. Ramsar convention 1971
4. United Nations Conference on Human Environment, 1972 Stockholm declaration.
5. World charter for Nature, 1982
6. Vienna Convention on protection of Ozone layer (1985) and Montreal protocol, 1987
7. Brundlant Report 1987
8. United Nations Conference on environment and Development, 1992 (Earth Submit)
9. The Rio Declaration on Environment and Development.
10. Kyoto Conference and pact on global warming.
11. AARHUS Convention, 1998
12. Johannesburg conference on earth Submit (2002)
13. Cartagena Protocol on Biosafety, 2003.

The impact of technology on the environment can be observed with the extinction of fauna and flora, the felling of rain forests, desertification, the pollution of the atmosphere, of lakes, rivers and sea, oil spillage, discharges into the ocean of radioactive and other toxic wastes, unregulated depletion of marine species from plankton to

19 Quartz India, Aadhaar is voluntary—but millions of Indians are already trapped, *available* at: https://qz.com/india/1351263/supreme-court-verdict-how-indias-aadhaar-id-became-mandatory/ (last visited on June 16 2021).

whales, destruction of coral reefs.[20] All of the above can cumulatively affect the global food chain, apart from their damaging effects upon the pure and healthy environment.[21] New technologies make massive deforestation a much easier operation than ever before. The loss of tree cover caused by uncontrolled felling of forests has an impact in at least three major ways. Firstly, it raises the carbon dioxide level in the atmosphere which otherwise the forest might have absorbed; Secondly, it erodes the valuable topsoil on which agriculture depends. Thirdly, it raises the water table and pumps it into the atmosphere, with the result that the water table rises, carrying its salt layer to the surface and turning green belts into arid wastes.[22]

The technological developments have led to the invention of new chemicals, nearly one thousand new chemicals many of them untried, come on the market each year, swelling the ranks of the nearly 100000 chemicals already in use. The world health organisation estimates that 75-85 per cent of cancers are triggered by environmental agents, such as industrial chemicals. Herbicides, such as Agent Orange, are thought to have caused sterility and deformities.[23] In order to address all these problems, major international conferences such as the 1992 Rio Conference on the environment, bring together all the member states of the United Nations but, by and large, the solutions, if any, are only partial and the problems grow, in intensity from year to year.

National Safeguards:

1. Constitution of India

a. Preamble-Socialistic, democratic, republic, Justice and Equality.

b. Fundamental rights – Article 21 of the constitution.

c. Directive Principles of the state policy: -Article 48A

d. Fundamental Duties: - Article 51A(g)

e. Centre-State relations (Article 245-263)

f. Seventh Schedule of the constitution, concurrent list 42nd Amendment

20 *Supra notes 12 at* 7.
21 *Ibid.*
22 *Ibid.*
23 *Ibid.*

i Entry 17-A providing for forests.

ii Entry 17-B for the protection of wild animals and birds.

iii Entry 20-A providing for the population control and family planning.

g. Eleventh schedule of the constitution.

Added by 73rd Amendments Act, 1992, this schedule has 8 entries which provides for environment protection and conservation.

h. 12th Schedule of the constitution –entry 8 provides for environmental issues and the duty of the urban local body's to protects and preserve the environment.

2. Statutory measures

a. The Water (prevention and control of pollution) Act, 1974.

b. The Air (prevention and control of pollution) Act, 1981

c. The Environment (prevention and Control of pollution) Act, 1986.

All these constitutional Statutory, and Judicial measures have unanimously directed themselves towards the environmental issues, particularly the judiciary has observed in so many cases that right to clean and pollution free environment is the fundamental right of the citizens and with the advancement in science and technology , the environment has somehow gets degraded, taking it seriously Hon'ble chief justice of India the then, P.N Bhagawati, in *M.C Mehta Case* while propounding the doctrine of absolute liability has categorically stated that " We do not want development at the cost of the life of human beings, therefore it's better to go back to the age of bullock cart".[24]

Recent Developments

The international workshop titled "A science-based approach to realize the future we want for all" was held in Kuala Lumpur, Malaysia, from 4 to 5 April, 2013. It was organized by UNESCO and LESTARI, UKM in collaboration with ISTIC and MEXT-Japan and was attended by a number of eminent international delegates.[25] Complexities and

24 See also *M.C Mehta* v. *U.O.I* AIR 1987 SC 985; *M.C Mehta* v. *U.O.I* AIR 1987 SC 982; *M.C Mehta* v. *U.O.I* AIR 1987 SC 1086; *M.C Mehta* v. *U.O.I* AIR 1988 SC 1037.

25 Kuala Lumpur Statement "Sustainability Science, A Science based approach to realize the future we want for all" *available at* http// www. portal.unesco.org (visited on September 29, 2013).

interrelationships of key global challenges require that "Sustainability Science" needs to be implemented through integrated approaches between the social and human sciences and the natural sciences. It is recommended to the governing bodies that UNESCO may promote this integrated approach into the next medium-term strategy and the programme and budget.[26] Interrelated complex sustainability challenges in society are deeply related to people's perceptions, sense of values, social systems and behaviour, which also interact with government policy and overall world perspectives. All interested parties need to continue to develop governance dialogues and sustainability science methodologies which addresses issues of equity, good governance and reverses unsustainable practices at all levels.[27]

Conclusion

The distinctive characteristics of modern civilized are expressly dependent upon technological support, in which hardly anyone knows anything about science and technology. This is a clear perception for disaster. It is dangerous and stupid for us to remain ignorant about global warming, ozone depletion, toxic and radioactive wastes, acid rain, job and wages depend upon science and technology. Because of the low birthrate in the 60's and 70's the national science foundation projects a shortage of nearly a million professional scientists and engineers in coming future, where will they come from? What about fusion, supercomputers, abortion, massive reduction in strategic weapons , addiction, high resolution TV, airline and airport safety food additives, animal rights, superconductivity, mid-getman vs. rail garrison MX missiles , going to mars , finding cures for AIDS and cancers? How can we decide national policy if we don't understand the underlying issues?[28] There are a reason people are nervous about technology, reasons lead to the very apprehension of the destruction of the climate of the planet, the availability of thalidomide, CFCs, Agent Orange, nerve gas and procurement of disastrous nuclear weapons, created the foundation for the very apprehension. We just can't conclude by saying that science puts too much power into the hands of morally feeble technologist or

26 Supra note 26 at 20.
27 *Ibid.*
28 *Supra note* 9 at 5.

corrupt, power crazed politicians and decide to get rid of it. Advances in medicine and agriculture have saved more lives that have been lost in all the wars in history. The resulting comfort that the modern civilized world is witnessing in the form of transportation, communication and entertainment is the direct manifestation of scientific and technological advancement. In *M.C Mehta v. Union of India*[29] the Hon'ble Supreme court of India while observing the disastrous impact of science and technology on human life has held that state can impose restriction on manufacturing of hazardous substance in order that people have right to live in a clean environment. To which constitutional protection in the form of fundamental right and international safeguards in the form of Human right are available to persons.

29 AIR 1987 SC 985.

The Comparative Analysis of Legal Framework for Privacy Protection vis-a-vis Telemedicine in U.S.A, U.K, Malaysia and India

Khusboo Malik*

Abstract

We are living in an era of technology where everything which we can think of may be realised in a wink of eye. Despite technological advancement the most of the parts of the world are still lagging behind in providing standard health care mechanism to their citizens. Apart from the challenges of terrorism and poverty, to provide quality health care to all is the greatest challenges before the human race in the 21st century. Lack of professionalism, education and poverty is making the situation more and more uncontrollable. When we look at the scenario in Indian perspective we can find that most of the qualified medical consultants choose to work in urban areas and reluctant to move in rural areas. India which is considered to be a nation of villages (six lakh villages) having almost two- third of its population only have one-fourth of the qualified medical consultants. According to PwC(PricewaterhouseCoopers) report availability of hospitals in vicinity is not a common phenomenon in India and every rural patient has to cover a long distance to reach a quality hospital. Furthermore, number of trained physicians is a matter of concern as not even one consultant is available over 1000 people. This urban rural gap can be filed by providing healthcare services through telemedicine.This paper is an attempt to discuss telemedicine, Right to Privacy in India, need of Privacy Protection in India and comparative study with other countries like U.S.A, U.K and Malaysia to practise Telemedicine.

* Khushboo Malik , Ph.D. Research Scholar, Faculty of Law, University of Delhi

INTRODUCTION

There is no gainsaying in the fact that the advent and development of technology makes our lives easier than ever before in all the facets of life be it professional or personal. The "right to privacy" has been a matter of debates and deliberations since long. Even in India this right was under the clouds of doubts for want of clear judicial pronouncement. Technology has paved its way in all the aspects of human lives and as per the age old adage ***'that every coin has two sides'***so is the case with technology. We are enjoying its fruits on the perils of becoming prey of it. It has been providing an equal platform for the breeding of the delinquent behaviour, consequently, privacy of our lives, valuable security, information and digital data is always on the brink of unauthorised access or theft. Keeping in view the gravity of the matter almost every country exists round the globe has been ruminating for the enacting a law which can save the innocent user and his privacy from digital delinquency.Though a universal set and application of law to protect privacy and nabbed the digital delinquents is the need of the hour but for want of consensus amongst all the nations nothing substantial has been done so far and as a result we often see the malware attacks in different parts of the world.

New technologies have vastly improved the ability to electronically record, store, transfer and share medical data. While these new advances have potential for improving health care delivery, they also create serious questions about who has access to this information and how it is protected. Additionally, this technology is threatened by potential unauthorized intrusion, such as computer hackers who have been known to tap illegally into private information on computer networks. Computer hackers could possibly gain access to and even alter patient records. Clearly, privacy and security concerns are not unique to telemedicine. Protection of personally identifiable information--whether health information, banking records or employment history data, must be ensured before consumers, patients and other users are willing to participate in electronic commerce. However, the challenge for telemedicine policy makers lies in identifying emerging concerns that

are unique to telemedicine. Lack of privacy and security standards do play an important role in the legal challenges facing telemedicine (e.g. malpractice) and have profound implications for acceptance of telemedicine services. This is of particular concern in the use of telemedicine technologies for treating mental illness, substance abuse, and other conditions that carry a social stigma.

Definition of Telemedicine

Telemedicine is defined by the Telemedicine Information Exchange(1997) as the "use of electronic signals to transfer medical data (photographs, x-ray images, audio, patient records, videoconferences, etc.) from one site to another via the Internet, Intranets, PCs, satellites, or videoconferencing telephone equipment in order to improve access to health care."[1] Reid (1996) defines telemedicine as "the use of advanced telecommunications technologies to exchange health information and provide health care services across geographic, time, social, and cultural barriers."[2]

According to American Telemedicine Association, telemedicine is the use of medical information exchanged from one site to another via electronic communications to improve a patient's clinical health status. Telemedicine includes a growing variety of applications and services using two-way video, e-mail,smart phones, wireless tools and other forms of telecommunications technology.[3]

Right to Privacy in India

Right to privacy was not given expressly in the texts of '**The Constitution of India**'. Different versions given by various courts over this right but it was always remains unclear for want of lucid interpretations. But recently nine judge bench of the Supreme Court in the case of, namely ***'K.S Puttuswamyvs UOI'*** by overruling its earlier

1 http://ocean.st.usm.edu/~w146169/teleweb/telemed.htm accessed on 31 march 2014
2 Ibid.
3 What is Telemedicine available at: http://www.americantelemed.org/about-telemedicine/what-is-telemedicine#.UzjRelf_GqI accessed on 31 march 2014

decisions held that Indians do have the fundamental right to privacy, which is intrinsic to life and liberty and thus comes under Article 21 of the Indian constitution and is an inalienable natural right.It also conferred additional protections which were not earlier available to it as a common law/statutory right. These include: – As a fundamental right it cannot be amended out of existence by the legislature. The legislature may interfere with the right of privacy in following conditions: the invasion must be by way of legislation; the legislation must be for the public interest, the legislation should be reasonable and have a nexus to the public interest. The SC Obliges the State to take positive measures to protect privacy i.eto take proactive steps to formulate a regime of data protection – in lieu of the fact that the collection and analysis of big data might infringe upon the right of privacy of the subjects whose data is collected.The Supreme Court and the High Courts may be approached directly in the event of breach of right to privacy under Article 32 and Article 226, respectively, of the Constitution.

In the above said judgement a distinction between anonymity and privacy is also explained.Both anonymity and privacy prevent others from gaining access to pieces of personal information yet they do so in opposite ways. Privacy involves hiding information whereas anonymity involves hiding what makes it personal. An unauthorised parting of the medical records of an individual which have been furnished to a hospital will amount to an invasion of privacy. On the other hand, the state may assert a legitimate interest in analysing data borne from hospital records to understand and deal with a public health epidemic such as malaria or dengue to obviate a serious impact on the population. If the State preserves the anonymity of the individual it could legitimately assert a valid state interest in the preservation of public health to design appropriate policy interventions on the basis of the data available to it.[4]

In this judgement it was also recognised that Information Privacy is also a facet of Right to Privacy and in the present age of information due

4 http://supremecourtofindia.nic.in/pdf/LU/ALL%20WP(C)%20No.494%20of%202012%20Right%20to%20Privacy.pdf

to technological advancement there is threat not only from state but non-state actors as well and recommended to have a data protection policy in India .

Need of privacy protection in Telemedicine

Undoubtedly, the health related information is very sensitive and important, to keep it secure is a very daunting task. The importance of data may be paraphrased in a way that health related information which is mustered collected and stored in the form of Electronic Health Records to provide telemedicine services to the patients or for the purpose of tele-consultation among doctors themselves for seeking their opinion on giving best treatment to patients or use of such records for tele-education *i.e.* for imparting education to medical students. Health professionals are largely depend on these records as any alteration or tampering with these records will change the diagnosis of disease and thus treatment and medicine prescribed which may be fatal for the concerned patient, risking his or her life. In India use of telemedicine to provide healthcare is in its infancy, but tomorrow if it develops as technology and introduced in our mainstream healthcare system there may be instances of well planned murder conspiracies by making changes in such health records.

Thus the issue of the security of such health records is of paramount significance and must be dealt with intelligently by our law making agencies.

If we do not have clear guidelines the healthcare professionals will not take interest in using this technology for providing their services as there will be constant fear of prosecution so it is necessary to define clearly the liability of healthcare professionals and all those who have access to such information. Millions of electronic health records are scrutinized each year by pharmaceutical benefit management(PBM) illegallyinfringing right to privacy of patients.

Various issues need to be addressed in telemedicine consultations to avoid infringement of privacy which are not explicitly addressed in our country these are

- How the patient's right of confidentiality of his personal data will be ascertained and safeguard?
- How to determinedthe security of the personal health data and confined itsaccessibility to only for the person entitled and authorised to view it?
- How to safeguard against its misuse of electronic records by unknown and unauthorisedaccess, interruption, Modification, or fabrication?
- Law is silent on consent in practising telemedicine(no standards of consent)
- No clear, separate telemedicine and electronic media-related health laws
- Lack of legalisation ontele-consultation.

Instances of leaked EHR OR EMR due to lack of availability of adequate safeguards

In the first week of December, it was reported that the electronic medical records (EMR) of over 35,000 patients held by a Maharashtra-based pathology lab were leaked, pointing to the lack of availability of adequate safeguards for protecting such sensitive information[5].

Such instances, however, are not uncommon. Globally, the medical industry is extremely susceptible to data breaches. The Office of Civil Rights under the US Department of Health and Human Services estimated that in 2015 alone, over 100 million records were breached, with most cases being linked to IT crimes and hacking[6]. In 2012, in Florida, an individual displayed list of 4000 AIDS patients

Laws in other countries and India related to practice of telemedicine

Laws of various countries related to practice of telemedicine are as follows:

5 Without Data Security and Privacy Laws, Medical Records in India Are Highly Vulnerable available athttps://thewire.in/102349/without-data-security-and-privacy-laws-medical-records-in-india-are-highly-vulnerable/

6 Ibid.

U.S.A

Among all of America's critical infrastructures, the healthcare sector is the most targeted and plagued by perpetual persistent attacks from numerous unknown malicious hackers, intent on exploiting vulnerabilities in their insecure and antiquated networks in order to exfiltrate patient health records. The United States of America spends approximately 18% of its GDP on healthcare. Incidentally, ~47% of the population of the United States have had their personal healthcare data compromised over last 12 months. According to digital security company Gemalto's report "Data Breach Index for the first half of 2015," of the 16 critical infrastructure sectors, the Healthcare industry suffered from the most recent data breaches, an estimated ~21% (188 out of 888 reported events). [7]

As healthcare sector manages very sensitive and diverse data in form of personal identifiable information and electronic protected health information there is need to protect such data from cyberattackers. Therefore, in 1996 the U.S.A enacted Health Insurance Portability and Accountability Act of 1996 ("HIPAA") to set national standards for protection of such information. The office of the National Coordinator for Health Information Technology (ONC) provides resources to healthcare professionals so that they can succeed fulfilling their privacy and security responsibilities. This guide to Privacy and Security of Electronic Health Information is refereed to as "guide."[8]The objective of the guide is to help health care professionals-especially Health Insurance Portability and Accountability Act(HIPPA), Covered Entities(CEs) and Medicare Eligible Professionals(EPs) from smaller organizations-better understand how to integrate federal health information privacy and security requirements into their practices.This guide also aims to provide updated information about fulfilment of the Medicare and Medicaid

7 Hacking healthcare IT in 2016 available at http://icitech.org/wp-content/uploads/2016/01/ICIT-Brief-Hacking-Healthcare-IT-in-2016.pdf

8 The office of the National Coordinator for Health Information Technology Guide to Privacy and Security of Electronic Health Information available at https://www.healthit.gov/sites/default/files/pdf/privacy/privacy-and-security-guide.pdf

Electronic Health Record (EHR) Incentive Programs privacy and security requirements as well as HIPPA Privacy , Security and Breach Notification Rules.

The U.S. Department of Health and Human Services (HHS), via ONC, the Centers for Medicare and Medicaid Services (CMS), and the Office for Civil Rights (OCR), supports privacy and security through a variety of activities. These activities include the meaningful use of certified EHRs, the Medicare and Medicaid EHR Incentive Programs, enforcement of the HIPAA Rules, and the release of educational resources and tools to help providers and hospitals mitigate privacy and security risks in their practices.[9] In January 2013 HHS also issued HIPPA Privacy, Security, and Breach Notification Rules to set forth rules how certain entities, including most health care providers, must protect and secure patient information.

The Insurance Portability and Accountability Act (HIPPA) and its Rules

The HIPPA was passed by congress in 1996 to streamline electronic health records systems while protecting patients, improving healthcare facilities and reducing fraud and abuse. It also addressed issues like security and privacy of health data also requires that Department of Health and Human Services to establish national standards for electronic health care transactions and national identifiers for providers, health plans and employers. Providers of telemedicine services should comply with HIPPA requirements as if they are treating in person but additionally they need to ensure that environment in which telemedicine interaction is taking place i.e. the originating and the distant site is secure and patient information is not inadvertently exposed.

The following HIPPA Rules give patients an array of rights with respect to their health information these are:

- **"The Privacy Rule"**- This rule helps in protecting the individual identifiable health information held or transmitted in oral or electronic form. It may be in the form of medical record, laboratory

9 Ibid.5

report or hospitals bill or patients name /or other identifying information and is termed as "protected health information" or "PHI".

- These rules also defines BAs *i.e.* Business Associates these are the persons other than service providers who perform certain functions on their behalf. They may perform data analysis, claim processing, certain patient safety activities and quality assurance, etc.
- "**The Security Rule"**- These rules defines the National standards for the protection and the security of electronic Protected Health Information(ePHI).
- "**The Breach Notification Rule**"- which mandates Business Associates(BAs) and Covered Entities(CEs) to provide notification following a breach of unsecured Protected Health Information(PHI).

These rules also set out limits to use limits on uses and disclosures of patient information and individuals rights in case of breach of privacy. It also defines purposes for which such information can be disclosed without permission *i.e*.consents of patient.These rules make it mandatory for every covered entity to provide patients with Notice of Privacy Practices (NPP).Moreover under these rules all telemedicine programs should undergo a program namely, security risk analysis called "security risk assessment" to identify potential security flaws and weaknesses.

Civil and Criminal penalties for non compliance of HIPPA Act and Rules

The "Office for Civil Rights(OCR)" is able to impose civil penalties and U.S Department of Justice investigates and prosecutes criminal violations of HIPPA for knowing misuse of unique health identifiers and knowing and unpermitted acquisition or disclosure of "Protected Health Information(PHI)". Overview of penalties depending upon intention while disclosing information is as follows:

- If Did Not Know or Could Not Have Known while disclosing penalty may range from $100 – $50,000
- If disclosure done with Reasonable Cause and Not "Wilful Neglect"penalty is $1,000 – $50,000
- If disclosure done with"Wilful Neglect", but Corrected within 30 Days penalty is $10,000 – $50,000

- If disclosure done with "Wilful Neglect" and notcorrectedwithin 30 Days penalty is $50,000
- Annual cap for all violations is $ 1.5 million

United Kingdom

Apart from EU Data Protection Directive, U.K has enacted Data Protection Act,1998. This Act was enacted to make new provisions for regulation of information relating to individuals, including the obtaining ,holding, use or disclosure of such information. This act gives individual rights in respect of their personal information and sets out obligations of 'data processors[10]' and 'data controllers[11]' and also seeks to establish penalties in case of breach and an enforcement regime. In Durant v. Financial Services Authority[12] it was held in this case that not all information about a person can trigger the application of data protection law, since only information that affects an individual's privacy can be considered personal. This case defines data as personal only if it affects privacy. Under section 2 of the act is defined "sensitive personal information" which means personal data[13] consisting of information as to[14](a)the racial or ethnic origin of the data subject,

(b)His political opinions,

(c)His religious beliefs or other beliefs of a similar nature,

(d)Whether he is a member of a trade union (within the meaning of the **M1**Trade Union and Labour Relations (Consolidation) Act 1992),

---

10 U.K Data Protection Act,1998 (data controller" means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

11 U.K Data Protection Act,1998("data processor", in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;)

12 2003 EWCA Civ 1746

13 U.K Data Protection Act "personal data" means data which relate to a living individual who can be identified— (a)from those data, or (b)from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

14 U.K Data Protection Act,1998

(e)His physical or mental health or condition,

(f)His sexual life,

(g)The commission or alleged commission by him of any offence, or

(h)any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

The EC Data Protective Directive acts as the basis for various national data protection laws in EU member states , providing eight data protection principles to the states that apply Directive.[15]the data protection principles are set out in schedule 1of the Act. The core data protection principle is the fair and lawful processing of personal information[16].The information must be obtained for one or more specified and lawful purposes, and must be relevant to the purpose for which they are processed[17]. The data should not be stored for longer than is necessary for the specified purpose[18].further both the controller and processor are under an obligation to enforce appropriate technical and organizational measures to protect against unlawful processing[19]. The processor is subject to the same stringent conditions imposed on the controller, who remains under a further obligation to monitor the processor's compliance with the security measures for the duration of the agency[20]. Under DPA there is provision for imprisonment and penalities in case of non –compliance of the provisions of this Act.The European Court of Human Rights ('ECtHR') emphasized the importance of protecting a person's health data in I v. Finland in 2008[21]

Records Management Code of Practice: Its part 1 was published on 30th March 2006 by the Department of Health as a guide to the required

---

15 Data Protection Directive
16 U.K Data Protection Act,1998, Schedule 2 and 3
17 U.K Data Protection Act,1998, Schedule 1,Part1,Principle 2 and 3.
18 U.K Data Protection Act,1998, Schedule 1,Part,Principle 5
19 U.K Data Protection Act,1998, Schedule 1,Part,Principle 7
20 P.Room& F.F. Waterhouse, Butterworths Data Security Law and Practice 68(2009)
21 Application No. 20511/03:2008 ECHR 623

standards of practice in the management of records for those who work within or under contract to NHS organisations in England. It is based on current legal requirements and professional best practice. Part 2 was published on 8 January 2009 which deals mainly with all of the retention periods.

MALAYSIA

To protect personal data from being misused government of Malaysia enacted Personal Data Protection Act(PDPA),2010 which came into force on 15th Nov 2013. Data users were given 3 months to comply with its conditions from date of enforcement and for its compliance following subsidiary Acts were introduced:

1.Personal Data Protection (Fees) Regulations 2013;
2. Personal Data Protection (Registration of Data User) Regulations 2013;
3. Personal Data Protection (Class of Data Users) Order 2013;
4. Personal Data Protection Regulations 2013 and
5. Personal Data Protection (Compounding of Offences) Regulations 2016,

The PDPA seeks to protect personal data from being misused. Personal data is defined as any information collected or processed in connection to a commercial transaction by any equipment operating automatically (e.g., ATM, Computers) which is capable of identifying a person (i.e data subject). The above definition will include such information as names, addresses, identification card/passport numbers, email addresses, telephone numbers, as well as banking details.[22]. This act not only prohibits collection of data without the consent of data subjects but also disclosure of such collected data without their consent. It mandates data users to inform the data subjects purpose for which their data is being collected, who all will have access to such data and about their choice how this data can be used. Under PDPA a duty is imposed on the data users to have in place adequate security and

22 Privacy Rights available at http://www.kass.com.my/data-protection/

indemnity measures to 'prevent the theft, misuse, unauthorized access, accidental disclosure, alteration or destruction' of data under their care. The data subjects are also given certain rights like having access to their data, modify or update it. The act also specifies certain situations where such personal data may be used like in cases of detection of crimes, or data processed outside Malaysia. Processing personal data without certificate of registeration and without the consent of data subjects is made punishable under PDPA.

Malaysia also enacted Telemedicine Act 1997 with a aim "to provide for regulation and control of practice of Telemedicine in Malaysia and for matters connected therwith". This Act specifically defines persons who may practice telemedicine there and also specifies need of certificate from Medical Council of Malaysia for medical practitioners registered outside Malysia to practice Telemedicine there .It also specifies time period for which such certificate shall be granted. The Medical Council has been given power to change the terms of certificate as well as cancel it. Under the legislation it is mandatory for the medical practitioner to obtain informed consent of the patients and to inform his regarding his right to withdraw consent at any time,of potential risks benefits, consequences of using telemedicine and that existing confidentiality policy required is applied to his /her records and such information will not be forwarded for any research purpose. This written consent shall be made part of patient's records. If such provisions are not fully complied with, the registered medical practitioner shall be guilty of a criminal offence and on conviction be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding two years or to both[23].

The Minister may make such regulations as appear to him to be necessary or expedient for carrying into effect the provisions of this Act[24]. The legislation can be made to prescribe the minimum standards in respect of any facility, computer, apparatus, appliance, equipment, instrument, material, article and substance which are to be used in the

23 Telemedicine Act,1997 of Malaysia
24 Telemedicine Act,1997, of Malaysia,Section 6

practice of telemedicine on any premises[25]. To provide for acceptable quality assurance and quality control in respect of telemedicine services[26]. To require persons practising telemedicine to maintain such books, records and reports as may be necessary for the proper enforcement and administration of this Act and to prescribe the manner in which such books, records and reports are to be kept and issued[27]. To require the furnishing of statistical information to the Director General[28].To provide that the contravention of any provision of any regulation made under this Act shall constitute an offence and that persons convicted of such offence shall be liable to a fine or imprisonment or both but such fine shall not exceed five thousand ringgit and such imprisonment shall not exceed one year[29]. To prescribe the offences under this Act or the regulations made under this Act which may be compounded and the person by whom and the manner in which such offences may be compounded[30]. To prescribe any other matter which isrequired or permitted by this Act to be prescribed[31].

India

Improvement in Information and Communication technology have allowed us to impart health services using technology such as telemedicine. In a country like ours where there is unequitable distribution of resources telemedicine has the potential to provide healthcare services in rural and distant areas.

But a shift from manual health records to 'electronic health records' is not protected adequately by present legal framework of data collection, its usage and breaches. Even in recent privacy judgement the SC emphasised on need of data protection policy in India as we have no specific legislation on Data Protection. Indian law only determines

25 Telemedicine Act,1997, of Malaysia Section 6(2)(a)
26 Telemedicine Act,1997, of Malaysia Section 6(2)(b)
27 Telemedicine Act,1997, of Malaysia Section 6(2)(c)
28 Telemedicine Act,1997, of Malaysia Section 6(2)(d)
29 Telemedicine Act,1997, of Malaysia Section 6(2)(e)
30 Telemedicine Act,1997, of Malaysia Section 6(2)(f)
31 Telemedicine Act,1997, of Malaysia Section 6(2)(g)

where privacy will be afforded legal protection but fails to determine what Privacy is.Existing laws does not adequately address concerns relating to health information and telemedicine practice in India. For understanding medico legal aspects of digital medicine, one needs into account following acts and regulations under consideration:

1) The Information Technology Act,2000, amended by Information Technology (Amendment) Act (2008) henceforth referred to as the IT Act, The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011

2) Other Service Providers Regulations under the New Telecom Policy 1999("OSP Regulations")

3) The Indian Medical Council Act, 1956("MCI Act") and The Indian Medical Council (Professional Conduct, Etiquette and Ethic 2002)

Other guidelines

1. Recommended guidelines and standards for practice of Telemedicine in India. by Department of Information Technology(DIT), Ministry of Communications and Information Technology (MCIT)

2. Electronic Health Record Standards –approved by Ministry of Health and Family Welfare(MoHFW

The Information Technology Act

The IT Act contains provisions for the protection of electronic data under section 43 A and section 72.IT Rules 2011 along with these sections are only codified provisions protecting privacy of individuals and their personal information. Under rule 3 of the rules definition of sensitive personal data is provided which is termed as 'Sensitive Personal Data Information'(SPDI).

Section 43 A along with the sensitive personal information rules lay down the compliances that a "body corporate" which collects or stores or otherwise deals with sensitive personal data or information such as passwords, financial information, health conditions, sexual orientation, biomedical records and medical records and history need to follow.It mandates corporates to take reasonable procedures to protect sensitive personal data by adopting 'Reasonable Security Practices'.Though Act

mandates that body corporate collecting information should obtain consent, proper manner of consent for various purposes is not defined.For the purpose of Section 43 A "body corporate", is defined as "a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities[32]." Since a majority of India's population cannot afford private healthcare, public medical services and hospitals are invariably used more often. There is a lack of remedies if public hospitals or NGOs do not maintain reasonable security practices, thus a large volume of personal information is left vulnerable[33].

Section 72 Breach of confidentiality and privacy[34]**.-** "Save as otherwise provided in this Act or any other law for the time being in force, any person who, in pursuant of any of the powers conferred under this Act, rules or regulations made there under, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both".

Neither IT Act nor the rules define word processing and in telemedicine consultatiion a lot of processing of EHR is done. The IT Act and Rules also fail to define 'data controller' as well as 'data processor' though rules define 'data subject'. The rules states that "provider of information" is synonymous with "data subject". There are no legislative registeration requirements for such data processors. Also there is no legal requirement on the 'data processor' to report data security breaches to either authorities or data subjects.

Under Rule 5, sub section 6 the 'data subjects' has been given right to access the data they have provided but fails to provide procedure to be

32 The Information Technology Act, 2008

33 Without Data Security and Privacy Laws, Medical Records in India Are Highly Vulnerable available at https://www.google.com/url?hl=en&q=https://thewire.in/102349/without-data-security-and-privacy-laws-medical-records-in-india-

34 The Information Technology Act,2008

followed by 'data subjects' in exercising such right and is also silent on time limit within which such request should be complied by 'data processor'.

In telemedicine consultations a lot of information related to patients is stored over cloud neither the Act nor the rules contains provisions relating to cloud-based data processing.

The Indian Medical Council Act, 1956("MCI Act") and The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002

By virtue of 'Hippocratic oath' taken by a physician under this act and regulations the physicians are obliged not to disclose and to protect the confidentiality of patients during all stages of the procedure and relating to all aspects of the information provided by the patient to the doctor, including that relating to their personal and domestic lives. But these are simply guildelines with no mechanism in the Act or Regulations to enforce them. For disclosing an anonymised medical information of individual no authorisation is required.

Recommended Guidelines & Standards For Practice Of Telemedicine In India

The Department of Information Technology, Ministry of Communications and Information Technology issued Recommended Guidelines & Standards for Practice of Telemedicine in India in May, 2003. As the name suggests, these Guidelines are not binding, although it is advisable to follow them as various issues arising from Telemedicine have yet not been tested by Indian Courts. The highlights of the document "Guidelines and standards for practice of Telemedicine in India" published by the communication and information technology Department of Information Technology are as follows:

1. Preamble

Inspired by recent advances in the provision of health care and medical education through the use of Information and communications technology[35];

35 Guidelines and standards of telemedicine, Dr. B.S. Bedi&R.L.N Murthy, available

- To address the common interest of the health and community welfare of the people of India;
- Realising that the promotion of Telemedicine will contribute to the availability of high quality medical services to the needy irrespective of socio economic and geographical disparities;
- Recognizing the Right to privacy and confidentiality in health matters;
- Desiring to contribute to broad international collaboration in the scientific, legal, and ethical aspects of the use of Telemedicine;
- Believing that such collaboration will contribute to the development of mutual understanding and strengthen the friendly relations between states and people
- Encouraging to provide a continued support for the development of Telemedicine /Telehealth, its applications and its greater relevance to India;
- Government of India is convinced that if a set of Standards and guidelines on Telemedicine be defined, that will promote the goal of providing all people and practically attainable standard of health care, which is sustainable in an integrated manner.
- As part of this endeavour, Department of Information Technology(DIT), Ministry of Communication and Information Technology(MCIT), has takeninitiative on the evolution and adaptation of standards for the practice of Telemedicine, under the aegis of the "Committee for standardization of digital information to facilitate implementation of Telemedicine systems using Information Technology (IT) enabled services.",
- The committee is supported by a "Technical Working Group (TWG)", consisting of members drawn from different government and private agencies/institutions with a mandate to evolve and submit a document on suitable standards and guidelines for Telemedicine practice in India.

athttp://laico.org/v2020resource/files/guidelinessandstandards.pdf(Oct 25,2014)

2. Need for Telemedicine Standards[36]

- With the advances in technology the delivery of healthcare to even remote locations has become practicable through methods like Telemedicine interoperability and interconnection .
- With Telemedicine services being developed into multiple and disparate networks in an operational mode in the country, there is an impending need to evolve standards and guidelines to facilitate growth of practice of Telemedicine that is standardized and scientific.
- Standards imply technical compliance with strict and defined criteria.
- In addition to technical standards, "clinical protocols and guidelines" are needed. "Clinical protocols for Telemedicine practice include preliminary scheduling procedures, actual consultation procedures and Telemedicine equipment operation procedures(such as telecommunication transmissions specifications)".

3. Key objectives in defining Standards[37]

- To advance the growth of Telemedicine.
- To enhance availability of quality medical service to those in need.
- To impart quality medical services, as it facilitates access to expert opinion leading to better diagnosis , treatment and prognosis.
- To define practice of Telemedicine technology that is appropriate to the Indian environment.
- To identify the means for protecting the privacy and confidentiality of patients health data.
- To define processes for "scientific practice" of Telemedicine.
- To contribute to broad international cooperation in the scientific, legal and ethical aspects of the use of Telemedicine.
- To encourage continued support for the advancement of Telemedicine and the applications globally to keep the standards contemporary.

---

36 *Ibid.*
37 *Ibid*

- To provide a framework for interoperability and scalability across Telemedicine services within the country and outside.

4.Framework in defining the guidelines and standards

Key considerations in Defining Guidelines & Standards include- Interoperability, Compatiblity, Scalability, Portability and Reliability. This framework has been so adopted to ensure – Inclusion of all the stakeholders, Making Recommendations vendor neutral, Making standards technology neutral. For a better and complete understanding of these concepts[38].

5. "Scope of the Standards"

The scope of the standards include the standards and guidelines for Telemedicine Infrastructure, connectivity, Data Interchange and Exchange along with Minimum Data sets and security[39].

6. "Classification of Telemedicine Centres"[40]

The Telemedicine Centre can be broadly classified into three classes. Primary Telemedicine Centre (PTC), Secondary Telemedicine Centre (STC) AND Tertiary Telemedicine Centre(TTC).There could be further sub classified as three major levels L1,L2 AND L3 depending on the size and facilities available, the smallest being L1.The Hardware requirement/standards are referred in the context of Telemedicine Consulting Centre(TCC) and Telemedicine Specialist Centre(TSC).

7."Details about the Recommended Standards"

This section provides the recommended specifications about Telemedicine platform to be used, clinical devices to be included in system, kind of configuration systems to be used, communication hardware required, patient information records to be supported by software, storage and transmissions formats for patient information records, data interchange/exchange standards, exchange of clinical message among systems-HL7, security measure to be addressed. The guidelines suggest following three tiers of identifiers to monitor the system. These are: health care provider identifier, doctor identifier and

---

38 *Ibid.*
39 *Ibid*
40 *Ibid.*

universal patient identifier , it also emphasise on need for a new digital id card, role of embedded digital signature systems to ensure confidentiality.

Though, the recommendations emphasised on issue of security policies. This document does not consider access control policies, but identifies the technological means for telemedicine systems involved to exchange sufficient information to implement access control policies but there is no mention of access control policy. Moreover, emphasis is made that consent of patient should be taken before beginning the use of video visits, confidentiality of records should be maintained, but if there is any failure, nothing is in document which will establish liability of defaulting doctor, technicians or Internet Service Providers. Also, if such medical information is hacked & changes made & consultation done on such changed information, patient suffers injuries, does not explain who will be held responsible.

Electronic Health Record Standards –approved by Ministry of Health and Family Welfare(MoHFW)

The Ministry of Health and Family Affairs had released a comprehensive version of technical standards for 'Electronic Health Records' first in 2013 and in March 2016 a revised version was notified in December 2016. These need to be adopted in IT systems by 'health care institutions/providers' across the country. Ownership of data is clarified by these guidelines and states that patient will be the owner of his/her data. Healthcare providers shall be the owner of medium of storage or transmission of such electronic medical records and these electronic health records are held in trust by them on behalf of the patient. But these are only guidelines and are healthcare providers are not obiliged to follow these.

Suggestions

To make delivery of healthcare services by using Telemedicine as part of mainstream healthcare delivery system.

Tomake it mandatory for medical practitioners to have a certificate from medical council to practice telemedicine in India.

To enact a Telemedicine Act of India to lay down processes and standards for practising Telemedicine in India.

To have a Data protection authority to look in matters of unauthorised access of data.

As telemedicine is still in development stage in India a large number of medical practitioners, medical students are unaware about this technology. To generate awareness among them by seminars, conferences etc and to introduce it as a subject in their course.

Conclusion

Though legislations and regulations governing health sector are fairly aware of issues and concerns related to right to privacy.However, the existing set of laws and legal mechanism does not appositely deals with the issue in hand *i.e.* security and privacy of health information such as issues of security, privacy and confidentialityand concerns regarding telemedicine practice like standards of software to be used, bandwidth at which transmission permissible, requirements of license etc. There is need to address these issues at policy level and implementation level.India though is rapidly moving on the roads of development but still access to standard, affordable and effective healthcare to every single citizen of this country, irrespective of his economic status is a dream. However, issue of lack of good and qualified health practitioner in all the regions of the country may be dealt with the help of technology by providing and developing the e-Health industry. An appropriate piece of legislation may advanced the goal of public interest by providing them affordable health care round the clock with a promise to keep their information safe and secure. Therefore, it is need of the hour to enact law on the issue of privacy so that nation may walk with the rest of the World hand in hand. Otherwise, it will impede the growth of the nation and inimical to the law laid down by the Supreme Court in the case of "K S Puttaswami". Though it is known that obtaining the desired result is very hard in a short span of time but it may be anticipated that a small step in this direction may develop a positive outlook which support that the industry to grow and instill the sense of confidence in the public at large.

The Doctrine of Precedent in Constitutional Decision Making

Dr. Nisha Dhanraj Dewani*

Abstract

The judiciary is an indispensable organ of government, secured for the smooth functioning of our constitution. The judiciary decides on citizens' rights and obligations based on legislation, customs, along with center and state disputes.In furtherance of the justice, the judges refer to previous rulings and rely on previous interpretations of legal issues to conclude the trials. Precedents are occurrences or situations that can be used as a guideline for future circumstances. But the applicability of precedents depends upon the degree of persuasion that varies on the court issuing the ruling, the notion of stare decisis requires courts to uphold their decisions and not distraught the status quo.This article will cover the broad categories of precedent theory along with the issues like applicability and its extent taking into consideration the Supreme Court, High Court and District courts judgments.

Key Words: - Ratio Decidendi, Stare Decisis, Obiter dicta,

Introduction

The notion of precedent has been an important aspect of judicial practice. Being a part of common law principal, the theory of precedent is a cornerstone of the legal system's hierarchical structure. When a decision is issued by a forum of superior or concurrent jurisdiction while adjudicating the rights of the parties to a lis incorporating a declaration of law, it works as a binding principle for future cases until it is unsettled, and this aspect leads to the evolution of jurisprudence. A precedent-setting decision carries the weight of what it actually resolves,

* Dr. Nisha Dhanraj Dewani, Associate Professor, Department of law, Maharaja Agrasen Institute of Management Studies.

not peripheral issues. Not only it's a part of our constitution[1] but also it is considered as a source of law as per Articles 38(1)(d) and 59 of the Statute of the International Court of Justice (ICJ).

Meaning and Genesis

The precedent is a distinct aspect of the English legal system, and it became a fundamental part of the common law system in the early 1800s. Lord Mansfield had solidified and confirmed the idea of judicial consistency, declaring that "Law does not consist of individual cases, but of universal principles," which was reopened by '*Lord Tenterden'* in the nineteenth century. "*Decisions of our forefathers, the judges of old, need to be followed and embraced until we can see very clearly that they are wrong, for otherwise there will be no certainty in the administration of law," C.J. said*.[2]."

In the words of Gray, '*a precedent covers everything said or done which furnished rule for subsequent practice*[3]'.

The British House of Lords,before the creation of the UK Supreme Court had set a precedent. According to that judgment, the courts were not strictly bound to always follow its own decisions. This was in existence until the case of *London Street Tramways* v. *London County Council*[4] was decided. It was observed in this case that if any law point has been decided by the House of Lords, that matter would be closed unless and until that is amended by the Parliament.The above observation had laid a risk,if there is an erroneous decision, that mistaken judgment would bind the House of Lords itself and may lead to future cases of individual adversity. Subsequently, the House of Lords by a judicial Practice Statement whittled down the doctrine of *stare decisis,*thatthe court is not bound by its own decision. It is follows:

1 Art. 141, The Constitution of India.
2 Dr. B.N. Mani Tripathi, Jurisprudence: The Legal Theory, Allahabad Law Agency, 19th ed., p. 206.
3 Gray J.C. "The Nature and Sources ofLaw", 2nd ed., 1921. p. 198
4 [1898] AC 375

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

Classification of Precedent

As precedent is very important**, Salmond** divides the precedents into two types, authoritative and persuasive. A precedent is authoritative when the court to which it is cited is obliged to follow it, irrespective of whether it is correct or incorrect. It must be referred by the judges whether it is approved or not. In addition, persuasive precedent is not mandatory but is useful or pertinentand known as persuasive authority or advisory precedent. Decisions determined by lower courts, peer or higher courts from other geographic jurisdictions, cases made in other parallel systems, such as military courts, administrative courts, indigenous/tribal courts, and, in extraordinary instances, cases resolved by other nations, treaties, and world judgment etc can be considered in this regard.

Moreover, Precedents may be original or declaratory, an original precedent is one, which is originated through the application of law and is considered a new law. A declaratory precedent is one which is merely the application of an already standing rule.[5]

5 Supra note; 1, P.202

To apply the doctrine of precedent, the court has to considerthe magnitude, gravity and extent of various facts and issues. For instance: -

(1) Whether the decided case (referred as precedent) is essentially similar in its significant facts to the undecided one?

(2) If it is found to be similar through the facts and issues then what legal rule is intrinsic in the decided case?

(3) How and to what extent that rule can be applied to the undecided case?

- ***Ratio Decidendi***

Two conditions have to be satisfied before a precedent could become established. They are:-

(a) it must indeed be a decision and

(b) the binding force depends on the relative status of the courts concerned.

According to **Dias**, the meaning of 'ratio decidendi' has three colors. To begin with, it may signify 'the motive for making a decision.' In this sense, even a finding of fact could be the ratio decidendi. As a result, A may state a rule and then determine that the facts do not correspond to it. Second, it could refer to "*the rule of law presented by the judge as the foundation for his decision*," or "*the rule of law that others view as having binding authority.*"[6]Ratio is best understood as a signal for the direction that subsequent selections should go within a wide range of variations. The concept of ratio must be viewed in light of the passage of time.

A court decision, on the other hand, contains some features, such as what the case decides between the parties and what principles it establishes. A precedent is not created by anything a judge says when making a decision. The concept that underpins a judgement is referred to as law quality. The principle on which the case is determined is the sole part of a court's ruling that can be used as authority by a subsequent judge. The ratio decidendi, or rule of law, on which a court decision is

6 Dicey,RMW, 'jurisprudence', 5th ed., 1985, Butterworths Law Publication,London, p.52,

based, is what binds. As a result, *Ratio Decindi* is the rule applied by the court and indicative of the trend established by the courts.

- **Obiter dicta**

Obiter dicta are the judge's observations that aren't necessary for the decision to be made. During the course of a decision, a judge is required to make a number of observations that are not directly related to the matter at hand. These are merely ad hoc observations. They don't have binding authority, yet they're nonetheless significant.

Usefulness of *stare decisis* (Precedent)

As discussed earlier, the principle that pronounced judgements should be built on the precedents established by passed decisions is known as the doctrine of *stare decisis*. "*Stare decisis*:" is an abbreviation of the Latin phrase "*stare decisis et non quietamovere*" which means as "to stand by decisions that are already settled. Also not to disturb those settled matters". The principal of stare decisis is nothing more than, as observed by Dowrick, in justice. According to the English Common Lawyers[7], it is the principle that judicial decisions have a binding character[8].

The Indian Government of India Act, 1935, demonstrates that a Federal Courtwas established with the interposition of hierarchy of courts. As per the arrangements, the decisions of the superior courts will have the binding effect on the courts below[9]. Prior to independence, the Federal Courts' judgements were binding on all subordinate courts. The Privy Council's decisions were binding on both the Federal Court and the lower courts. The Privy Council ceased to be India's appeal court after independence, and the Federal Court was disbanded. The Supreme

7 (1961 Edn., p. 195)

8 *VidyaCharan* v. *Khubchand*, AIR 1964 SC 1691.

9 Sec. 212, The Government of India Act: "the law declared by federal court and by any judgment of the Privy Council shall, so far as applicable, be recognized as binding on and shall be followed by all the courts in British India, and so far as respects the application and interpretation of the Act or any Order in Council there under or any matter with the respect to which the Federal Legislature has power to make law in relation to the State, in any Federal State."

Court of India, which is the last appellate court, was formed by the Indian Constitution. Now, there are High Courts in states and district courts in districts, but this hierarchy poses a number of concerns, according to this strategy. For example, is it true that High Courts must obey Supreme Court decisions?

The usefulness of the doctrine of stare decisis is:

1) The doctrine achieves equality, consistency and impartiality by treating like cases alike.

2) The doctrine helps the courts to dispense justice in an efficient manner. It saves much time to the court as well as reduces cost for litigants.

3) The concept aids the law in balancing the requirement for clarity with the necessity to keep up with changing ideas and social circumstances. Within the confines of rules, certainty is retained, while concepts' flexibility and adaptability are gained through their interpretation.

4) Because of the absence of a code from the earlier days, lawyers were compelled to seek guidance in expertise and habits of thought.

5) The doctrine has a great controlling influence on the judge, who, if not bound by established judicial precedents will be inclined to interpret law according to their own predictions thereby creating a chaos in the human relations as well as in the administration of justice.

6) The doctrine is based on a universal sense of justice, i.e., all men should be treated alike in like circumstances.

7) It is very important to keep in practice that, for the sake of ease, a topic once determined be settled and not susceptible to re-arguments in every circumstance in which it occurs. It will save the judges and attorneys time and effort.

8) Judges are guided by precedents, and as a result, they are protected from making errors that they would have made otherwise. As a result, the judges place a high value on it. Judges are protected against bias and partiality by following precedents, which are obligatory on

them. People's faith in the courts is bolstered when cases are decided based on well-established principles.

The doctrine should not be followed to the letter. If the court is pleased with its error and the general welfare of the public, it may, in suitable cases, reverse its own judgement. It was opined in *Manganese Ore (India) Ltd* v. *Regional Asstt. CST*[10],Because the notion of stare decisis is a highly useful precedent that should not be disregarded unless there are exceptional or specific circumstances.

In *Suganthi Suresh Kumar* v. *Jagdeesham*[11], The Supreme Court ruled that the High Court can not overturn the Apex Court's ruling since the Supreme Court had established the legal position without considering any other factors. It is not merely an issue of judicial discipline in India; it is a constitutional necessity, as stated in Article 141, that the law declared by the Supreme Court be obligatory on all courts within India's jurisdiction.

The second question is whether the SC is obligated to follow its own judgement. Article 141 does, however, give a solution to this question. The phrase "*all courts inside India's territory*" plainly refers to courts other than the Supreme Court. As a result, the Supreme Court is not bound by its own rulings and may, in appropriate cases, overrule them. The supreme court again fingered the same issuein the case of *Bengal lmmunity Co.* v. *State of Bihar.*[12] In this case, the Court held that:

"*The Supreme Court should not lightly dissent from its previous decisions. Its power of review must be exercised with due care and caution and only for advancing the public well being in the light of surrounding circumstances of each case brought to its notice but it is not right to confine its power within rigidly fixed limits. It on a re-examination it comes to the conclusion that the previous majority decision was plainly erroneous then it will be its duty to say so and not to perpetuate its mistake*."

10 (1976) 4 SCC 124
11 AIR 2002 SC 681
12 AIR 1955 SC 661.

Further, in 1967, the Supreme Court in *State of West Bengal* v. *Corporation of Calcutta*[13], held that:

"*If the aforesaid rule of construction accepted by this Court is inconsistent with the legal philosophy of our constitution, it is our duty to correct ourselves and lay down the right rule. In constitutional matters which affect the evolution of our policy, we must more readily do so than in other branches of law, as perpetuations of a mistake will be harmful to public interest."*

In *T. I. Officer, Tuticorin* v. *T.S.D. Nadar*[14] held, that "*it is only when the SC finds itself unable to accent the earlier view that it would be justified in deciding the case before it in a different way*". As a result, the Supreme Court will rarely reverse a previous ruling. However, if an earlier decision is proved to be incorrect and consequently harmful to the public's welfare, the Supreme Court will not hesitate to reverse it. In *Sajjan Singh* v. *State of Rajasthan*[15]

"*It is true that the constitution does not place any restriction on our power to review our earlier decisions or even to depart from them and there can be no doubt that in matters relating to the decisions of constitutional points which have a significant impact on the fundamental rights of citizens, we would be prepared to review our earlier decisions in the interest of the public good. The doctrine of the stare decisis may not strictly apply in this context and no one can dispute the position that the said doctrine should not be permitted to perpetuate erroneous decisions pronounced by this court would be final, cannot be ignored and unless considerations of a substantial and compelling character make it necessary and essential that the question already decided should be reopened? The answer of the question would depend on the nature of the infirmity alleged in the earlier decision, its impact on the public good*

13 AIR 1967 SC 997
14 AIR 1976 SC 623.
15 AIR 1965 SC 845.

and the validity and compelling character of the considerations urged in support of the contrary view. If the said decision has been followed in large number of cases, then that is again a factor which must be taken into account."

In *Enatullah* v.*Kowsher Ali*[16], it was observed: "*A decision of a Full Bench is binding on all Division Bench, unless it is subsequently reversed by a Bench specially constituted or by a rule laid down by the Judicial Committee of the Privy Council, and it is obvious that it might lead to serious results if a Division Bench, wherever it felt inclined to differ from a decision of a Full Bench, could refer the matter to a Special Bench and the Chief Justice was compelled to form such a Special Bench whether he thought it necessary or not*."

By delving into the arena of judgments, the Supreme Court further stated in *Dalbir Singh* v. *State of Punjab*, that every judgement may be divided down into three halves. 1) direct and inferential findings of material facts; 2) legal principles relevant to the legal challenges revealed by the facts; and 3) judgement based on the combined effect of 1 and 2. Ingredient is a critical component in the precedents doctrine. It is, in fact, in the Decidendi Ratio. A ruling on a sentence question based on the facts of a specific instance may never be considered a binding precedent, much less "law announced." A division bench of the Supreme Court recently slammed the practise of giving caveats against interpreting judicial rulings as precedents in the case of Ramesh Rathod v. VishanbhaiHirabhai[17]. "The comment that the ruling must not be deemed a precedent for any other individual accused in the FIR on the grounds of parity does not represent judicially competent reasoning," the panel said. It was emphasised that whether or not an order constitutes a precedent is a subject for future adjudication, and the judge's comment that the order was 'caveated' was improper and incorrect. Orders declaring that it should not be considered as precedent, according to

16 AIR 1964 All 210
17 SLP(Crl) No 790 of 2021

Justice Chandrachud, who was headed the division bench, demonstrate a lack of faith and moral conviction in one's views. Those orders should not be issued in such a scenario.

The Factors responsible for non-application of precedent

(1) Legislation:If a legislation or statutory rule is incongruous with what is later passed, the precedent is no longer binding. Constitutional amendments have reversed a number of rulings on constitutional law, including the verdicts in *Dwarka Das Srinivas* v. *Sholapur Spinning and Weaving Comp*.[18] and *State of West Bengal* v. *Subodh Gopal*[19] by the amendment of Art. 31 of the Indian Constitution in 1955 or *Golak Nath* v. *State of Punjab*[20], by the 25th Amendment of the constitution.

(2) Reversal and overruling: When the same decision is appealed and overruled by the appellate court, the precedent is reversed. When a higher court finds in another case that the previous case was incorrectly determined and should not be followed, this is known as overruling. A precedent is not enforceable if it was made in the absence of a statute or a regulation with the force of law, such as delegated legislation.

(3) A precedent loses its power if the court that established it failed to take into account a conflicting decision by a higher court.

(4) A court is not bound by its own prior decisions, even if they are contradictory. As a result, the precedent's authority is either washed away by higher or equal authority or eroded by contradiction with past higher or equal authority. Precedents that are not fully contested or that are silent cease to be binding.

(5) Per Incuria literally translates to 'carelessness,' and the expression 'per incuriam' refers to judgements rendered in ignorance of a legislation or regulation. A judgement given in ignorance of a legislation or a regulation having statutory force that might have impacted the outcome is not binding on a court otherwise bound by its own decision, according to the English theory of precedents. In *London Street*

18 AIR 1954 SC119
19 AIR 1954 SC 92
20 AIR 1967 SC 164.

Tramways Co. V. *London County Council*[21].The House of Lords acknowledged that such a decision was an exception to the norm that the House of Lords was bound by its own decisions in all cases. In the *Bristol Aeroplanecase*[22], the court of Appeal acknowledged the same exemption. "It cannot be proper to state that in such a circumstance, the court is authorised to reject the statutory provision and is compelled to adopt its own conclusion when that provision was not present in its mind."

Conclusion

While the government establishes the broad principles to be followed in the adjudication of disputes through legislation and enactments, the courts are the sole decider of those rules. In circumstances when a similar or identical point of law is addressed before the court, the theory of precedents renders the decisions of the higher courts typically binding on the lower courts. The notion of precedents is extremely valuable because it gives certainty. On the other hand, because precedents are thought to be obligatory in nature, they may obstruct the evolution of law, which is important as society evolves. On the basis of above classification and landmark case laws, the precedent is considered as the most important instrument of law which gave rise to common law although the doctrine of *stare decisis* causes sometimes a great difficulty and just because of this reason, the rule laid down by *Taylor'scase*[23] and *Young's case*[24] have lessened the rigor of this doctrine. Also it is supported by thethe judgment as pronounced by Krishna Iyer J., in *K.C. Dora* v. *G. Annamanaidu*[25]that "*Precedent should not be petrified nor judicial dicta divorced from the socio-economic mores of age. Judges are not prophets and only interpret laws in the light of contemporary ethos. To regard them otherwise is unscientific*". Apart from above, to make precedent more useful, it

21 (1898) AC 375
22 (1944) 1KB 718
23 *R* v. *Taylor* (1950) 2 KB 368
24 *Young* v. *BristonAeroplane Co. Ltd*. (1944) K.B. 718 (C.A).
25 AIR 1974 SC 1069.

should be cited with various aspects such as reporting, citation, reasons and authority of precedent.

Inheritance Rights of Women: A Comparative Overview of Islamic Law and Customary Laws of Kashmir.

Syed Shahid Rashid*

Abstract

The fulfillment of property and economic rights of woman is considered as one of the keystones of granting gender justice to women. It means equal treatment and equitable value of the sexes. It is often used with reference to emancipatory projects that promote women's rights through legal changes and women's interests in social and economic policy. The property right of women is one such cornerstone which has always been at the point of reference whenever emancipation of women is discussed. One such field is law of succession or law of inheritance. This paper is a humble attempt to simplify a comparative overview of inheritance rights of women under Islamic Law and customary law which dominated the inheritance matters in J and K.

Key Words: *law of inheritance, customary law, khananashin, khanaberun, True Grandmother.*

Introduction

The Holy Qur'an makes it abundantly clear that women have their individual status and enjoy all their rights as individuals, not merely by virtue of being a mother, wife, sister, or daughter. Islam is the first religion to guarantee inheritance rights to women. The economic stability of women is also ensured by the Islam. One of the essential legal effects of a valid Muslim marriage is that wife becomes entitled to maintenance (*nafaqah*) during the continuation of marriage.[1] The divorced woman is also entitled to maintenance during the period of

---

* The Author is pursuing Ph.D. from School of Law, University of Kashmir.

1 This principle is drawn from Surah Al Nisa Verse 34.

iddat.[2] Daughters are entitled to maintenance till they are married. Similarly mother is also entitled to maintenance from her children. The wife is entitled to dower**,** a sum that becomes payable by the husband to the wife on marriage either by agreement between the parties or by operation of law. The wife has a right to refuse access to husband in case of refusal of prompt dower. If the widow is lawfully in possession of her deceased husband's property, in lieu of her unpaid dower, she is entitled to retain such possession until her dower debt is satisfied. This is called widow's right of retention. It is a personal right given by Muslim Law to safeguard the position of the widow as against other heirs and creditors to enforce her rights. The woman, in Islam, is not only the absolute owner of her property but also has extensive rights over it whatever she earns, purchases, possess, receives as gift or by way of bequest. In spite of all this her husband is under obligation to support her. She is not bound to earn or support for her family economically. If the wife is wealthy, still the husband is not absolved from the responsibility to support her.

Inheritance Rights of Women under Islamic Law

Under the Islamic Law of inheritance, Women are considered as important legal heirs. In the Pre-Quranic Arab, the females were totally excluded from inheriting any estate from the deceased person. All the estates were devolved into the male successors as a customary practice. The economic rights of women were not recognized at all, thus they were absolutely deprived from the property rights. Islam not only vested in woman the right to inherit the property from her father, mother, husband, offspring and other near relatives but also made her the rightful owner of the same. Before discussing women's right to inheritance and her share under Islamic law it is more appropriate to throw some light upon the Islamic law of Inheritance.

Islamic Law of Inheritance

2 Iddat of divorced woman is three menstrual cycles i.e. 3 months and 10 days or if pregnant then till delivery.

Law of inheritance or *qanoon-i-waraasat* is one of the most important and emphasized branches of Law of Islam. In Arabic this law is called *ilm-ul-Faraiz*. The clear cut rules regarding law of inheritance are laid down in the Holy Quran in Surah Al-Nisa.[3] This law deals with the division of estate of a deceased person. It is to be noted that inheritance has a close link with the death of the person/owner. In other words, law of inheritance comes into operation only when the owner of the property dies. It is reported that in the battle of Ahud, near about seventy companions of the Prophet Muhammad S.A.W. were martyred and rehabilitation of widows of such martyrs become one of the major challenges in that society which was gradually evolving on Islamic principles. Many social issues cropped up before the Prophet like remarriage of widows, property rights of orphans, issues pertaining to guardianship, rights of heirs etc. It is reported that a widow of one *Sayeed-ibn-rabi*, who had three daughters complained before Prophet of Allah that the brother of Sayeed ibn Rabi has usurped the whole property (date orchards) of sayedd ibn rabi, and has left nothing for the orphans. It is to be noted that according to the customary practice of Arabia females were totally excluded from inheritance.[4] In this backdrop the verses of surah Al-Nisa regarding ilm-ul-fariz were revealed. The Prophet of Allah also emphasized forcefully the great need for acquiring the knowledge of the *ilm-ul-Faraiz* i.e law of inheritance and transmitting it to others.

"Learn the laws of inheritance and teach them to the people, for they are one half of useful knowledge"[5]

"Learn the laws of inheritance with the same sincerity as you learn the Holy Quran."[6]

---

3 The Holy Quran: Surah Al Nisa

4 Commentary of Surah Al Nisa, Tafheemul Quran by Syed Abul A'la, Maududi; Vo. 1, Page 325. Markaza Maktaba Islami New Delhi. 2011 edition.

5 Narration of Hazrat Abu Huraira reported by Bahiqi and Hakim in Durri Mansoor

6 Darmi reports the narration of Hazrat Umar.

Quranic Instructions on the law of Inheritance:

1. "For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much- it is an obligatory share."[7]

2. "Allah instructs you concerning your children: for the male is equal to the share of two females. But if there are only daughters, two or more, for them is two thirds of one's estate. And if there is only one daughter, for her is half. And for one's parents, to each one of them is a sixth of his (deceased's) estate if he left children. But if he had no children and the parents alone inherit from him, then for his mother is one third. And if he had brothers or sisters, for his mother is a sixth, after any bequest he may have made or debt. Your parents or your children, you know not which of them are nearest to you in benefit. These shares are an obligation imposed by Allah. Indeed, Allah is ever Knowing and Wise".[8]

3. "And for you is half of what your wives leave if they have no child. But if they have a child, for you is one-fourth of what they leave, after any bequest they may have made or debt. And for the wives is one-fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you may have made or debt. And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth. But if they are more than two, they share a third, after any bequest which was made or debt, as long as there is no detriment (caused). This is an ordinance from Allah, and Allah is Knowing and Forbearing".[9]

Rules for Women as a Legal Heir under Islamic Law of Inheritance.

1. Wife

Wife of the deceased is entitled to **one-eighth (1/8)** share of the Property in case of presence of child/children of deceased. In case

7 The *Holy Quran: Surah Al Nisa*: 7
8 The *Holy Quran : Surah Al Nisa* : 11
9 The *Holy Quran : Surah Al Nisa* : 12

there is/are no child/children of deceased, then the wife (widow) is entitled to **one-fourth (1/4)** share in the property. Where there is more than one widow of deceased, then they are entitled to such share of $1/8^{th}$ or $1/4^{th}$ mutually. It is to be noted that share of inheritance of wife does not include mahr and maintenance which are separate entitlements.

2. Daughter:

Daughter of the deceased is entitled to one-half (1/2) of share in the property of the deceased in case there is no son of deceased and daughter is only child of deceased. In case there are two or more than two daughters and there is no son of the deceased, then such daughters are entitled to two-third (2/3) of share in the property of the deceased mutually. In case there is/are son(s) of the deceased then such daughter(s) is/are entitled to share in the ratio of 2:1 i.e two shares to son and one share to daughter.

3. Mother:

Mother of the deceased is entitled to **one-third (1/3)** of the share in the net estate in case there is no child of deceased, no agnatic descendant(ss, sd, sss, h.l.s) of deceased and not more than one brother and sister of any description. In case there is a child of deceased or son's child (h.l.s) or two or more brothers or sisters of deceased or there is a brother, a sister and the father of deceased then such mother of the deceased is entitled to **one-sixth (1/6)** of share in the net estate of deceased. If the deceased leaves behind spouse and father, then mother of such deceased is entitled to **1/3 of residue**. If the deceased leaves only father and mother behind, then mother is entitled to 1/3 of share in the net estate of deceased.

4. True Grand Mother:

True Grand Mother is entitled to 1/6 of share if there is no mother and no nearer true grandmother. If there is no mother of deceased but father's mother and mother's mother is alive, then both these grandmothers shall get 1/6 mutually. Father's mother is otherwise excluded by father.

5. Son's Daughter:

Son's Daughter is entitled to one half of share in the property of deceased if such son's daughter is alone and when there is no son or daughter of deceased. If there are more than two or more son's daughters and no son or daughter of deceased, then such son's daughters are entitled to 2/3 mutually. If there is a daughter or higher son's daughter, but no son or son's son of deceased then such SD is entitled to 1/6 whether one or more. If there is a equal son's son then such son's daughter becomes residuary.

6. Full Sister

Sister of the deceased is entitled to 1/2 (one- half) of the share (if alone) and 2/3 (if two are more) when there is no child, child of a son, father, true grandfather, or full brother of the deceased. In case of brother, such sister is converted into residurary i.e 2:1 rule. In case of father of deceased, sister of deceased is excluded. In the presence of mother of deceased, sister is not excluded, provided there is no child of deceased.

Customary Law in Jammu and Kashmir

Customary practices vary from place to place and region to region. The Historical School of Western Jurisprudence laid down the greater emphasis on the significance of customs as an important source of law. According to Carl Von Savigny, who is considered to be the founder of this school, law is found not made. It is found in the 'spirit of the people' i.e. volksgeist, the term he used for the popular consciousness of the people which reflects their national spirit. This School regards custom, as a sole criterion to decide the validity of law and advocate the evolutionary process of law. It should always conform to the popular consciousness which emanates from customs, history, language and national character of the people and these factors act as the core features in the structure of 'law'. This school rejects the positive notion of law and legal reforms in the form of codifications and considers law as a matter of unconscious and organic growth.

Customary law of Jammu and Kashmir reflected its social, political, cultural and economic conditions. In Kashmir the customary practices

and cultural traditions are regarded as very sacrosanct. The deep connection of natives both Hindus as well as Muslims with these customs and traditions can be seen more visibly in the institution of family at the time of marriage, mourning, wearing, eating habits etc. Many customary practices regarding family system were in vogue since centuries like adoption, resident daughter (khana-nishin), limited rights of the widow, minor daughters, and khana-damad etc. All these customs were, however, in scattered form and not recorded anywhere. It was during the reign of Mahraja Pratab Singh[10] that Settlement Officers in various parts of the State were appointed to compile and prepare a record of these customs. In the Kashmir Valley Pandit Sant Ram Dogra, an Assistant Settlement officer Kashmir was appointed as a Special officer to compile these customs (Riwaje-aam) in the valley in the year 1915. After touring the different parts of the valley and making enquiries regarding succession and inheritance, family relations, gift, pre-emption etc., he compiled this 'Code of Tribal Customs in Kashmir' incorporating therein the custom observed by the inhabitants of the Valley.[11] The revenue as well as civil courts in the Valley had invariably relied on this 'code' for their decisions. Similar codes were prepared for Poonch area by Lala Makhan Lal and for Ladakh and Gilgit by Thakur Singh. The decisions of the highest revenue and civil courts in the State dealing mainly with Muslim succession, marriage etc. was mainly on the findings of these compilations. The Hindus were governed by laws based on ancient texts in which women's share of property was considerably limited. At certain levels customary laws also prevailed till the Hindu laws were codified.

The provisions of the Muslim Personal Law were not applicable in J&K in their entirety. It being not the law of the land, therefore, only such parts of it were applied by the courts which related to the matters mentioned in the Laws Consolidation Act and which had not been abrogated by the various enactments or customs. In the year 1872 A.D.

10 Pratap Singh's rule started in 1885 till 1925.
11 Molvi Akbar v Mohd. Akhoon AIR 1972 JK 105.

the Dogra Rulers of the State promulgated Jammu and Kashmir Laws Consolidation Regulations, 1872 which was later enacted as Sri Pratab Jammu and Kashmir Laws Consolidation Act, (1977 Samvat Vikrami) 1920 A.D. It provides that the Law of Shariah, will apply to Muslims only in the following matters:[12]

i. Marriage, divorce, dower, adoption, guardianship, minority, bastardy, and female relation,

ii. Succession, inheritance and special property of females and partitions,

iii. Gifts, waqfs, wills, legacies and;

iv. Caste or religious usages.

However, the above rule laid down in sec. 4(d) was subject to two exceptions regarding the application of Personal law i.e. the Courts cannot apply such personal law where:

a. Any enactment has altered or abolished the Personal law;

b. Any valid custom had modified the Personal law.

The presumption in the specified matters was in favor of the Muslim personal law of the parties' i.e the parties were presumed to be governed by personal laws, the rule of decision was the Muslim law where the parties were Muslims except in so far as such law (Muslim law) had been altered or abolished by this or any other enactment, or had been modified by any custom applicable to the parties concerned. Thus the customs enjoyed overriding effect on the personal laws in case of modification, abolition and alteration.

Judicial approach in determining customary laws in J&K

The approach of courts in Jammu and Kashmir also favored customs and maintained their precedence over Muslim Personal law even though personal law of the parties was the first rule of decision subject to certain exceptions.

In *Akhar Rather* v. *Azizi,*[13] It was held that ordinarily parties are governed by their personal laws and the only exception are those in

12 Section 4(d) of the Act, of 1977 Svt. (1920 AD)

13 8 J. & K. L.R. 264).

which one or the other party prove successfully that personal law is abrogated by such customs as are found to be prevailing.

In *Ahad Lone v Azizi*,[14] a custom superseding the ordinary law was held well established rule so far as it is proved and everything beyond the proved custom must be governed by such law- Not only each custom but alleged separate incident of a custom must be proved to exist as customary law".

In *Abdullah* v. *Mst. Fazi,*[15] The matter was before the revenue court which held that "inheritance to landed estate in Kashmir Province is governed by custom and not by the *Shariat'*.

In *Mst, Khitiooni* v. *Mst. Khurshi,*[16] the court held that "in matters of succession to agricultural property among Muslims, customary law applies and not the *Shariat*".

Inheritance Rights of Muslim Women under Customary laws

Customary Law of Jammu and Kashmir occupied inheritance matters on large scale as compared to other matters of personal law. These customs predominantly override the elaborate rules of Muslim law regarding inheritance, wills and legacies and the main basis of these customs was male chauvinism and agnatic relationships. The general rule of inheritance under the customary law in the valley was that succession first goes to the direct male lineal descendants of the last owner to the exclusion of female descendants, "excepting in the case of daughters who have been married at home by their fathers in their lifetime". For instance, a daughter ordinarily had no share in the presence of sons, a sister could get no share in the presence of brothers and a widow could get only a life interest in the property. In case of death of Muslim agriculturist leaving sons and married daughters, the sons exclude such daughters unless it was proved that such daughter or

14 8 J. & K. L.R. 118).
15 Revision petition No. 10), dated 18th Har 2007 (Samvat) decided on 18th Assuj 2007 (Samvat)
16 Revision petition No. 86 dated 28th *Jeth* 2007 *(Samvat*

daughters were made khana nashin by their fathers. Khana nashin daughters[17] of father used to inherit equal to sons' share in presence of son while all other heirs stand excluded. However such *khana nashin* daughter did not inherit absolutely. In case she had no son then such property would revert back to her father's male relation. Under customary law a daughter married outside her father's house would lose her right altogether. Such daughters were called as *khana berun*. The customary practices were discriminatory in nature regarding females and major impediment in the economic and social empowerment of women. These customary practices had its roots embedded in the landlordism, feudalistic rule and the socio-economic structure of the time. The main source of income was attached with agricultural activities. The land owning class or landlords exploited the labour class or serfs and land tillers by paying them meagerly. All rights in the lands and other property were vested in the landlords and the laws were formulated to protect these rights. In this scenario men were in a dominant position to usurp property rights of women. However customary laws were repealed by J and K Shariat Act, 2007.

Conclusion:

The right to inheritance of women plays a vital role in the overall socio-economic empowerment of women. It is very clear that Islamic law of inheritance is by far not only superior but rational and free from discriminations against women as compared to customary laws which had prevailed in J and K. However, Muslim Women in Kashmir still continue to be treated as per customary law in the matters of inheritance, despite the legislative intervention. The customs, traditional prejudices relating to Women, non-acknowledgement of rights of women relating to property, dominance of males remain impediments to the proper application of the Shariat Act 2007.[18]

17 Those daughters who were married with the person who would stay in the parental home of daughter with wife's father and mother.

18 Shariat Act 2007 is now replaced by Shariat Act 1937 after abrogation of Article 370 post 5th August, 2019.

Dynamics of Indian Federalism

Mohd Yasin Wani*
Ashfaq Hamid Dar**

Abstract

Federalism is basically a method of dividing sovereignty between the national and regional governments so that each can work independently in its own sphere. At international level United States Constitution is considered to be a classical example of federalism. However, there are other constitutions which although deviate from strict federal principles but are still regarded as federal. Indian constitution is one such example. It is regarded as a federal constitution in its own unique way. The paper thus will examine the different meanings associated with federalism. A comparative study of different federal constitutions at international level will be made and comparisons will be drawn with the Indian constitution. The paper will also focus on the attitude of Indian judiciary towards federalism in India.

Keywords: *Federalism, Federal setup, Asymmetric, Supreme Court*.

Introduction

Federalism is a form of government in which the sovereign authority of political power is divided between various units. The term *federalism* basically comes from a Latin world *foedus,* which means treaty, pact or covenant. In common parlance this form of government is also known as a *federation* or a *federal state.* It is an agreement between governments to share power. This is relatively summarized by Wheare as the method of dividing powers so that the general and regional

* Assistant Professor, School of Law University of Kashmir, Hazratbal, Srinagar, J&K
** Reserach Scholar, School of Law University of Kashmir, Hazratbal, Srinagar, J&K.

governments are each, within a sphere, coordinate and independent.[1] One may concur with James Bryce as well who while describing American federal setup laid down that it is a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other.[2] Thus federalism is a protected dispersion of power where governmental activities are directed in such a manner in order to keep up their separate trustworthy qualities. It is a constitutional diffusion of power in which the activities of the government are conducted in such a way so as to maintain their individual probity. In such type of government, the powers of the state are dispersed among a number of co-ordinating bodies each originating in and controlled by the Constitution.[3] Therefore, an independence of general and regional government in a dual polity is fundamental to a federal setup. In order to make this 'independence' genuine and secure, constitutional jurists have articulated certain conditions for a federal system which include written constitution, rigid constitution, independent judiciary etc. There are, however, certain jurists who apprehend that the term 'independent' used to signify relationship between federal and regional governments might mean 'isolation'. They argue that if a federal setup is to work, neither the federal nor the regional government can work in isolation. Hence, they prefer the words like 'autonomy', 'coordinate' to express relationship between the two sets of government. Livingston accordingly redefines a federal government as that political and constitutional organization which unites a number of diversified groups or component politics into a single polity so that the personality and individuality of component parts are largely preserved while creating in its entirety a separate and distinct political

1 K.C.Wheare, *Federal Government,*10(London: English Language Book Society, 1968).

2 James Bryce, *The American Commonwealth,* 318 (New York, Macmillan 1914).

3 A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 157 (Macmillan and Co., London 1915).

and constitutional unit.[4] Yet, there are some jurists who assert that federalism is solution to what is primarily a political problem. The solution is political because it centres around power and stands for the division of political power. Hence it is recognized that political motives play a dominant role in the origin of federal systems. Taking together all the above views federalism may be defined as a political framework which creates broadly two levels of Government in a society, each assigned with powers and functions emerging from an assortment of social, economic, cultural and political factors.

Federalism: International perspective

At international level constitution of United States is considered to be the epitome of classical federalism. The federation here came into existence as a result of the voluntary compact between 13 sovereign states that surrendered a part of their sovereign powers to federal entity and retained themselves the unsurrendered residue. The US Constitution embraces an uncomplicated method of division of powers. It enumerates only the powers of the federal government and leaves the entire unenumerated residue to the states.[5] Accordingly the 10th amendment to the US Constitution provides that the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people.[6] Thus federal government in America is the exception while as Government of the States is the rule.[7] However, judicial creativity has led to the expansion of powers of federal government at the cost of residual state powers. The congress is given powers to make all laws which may be 'necessary and proper' to

4 W. S. Livingston, *Federalism and Constitutional Change* (Oxford University Press, London, 1956).

5 M.P.Jain, *Indian Constitutional Law,* 621 (Lexis NexisButterworthsWadhwa, Nagpur, 6thedn. 2012)

6 Tenth Amendment US Constitution, available at: https://constitution.findlaw.com/amendment10.html,

7 A. D. Tocqueville, *Democracy In America,* available at: https://www.marxists.org/reference/archive/de-tocqueville/democracy-america/ch05.htm

give effect to its enumerated powers. The centre may enter into treaties with foreign countries which on being ratified by the senators override the state legislations. Similarly, war powers of the Congress staggers the imagination by its scope and variety. What is necessary to win a war, Congress may do.[8] In *U.S. v Darby*[9], Supreme Court, emasculated 10th Amendment by holding that this amendment did not add anything new to the constitution. It only states a truism that all is retained which has not been surrendered. It can thus be said that States constitutional position has become inferior to the central government through the liberal interpretation of the Supreme Court.

Canada also has two constitutionally recognized levels of government: federal and provincial. There are further two forms of government, territorial and local, which, however, are not constitutionally recognized. Federal government is entrusted with responsibility of enacting and implementing laws for the entire nation. In doing as such, the government is bestowed with its own constitutional powers and jurisdictions, which it might discharge independent of the provincial government. The second perceived level of government in Canada is Provincial governments. These provincial governments enact and execute laws inside their provincial territory, and are furnished with their own constitutionally recognized powers, which again they might exercise independent of the federal government. It was the British North America Act of 1867 (which, in 1982, was renamed the Constitution Act, 1867) which first provided the basics of Canadian federalism. This Act embarked on the jurisdictional powers of both levels of government.[10] By virtue of Section 91 of the Act the centre is empowered to make laws for peace, order and good government of Canada with respect to subjects not exclusively assigned to the provinces. Similarly, Section 92 of the Act vests certain powers with

8 R. E. Cushman, *Cases in Constitutional Law*, (Appleton-Century-Crofts, Newyork, 1958).

9 312 U.S. 100 (1941)

10 J Makarenko.*Federalism in Canada Basic Framework*, available at: https://www.mapleleafweb.com/features/federalism-canada-basic-framework-and-operation(visited on 18-04-2020)

Provincial Legislatures. The result of this is that unless a law in its Pith and Substance comes in any of the entries under Section 92, it would come under the competence of the central government by virtue of forgoing residuary words in Section 91. Thus, unlike America, the framers of the Canadian Constitution vested residuary powers with the provinces.

The commonwealth of Australia joined the family of federation in 1900 when the British parliament enacted the Commonwealth of Australia Constitution Act. It follows the American model to the degree of giving explicit powers to the centre but, in effect there are some fascinating contrasts between the two in the plan of appropriation of powers between the Centre and States. Constitution of Australia enumerates the powers of federal government but does not make those exclusive, instead the states are also authorised to legislate in the area concurrently. However, by virtue of other Constitutional provisions or by their own nature, there are certain heads with respect to which only federal government can legislate.[11]

Federalism: Indian Experience

The experience of working under a provincial autonomy under the Government of India Act, 1935, the impact of British and the fame of federalism in the twentieth century as an alluring political framework for plural social orders influenced the founding fathers to adopt a federal setup. While introducing the Draft Constitution, DR. B. R. Ambedkar described it as 'federal' even though the word 'Union' was used therein, for which Ambedkar pointed out two definite advantages, one that Indian federation is not the result of an agreement by the units and second that the component units have no freedom to secede.[12] Credit of the framers of the Constitution thus lies not in bringing the Indian States under federal system but in placing them as much as possible on the

11 M.P.Jain, *Indian Constitutional Law,* 621 (Lexis NexisButterworthsWadhwa, Nagpur, 6thedn. 2012).

12 Constituent Assembly Debates, Vol. VII, p. 43.

same footing as the other units of federation under the same constitution. An important question that arises is whether Indian Constitution can be classified as federal or not. There is divergent opinion among Scholars regarding this question. Those who disagree with it proceed with traditional federal systems as prevalent in United States of America. However there have been deviations from that set up even in USA itself. Under the traditional set up the states agree to delegate certain powers inherent in themselves to federal government but at the same time retain their individual sovereignty. However, judged by this test hardly any country can claim to be federal as in due course of time as seen in USA itself the powers of federal government have been amazingly expanded at the cost of State powers through Judicial interpretations. According to Dr. Basu the question seems to be one of degrees[13], the answer to which will depend upon how many federal features it possesses. Like other federal Constitutions, Indian constitution too is Rigid, written, there is division of powers, independence of judiciary etc. but there are certain non-federal features in it for instance, Governors of the States are appointed by the President and are answerable to him.[14] Parliament has power to legislate in national interest with respect to any matter enumerated in State list.[15] In addition to this, Constitution bestows the Central government with wide array of powers during emergency which include legislating in State lists[16], giving direction to state governments as to the manner in which executive power is to be exercised[17] and many more others. Commenting on the emergency powers, V.N. Shukla observes that these powers come into operation only on the happening of the specific contingencies and therefore, does not modify or destroy the federal system. He further says that it is the merit of the Constitution that it visualises the contingencies when the strict application of federal principle might destroy the basic assumption on which our Constitution

13 D.D. Basu, *Commentary on the Constitution of India*, 27 (Lexis Nexis (Silver Jubilee) , 6th edn.2015)
14 Constitution of India, Articles 155, 156.
15 *Id.,* Article 249.
16 *Id.,* Article 352.
17 *Id.,* Article 256.

is built.[18] Fiscal federalism in India is also more tilted in favour of the centre. More powers in the field of Tax are vested with the centre. It determines the share of state in tax revenue. Thus, in financial matters states always look for assistance to the centre.

Federalism in India is asymmetric. It is based on unequal powers between Centre and the States in political, administrative and financial spheres. Unlike USA, Indian federation isn't an 'indestructible union of indestructible states'. Here, it is only Union which is indestructible. Parliament by virtue of Article 3[19] of the Constitution has power to create new states by separating territories from the current ones, adjust their limits and change their names. The only condition is that the 'Bill' for the reason should be set in the Parliament on the recommendation of the President and has been alluded to the concerned state legislature for ascertaining their perspectives (their endorsement of the bill isn't important). Thus the very existence of the state depends upon the central government. There are various kinds of asymmetries found in Indian Constitution. One is a universal asymmetry which affects all the units. For instance, in the Rajya Sabha, States are represented not on the basis of formal equality as is found in United States of America but on the basis of their populace.[20]Accordingly States with large population have more seats than those with less population. The second is specific asymmetries which are found in the provisions dealing with the administration of tribal areas, intra-state regional disparities, law and order situation and fixation of number of seats in legislative assemblies in relation to states of Maharashtra, Gujarat, Assam, Manipur, Andhra Pradesh, Sikkim, Arunachal Pradesh and Goa.[21] The third kind of asymmetry relates to Union Territories (UTs). The eight UTs have been created at different times and on varied reasons. Erstwhile State of Jammu and Kashmir was recently bifurcated

18 M. P. Singh, *V. N. Shukla, Constitution of India,* 40 (Eastern Book Company, Luknow,12th edn., 2013)
19 *Id.,* Article 3.
20 *Id.,* Articles 3[1] and 80[2] read with the fourth schedule.
21 *Id.*, Articles 371, 371B, 371C, 371D, 371E, 371F, 371H, 371I

and two UTs (UT of J&K and UT of Ladakh) were created.[22] Another kind of asymmetry is found in the Sixth Schedule to the Constitution containing provisions for the administration of tribal areas in Assam, Meghalaya, Tripura and Mizoram. Here autonomous districts and autonomous regions are created. Any autonomous district with different Scheduled Tribes will be divided into autonomous regions. These will be administered by District Councils and Regional Councils. These Councils can make laws with respect to allotment, occupation and use of land, management of forests other than reserve forests and water courses. Besides they can regulate social customs, marriage and divorce and property issues.[23]

Federalism: Judicial Trends

Judiciary in India is the guardian of the Constitution. Independence of judiciary is one of the important components of federalism. The Supreme Court as a premier institution in the country has delivered a number of judgments on federalism, but its stand on federalism has been inconsistent.

In the *Automobile Transport* v. *State of Rajasthan*,[24] a seven judges' bench of Supreme Court while interpreting the impact of Article 301 of the Constitution characterized Indian Constitution as federal. Court in this case observed:[25]

The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the conditions then prevailing, a distribution of powers and a basic part of our constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The constitution itself says by Art. 1 that India is a Union of States and in interpreting the constitution one must keep in view the essential structure of a federal or quasi-federal constitution, namely, that the units of the Union have also certain powers as has the Union itself.

22 The Jammu and Kashmir Re-organisation Act, 2019.
23 Constitution of India, 6th Schedule.
24 AIR 1962 SC 1406.
25 *Id.* at 1415-16.

In *State of West Bengal* v. *Union of India*,[26]the main issue involved was the exercise of sovereign powers by the Indian states. In addition to this, the competence of the Parliament to sanction a law for the compulsory acquisition of the land by the Union and other properties vested in or owned by the state and the sovereign authority of states as distinct entities were likewise examined. The Supreme Court held that the Indian Constitution didn't postulate a standard of absolute federalism. In spite of the fact that the authority was decentralized this was for the most part because of the strenuous task of overseeing an enormous territory. The Court laid out the attributes, which accentuate the fact that the Indian Constitution cannot be characterized as Traditional federal constitution. These include- Separate constitution for each State, unilateral power of the Centre to alter the Constitution etc. The Court in this case concluded that even though both the Centre and States derive their powers from the same Constitution, the States nevertheless would have no legal rights as against the overriding powers of the Union, because of a general theory of paramountcy of the Union.

However in later judgments Supreme Court characterised Indian Constitution as federal. In the landmark case of *KeshavanadaBharti*v. *State of Kerala*,[27] Supreme Court considered the federal character of the constitution as a basic feature of our constitution. In *State of Rajasthan* v. *Union of India*,[28] Beg, J. Observed:[29]

In a sense, therefore, the Indian Union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated, and socially, intellectually and spiritually uplifted. In such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Central Government.

26 AIR 1963 SC 1241.
27 AIR 1973 SC 1461.
28 AIR 1977 SC 1361.
29 *Id.*, at 1382

Though to some extent ambiguous, this perception doesn't conflict with the postulation propounded in the books, that a federal setup is offered by the Constitution of India in normal times as 'watering down' is because of specific arrangements which are proposed to meet unprecedented circumstances, for example, Articles 256-257, 356, 365.

Again In*S.R. Bommai*v. *Union of India*,[30] Court clearly articulated that Indian Constitution is federal and observed:

.....The constitution provide the more power to Central government but the state is also supreme within its spheres"…The constitution of India is differently described, more appropriately as 'quasi- federal' because it is a mixture of the federal and unitary elements, leaning more towards the latter but then what is there in a name, what is important to bear in mind is the thrust and implications of the various provisions of the constitution bearing on the controversy in regard to scope and ambit of the Presidential power under Article 356 and related provisions.

In *KuldipNayar*v. *Union of India*,[31] the Parliament amended the Representative of People Act, 1951 wherein it deleted the requirement of "domicile" in the State concerned for getting elected to the Council of States. The issue in this case was: Whether this amendment violated the principle of Federalism, a basic structure of the constitution? It was contended on behalf of the petitioner that the impugned amendment to section 3 of the Representative of People Act 1951 offended the principle of federalism as it seeks to change the character of republic which is the foundation of our democracy and that it distorts the balance of power between the Union and the States and therefore, is, violative of the provisions of the Constitution. The counsel for the petitioner also urged that the Council of States is a House of Parliament constituted to provide representation of various States and Union Territories; that its members have to represent the people of different States to enable them to legislate after understanding their problems; that the nomenclature "Council of States" indicates the federal character of the House and a representative who is not ordinarily resident and who does not belong to

30 AIR 1994 SC 1918.
31 AIR 2006 SC 3127.

the State concerned cannot effectively represent the State. Rejecting the petitioner's contentions court observed:

…India is a federal state of its kind and it is no part of federal principle that representatives of state must belong to that state. Hence, if Indian Parliament in its wisdom had chosen not to require residential qualification, it would definitely not violate basic feature of federalism.

In *UCO Bank* v. *DipakDebbarma,*[32] Court observed that the federal structure under the constitutional scheme can also work to nullify an incidental encroachment made by the Parliamentary legislation on a subject of a State legislation where the dominant legislation is the State legislation. Hence, it contemplates that even if there is doctrine of federal supremacy but it does not mean that states have no autonomy. The states are supreme within their allotted sphere and centre has no authority to transgress the limits. If centre does so, the court has to interpret the entries by giving widest possible interpretation to each entry.

The Constitution Bench of the Supreme Court in *Govt. (NCT of Delhi)* v. *Union of India,*[33] observed that constitutional statesmanship between the two levels of governance, the Centre and the Union Territory, ought to ensure that practical issues are resolved with a sense of political maturity and administrative experience. Court further held that the fundamental feature of federalism is that the legislature in each state is supreme within that state. Therefore, in order to preserve the federal spirit of the Indian constitution it is imperative to not interfere with the functioning of state governments by the governors or the Lt Governors who are only the titular head of the states.

32 (2017) 2 SCC 585.
33 (2018) 8 SCC 501.

Conclusion

It can be concluded that federalism envisages a system where there are two types of Governments which are supreme within their respective domains. It is a compromise between National integration and Regional autonomy. Albeit American Constitution is considered as a classical example of federal constitution but there have been deviations in that too. The federal government's powers have been expanded at the cost of residual powers of the State governments through judicial interpretations. Similarly, Canadian and Australian constitutions are likewise classified as federal though there are deviations from strict federal principles. On the same analogy Constitution of India can also be characterised to be a federal Constitution of its own kind even though it is asymmetrical. The Supreme Court of India has also of late recognized the fact that the founding fathers of the Indian Constitution intended to provide a federal structure with a strong Centre, which would prevent the nation from disintegration.

Protection of Children from Sexual Offenses Act 2012: An Overview

Dr Rubina Iqbal*

Abstract

Children are the most susceptible sections in the society. The problem of children is currently a global problem and exists all over the world. A child can surrender to any sort of pressure as he/she is undeveloped, weak and dependent on others. The child is exposed to issues like health, educational opportunities; sexual exploitation etc., the future of all nations depends upon the sound development of its children. Among the Indian population, children constitute about 39 percent. Hence, the issues related to child care, child welfare and child developments have always been getting the attention of the Government of India. This paper will analyses the legislative measures to protect the rights of children in India and also to assess and evaluate the contribution of the (POCSO) Act, 2012 to this, how the parents/children, to be well-informed against the offence. The article will also talk about the loopholes and along with suggestion.

Key words: *Children, Child Sexual Abuse, POCSO, Physical Effects of Sexual Assault, Punishment for Offences, Educating the Children.*

Introduction:

Child Sexual Abuse is a comprehensive term used to depict sexual offences against children. To put it simply, Child Sexual Abuse takes place when a person involves the child in sexual activities for his/her sexual gratification, commercial gain or both. Child sexual abuse concerns all countries, all social backgrounds, all cultures and all religions. In fact, children are the foremost victims of sexual violence. However, t*here* is no minimum age for being a victim of sexual violence. Before puberty, girls and boys could be victims in the same proportions. When a child is sexually abused, one out of five times a

* Dr Rubina Iqbal, Assistant Professor (Contractual), Department of Law, University of Kashmir.

woman is the perpetrator. When a minor is a victim of sexual violence, one out of every two times it is a minor who is the perpetrator. To limit sexual violence, it is important to help both victims and perpetrators.[1] Child sexual abuse takes place in the context of a relationship where responsibility, trust or power is abused by the perpetrator.

Statistics on Child Sexual Abuse:

Study on Child Abuse by Ministry of Women and Child Development was held earlier in 2017 in 13 states. It was reported that more than 53.22 % of children in India reported one or more forms of sexual abuse, 52.94% (boys) & 47.06% (girls). Further the report stated that both girls and boys are equally vulnerable and number of reported cases fall within the age group 12 – 15yrs. 50% of sexual offenders were known to the child or were in positions of trust.[2] Another report was issued by National crime record bureau. The *National Crime Record Bureau in 2016* in its report said that a total 106958 cases of crime against children were reported, a rise of 13.6% from the previous year (94,172 cases in 2015. There has been continuous progression in crime against children. A total of 36,022 children abused were cases under the Protection of Children from Sexual Offences (POCSO) Act, 2012, which accounted for 33.68% of all cases of crimes against children. In 95% cases of women and girl victims of rape, offenders were known to the victim.[3]

History of Protection of Children from Sexual Offences (POCSO) Act, 2012:

1 Special Courts and Procedures for trial under "The Protection of Children from Sexual Offences Act, 2012", Compiled by: Judicial Academy Jharkhand, at p 3.

2 Understanding - The Protection Of Children from Sexual Offences (POCSO) Act 2012 and Child Sexual Abuse (CSA) CHILDLINE India Foundation Supported by Ministry of Women & Child Development Government of India.

3 Ibid

In order to effectively address the heinous crimes of sexual abuse and sexual exploitation of children through less ambiguous and more stringent legal provisions, the Ministry of Women and Child Development championed the introduction of the Protection of Children from Sexual Offences (POCSO) Act, 2012. The Act has been enacted to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and related matters and incidents. The Act was amended in 2019, to make provisions for enhancement of punishments for various offences so as to deter the perpetrators and ensure safety, security and dignified childhood for a child. Before the Protection of Children from Sexual Offences (POCSO) Act, 2012 Goa Children's Act, 2003, was the only specific piece of child abuse legislation before the 2012 Act. Child sexual abuse was prosecuted under the following sections of Indian Penal Code:[4]

4 In Mr. Freddy A. Peats (Central Jail, Aguada) V. State Bombay High Court, Aug 14, 2003, the appellants who are original accused Nos.1 and 3, challenge their conviction and sentence passed by the Addl. Sessions Judge, South Goa, Margao, by Judgment dated 12.7.2002 in Sessions Case No.12/1999 and Sessions Case No.53/2000. The appellant Freddy Peats in Criminal Appeal No.44/2002 stands convicted for an offence punishable under Sections 367, read with 120-B of the Indian Penal Code, 372 and 363 of the Indian Penal Code and is sentenced to undergo R.I. for 7 years, R.I. for 7 years and R.I. for 3 years respectively. The appellant Macbride @ Owens in Criminal Appeal No. 38/2003 stands convicted for the offences punishable under Sections 377 of the Indian Penal Code, 367 read with 120-B of the Indian Penal Code and 323 of the Indian Penal Code and is sentenced to undergo R.I. for 7 years and fine of Rs.5,000/-, in default to undergo S.I. for 2 years, R.I. for 7 years and a fine of Rs.5,000/- in default to undergo S.I. for 2 years and R.I. for one year and a fine of Rs.1,000/- in default to undergo S.I. for two months, respectively. On the face of such an overwhelming evidence, the learned trial Court convicted and sentenced the accused as aforestated. With the assistance of Mr. S.N. Joshi, the learned Counsel on behalf of the appellant Freddy Peats and Mr. S.G. Bhobe, the learned Counsel appearing on behalf the appellant Macbride, I have perused the evidence of the witesses as well as the Judgment of the learned trial Court. The conviction of accused No.3 Macbride for the offence punishable under Section 367 is unsustainable. The witnesses have admitted that accused No.3 Macbride had taken the children with the consent of accused Freddy Peats in whose custody they were. Even, otherwise, accused Macbride is sentenced to serve 7 years R.I. for an offence punishable under Section 377 of the I.P.C. The sentences

- I.P.C. (1860) 375- Rape
- I.P.C. (1860) 354- Outraging the modesty of a woman
- I.P.C. (1860) 377- Unnatural offences

However, the IPC could not effectively protect the child due to various loopholes like:

- IPC 375 doesn't protect male victims or anyone from sexual acts of penetration other than "traditional" peno-vaginal intercourse.
- IPC 354 lacks a statutory definition of "modesty". It carries a weak penalty and is a compoundable offence. Further, it does not protect the "modesty" of a male child.
- In IPC 377, the term "unnatural offences" is not defined. It only applies to victims penetrated by their attacker's sex act, and is not designed to criminalise sexual abuse of children.

Role of the Law Commission of India against sexual violence and rape:

Guided by the Supreme Court in a PIL by a non-governmental organisation, the Law Commission of India passed its 172nd report in March 2000, which was related to the amendment of the then rape laws. Through the report, the law commission-

- Sought for widening the ambit of offences under section 375. • Sought to add more gender neutrality to the laws of rape and sexual assault, which were heavily inclined towards women then.
- Aimed at prohibiting sexual exploitation and abuse of children. A sexual offence could bring about a traumatic and long-drawn effect on a child's psyche.

---

have been directed to run concurrently. Therefore, according to me, there is no evidence for sustaining the conviction of accused No.3 Macbride for an offence punishable under Section 367 of the I.P.C. I have given my anxious consideration to the evidence on record and I found that the learned trial Court has appreciated the evidence correctly and has convicted and sentenced the appellant/accused No.1 Freddy Peats. No interference is called for in the appeal filed by the appellant Freddy Peats. Accordingly Criminal Appeal No.44/2002 is dismissed.

Following the horrendous Nirbhaya gang rape case in 2012, the Law Commission of India yet again sought to have the existing laws on rape and sexual violence amended. A committee was established, headed by Justice J.S. Verma, to delve into the current legislation and suggest reforms. Based on the committee's report, the Criminal law (Amendment) Act of 2013 was passed, that made the laws on rape and sexual violence more stringent.

Need for the Act:

Sopping Child Sexual Abuse is indispensable. The Indian community should make concerted efforts to stop child sexual abuse in the country. It is not only the responsibility of the Government to keep children safe and secure but it is also the responsibility of all of us to ensure a safe and protected environment for our children to enable them to live with dignity and free from any form of violence. One can easily say that tears and silence are memories of many children who are sexually abused. Child sexual abuse has become an epidemic which is spreading all over the society either higher class or, lower class and attacking the younger ones. Pain and tissue injury can heal with the passage of time, but psychological and medical consequences still leave scars on individual life. It reflects itself in different forms, including physical and psychological aggression, rape and sexual abuse, and takes place at home, at neighbourhoods, at school, at work and in legal and child protection institutions. Abuse tends to be transmitted from one generation to the next, and the individuals most often responsible are parents or other adult members of the household. India is the second largest child population in the world, 42% of India's total population is below eighteen years. Apart from framing several statutes, there still exist certain loopholes which were unable to cover provisions related to child sexual abuse existing laws (Indian Penal Code (IPC), Information Technology Act, 2000 and Juvenile Justice Act, 2000) not enough to address sexual offences. No specific provisions or laws for dealing with sexual abuse of male children.[5] Therefore the Protection of Children

5 Section 375 that defines rape, Section 376 deals with rape committed with girl , it does specifies age, the other IPC provisions that are invoked is

from Sexual Abuse Act, 2012 was drafted to deal with sexual assaults and exploitation over children.[6] Therefore, order to effectively address the heinous crimes of sexual abuse and sexual exploitation of children through less ambiguous and more stringent legal provisions, the Ministry of Women and Child Development championed the introduction of the Protection of Children from Sexual Offences (POCSO) Act, 2012. It is a special enactment which provides punishment for penetrative, touch, and non-touch based sexual offences against children and also mandates the establishment of Special Courts and procedures for trial of offences involving children as the statute was enacted to protect children from offences arising out of sexual assault, sexual harassment and pornography and provides for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. The Act is applicable to the whole of India. The POCSO Act 2012 intends to protect the child through all stages of judicial process and gives paramount importance to the principle of ***"best interest of the child".***[7]

Object of the Act:

The objective of the Act is to save the children from being sexually abused and punish and create fear in the hearts of the offenders. This act also lay guideline for police, committee and courts, that, how they have to deal with rape victim and what procedure to be followed.[8] POCSO Act, 2012 is the abbreviation of Protection of Children from Sexual Offences Act, 2012. According to the provisions of the Act even if an

relating to unnatural practices is Section 377, this section does not covers forcible sex with a boy amount to rape and IPC is silent under this situation, Under Section 67 of the Information Technology Act, 2000, publication and transmission of pornography through the internet is an offence.

6 K.G. Prithvi and K.P. Manish , "A Critique On Protection Of Children From Sexual Offences (POCSO) Act, 2012", India Law journal, available at: https://www.indialawjournal.org/a-critique-on-protection-of-children-from-sexual-offences-act.php.

7 Karen A. Duncan, "Healing from the Trauma of Childhood Sexual Abuse: The Journey for Women", Praeger Reprint edition, , ISBN-10 : 0313363218, at p 16, 2008.

8 The Protection of Children from Sexual Offences Act (POCSO Act) 2012.

attempt or commission of sexual assault/offence/ harassment happens against a child (male or female) under the age of 18 years, then such cases are filed under POCSO Act, 2012. Sexual offence against a boy is also covered under POCSO Act. The Act is gender neutral as it does not distinguish between boy and girl.[9] The Act, Provides for child friendly processes for reporting, recording and trial keeping best interest of child as top priority. Burden of proof is on the accused in cases of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault and aggravated sexual assault. It makes reporting of child sexual abuse cases mandatory. The Act contemplates the best interests and well-being of the child as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child.[10] The Act was amended in 2019, to make provisions for enhancement of punishments for various offences so as to deter the perpetrators and ensure safety, security and dignified childhood for a child.[11]

An Overview of The Protection of Children from Sexual Offenses, Act 2012:

The Protection of Children from Sexual Offences Act (POCSO Act) 2012 was formulated in order to effectively address sexual abuse and sexual exploitation of children. The Act received the President's assent on 19th June 2012 and was notified in the Gazette of India on 20th June, 2012. The Act defines a child as any person below the age of 18 years and provides protection to all children under the age of 18 years from sexual abuse. It defines different forms of sexual abuse including 1) penetrative assault 2) non-penetrative assault, as well as sexual harassment and pornography.[12] It deems a sexual assault to be

9 Supra note 1.

10 This Act has been amended on 6th August'2019 and came into effect from 16th august 2019.

11 Pinki Virani, "Bitter Chocolate: Child Sexual Abuse In India", Penguin India, ISBN-10 : 9780140298970, at p 25, 2008.

12 The Act defines "child pornography" as any visual depiction of sexually explicit conduct involving a child which includes photograph, video, digital or computer generated image indistinguishable from an actual child, and image created, adapted, or modified, but appear to depict a child.

"aggravated" under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a position of trust or authority like a family member, police officer, teacher, or doctor. Thus, the police personnel receiving a report of sexual abuse of a child are given the responsibility of making urgent arrangements for the care and protection of the child, such as obtaining emergency medical treatment for the child and placing the child in a shelter home, and bringing the matter in front of the Child welfare committee.[13]

Where to file a complaint and to whom:[14]

1. If any person, including child, has any doubt that such offence can happen or has the knowledge that such offence has been committed, can give the information to the following authorities:

(a) Special Juvenile Police Unit formed in all police stations;

(b) Local police.[15]

In every report:

i. A written report shall be filed;

ii. The report should be read out to the person filing the report;

iii. Entry of the report in the register of police unit.

2. If the report has been filed by a child, then it should be registered in simple language, so that the child can understand the elements of report. If the report has been registered in a language which the child is unable to understand, then a translator or an interpreter shall be provided.[16]

3. Where a special juvenile police unit or local police after investigation finds that the child against whom the offence has been committed, needs care and protection, then the reasons shall be recorded in writing, after which within the limits of 24 hours police will arrange

13 The Protection of Children from Sexual Offences Act, 2012 Kerala Medico-legal Society website, Law for Protecting Children from Sexual Offences.

14 "Need stringent laws to curb child sexual abuse: Tirath". News.in.msn.com. 2012-03-053 March 2012.

15 For not reporting such type of offence or filing a false report shall be liable for punishment.

16 POCSO Act, 2012 the Protection of Children from Sexual Offences Act of 2012.

for his/her care and protection (which includes sending the child to a protection home or a nearby hospital as per needs).[17]

4. Special juvenile police unit or local police without any further delay shall inform about the cases to Child Welfare Committee[18] and to the Special Court or to the Sessions Court where the Special Court have not been named.

5. If any person gives any information regarding such offences with good intentions, then no action shall be taken against that person.[19]

The sexual offences which are recognized under the POCSO Act and Punishments for those offences:[20]

Penetrative and aggravated penetrative sexual assault, sexual and aggravated sexual assault, sexual harassment, and child harassment including using of child for pornographic purposes are the five offences against children that are covered by this Act.[21] This act envisages punishing even for abetment or for an attempt to commit the offences defined in the act. It recognizes that the intent to commit an offence, even when unsuccessful needs to be penalized. The punishment for the attempt to commit is up to half the punishment prescribed for the commission of the offence and the various penal provisions in the act may be summarised in a tabular form for easy reference as below:[22]

Description of offences	Relevant sections Under	Minimum sentence	Maximum sentence

17 Debarati Halder, "Child Sexual Abuse and Protection Laws in India (SAGE Law)", Sage Publications Pvt. Ltd; 1st edition, at p 61, 2018.

18 The Child Welfare Committee (CWC) shall make a recommendation to District Legal Services Authority for legal aid and assistance. The legal aid and assistance shall be provided to the child in accordance with the provisions of the Legal Services Authorities Act, 1987 (39 of 1987).

19 K. Susheel Barath and Dr.V.Mahalakshmi, "LEGAL IMPLICATIONS OF POCSO ACT, 2012 – AN ANALYSIS", International Journal of Multidisciplinary Research Review, Vol.1, Issue - 1, Jan -2016, at pp 155.

20 POCSO Act – Providing Child-Friendly Judicial Process. Press information Bureau, Government of India. Available at: http://pib.nic.in/newsite/efeatures.aspx?relid=86150.

21 Supra note 5.

22 Pinki Virani, "Bitter Chocolate: Child Sexual Abuse In India", Penguin India, ISBN-10 : 9780140298970, at p 50, 2008.

	POCSO		
Penetrative sexual Assault	Sec-4	Seven years	Imprisonment for life
Aggravated Penetrative sexual Assault	Sec-6	Ten years	Imprisonment for life
Sexual assault	Sec-8	Three years	Five years
Aggravated sexual Assault	Sec-10	Five years	Seven years
Sexual harassment	Sec-12		Three years
Using Child for Pornographic purposes	Sec -14(1) Sec -14(2) Sec -14(3) Sec -14(4) Sec -14(5)	Ten years Rigorous Imprisonment for life. Six years Eight years	5 years & up to 7 years for subsequent offence. Imprisonment for life. Eight years Ten years
Storage of pornographic material involving child	Sec -15		Three years &/or Fine
Abatement of offence	Sec- 17	Provided for the offence	

Attempt to commit Offence	Sec -18	Half of the longest term	
Failure to Report or Record Complaint	Sec-21		6 Months to 1 year &/or Fine
False Complaint or False Information	Sec - 22		6 Months to 1 year &/or Fine

According to this Act all the offences are considered as grievous offences. These offences are non- bailable and cognizable offences. In **Santosh Kumar Mandal v. State, Bail Appln No. 1763/2016,**[23] Delhi High Court, *"Considering the gravity of the offences and the special mechanism provided under POCSO Act to hold that the offences are bailable though cognizable and would fall in category 3 would be rendering an interpretation to the classification provided in second part of First Schedule of Cr.P.C contrary to the object of the special enactment. Thus offences punishable under POCSO Act including Section 12 are cognizable and non-bailable offences."* All the above offences shall be punished with imprisonment for either description but aggravated penetrative sexual assault shall be punished with rigorous imprisonment. Imprisonment for life is always rigorous imprisonment. All the above offences shall also be liable to fine if not otherwise provided. Section 42 and 42 A provides that if the same act is an offence under IPC the stringent punishment of the two shall be awarded as the Act is though overriding but not in derogation.[24]

23 (28 September 2016) (2016) SCC Onliner Del 5378.

24 POCSO Act – Providing Child-Friendly Judicial Process. Press information Bureau, Government of India. Available at: http://pib.nic.in/newsite/efeatures.aspx?relid=86150.

Process for Media:[25]

There are restrictions on media, studio or photographic facilities on reporting an offence. If any person who is working with media, hotel, lodge, hospital, club, studio or photography has the knowledge that through any object, element or medium, sexual harassment of a child is happening, then that person should provide the information to special juvenile police unit or to local police.[26] For child's complete development and respect, during all the steps of legal procedure child's information needs to be kept confidential. It is necessary to:[27]

✓ Not to make any report or present comments related to child which can violate the confidentiality of child's information;[28]

✓ Through media's report, no information of child shall be disclosed like name, address, photograph, family details, neighbourhood or any other particulars; until the capable court haven't released any order permitting the same.[29]

Process of recording the statement of child:[30]

➢ Child's statement shall be recorded at the residence of child or at place where child is comfortable in presence of a woman officer not below the rank of sub-inspector.[31]

➢ While recording the statement of child, police officer shall not be in uniform.[32]

➢ The police officer investigating the case shall make sure that the child at no point comes in contact with the accused.

---

25 Nipun Saxena v. Union of India, (2019) 2 SCC, 703: 2018 SCC, SC 2772 at page 723, State of Punjab v. Ramdev Singh, (2004) 1, SCC 421 : 2004 SCC (Cri) 307 at page 424.
680 : (2018) 3 SCC (Cri) 244 at page 499

26 *Lalit Yadav v. State of Chhattisgarh, (2018) 7 SCC 499 : 2018 SCC, SC.*

27 Section 23 of the Protection of Children from Sexual Offences Act, 2012.

28 Media shall not disclose any information without any authentic proof.

29 POCSO Act, 2012 the Protection of Children from Sexual Offences Act of 2012.

30 Recording of statement of child by police (Section 24) of the Protection of Children From Sexual Offences Act, 2012.

31 Ref: Court On Its Own Motion v. State & Anr.

32 Mahender Singh Chhabra v. State of N.C.T of Delhi &Ors.

- Under no circumstances the child shall be detained in police station in the night.
- Police officer shall ensure that child's identity is protected from public and media, unless otherwise directed by the Special Court in the interest of child.[33]

Recording of a statement of child by Magistrate:[34]

1. Magistrate shall record the statement as spoken by the child.[35]

Additional provisions regarding statement to be recorded:[36]

A. Magistrate or police officer shall record the statement of child in presence of his/her father or mother or any other person in whom the child has trust or confidence.

B. Wherever necessary, Magistrate or Police Officer may take the assistance of a translator or an interpreter.[37]

C. If the child has mental or physical disability then the assistance of special educator or person familiar with the manner of communication of child may be taken to record the statement.

Wherever possible, Magistrate or Police officer shall ensure that the statement of child is also recorded by audio-visual means.[38]

Medical examination of child:[39]

i. Medical examination of child in respect of whom any offences has been committed under this Act, shall be done whether First Information Report has been filed or not;[40]

ii. If the victim of offence is a girl child, then the medical examination shall be conducted by a woman doctor;[41]

---

33 Isha Kansal, "Child Sexual Abuse in India : Socio-Legal Issues", International Journal of Scientific Research in Science and Technology, Volume 2, Issue 2, Print ISSN: 2395-6011ISSN: 2395-602X, 2019.
34 Section 25 of the Protection of Children from Sexual Offences Act of 2012.
35 Court On Its Own Motion v. State & Anr.
36 Section 26 of the Protection of Children from Sexual Offences Act of 2012.
37 Supra note 21.
38 Mahender Singh Chhabra v. State of N.C.T Of Delhi &Ors.
39 Section 27 of the Protection of Children from Sexual Offences Act of 2012.
40 Sakshi v. UOI.
41 The State Of Maharashtra vs Atul Rama Lote on 25 April, 2019.

iii. Child's medical examination shall be conducted in the presence of parents or guardian, and if they are not present, then in presence of any other person in whom the child has trust or confidence;[42]

iv. If during medical examination of child, his/her parents or any other person whom the child trust cannot be present, for any reason, then the medical examination shall be conducted in presence of a woman nominated by the head of medical institution.

Designation of special courts:[43]

For the purpose of speedy trial, State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, appoint a Special Court i.e. Sessions Court in each district.[44]

Special Court formed under this Act has the right to decide on cases which involves online exploitation of a child through any act, or conduct or manner.[45]

Presumption as to certain offences:[46]

If any person is facing criminal charges related to sexual offence on a child or abetting others to commit sexual offence on that child, then the Special Court shall believe that the person has committed the offence, unless proven otherwise.[47]

Presumption of culpable mental state:[48]

Special Court shall believe that the offender has the knowledge of offence and the person has the intention and motive of committing the

42 Bhupen Kalita vs State Of Assam, on 5 June, 2020.
43 Section 28 of the Protection of Children from Sexual Offences Act of 2012.
44 If any person attempts to commit an offence under the POCSO Act during the provision of Sessions court, protection of Child Rights Act, 2005 or any rule applicable at that time, then such Court shall be deemed to be a Special Court under this section.
45 Pramod Yadav vs The State Of Madhya Pradesh on 22 April, 2021.
46 Section 29(Estimation of certain offences) of the Protection of Children from Sexual Offences Act of 2012.
47 Dharmander Singh @ Saheb vs State on 22 September, 2020.
48 Section 30 of the Protection of Children from Sexual Offences Act of 2012.

offence, unless it is proven otherwise, that the person mental state was different.[49]

Special Public Prosecutors:[50]

i. To conduct cases of state government, in every court a Special Public Prosecutor shall be appointed.[51]

ii. A person shall be eligible as a Special Public Prosecutor only when he/she had been in practice as an advocate for not less than 7 years.[52]

Procedure and Powers of Special Courts:[53]

1. Any Special Court can take the cognizance of any offence, upon receiving a complaint of facts which constitute such offence, or on police report.

2. The Special Public Prosecutor or any advocate appointed by accused, shall submit the questions to the Special Court that need to be asked to the child during examination-in-chief, cross-examination or re-examination, which the Special Court shall in turn put those questions to the child.

3. If Special Court finds it necessary, then it can permit frequent breaks to the child during trial.[54]

4. Special Court shall create a child-friendly atmosphere in the court by allowing any member, care taker, friend or relative, in which the child has trust or confidence.

5. Special Court shall ensure that the child is not called repeatedly in the court.

6. Special court shall not permit aggressive questioning or character assassination of child and shall ensure the dignity of child is maintained throughout the trial.

---

49 Balasaheb Alias Suryakant vs The State Of Maharasthra on 22 March, 2017.
50 Section 32 of the Protection of Children from Sexual Offences Act of 2012.
51 Aju Mathew v. State Of Kerala | Kerala High Court, 2017.
52 Raghav vs State on 24 May, 2018.
53 Section 33 of the Protection of Children from Sexual Offences Act of 2012.
54 Court On Its Own Motion v. State of N.C.T Of Delhi.

7. Special Court shall ensure that at no time during the trial identity of child is disclosed

8. If found necessary or in best interest of child, Special Court shall give the permission for revealing the identity of child.

Explanation: *child's identity shall include the child's family, school, relatives, neighbourhood or any other information through which the identity of child can be found.*

9. Special Court can also order to provide compensation to the child for physical and mental injuries caused for the immediate rehabilitation of child.

10. Special Court, for the purpose of trial, has all the powers of Sessions Court, and can also ask for the reason of delay in trial.

RECORDING OF EVIDENCE:[55]

Period for recording of evidence of child and disposal of case

i. Evidence of child shall be recorded by the Special Court within a period of 30 days of cognizance of offence.

ii. Special Court shall complete the trial, as far as possible, within a period of one year from the date of cognizance of the offence.[56]

Child not to see accused at the time of testifying:[57]

(a) Special Court shall ensure that the child is not exposed to the accused while giving statement, and shall also ensure that the accused is in a position to hear the child's statement and communicate with his/her advocate.

(b) Special Court shall record the statement of child through video conferencing or by using single visibility mirrors or curtains.[58]

Trials to be conducted *in camera*:[59]

55 Alakh Alok Srivastava Vs Union of India and Others reported in 2018 SCC Online SC 478

56 Section 35 of the Protection of Children from Sexual Offences Act of 2012.

57 Section 36 of the Protection of Children from Sexual Offences Act of 2012.

58 Lokesh vs State on 7 June, 2019.

59 Section 37 of the Protection of Children from Sexual Offences Act of 2012.

❖ Special Court shall try cases in camera where child's mother, father or any other person on whom the child has trust or confidence is present.[60]

Monitoring the implementation of the Act:[61]

The National Commission for Protection of Child Rights constituted under section 3, or as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) shall, in addition to the functions assigned to them under that Act, also monitor the implementation of the provisions of this Act in such manner as may be prescribed.[62]

Guidelines for child to take assistance of experts:[63]

State government will provide the child assistance of non-governmental organizations, professional and experts or any person having the knowledge of psychology, social work, mental health and child development.[64]

Rights of child to take assistance of legal practitioner:[65]

Family or the guardian or child has the right to refer to their choice of legal practitioner, but if they are unable to bear the cost, then according to the provision they shall be provided with a legal practitioner.[66]

60 Nipun Saxena vs Union of India Ministry Of Home, 2018.
61 Section 44 of the Protection of Children from Sexual Offences Act of 2012.
62 The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, while inquiring into any matter relating to any offence under this Act, have the same powers as are vested in it under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006). The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, also include, its activities under this section, in the annual report referred to in section 16 of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006).
63 Section 39 of the Protection of Children from Sexual Offences Act of 2012.
64 The State Of Maharashtra vs Atul Rama, 2019.
65 Section 40 of the Protection of Children from Sexual Offences Act of 2012.
66 State Of Gujarat vs Ashokbhai S/O. Mavjibhai, 2018, Shyam Sunder vs State Of U.P, 2019.

Public awareness about Act:[67]

Central government and State government shall take all measures to ensure that-

- The provisions of this act shall reach the general public, children as well as their parents and guardians and make them aware about it through media including television, radio and print media.
- Central government and State government and other concerned persons (which include police officers) are imparted with periodic training concerning the implementations of provision of the Act.[68]

Awareness for the parents/children:

The signs of child abuse aren't always obvious, and a child might not feel able to tell anyone what's happening to them. Sometimes, children don't even realise that what's happening to them is abuse. There are different types of child abuse and the signs that a child is being abused may depend on the type. For example, the signs that a child is being neglected may be different from the signs that a child is being abused sexually. Some common signs that there may be something concerning happening in a child's life include:[69]

1. Unexplained changes in behaviour or personality;
2. Becoming withdrawn;
3. Seeming anxious;
4. Becoming uncharacteristically aggressive;
5. Lacks social skills and has few friends, if any;
6. Poor bond or relationship with a parent;
7. Knowledge of adult issues inappropriate for their age;
8. Running away or going missing always choosing to wear clothes which cover their body.

These signs don't necessarily mean that a child is being abused, there could be other things happening in their life which are affecting

67 Section 43 of the Protection of Children from Sexual Offences Act of 2012.
68 State Of Gujarat vs Ashokbhai S/O. Mavjibhai, 2018.
69 Understanding - The Protection Of Children from Sexual Offences (POCSO) Act 2012 and Child Sexual Abuse (CSA) CHILDLINE India Foundation Supported by Ministry of Women & Child Development Government of India.

their behaviour – but we can help you to assess the situation.[70] You may also notice some concerning behaviour from adults who you know have children in their care, which makes you concerned for the child/children's safety and wellbeing.

DO'S:

Adopt supportive behaviour towards child victims[71]:

1. Listen to the child with patience when the child complains about a person or an incident or a physical discomfort;
2. Believe the child;
3. Tell the child that he/she is brave;
4. Tell the child it is not his/her fault that he/she has been abused;
5. Raise your concern with people close to the child;
6. Call child line of 1098;
7. Ensure the child has undergone medical examination immediately after reporting the incident;
8. Report incident of abuse of the nearest police station;
9. Be sensitive while discussing the incident or its details with the child[72]

DON'T'S

1. Blaming the child;
2. Ignoring when the child complains about a person or an incident or a physical discomfort;
3. Reacting in extremes when the incident is reported;
4. Sending the child back to the person/place where the abuse happened;
5. Not providing medical attention to the child;
6. asking the child not to seek help from others;

70 Isha Kansal, "Child Sexual Abuse in India : Socio-Legal Issues", International Journal of Scientific Research in Science and Technology, Volume 2, Issue 2, Print ISSN: 2395-6011ISSN: 2395-602X, 2019.

71 Supra note 2.

72 Breaking the silence- with the help of POCSO ACT, 2012, By abhyu5u - March 21, 2017, available at: https://blog.ipleaders.in/breaking-the-silence-with-the-help-of-pocso-act-2012/.

7. Not taking action even when one is aware of the abuse being taking place;

8. Disclosing the child's identity to other people or the media;

9. Not reporting the incident at the police station.

Myths about child sexual abuse:

Myth 1- It is a rare thing;

Myth 2 - It occurs only in western countries;

Myth 3 - In India it happens only in slums;

Myth 4- Only girls are affected by child sexual abuse;

Myth 5- It happens only to children belonging to troubled or broken families;

Myth 6- People who abuse children sexually are generally a stranger to the child;[73]

Loopholes in the Act:

Upon a preliminary reading of the POCSO Act, it qualifies as the ideal piece of legislation to protect children from sexual offences. However, there are certain conceptual problems in it. The Act does not leave any possibility of consent given by persons under 18. This would mean that if a seventeen year old boy or girl had a nineteen year old sexual partner, the partner would be liable to be booked under the provisions of the POCSO Act. The Act also does not provide any clarity on what happens when two minors engage in any kind of sexual activity. Technically, they are both Children in Need of Care and Protection (CNCP) and Children in Conflict with Law (CCLs). In practice though, the police declare girls to be Children in Need of Care and Protection and the boys to be Children in Conflict with Law.

Another problem faced by victims is proving the age of the child. Since the POCSO Act is silent on what documents are to be considered for determining the age of the child victim, the provisions of Rule 12 of the Juvenile Justice Rules have been read by Courts as applying to child victims as well. This rule recognizes only the birth certificate, the school

73 Debarati Halder, "Child Sexual Abuse and Protection Laws in India (SAGE Law)", Sage Publications Pvt. Ltd; 1st edition, at p 88, 2018.

certificate of the child, or the matriculation certificate. However, children who are only able to produce other documents – even a legal document such as a passport – have to undergo a bone ossification test. This test can give a rough estimate of the age of the child at best. There needs to be a clear provision in the POCSO Act that lays down what documents should be considered for proving the age of the child, and whether the benefit of the doubt should be given to the child if the ossification test cannot provide an exact assessment.

Similar to the law of rape under the IPC, the pronoun used for the accused is "he", thus, again, only a male can be booked for the offences under the relevant provisions of the POCSO Act. Though, unlike rape, a victim under the POCSO Act can be any child irrespective of the gender, the accused still can only be a male and females are again given a protective shield, for reasons unknown. Saying that females do not subject children to forceful sexual assault is untrue. These are clear examples of the unexplained gender bias in the laws relating to sexual intercourse in India. Also, since the POCSO Act only looks into the age aspect, a teenage girl below the age of 18 who experiences coercive sexual assault may later have the boy booked under the IPC. But, vice-versa won't be true due to the biased definition. A woman who commits a like offence can be booked only for sexual assault under the POCSO Act, the punishment therein being much less compared to sexual assault under the IPC.

Conclusion and suggestions:

It is true that loopholes can be created however good and efficient the law is. The POCSO Act is a comprehensive law which was initiated to protect the children from sexual abuse and exploitation. Considering the welfare of the people, legislature is making laws, and in no way would the intention of the legislation would be to make an inefficient and uncertain law. However, the amendment Act is arbitrary and is against the fair procedure of law, at certain points it is favouring the offenders. The authors view that certain provisions of the amendment shall be removed to procure law in its unvarnished sense. The POCSO Act, 2012 is an excellent legislation and it recognizes almost every

known form of sexual abuse against children as punishable offence, but still a few challenges remain to be answered. A multi-dimensional, multi-agency team and multi-tier approach including access to psychosocial support is to be made available to deliver holistic comprehensive care under one roof for victims of child sexual abuse. There are several constraints which forbid effective implementation of the laws. Due to relatively low success in achieving concrete child development outcomes in India, the condition of underprivileged kids and youth is harsh and needs constant attention. Violation of the rights of children seems to have reached epidemic proportion in our country. There is a need to intensify efforts for children welfare at all levels to implement the policies and programs of the government and contribute to the safety of children. As crimes against the children are increasing, the future of this nation is at stake. Laws are codified to change the existing situation of society, but negligible difference has been made in the area of sexual offences against children. Rather it would be correct, saying that the situation is getting worse. The list of ones to blame is in exhaustive, as it includes most of the country's judicial officers, advocates and the commoners. It is the lack of awareness about the POCSO Act making it easy for the criminals to escape the punishments they deserve.

Non-Performing Assets (NPAs): An analysis of SARFAESI Act

Romisa Rasool*

Abstract

The banks and financial institutions are backbone of the economy. The growing figures of non-performing assets (NPA's) have adversely affected the functioning of the banks. The problem of illiquidity and concentration of risk caused due to NPA's called for special measures. In order to address the issue, Parliament of India came up with special legislations. Securitisation and Reconstruction of Financial Assets Act, 2002 (SARFAESI) is one such promising legislation which aimed to deal with the issue of NPA'S. The SARFAESI Act conferpower in the banks and financial institution to recover the bad debts without taking recourse to judicial machinery. The paper aims to trace out the legislative measures enacted from time to time to curb NPA'S. The critical analysis of the important provisions of the SARFAESI Act is carried out with a view to highlight the loopholes in the legislation. The working and efficacy of the legislation is also discussed.

Key Words: *SARFAESI Act, NPA, Securitisation, Security Interest.*

Introduction

The banking sector in India is currently passing through an exciting and challenging phase. The phenomenal rise in the non-performing assets NPAs over the last decade has posed a threat to banking industry, as well as to the national economy. The recovery of debts taking recourse to civil courts proved to be inefficient and time consuming. The NPAs remained unproductive assets in the books of the bank and their accumulation affected the credit availability, thereby resulting in credit crunch.[1] Urgent need was felt to work out a mechanism through which the banks and financial institutions could realise and reduce the NPAs.

---

* The writer is pursuing Ph.D. in the University of Kashmir, Department of Law, Hazratbal, Srinagar.

1 Credit crunch means where the bank is not in a position to meet the requirements of the needy borrowers which in most cases lead to closing down of banks.

The Tiwari Committee constituted in 1981, inter-alia recommended setting up of Special Tribunals for recovery of dues of the banks and financial institutions by following a summary procedure. After that in 1991, another committee namely Committee on Financial System 'Narasimham Committee-I' was constituted keeping in view the scams in securities which had surfaced. The committee defined the term non performing asset as the asset on which the interest remained unpaid on the balance sheet for a period of ninety days. The committee too recommended the setting up of Special Tribunals which would expedite the recovery process. The Government in 1993 adhering to the recommendations made, enacted the Recovery of Debts to Banks and Financial Institutions Act,1993(RBD) which provided for establishment of Special Debt Recovery Tribunals. The tribunals though made a commendable progress in the process of recovery of bad debts yet the RBD Act, could not come up to the expectations. The tribunals like courts were overburdened with complaints, resulting in making the process tardy and costly. The rising graph of NPAs could not be prevented. The cause of mounting NPAs was ascribed to the weak creditor's rights prevailing in the country, pendency of litigation and the strict civil law requirement that rendered the attachment and foreclosure of the assets futile.[2] Therefore, the need was felt to strengthen the recovery efforts of banks and financial institutions. The Committee on Banking Sector Reforms 'Narsimham-II' was constituted in the year 1997 to review the implementation of the financial sector reforms. The committee suggested changes in the legal framework for speedy recovery of debts and recommended setting up of expert committee. The committee subsequently was constituted under the chairmanship of Mr. T.R Andhyraujina which submitted its report in May, year 2000. The committee recommended the enactment of new laws for the enforcement of securities by banks without the intervention of courts and for securitisation of financial assets. The draft legislations were prepared

2 Saanjh N. Purohit, "Perspectives on the Securitisation and Reconstruction of Assets and Enforcement of Security Interest Act, 2002" 1 *Comp LJ* 23 (2004).

during which the concept of enforcement of security interests by the banks cropped up. The concepts of securitisation, asset reconstruction and enforcement of security interests were thought to be interlinked and were clubbed into single ordinance namely Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance of 2002. The Bill was passed by the parliament and received the assent of the President on 17th December, 2002. Thus, resulting in the enactment of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.[3] The constitutional validity of the SARFAESI Act was challenged before various courts but Supreme Court in ***Mardia Chemicals v. Union of India***[4] declared the law to be valid except subsection (2) of section 17. The Act, was amended in 2004 to make it in consonance with the Supreme Court's decision. The Act, further has been amended from time to time to keep pace with the emerging changes and latest by an Amendment Act of year 2016 which received assent of the President on 12thAugust 2016. The existing legal system is not adequate for the early recovery of debts from the defaulting borrowers, it is in this back drop the comprehensive analysis of the SARFAESI Act, has been made in order to highlight the efficacy and to point out the loopholes if any, in the legislation.

SARFAESI ACT, 2002: An Analysis

The SARFAESI Act, is the legislative measure taken by the government for ensuring that the dues of secured creditors, including banks and financial institutions are timely recovered. The secured creditors have been empowered to take measures for recovery of their dues without the intervention of the courts and tribunals. The Act, introduced directly a regulatory mechanism for securitisation in India. It strives to provide mechanism for the controlling NPAs, by providing means for the transferability of the financial assets to securitisation companies or Asset Reconstruction Companies (ARCs).[5] The object of

3 M.J Aslam, *Legal Aspects of Bank Lending* 720(Asia Law House, Hyderabad, 1st edn.,2010).
4 AIR 2004 SC 2371.
5 SaurabhSaraogiandNupoorAgarwal, *"*Securitisation Act – Objectives*"* 85 *CLA (Mag)* 61 (2008).

this legislation, is to curb the menace of the growing NPAs by making the recovery speedy. The Act, also provides for wiping of bad debts from the balance sheets of the financial institutions by transferring them to ARCs, thus solving the problem of illiquidity of funds which adversely effects the lending capacity of banks. In ***Vishal N Kalsaria*v. *Bank of India &Ors***,[6] apex Court held, that the SARFAESI Act was enacted with a view to regulate the securitisation and reconstruction of financial assets and enforcement of security interests against the debtor by securing the possession of such secured assets and recover the loan amount due to banks and financial institutions. The Preamble of the SARFAESI Act, showcase that Act, the is regulatory in kind. Attempthas been made to streamline the normal civil law procedures to foreclose the mortgaged assets by empowering enforcement of security interest. The Act, combined the three concepts viz, securitisation, asset reconstruction and enforcement of security interest in secured assets or properties.

Securitisation

In layman's term, securitisation means sale and purchase of loans. The concept of securitisation has taken its colour from draft Convention on Assignment of Receivables formulated in the 34th session of UNICTRAL 'United Nations Commission on International Trade Law' held in Vienna in 2001. One of the objectives of the draft convention is innovative financing technique like securitisation. Securitisation is a process by which a company clubs its different financial assets including debts to form a consolidated financial instrument issued to investors who get interest in such securities.[7] Thus, asset securitisation is a process of accumulating assets into securities and securities into liquidity on an ongoing basis.[8] It is the financial tool whereby receivables of loan assets backed by underlying securities are converted into debt instruments for

6 AIR 2016 SC 530.
7 Available at https://economictimes.indiatimes.com/definition/securitization,Retrieved on Apr. 13, 2020.
8 Vinod Kothari, *Securitisation, Asset Reconstruction & Enforcement of Security Interests* 7 (Lexis Nexis, Gurgaon, 4th edn.,2013)

investment. Hence, it is the name of debt securities[9]backed by stream of cash flows. These securities can then be sold to Qualified Institutional Buyers (QIB's)[10]. The Reserve Bank of India (RBI) in their guidelines on Securitisation of Standard Assets[11] explained the concept of securitisation as, "The process by which assets are sold to a bankruptcy remote[12] special purpose vehicle (SPV) in return for an immediate cash payment. After that the SPV's repack and sell the security interest from these assets or pool of assets to third party investors by issuance of debt securities. These securities represent claims of third party on the cash flows which would come from the assets." However, the statutory definition of securitisation is given in section 2(z)[13] of the Act. The parties involved in securitisation transactions are:

i) **Originator** means banks and financial institutions which sell the financial assets[14] backed by securities.

ii) **Original borrowers or obligors** meansthe borrowers who have taken loans from the originator. Their borrowings have created the underlying assets.

---

9 Section 2 (ia) of SARFAESI Act defines debt securities as those listed in accordance with regulations made by SEBI under SEBI Act,1992.

10 Under Section 2(u) of SARFAESI Act QIB's may be a bank, financial institution, State Financial Corporation, State Industrial Development Corporation, Insurance Company, a trustee or securitisation or reconstruction company registered with RBI under Section 3; any asset management company competent to make investment on behalf of mutual fund, a foreign investor registered under SEBI Act 1992 and any other body corporate specified by SEBI. After amendment of 2016 also, qualified buyers are made eligible.

11 Reserve Bank of India, "Guidelines on Securitisation of Standard Assets" (2005-06). Issued vide circular No. 2005-06/ 294. DBOD.NO.BP.BC.60/ 21-04-048/2005-2006 dated 01-02-2006, *available at*https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=2723# retrieved on Mar. 24, 2020

12 Bankruptcy remote means that after transfer of assets, if the originator i.e., bank becomes bankrupt, the same will not affect the rights and interests of the investors which they have on the secured assets held by SPV

13 Section 2(z) defines Securitisationas acquisition of financial assets by any Securitisation Company from any originator, whether by raising of funds by such securitisation company or reconstruction company from qualified institutional buyers by issue of security receipts representing undivided interest in such financial asset or otherwise.

14 Financial asset is the claim of a bank and financial institution to receive future payments of loans.

iii) **Special Purpose Vehicle**: The entity to which financial assets are transferred are referred as Special Purpose Vehicle. It can be a company or trust. However, in the SARFAESI Act, the assets will be transferred to an independent Asset Reconstruction Company. The SPV purchases the assets from the originator and then issues securities against these assets.

iv) **Investors or Qualified Buyers (QBs)** are the buyers of securities. Buyer may be a bank, financial institution, State Financial Corporation, State Industrial Development Corporation, Insurance Company, a trustee or asset reconstruction company registered with RBI[15], any asset management company competent to make investment on behalf of mutual fund, a foreign institutional investor registered under Securities and Exchange Board of India (SEBI) Act, 1992 or regulations made there under, any category of non-institutional investors as may be specified by Reserve Bank of India under sub section (1) of section seven[16] or any other body corporate specified by SEBI. Prior to Amendment Act, of 2016 only qualified institutional buyers were eligible to invest in securities. By the Amendment Act, of 2016, word Qualified buyers has been substituted for qualified institutional buyers and now non-institutional buyers as specified by RBI under section 7(1) are also eligible to invest[17].

v) **Securitisation company**: The Act, makes mandatory for securitisation company and asset reconstruction companies to obtain

15 Section 2 (1) (u) and Sec.3 of SARFAESI Act.

16 Section 7 (1): Issue of security by raising of receipts or funds by asset reconstruction company.
Without prejudice to the provisions contained in the Companies Act,1956, the Securities Contracts (Regulation) Act,1956 and the Securities and Exchange Board of India Act, 1992, any asset reconstruction company may, after acquisition of any financial asset under sub section (1) of section 5, offer security receipts to qualified institutional buyers or such other category of investors including non-institutional investors as may be specified by Reserve Bank of India in consultation with the Board, from time to time, for subscription in accordance with the provisions of those Acts.

17 Taxmann's, *Guide to SARFAESI Act 2002 & Recovery of Debts and Bankruptcy Act 1993* 156 (Taxmann Publications (P.) Ltd., New Delhi, 2016).

certificate of registration from RBI as provided under Section 3[18], so as to commence their business of asset reconstruction and securitisation. The RBI also has the power, under certain circumstances to cancel the certificate of registration granted to securitisation or reconstruction company.[19]

Process of Securitisation

Securitisation is the process of issuing capital market instrument in sectors which have illiquid assets. Section 5 of the SARFAESI Act, mandates that only banks and financial institutions can securitise their financial assets. The provision also provides for the modes of acquisition of financial assets of the banks and financial institutions. Five stages are involved in the process of securitisation:

Identification Process: The first step starts with segregation of loans into relatively homogenous pools. Homogeneity is necessary to enable a cost-efficient analysis of the credit risk of the pooled asset and to achieve a common payment pattern. This step involves the identification of the pool of similar debts.[20]

Transfer Process: In the second stage, these asset pools are sold to a special purpose vehicle (SPV) on discount for transforming them into debt securities. The SPV acts as intermediary. Money received from investors is paid to the transferor. So, in this stage future claims of banks to receive future payments are assigned to SPV.

---

18 No asset reconstruction company shall commence or carry on the business of securitisation or asset reconstruction without obtaining a certificate of registration granted under this section; and having net owned fund of not less than two crore rupees or such other higher amount as the Reserve Bank, may, by notification, specify; Provided that the Reserve Bank may, by notification, specify different amounts of owned fund for different class or classes of asset reconstruction companies Provided further that asset reconstruction company, existing on the commencement of this Act, shall make an application for registration to the Reserve Bank before the expiry of six months from such commencement and notwithstanding anything contained in this sub-section may continue to carry on the business of securitisation or asset reconstruction until a certificate of registration is granted to it or, as the case may be, rejection of application for registration is communicated to it.

19 Aakash Choubey, "Securitisation: A Concept Misunderstood" 2 *Comp LJ* 46 (2004).

20 S. Venugopalan, *"*Securitisation of Debts- Some Legal and Regulatory Issues*"* 35 *CLA (Mag*) 166 (1999).

Issue Process: The SPV takes up the task of converting these assets of different maturities into securities. The securities issued by SPV's are pay through certificates[21], pass through certificates[22], interest only certificates, principal only certificates, etc. The subscriptions towards these securities received are paid to bank or financial institution i.e., to originators.

Payment Process: If collection is made by original borrower, he is under obligation to pass on the money to ARC. If the payment of interest on these securities are facilitated by the collection received by the SPV from the securitised assets, then the task of collection is usually done by special servicing agents on payment of commission.

Credit Rating Process: As these securities are to be issued to Qualified Buyers, so to make them attractive and easily acceptable these certificates are rated by any reputed credit rating agency, which provides a sense of confidence to the investors with regard to timely payment of principal and interest by SPV.

Advantages of Securitisation

This technique of securitisation solved two problems which were faced by the banks i.e. illiquidity and concentration of risk. As to liquidity crunch, it arises whenever a borrower fails to oblige his liability to pay back the money for a secured debt to banks. Though loan being an asset of a bank it must get it back on the agreed terms and conditions including the time limit but where the borrower fails to discharge his liabilities, it becomes a non-performing asset. The value of non-performing asset cannot be utilized by the bank anymore. Thereby, it becomes the main reason for illiquidity i.e. locking of funds in loans and advances given for developmental projects. Thus, securitisation involves

21 Pay through Certificate involves a specific assignment / sale of cash flow to the SPV. The SPV then issues pay through certificates to investors. In this, normally the cash is collected by the SPV from the borrower and then distributed to the certificate holders.

22 In Pass through Certificate, a direct participation in the cash flow is sold. Receipt of asset cash flow is deposited in designated accounts. The funds are then passed on to Certificate Holders. Receivables are directly assigned to investors through SPV. Thus, the cash is collected by the original lender which is then passed on to SPV.

the conversion of usually illiquid assets with predictable cash flows into market securities.[23] The second problem solved by asset securitisation is that of concentration of risk, faced by financial institutions. Securitisation enables the structuring and selling of negotiable instruments in order to spread risk over a large group of investors. The risk here means the risk which banks or financial institutions take while making funds available to the borrowers by way of loans which they might be reluctant to offer in absence of the technique of asset securitisation. This is the risk management aspect of banking which securitisation deals with.

Asset Reconstruction

The SARFAESI Act, has certain unique features, and on account of similarities between securitisation and asset reconstruction, the two transactions are combined in one law. Asset reconstruction is the process of recovering bad loans or liquidating bad assets. In reconstruction transactions, financial assets with the benefit of underlying securities are acquired from the banks and financial institutions by the reconstruction company. The right, title and interest in the receivables and underlying securities has to be acquired by the securitisation or reconstruction company. The provisions of the Act, do not provide for compulsory raising of funds as essential part of securitisation and reconstruction transactions, thus permit raising funds from any other source like that of from companies.[24] It is for this reason, securitisation and reconstruction of assets are treated at par under the SARFAESI Act. Asset reconstruction under clause (b) subsection (1) of section 2 is defined as acquisition by any securitisation or reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance. However, the amendment act, of 2016 inserted new sub-clause to section 2 i.e. section

23 S.C Mitra and R.P. Kantaria, *Securtisation and Reconstruction of Financial Assets and Enforcement of Security Interest Law* 3 (Orient Publishing Company, Allahabad, 1st edn.,2014).

24 M.R. Umarji, *Law and Practice Relating to Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest* 8 (Taxmann Allied Services (P.) Ltd., New Delhi, 4th edn.,2006).

2(1) (ba) to define asset reconstruction company as a company registered with RBI under Section 3 of the Act, for the purpose of carrying on business of asset reconstruction or securitisation, or both. The asset reconstruction companies (ARC) would buy out the NPAs of banks and financial institutions at a discounted price, which could pave a way for banking institutions to focus on core activities. Banks and financial institutions prefer to sell NPAs to ARCs as it is cost efficient and also enables them to take off NPAs from their balance sheets to unlock the capital.[25]The asset reconstruction or securitisation is carried out in the following manners:

a) Taking over the management of the business of the borrower.

b) Changing the management of the business of the borrower.

c) Rescheduling the payment schedule of the debt.

d) Enforcing the security interest.

e) Entering into settlement with the borrower for payment of debt.[26]

Enforcement of Security Interest

Chapter III of the SARFAESI Act, provide for the enforcement of security interest. The special powers of recovery conferred on banks and financial institutions by this chapter are not available to other lenders in the market. The security interest can be enforced without the intervention of any court or tribunal. The Act, stipulates four conditions for enforcing the rights by a creditor.

(a) The debt is secured.

The term debt does not exist originally in the interpretation clause of the SARFAESI Act. However, it was inserted by Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act 2004. The term debt has been defined similarly as was defined in Section 2 (g) of DRT Act[27]. The debt may be secured or unsecured as definition of

25 MamtaBhargava, "Securitisation Company and Asset Reconstruction Company*"* 84 *CLA (Mag.)* 199 (2008).

26 TKA Padmanabhan*, "*Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Bill,2002- An overview" 49 *CLA(Mag)* 166 (2002).

27 Debt means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution

debt in SARFAESI Act includes both type of debts. But, unsecured debts i.e., the debts not backed up by any security or security interest cannot become subject matter of enforcement under Section 13 of the Act. There is nothing in the Act, which could prevent such unsecured debts from being converted into debt securities in securitisation process or being reconstructed in asset management by a securitisation or asset reconstruction company.

(b) The debt has been classified as NPA by the banks.

The term NPA is defined under Section 2(1)(o) of SARFEASI Act, as an account of a borrower which has been classified by a creditor either "as a substandard asset or a doubtful asset or a loss asset" of the creditor and such a classification is required to be made in accordance with the directions or guidelines relating to assets classification issued by the RBI. The guidelines for classification of assets as NPA has been given by RBI in 2015.[28] The classification of account as NPA is condition precedent to initiate action under the SARFAESI Act. The definition of NPA has been amended in 2004, wherein, classification of assets as NPA has been allowed to be made in accordance with the directions or guidelines issued by the authority or body either established or constituted or appointed by any law for the time being in force in all those cases where the creditor is either administered or regulated by such an authority. If the creditor is not regulated by such an authority, then the creditor is required to classify the account of a borrower as NPA in accordance with the guidelines and directions issued by the RBI.

---

or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or
the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured
or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or
otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application.

28 Master Circular DBB No. BC.BC.2/21.04.048/2015-16 dated 1-7-2015 titled 'Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to advances.

(c) **The outstanding dues are one lakh and above which account for more than 20% of principal loan amount and interest thereon.**

(d) **The security to be enforced is not Agricultural land.**[29]

A lot of confusion was created by the different decisions of courts as to which activities fall within the domain of agriculture and agricultural purpose so as to be excluded from the operation of the SARFAESI Act. The confusion has been clarified in the case of ***K.P. Muhammad Basheer v. General Manager (authorised officer) Kannur District Co-Op. Bank Ltd.***[30]The court held that neither the term 'agricultural land' nor 'agriculture' is defined in the Act. The Court opined that the general sense of the term in which it has been understood in common parlance is to be adopted for understanding the scope of the terms where the statute is silent as to its scope. Agricultural land is that species of land which could be said to be either used ordinarily for agricultural purpose or must have a connection with an agricultural use or purpose. Primarily agriculture is understood as a process of putting land to use in the growing of crops by employing human skill and labour upon land and it cannot be defined or understood by the nature of the products cultivated. So, the criteria to determine whether the land is used for agricultural purpose is to determine whether the human skill and labour is employed upon such land and if it is so applied then such land is agricultural land and is exempted under Section 31 of SARFAESI Act.

The Act, provides for setting up of Central Registry of Securitisation Asset Reconstruction and Security Interest (CERSAI). The secured creditors, who fail to register their claims with the central registry, will not be able to enforce their claim against a borrower's property. The central registry, set up under the SARFAESI Act, provides a platform to banks and financial institutions to share information when a security interest is created over a borrower's property. The intent of this central database is to prevent multiple financing against the same

29 V. Sekar and Dr. V. Balachandran, "Importance of SARFAESI Act- Some Issues" 2 *IJMSS* 2 (2013).

30 AIR 2010 Ker. 118.

property. The government has on 24 Jan 2020 notified parts of the 2016 amendment to the SARFAESI Act which makes mandatory for secured creditors toshare information with the central registry. The primacy is given to those secured creditors who register their security interest in a borrower's assets.[31]

Security interest[32] can be enforced if the borrower, who is liable to a secured creditor under the security agreement, defaults, and the debt is classified by the secured creditor as NPA. The procedure for enforcement of security interest is given under sections 13 to 19 of the SARFEASI Act.

Section 13 states "*Notwithstanding anything contained in section 69 or section 69 (A) of the Transfer of Property Act 1882*[33]*, any security created in favour of any secured creditor*[34] *may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act".*

The procedure for enforcement of security interest under SARFAESI Act is detailed as under:

Issuance of Demand Notice

The process begins by issuance of sixty-days demand notice under section 13(2) by the secured creditor to the borrower who has failed to make repayment of the secured debt or any instalment. The mandatory

31 Rohit Jain, "Debt Recovery: Creditors to lose claim if they fail to share borrower's information" *Bloomberg Quint*, Jan 2.2020. Retrieved on Apr. 12, 2020, *available at*https://www.bloombergquint.com/bq-blue-exclusive/sarfaesi-act-creditors-to-lose-claim-if-they-fail-to-share-borrowers-information

32 Under Sec 2 (1) (zf) of SARFAESI Act, Security interest means right, title and interest of any kind upon property, movable and immovable, created in favour of the secured creditor and includes mortgage, charge, hypothecation other than those specified in the Section 31 of the Act. Section 31 clarifies that SARFAESI Act is not absolute, as it lays down that Act will not apply in certain situations.

33 Section 69 of the Transfer of Property Act ,1882 states when the power of sale is valid, whereas 69 (A) of Transfer of Property Act deals with appointment of receiver.

34 Section 2 (1) (zd) defines secured creditor as any bank or financial institution or any consortium or group of banks or financial institutions and includes debenture trustee, securitisation or reconstruction company or any other trustee holding securities on behalf of the bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance.

pre conditions for issuing notice are, borrower should have made default in repayment of secured debt and as a consequence his account in respect of such debt is classified as non-performing asset. If these two conditions are satisfied the secured creditor is at liberty to issue notice. The period of sixty days commences from the date of the notice. The Supreme Court in ***Transcore v. Union of India,***[35] has held that demand notice operates as an attachment/injunction restraining the borrower from disposing of the secured assets and therefore it is not merely a show cause notice. Through notice an opportunity is provided to debtor to liquidate his assets with secured creditor. The notice must accurately mention the amount of the loan taken, balance outstanding therein, details of the security interest, the facts that account has been classified as NPA and caution to borrower that if he fails to discharge his liability within prescribed sixty days, the secured creditor will take recourse to any one of the measures given in sec. 13(4). The Calcutta High Court in ***M/s. AdiJogesh Radio v. State of West Bengal***[36] stated that the object of notice under section 13(2) of the Act, and the time afforded thereunder is to give the borrower an opportunity to stave off the measures enumerated in section 13(4) of the SARFAESI Act, being resorted to by secured creditor. Section 13(2) would certainly place an embargo on the secured creditor to take any of the steps contemplated in section 13(4) without a notice being issued and without the statutory period running. But such embargo would not extend to measures otherwise available to the secured creditor outside the Act. After receiving notice, the borrower has right to make objections to the demand notice through representation. It is the first opportunity provided to the borrower by section 13(3-A) to challenge the demand notice, classification of his account as an NPA and the quantum of amount specified in the notice. There was no provision of representation in the Act, however, same was incorporated after the Apex Court judgment in ***Mardia Chemical Limited and Ors v. Union of India.***[37]Section 13(3-A)[38] has been inserted

35 AIR 2007 SC 712.
36 AIR 2010 Cal. 25.
37 *Supra note* 4.

which provides that on receiving the notice under section 13(2) if the borrower makes representation or makes any objection, the secured creditor shall be compelled to consider such representation and if he comes to the conclusion that objection is not tenable, he shall communicate within one week,[39] now fifteen days after 2012 amendment, the reasons in writing for the non-acceptance. It is mandatory on the secured creditor to consider such representation. The Supreme Court has reiterated the same in ***Munshi Ram Gupta v. State Bank of India.***[40]The consideration of secured creditor is final and not appealable before DRT.[41] The secured creditor has absolute discretion to reject such representation. Such rejection of representation by secured creditor is not justifiable. The DRT has been given power under the SARFAESI Act to determine the legality of rejection only after the secured creditor has actually taken over the assets. Thus, the very essence of the right of representation given to borrower to challenge the declaration of his account as non performing is rendered illusory. There is no other remedy available to the debtor till assets are taken over by secured creditor.

Taking Possession of Asset

In case the borrower fails to discharge his liability within sixty days of the notice, the secured creditor may proceed further to exercise any one or more of the rights mentioned in section 13 (4)[42] of the Act, but no

38 Sub- Section 13(3-A) inserted by the Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Act, 2004.

39 Substituted by "fifteen days" instead of "one week" by Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Act, 2012.

40 AIR 2012 Utr. 4.

41 Explanation to Section 17(1) of SARFAESI Act.

42 In case the borrower fails to discharge his liability in full within the period specified in sub- section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely: -

a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

time limit has been fixed for taking recourse to proceedings under subsection (4) of section 13. Even if no time limit has been prescribed the secured creditor has to take recourse to measures prescribed therein within reasonable time depending on facts and circumstances of each case.[43] However, in case of ***Zephyr Exports Pvt. Ltd v. Central Bank of India***,[44] the Court held that though the measures under Section 13(4) should be taken within reasonable time but the failure to do such would not affect the rights of secured creditor. Right to initiate measures subsist till the asset remained NPA. The creditor does not lose the right to get repayment after the expiry of the notice period however fresh notice is to be issued.

The most common recourse taken by the secured creditor under section 13(4) is to take possession of the secured assets.[45]After the expiry of sixty days the secured creditor can take possession symbolic or actual and the borrower has no right to challenge the action of bank even on malafidies, until dispossessed. If after the notice the secured creditor meets with resistance from the borrower, recourse could be taken to mechanism provided under section 14 of the SARFAESI Act[46] by making application to the Chief Metropolitan Magistrate (CMM) or District Magistrate (DM). The Magistrate (CMM/DM) will scrutinise the application as provided in section 14, and if satisfied, appoint subordinate officer to take possession of the assets and documents. The secured creditor can also directly approach the Magistrate concerned

---

d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

43 *Industrial Finance Corporation of India v. Parekh Platinum Ltd*, AIR 2010 Guj 35.

44 II (2013) BC 419.

45 Khanna, KK Arun, "Is Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002: An effective tool of recovery: A study" 12 *KLJ* 16 (2007).

46 Section 14 provides that the secured creditor can take over the possession of assets after giving sixty days' notice. Where the secured creditor expects resistance, he can request in writing, the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction assets or documents are located. On such request, CMM/DM shall take possession of such assets and documents relating thereto.

under section 14 of SARFAESI Act.[47] The Act, provides different forums to secured creditor and debtor to redress the grievances. On one hand the secured creditor is empowered to seek assistance of state machinery while as the debtor is left with no option than to accept his fate. The debtor has no right to make objections to DM/CMM against the application seeking assistance made by the secured creditor. The borrower has no access to any impartial authority until dispossessed. Though the apex court in case of ***Travancore*** observed that if the DRT after examining the facts and circumstances of the case under Section 17 arrived to a conclusion that any measure under section 13(4) taken by the secured creditor is not in accordance with the provisions of the Act, it may by order restore the possession to the borrower. The DRT is empowered to make good the loss, if any, by restoring status quo ante. But the apex court was unable to consider the suffering of the borrower who though may get the possession back but the agonies, he might have gone through are beyond repair.

Ownership and Sale of the Secured Assets

In case of movable property, the movable assets could be sold by any of the following methods-

a) Obtaining quotations from parties dealing with secured assets or those who may be interested in buying such assets, b) Inviting tenders c) Holding public auctions d) By private treaty.[48]

The secured creditor has to cancel the sale of the property if the borrower pays off his dues at any time before expiry of thirty days' time of sale notice. If the buyer does not pay for the asset within time as agreed, the movable assets can be offered for sale again. On receipt of the sale price, the Authorised Officer (AO) shall issue a certificate of sale.[49] Thereafter the sale shall be absolute. The certificate of sale shall be prima facie evidence of title of purchaser.

In cases of immovable property, the AO shall take possession by delivering possession notice to borrower. After taking possession, the

47 *Standard Chartered Bank v. V. Noble Kumar*, (2013) 9 SCC 618.
48 Rule 6 of Security Interest (Enforcement) Rules ,2002.
49 Rule 7 Security Interest (Enforcement) Rules ,2002.

AO shall take care of property as an owner of ordinary prudence. After the assets are taken over, the AO is required to obtain estimated value of assets and fix a reserve price of assets to be sold from an approved valuer, in consultation with secured creditor, to ensure maximum realisation of dues.[50] There is no provision to consult borrower or involve him in the process of valuation. The AO shall serve to the borrower a notice of thirty days for sale of immovable secured assets.[51] The sale of immovable property shall not take place before expiry of thirty days on which public notice of sale is published in newspapers or notice of sale has been served on the borrower. Apex court in case of ***Mathew Varghese v. M. Amritha Kumar and Ors***[52] stated that unless and until a clear thirty days' notice is given to the borrower, no sale or transfer can be resorted to by a secured creditor. If the sale does not take place pursuant to notice issued under Rules 8[53] and 9[54] of 2002 Rules read along with 13(8) of the SARFAESI Act (which gives right to borrower to get back his property before thirty days of sale), it is imperative that for effecting the sale, the procedure is to be followed afresh, as earlier notice issued would lapse. The judgment of apex court clearly lays that the procedure as given in Rules 8 and 9 are mandatory and no sale could be carried by secured creditor without giving notice of thirty days to borrower. This is also substantiated by another decision of apex court in ***Rajiv SubramaniyanOrs. v. Pandiyas and Ors***,[55] wherein the assets of the borrower were sold without giving him notice. The apex court declared such sale as void.

Thus, the borrower has the right to get back his property on payment of the amount due to the secured creditor together with all costs, charges and expenses incurred by secured creditor at any time before the date of notice for public auction or inviting quotations or

50 Rule 8(5) of Security Interest (Enforcement) Rules, 2002.
51 Sub-rule (6) of Rule 8 of Security Interest (Enforcement) Rules ,2002.
52 (2014) 5 SCC 610.
53 Rule 8 gives the procedure to be followed in sale of immovable property including 30 days' notice to borrower before sale of assets.
54 Rule 9 states that no sale shall take place before expiry of 30 days from date of notice as given under sub-rule 6 of Rule 8.
55 (2014) 5 SCC 651.

tender from public or private treaty for transfer by way of lease, assignment or sale of secured assets[56].

Application Against Measures to Recover Secured Debt

The normal system of checking the misuse of powers under the SARFAESI Act, is available under sections 17 and 18 of the Act. The forum constituted by DRT Act, has been made available for adjudication in relation to ascertain the validity of the measures taken under the SARFAESI. However, such right to approach to DRT is suspended till such time that the secured creditor takes recourse to any of the measured under section 13(4).[57] The section enables any person including borrower who is aggrieved by the action taken by the secured creditor to make an application to the DRT having jurisdiction in the matter within forty-five days from the date on which such measures have been taken. The ambit of section is wide enough to include the claims of any person other than borrower who has suffered a legal grievance by the action taken by secured creditor. So bonafide purchaser of the mortgaged property can also make application to the DRT. The application has to be filed before the DRT having jurisdiction i.e. within whose jurisdiction the cause of action arises or where the secured asset is located or the branch of the bank is situated in which borrowers account is maintained. On application, the DRT has to consider whether the action taken by the secured creditor is in accordance with the provisions of the Act. If the DRT concludes that action of the secured creditor is unwarranted, it may by order declare the action of the secured creditor as invalid and restore the possession of the secured assets or management of the secured assets to the borrower.[58] The DRT as well as Debt Recovery Appellate Tribunal (DRAT) has power to award compensation in case where the secured creditor has abused the statutory powers vested in him. The compensation is to be paid by the secured creditor to borrower or any other aggrieved person. The application under Section 17 shall be

56 As provided by Amendment Act of 2016.
57 G.S DUBEY, "Scope for Challenge Before High Court in Relation to Secured Creditor's Action Under SARFAESI Act" 193 *Comp. Cases* 1 (2015).
58 Subsection (3) of Section 17 of SARFAESI Act.

disposed-off within sixty days[59] however DRT may extend such period after recording reasons in writing but such extension shall not exceed four months from the date of making of such application. In case DRT fails to dispose of such application within four months, the applicant may apply to DRAT for directing DRT to dispose-off application expeditiously.[60] Thus appellate authority under the Act, is DRAT to which person aggrieved by the order of the DRT can appeal within period of thirty days from the date of receipt of the order of the DRT. No appeal shall lie until the borrower deposits fifty percent of the debt or the amount determined by the DRT whichever is less to DRAT. The DRAT can reduce the amount of pre-deposit from fifty percent to twenty-five in appropriate cases after recording reasons for the same. The deposit of such amount in terms of section 18 is condition precedent for entertainment of the appeal. The court in the case of ***Narayan Chandra Ghosh v UCO Bank***[61] held that section 18 of the Act, confers a statutory right on a person aggrieved by any order made by the DRT under Section 17 of the Act, to prefer an appeal to DRAT. However, the right conferred under Section 18 is subject to the condition that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty percent of the amount of debt due from him, as claimed by the secured creditor or determined by the DRT, whichever is less. However, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty five percent of the debt. Thus, there is an absolute bar to the entertainment of an appeal under section 18 of the Act, unless the pre deposit is made. For adjudication and disposal of application before the DRAT, the provisions of the two enactments viz., SARFAESI Act and DRT Act, 1993 are to be followed. SARFAESI Act, is to be applied for examining whether the statutory powers have been properly exercised by the secured creditor and DRT, Act for the purpose of procedure. The

59 Section 17 (5) of SARFAESI Act, 2002.
60 Section 17 (6) of SARFAESI Act, 2002.
61 (2011) 4 SCC 548.

remedy is available to both secured creditor and borrower in case they are aggrieved of the order of DRT.

Exceptions to the SARFAESI Act

The application of SARFAESI Act, is not absolute. It does not absolutely apply over all kinds of mortgage transactions. The Section spells out the situations in which provisions of Section 13 of the Act, do not apply. First is on the lien of goods, money or security given by or under the Indian Contract Act, or Sale of Goods Act, 1930 or any other law for the time being in force. Whenever any goods or securities are deposited or bailed out to a banker, he has got right under the Indian Contract Act, to retain such goods or securities for any balance of accounts due from the customer. The secured creditor gets an interest in such a security or goods or money but he is barred from enforcing his security interest in such a possessory security under the SARFAESI Act. Other situations where in the secured creditor does not hold the right to enforce his security interest are in cases of pledge of movables, creation of security interest in any aircraft and any vessel, any conditional sale, hire purchase of lease or any other contract in which no security interest has been created. Any security interest for securing repayment of any financial asset not exceeding one lakh rupees and any security interest created in agricultural land cannot be enforced under SARFAESI Act.

The SARFAESI Act, can be said to be a very progressive piece of legislation but is saddled with loopholes. The Act, suffers from certain loopholes which are required to be addressed, some among them are as under:

1) The Act, provides for securitisation of financial assets, a major criticism of securitisation transactions is that they are merely 'window dressing', that is, transactions enabling a financially distressed company to create off-balance sheet financing, and in the process, present a false picture of banks and financial institutions in the market. The false picture occurs, because, after the transaction, the balance sheet appears stronger because cash has increased without corresponding liability.

2) Section 3 of the Act, deals with the registration of securitisation and reconstruction company. It states that once a company is registered

with the Reserve Bank the company becomes virtually immune from any legal challenge. The certificate of registration issued will vest unbridled powers with the private company. The motive of these private companies is to earn profits by recovery of loans. The private companies often hire recovery agents which harass the borrowers and threat them of dire consequences in order to make the recovery of loan fast. Thus, vesting such powers in a private company without any watchdog is unjustified.

3) The Act, contains provisions wherein the banks and financial institutions have the option of writing off their bad debts to asset reconstruction companies. There remains no incentive for the banks to make proper inquiry before sanctioning the loans for new projects. The banks in order to attract more customers usually sanction more loans without taking into consideration their capacity to repay. In a way, we can say the Act,encourages the banks to sanction loans without any second thought by giving them the option to write off their bad debts.

4) Audi alteram partem which is one of the fundamental principles of natural justice, protects a person from arbitrary administrative actions whenever his right to person or property is jeopardised. The corollary of this principle stands as "qui aliquidstatuerit, parte in auditaalteraaeuquum licit discerit, haudaequumfacerit" which means 'he who shall decide anything without the other side having been heard although he may have said what is right may not have done what is right. Thus, declaring the account of borrower as non-performing without giving the borrower a fair hearing is in violation of the fundamental principle of natural justice.

5) The power to classify an account as NPA has been vested solely in banks and there exists no adjudicatory authority to decide the dispute relating to the amount of liability of borrower. The banker has power to declare the account as NPA irrespective of the fact whether the default is wilful or otherwise. Even if such declaration is arbitrary, borrower could not challenge such classification except in appeal after possession of secured assets have been taken by bank and not before that. Thus, there

is no adjudicatory forum or authority to resolve any dispute which may arise in respect of alleged dues or the NPA.

6) Lending transactions, despite documentation and securities, at times remind of the situation "when a creditor lends an umbrella, there are no rains and when he demands it back, there are heavy rains and storms". As the SARFAESI Act vests recovery powers with banks but law at the same time has to balance the situation against exploitative attitude of the creditors who spare no effort, legal or beyond to ruin the borrower who may have bonafide intention to pay off the creditor provided some breathing time is made available to him to realise his own dues from others and create liquidity.[62]Instead of giving breathing time the secured creditor classifies his account as non-performing without going into the nature of the default and without going into the detail whether default is wilful or because of certain circumstances beyond the control of borrower. SARFAESI Act, do not make any sort of distinction between wilful defaulter and defaulter by circumstance. The banks instead of making investigation as to the cause of default pass judgment and declare the account of borrower as non-performing. The tag of wilful defaulter results in virtual rendition of the defaulter as pariah in the financial and commercial world. The Act, makes no classification between genuine defaulter and wilful defaulter which in some cases is called for doing justice. So, section 13(2) by making no classification between genuine defaulter and wilful defaulter becomes arbitrary and fanciful.

7) Under section 13(2) of SARFAESI Act, the borrower has the right to object to the demand notice through representation. Such representation is to be decided by the officials of the lender bank. Though the bank officials may not be biased but any reasonable man cannot ignore the pressing urgency of the banks to recover the sunken loans. It creates doubt in the mind of borrower that officials being the judges in their own case would always decide things in their favour. So, better is to vest such powers of classifying accounts as non-performing

62 Dr. Mahesh Thakar, "Creditor's Most Preferred Remedy is Subject to Stringent Conditions" 193 *Comp. Cases* 27 (2015).

to an independent system other than the officials of the lending bank which would regain the confidence of the borrower in such right of representation.

8) According to Section 14, the secured creditor may for the purpose of taking possession take help of the CMM/DM to assist secured creditor in taking possession of such assets and documents. The secured creditor gets assistance from the judicial officers on contrary the borrower who is about to lose his assets and business has no such recourse available. The borrower has to face all this only because of a decision passed by the secured creditor and not by any judicial authority.

9) The SARFAESI Act, does not attack the root cause of bad loans, which is political pressure, lack of due diligence on the part of secured creditor and their connivance with borrowers. It fails to cure the disease at the root.

10) The provisions of SARFAESI Act, are invariably applicable to all the borrowers irrespective of their respective liabilities. The Act, treats borrowers equally irrespective of their respective liabilities. Vijay Malaya, owner of Kingfisher Airlines who owes more than 100 crores to different banks would be treated at par with a common man who has defaulted in paying back educational loan to support his child's education. Thus, some sort of differential treatment is called for where amount in default is small as compared to when it is huge.

11) The procedural mechanism of the Act, offers different forums of redressal to the borrower and the creditor. The secured creditor gets to stake his claim against the borrower under section 13(4), and the borrower can object to such action under section 17 by making application to the DRT. Such right to approach the DRT is suspended until the secured creditor takes recourse to any of the measures under section 13(4). The procedure does not seem to be fair where the creditor adjudicates his own proceedings and the debtor has to take recourse to another forum.

12) The Act, gives unbridled powers to the banks and usually the power is abused by the banks who use criminal force in

taking over possession of assets. In order to protect borrowers from such harassment on the part of agents it is pertinent to make the lenders liable in case the borrowers suffer from high handed behaviour and attitude of lenders. In many cases the courts have denounced such use of force by the banks. Absence of the provisions providing for lenders liability aggravate the matter. Neglect to introduce such safeguards in the Act, to protect the borrowers against their vulnerability to arbitrary action on the part of the lenders is denounced.

The SARFAESI Act, had been passed with the avowed object of lowering the levels of NPAs. The banks and financial institutions are vested with immense powers to enforce security interest without the intervention of the courts. The Apex court[63] has also observed that few provisions of the Act, though harsh to the interests of borrowers, still, the court has desisted to tinker it; in order to combat the growing menace of NPA's. From year 2010-2019 following tabulated figures of NPA's were to be recovered through the mechanism provided under SARFAESI Act.

NPA's of Scheduled Commercial Banks Recovered through SARFAESI Act 2002.

Year	Amount Involved	Amount Recovered	Percentage of amount recovered
2010-2011	30,604	11,561	37.78
2011-2012	35,300	10,101	28.60
2012-2013	68,100	18,500	27.10
2013-2014	94,602	24,402	25.80
2014-2015	1,56800	25,600	16.30
2015-2016	80,100	13,200	16.50
2016-2017	1,13100	7,800	6.89
2017-2018	81,879	26,380	32.2
2018-2019	2,89073	41,876	14.5

63 *United Bank of India v. SatyawatiTandon,* AIR 2010 SC 3413.

Source: Reserve Bank of India, Reports on Trend and progress of Banking in India, 2010-2019.

By the end of 2019, it is evident that SARFAESI Act, has failed in its object to recover the NPAs, despite having stringent recovery mechanism. The percentage of recovery has varied from 37% to 6% indicating the dismal picture. The data given above would clearly show the efficacy of the SARFAESI Act, in recovery of NPA's. The recovery under the Act, has not been as ambitious as was expected after the introduction of the Act.

Conclusion

The recovery of NPA's has always been a nightmare for the creditors. The banks or other financial institutions often find it difficult to recover the loans. From time to time the legislature has done its part by enacting laws to keep check on the NPA's in order to boost the economy. The legislature has strengthened the hold of creditors by vesting unbridled powers to them. The SARFAESI Act, is one such tool in the hands of creditors to realise the debts. The creditors can take immediate possession of the security without taking recourse to courts. The offending provisions are such that, it all has been made one sided affair. Drastic measures of sale of the property or taking over the management or the possession of the secured assets are available without affording any opportunity to the borrower. The Act, is biased as it weighs more in favour of the creditors and putting the borrower at the mercy of the creditor. Though unfair still the Act, has failed to fetch the desired results. The main reason for the same being that the Act, stresses more on reinforcing the recovery procedures rather than recognising other grounds which led to surge in NPAs. Making recovery laws stringent could not beget results until they are followed by good banking practices. Moreover, the loopholes in the Act, need to be done away with.

Investigation under the Code of Criminal Procedure

Abstract

Investigationof crime is the first important step towards an effective administration of criminal justice system. It is through investigation that the veracity of an offence is established and crucial evidences are collected. The Code of Criminal Procedure authorizes both the Police and Judicial Magistrate into the task the of investigation. In cases of cognizable offences, the police can initiate investigation,while Judicial Magistrate can order investigation to be carried out by the Police. Even if police carry out investigation of cognizable offences, the judiciary is empowered by virtue of the inherent powers, tolook into the judicious exercise of the power of investigation by the police. Similarly, the Judicial Magistrate can order investigation of cognizable offences only at the pre-cognizance stage and such an order cannot be challenged in the court. Of Non-cognizable offences, police cannot initiate an investigation without an order of Judicial Magistrate and the Judicial Magistrate also cannot give an order for investigation in an arbitrary manner. The paper is an attempt to elucidate on such different aspects related with investigation of offences under the Code of Criminal Procedure.

Key Words: *Cognizable Offence, Non-Cognizable Offence, Investigation, Police, Magistrate, First Information Report, Charge sheet.*

In both adversarial and inquisitorial systems, investigation sets the ball in motion for further processes of the justice system. Police happens to be the authorized agency of the State to initiate any investigation based on own cognizance or under the direction of Magistrate. However, many countries following inquisitorial system both investigation as well as prosecution powers are vested with the State Prosecution. In those countries, police functions under the general control of Prosecution for the purpose of investigation. In Germany for instance the Criminal Procedure Code authorizes the prosecution to undertake investigation to

themselves or require police to do so. In France also, theProsecutors lead investigation process with the help of police officers appointed for investigation purpose. Irrespective of any agency authorized by respective code of criminal procedure to undertake the role of investigator, the vital task of investigation in itself is a subject of legal research.

Investigation:

The CrPCdefines Investigation as under:

"investigation" includes all the proceedings under this Code for the collection of evidences conducted by a police officer or by any person (other than a magistrate) who is authorized by a Magistrate in this behalf.[1]

Thus the stage of investigation of an offence essentially includes "collection of evidence". As per the scheme of the Code, the primary role to collect the evidence is of investigating authorities only. However, there occur various stages during the stage of investigation which warrant interference by the judicial organ of the State, primarily by the Judicial Magistrate. Though the extent of the interference of the judicial organ appears to be minimal, however, the Magistrate has been authorized by some provisions of CrPC to interfere with the investigation process also.

Investigation proceedings are conducted by a police officer or by any person who is authorized by a Magistrate in this behalf but not the Magistrate himself. However the judiciary has the duty not only to ensure that the enforcement is correctly targeted but also to ensure that it was properly conduced. The focus is now no longer only on the action and guilt of the accused; the criminal court should look into how the executive has deployed its power against him prior to the trial. On a broader view, the court's duty includes the supervision of police conduct.[2]

1 Section 2(h) of CrPC.
2 Supra n. 22.

As held by the Hon'ble Supreme Court in *H.N. Rishbud V. State of Delhi*[3] the investigation generally consists of the following steps:–

i. Proceeding to the spot;

ii. Ascertainment of the facts and circumstances of the case;

iii. Discovery and arrest of the suspected offender;

iv. Collection of evidence relating to the commission of the offence which may consist of the examination of various persons (including the accused) and the, reduction of their statements into writing, if the Officer thinks fit, the search of places or seizure of things considered necessary for the investigation and to be produced at the trial;

v. Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial, and if so, taking necessary steps for the same by filing of a charge-sheet under Section 173 CrPC. before the competent Court.

Cognizable Offence and Non-Cognizable Offence:

The Code of Criminal Procedure has classified offences into the Cognizable Offences and Non-Cognizable Offences. The definitions are given in Section 2 of the Code.

"cognizable offence means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant".

"non-cognizable offence" means an offence for which, and non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant".

Investigation of Cognizable Offences by Police:

In cases of cognizable offences, by virtue of the powers vested with them under Section 156(1) of the Cr.PC, police can investigate any such offence without the order of a Magistrate. However, there is a

3 A.I.R. 1955 S.C. 196.

requirement of mandatory registration of an FIR prior to any police investigation as per Section 154 of the Code. Some of the important decisions of the Supreme Court in this regard are mentioned herein below:

In *KirenderSarkar and Others* v*State of Assam,*[4]it was held that ordinarily the information about the offence committed is to be given to the police station having territorial jurisdiction where the offence has been committed. The officer in charge of the police station is legally bound to register a First Information Report in terms of Section 154 if the allegation made gives rise to a cognizable offence.

In *State of Haryana v BhajanLal*[5], it was held that at the stage of registration of a crime or case on the basis of the information disclosing cognizable offence, the concerned police officer is obliged to register a case and proceed with investigation if he has reason to suspect the commission of an offence. He cannot embark upon an enquiry as to whether the information laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible.

In State of *Haryana v BhajanLal*[6]it was also observed that:

(1) An overall reading of all the codes makes it clear that the condition which is sine qua non for recording a first information report must disclose a cognizable offence.

(2) It is therefore manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154 (1) of the Code, the said police officer has no other option except entering the substance in a prescribed form thereof.

S.154 (1) provides that every information relating to the commission of a cognizable offence if given orally, to an officer in-charge of a police station shall be reduced in writing by him or under his directions.

4 (2009) 3 Cr. L. J 3727 (SC)
5 1992 Supp (1) SCC 335.
6 Ibid

The Supreme Court in the cases of *BhajanLal and Others*[7], *Parkash Singh Badal and Another v. State of Punjab and Others*[8] and *AlequePadamsee and Others*[9]held that if a complaint alleging commission of cognizable offence is received in the Police Station, then the police has no option but to register an FIR under S.154 CrPC.

On the other hand Supreme Court in the cases, namely, *Rajinder Singh Katoch*[10]*P. Sirajuddin etc. v. State of Madras etc*[11], and*Sevi and Another etc. v. State of Tamil Nadu and Another*[12],: have taken contrary view and held that before registering the FIR under S.154 of CrPC, it is open to the SHO to hold a preliminary enquiry to ascertain whether there is a prima facie case of commission of cognizable offence or not. It was in this context the matter was referred to the larger Bench.

In the reference order Justice DalveerBhandari said *"It is quite evident from the ratio laid down in the aforementioned cases that different Benches of this Court have taken divergent views in different cases. In this case also after this Court's notice, the Union of India, the States and the Union Territories have also taken or expressed divergent views about the interpretation of S.154 CrPC".*[13]

---

7 (1992 Suppl.1 SCC 335),
8 (2007)(1) SCC 106)
9 (2007) 6 SCC 171)
10 (2007) 10 SCC 69),
11 1970 (1) SCC 595
12 1981 Supp SCC 43
13 *Lalita Kumari* v *Government of Uttar Pradesh and Another*, 12 November, 2013 (SC) judgment delivered by: P Sathashivam . The Supreme court had directed in para 111 : "Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further. iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action

In *Lalita Kumari v Government of Uttar Pradesh and Another*[14], a landmark judgement on the issue, it was finally held that the registration of FIR is mandatory if the information discloses a cognizable case. No preliminary inquiry is permissible by the police officer. If the information does not clearly disclose a cognizable offence then only a preliminary inquiry can be conducted in order to find out whether it is a cognizable offence. The inquiry should be completed immediately and the maximum delay should not exceed 7 days.

Power to quash and cancel FIR:

Section 482 of the Code provides that nothing shall limit or affect the inherent powers of the High Court to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The framers of the Code could not have provided which all cases should be covered as abuse of the process of court. It is for the court to take decision in particular cases.[15]

The scope of exercise of power under Section 482 of the Code was discussed in*State of Haryana* v.*BhajanLal,*[16] and the illustrative categories indicated in the judgement for exercise of inherent powers by High Court are as follows::

i. Where the allegationsmade in the FIR or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

---

must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence. v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under: a) Matrimonial disputes/ family disputes b) Commercial offences c) Medical negligence cases d) Corruption cases"

14 Ibid

15 *State of Orissa* v *Saroj Kumar Sahoo* (2006) 2 SCC Cri 272.

16 (1992) Supp 1 335.

ii. Where the allegation in the FIR or other materials do not constitute a cognizable offence justifying an investigation by the police under Section 156(1) of the code except under an order of a Magistrate within the purview of Section 155(2).

iii. Where the uncontroverted allegations in the FIR and the evidence collected thereon do not disclose the commission of any offence or make out a case against the accused.

iv. Where the allegations in the FIR do not constitute any cognizable offence but constitute only a non- cognizable offence, to which no investigation is permitted by the police without the order of Magistrate under Section 155(2).

v. Where the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

vi. Where there is an express legal bar engrafted in any of the provisions of the Cr. P.C or the Act concerned to the institution and continuance of the proceedings and/or where there is a specific provision in the Cr.P.C or Act concerned, providing efficacious redress for the grievance of the aggrieved party.

vii. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

Further investigation after filling of the charge sheet:

On completion of investigation by Officer in Charge of a Police Station, the procedure is that the police report (charge sheet) is filled before the magistrate under Section 173(2) of the Code. However, if the investigating police officer finds additional evidence as to the guilt or innocence of the accused person it would be in the interests of justice to allow such officer to make further investigation and to send supplementary report or reports to the concerned magistrate. Power of

police to conduct further investigation, even after laying final report, is recognized under section 173(8) of the Code. [17]

Investigation of Cognizable Offences by Magistrate:

Taking of Cognizance of Offences by Magistrates finds mention inSection 190 of the Code upon fulfilment of any of the following grounds:

i) Upon receiving a complaint of facts which constitute such offence;

ii) Upon a police report of such facts;

iii) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

Section 156(3) [18] further provides that any *Magistrate* empowered under *Section 190* may order an investigation.

As per Section 156(3) it is not essential that the Magistrate shall order investigation but the Magistrate is empowered in Section 156(3) to order such investigation in cognizable cases whereupon the police officer would be bound to take the FIR and investigate. This is a wide power with which the magistrate is entrusted to ensure investigation.

In *SakiriVasu v State of UP*[19] it was held that Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

17 *Sri. B.S.S.S.V.V.V. Maharaj*v *State of Uttar Pradesh, 1999 Cr Lj 3661 (SC)*

18 Section 156(3): (3) Any Magistrate empowered under section 190 may order such an investigation as above mentioned

19 (2008) 2 SCC 409

Magistrate's order for investigation:

In *Tula Ram v Kishore Singh*,[20] the Supreme Court considered the order for investigating under Section 156(3) on a complaint. After considering various earlier decisions, the court on a careful consideration of facts and circumstance of the case proposed the following legal propositions:

- That a Magistrate can order investigation u/s. 156(3) only at the pre- cognizance stage, that is to say, before taking cognizance u/s. 190, 200 and 204 and when a Magistrate decides to take cognizance under the provisions of Chapter 14, he is not entitled in law to order any investigation u/s 156(3) though. In cases not falling within the proviso to s.204, he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 202 of the Code.
- Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:

a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightway issue process to the accused but before he does so, he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses;

b) The Magistrate can postpone the issue of process and direct an enquiry by himself;

c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

- In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

- Where a Magistrate orders investigation by the police before taking cognizance u/s. 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or

20 1977 AIR 2401, 1978 SCR (1) 615

straightway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 as described above.

Can Magistrate's order under section 156(3) be challenged?:

It was held in*DevarapalliLakshminarayana Reddy* v.*Narayan Reddy*[21], that an order made under Sub-section (3) *of* Section 156*,* is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156 (1) only and it cannot be challenged. The Court reasoned that a police officer records an FIR in accordance with the procedure mentioned in Section 154 (1*)*, and in the event of the failure of the police officer to record the information, the aggrieved informant has been given a right to approach the Superintendent of Police under Section 154 (3) for a direction for investigation. Such powers may also be exercised by any officer superior in rank to an officer in-charge of a Police Station in view of *Section 36*. The power of a Magistrate for giving directions under Section 156(3) is thus allied to the powers of police officers under Sections 154(1), 154(3) and 36 of the CrPC. It would thus be highly illogical to suggest that the Courts have no jurisdiction to interfere in a criminal revision or other judicial proceedings with the decision of the police officer in-charge of the police station to lodge an FIR under Section 154(1*)* or by a superior officer under Section 154(3*)*, or the actual investigation conducted by the police under the aforesaid provisions, but the initial order of the Magistrate under Section 156(3*)* peremptorily reminding the police to perform its duty and investigate a cognizable offence could not be subject to challenge in a criminal revision or other judicial proceeding.

Magistrate cannot direct a superior officer to investigate:

While ordering registration of case under Section 156(3), the Magistrate cannot direct any superior police officer than Officer in

21 AIR 1976 SC 1672

charge of the police station to conduct an investigation. In *Central Bureau of Investigation Jaipur v State of Rajasthan*[22]it was held that the Magistrate can only direct the officer in charge of the police station to conduct investigation under Section 156(3) and not to any superior officer, though, such superior officer can exercise his powers by virtue of Section 36 of the Code. Superior officer thus can himself take over investigation from officer in charge of the police station.

Investigation of Non-Cognizable Offences:

Section 155(2) explicitly denies any power to a police officer to investigate non- cognizable case without an order of the Magistrate having power to try such case. Any investigation being carried out by police in such a case is illegal and void. The primary rule is that no police officer shall investigate a non- cognizable case without the order of a magistrate having power to try such case or commit the case for trial. The Code does not expressly give power to a magistrate to order investigation into a non cognizable case. Such a power, however, can be implied from the wording of Section 155(2). The code does not give any direction or guidance to the magistrate as to how and in what circumstances the power to order investigation is to be exercised. Certainly the power is not to be exercised arbitrarily or capriciously. Probably the magistrate is to be consider the totality of the circumstances and consider whether it would not be just and proper to ask the police to investigate the non cognizable case.If a police officer investigates a non cognizable case without the order of a magistrate, such a non-conformance to the mandatory provisions laid down in Section 155(2) may be a material one vitiating the ultimate proceedings and may be considered as violative of Article 21of the constitution.[23]

22 AIR 2001 SC 668.

23 *Subodh Singh* v State, 1974 Cri LJ 185 (Cal) also in *P kunhumuhammed*v *State of Kerala,* 1981 Cri LJ 356 (Ker).

Conclusion:

In conclusion it can be said that investigation is an affair of utmost significance for success or failure of any criminal justice process. The judiciary has interpreted several provisions related with investigation of the Code of Criminal Procedure in a progressive manner. Reading of the provisions of the Code in the light of judicial pronouncements can give us an adequate understanding of the complexities of investigation. The discussion above was an effort in the direction.

Debajit Kumar Sarmah*

* **Assistant Professor, Tezpur University(Central), Assam**

An Appraisal of Jolting Insertion of Mediation under Consumer Protection Act, 2019

ABSTRACT

Whether the traditional method of formal adjudication, i.e., the court system will remain effective till the civilizations exist? Well, a concrete answer may not be given but this certainly raises another question that what if this method turns or starts turning obsolete, should not there be an 'alternative' to act as an ancillary measure. Indeed, the government had realized the importance of the Alternative Dispute Resolution (hereinafter referred to as 'ADR') mechanism way before, though the reason preceding its emergence may not be that as stated above. ADR is a complete body in itself encapsulating different methods that have similar procedures for disposing cases without the involvement of court. Mediation is one such method whereby negotiation is facilitated between the disputants to reach a mutually-consensual settlement. The scope of mediation has been widened by its inclusion in the new Consumer Protection Act of 2019 (hereinafter referred to as 'the Act'), but the Act has also opened the back-door to welcome issues and challenges. This Research Paper has a tunnel-minded vision to bring on the forefront such hurdles in the growth of mediation through this Act.

Key Words: *Adjudication, Consumer, Dispute Resolution, Mediation, Negotiation*

INTRODUCTION

Mediation is a tool through which the parties in dispute find a mid-way to reach a win-win situation. The process is facilitated by a third party which is obliged to be impartial but such obligation does not rest upon the parties to conform to the settlement so reached. Much formal procedure is not required to conduct mediation proceedings as compared to arbitration and thus involves such issues that have the potential of resulting in amicable resolutions. In the recent past, mediation has

become a parallel mechanism to the commissions under the Act with the idea of effective settlement of consumer grievances.

This paper deals with the question whether mediation truly purports to be a relevant body to deal with all or certain kinds of consumer disputes.

Mediation as a part of the Act is a novel concept and not much relevant material is available in this regard.Thus, the ideas and opinions expressed in this submission are my analysis of the Act involving a critical study of mediation in the context of consumer disputes and other related concepts.

MEDIATION: AN ANALYSIS

The Supreme Court is the final arbiter of the Indian Constitution and irrespective of the unavailability of any law regarding to mediation, its observations are of `dogmatic significance. In the case of **Salem Advocate Bar Association v. Union of India**[1], the Supreme Court took a firm stand for the relevance of mediation. This led to laying down of model rules and establishment of mediation centres attached to courts. Also, in **Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.**[2], the Apex Court laid down certain case types suitable for mediation, namely, cases relating to trade, commerce and contracts, matrimonial disputes, disputes with members of societies, cases of tortuous liability and *consumer disputes.* These are some of the pioneer cases where the court had annexed relevance to mediation within the legal framework.

A. Procedural Screening

In order to know the effectiveness of mediation, it becomes an imperative, firstly, to look into how it all goes that ultimately ends up in a settlement and secondly, what differentiates it from the formal adjudication. To make it more relevant, it is better to study the aforesaid in the light of the Act. For say, the claimants have sued the defendants

1 (2003) 1 SCC 49
2 (2010) 8 SCC 24

for Rs. 43,500 with respect to failure to supply jewellery as promised. The defendants are of the view that the items have got lost in the post and the same is not within their control. However, the claimants are refusing to accept the above justification and stand by the contention that either the defendants are being dishonest or they did not have enough stock. Now, one of the most probable response by a mediator to this problem will be that he had figured out that the disputants are sharing a business relationship from a long time and a little less amount of compensation than what has been claimed will be fixed to be acceptable to both. Further, this might not be truly a win-win situation for claimants, so the mediator will convince the other side to supply such jewellery in future at more preferential rates than earlier.

The above situation is an inference of how a balance is meted out in the interests of both sides. How a court or a commission, an adjudicating body under the Act, will view and decide such case needs to be learnt in order to understand the growing need for mediation. This could be better done by comparing the approaches of both the said mechanisms with regard to a particular issue. For instance, one is a printing company and the other is a consulting firm. The issue resides in the additional bill charged by the firm and the same is opposed for not performing their duties diligently in the first place. Again, a counter allegation is that the employees of the company slacked off in the initial sessions which required them to conduct further sessions for them, thus leading to additional charges. Here comes the role of the mediator, who will first conduct a *joint session* where he confronts the fact as admitted by the printing company that due to lay-offs in the recent past has brought down the morale of the employees. This brings them to a short-end of the stick and the same cannot be an excuse for not paying the due additional bill. To ensure that an *impasse* does not get created, *caucuses* might turn out to be beneficial. In the private session, latent concerns will gain more light, whereby the printing company tells that they are in a financial distress and the firm's concern on the other hand is of their reputation which will get deteriorated due to the failed training programs. Lastly, *negotiations* come into picture leading to additional

charges getting reduced by half and a promise on behalf of the company that they will not malign the firm to other organizations.

If the above problem would have been at the scrutiny of a court, had it been the same follow-up as was there in the case of mediation?In my opinion, no. Instead, firstly the court must had gone into the requirement to establish a *prima facie* case. For say, whether the services so provided in this case are covered within the definition of *service* provided under *section 2(42)*[3] *of the Act*. This stretches the argument further that if it is a *contract of personal service,* then the same will be ousted from the definition by the exclusionary part of such definition. This will lead to citing of authorities to differentiate between 'contract of service' and 'contract for service'. Thereafter, once this will be decided, another issue arises as to whether any clause was there in the actual contract between the disputing parties to allow or eliminate charges for additional sessions or under which circumstances that such charges could be attracted, if any. *One thing becomes manifest here that the latter mechanism will consume time more than a foam soaks water, make the parties go lethargic and the end result will in turn be futile. More importantly, the decision will not be so amicable as one's right will certainly get suppressed which was not the case in mediation.*

B. Declining Preference for Arbitration in the Act

The legislators were not keen to have an arbitration clause in the Act and rather showed a preference for mediation. The question arises here is that why was it so, where an arbitration agreement holds much water than a mediation settlement. If we have a look at the object of the Act, it is more inclined towards opening gates for better redressal of consumer complaints. An arbitration clause in the agreement tends to

3 S. 2(42)- "service" means service of any description which is made available topotential users and includes, but not limited to, the provision of facilities in connectionwith banking, financing, insurance, transport, processing, supply of electrical or otherenergy, telecom, boarding or lodging or both, housing construction, entertainment,amusement or the purveying of news or other information, but does not include therendering of any service free of charge or under a contract of personal service;

degrade the position of a consumer as e-commerce is becoming vibrant now-a-days and otherwise also, such clause pushes the consumer into arbitration and shuts down other redressal mechanisms in the Act. The same was highlighted in the case of **Aftab Singh and others v. Emaar MGF Limited and Another**[4], wherein the builder contended that the buyer agreement had an arbitration clause which overrides and excludes the jurisdiction of National Consumer Disputes Redressal Commission (NCDRC). However, the court struck down his contention and said that the impugned arbitration clause cannot oust the jurisdiction of a tribunal and the matter can be exclusively heard before the NCDRC. In order to avoid such conflict between parallel mechanisms of adjudication or to further aggravate the situation by explicitly providing recognition to arbitration in the Act, it bowed in favour of mediation. How advantageous mediation is, was much noticeable in the previous part and is such mechanism which settles disputes, especially those involving petty amount of money, in a more effective manner than arbitration.

C. Provisions of Mediation in the Act

Chapter V of the Consumer Protection Act, 2019 Act deals with mediation. *Section 74*[5] empowers the Central Government and State Government to establish a consumer mediation cell to be attached to the

4 (2019) 12 SCC 751

5 S.74 (1) The State Government shall establish, by notification, a consumer mediationcell to be attached to each of the District Commissions and the State Commissions of thatState.
(2) The Central Government shall establish, by notification, a consumer mediation cellto be attached to the National Commission and each of the regional Benches.
(3) A consumer mediation cell shall consist of such persons as may be prescribed.
(4) Every consumer mediation cell shall maintain—
(a) a list of empanelled mediators;
(b) a list of cases handled by the cell;
c) record of proceeding; and
(d) any other information as may be specified by regulations.
(5) Every consumer mediation cell shall submit a quarterly report to the DistrictCommission, State Commission or the National Commission to which it is attached, in themanner specified by regulations.

NCDRC and the District and State Commissions respectively. Also, such mediation cell has to maintain a list of empanelled mediators, list of cases, record of proceedings and other relevant information. *Section 75*[6] empowers DCDRC, SCDRC and NCDRC to appoint a panel of mediators respectively on the recommendation of a selection committee, consisting of the President and a member of the commission. From the qualifications and experience so required, hailing though the code of conduct and till the impeachment, all the requirements will be such as specified in the regulations. The term of office of such mediators will be of five years and they could be re-empanelled as well. *Section 77*[7] lays down the duties of mediators, to be enumerated, firstly to disclose any personal, professional or financial interest involved in the dispute, secondly, any circumstances which raise a justifiable doubt as to independence or impartiality and lastly, any other facts as concerned through a legislation. The mediator can be removed and replaced by another mediator by the respective commission on information so given

6 S.75 (1) For the purpose of mediation, the National Commission or the State Commission or the District Commission, as the case may be, shall prepare a panel of the mediators to bemaintained by the consumer mediation cell attached to it, on the recommendation of aselection committee consisting of the President and a member of that Commission.
(2) The qualifications and experience required for empanelment as mediator, theprocedure for empanelment, the manner of training empanelled mediators, the fee payable toempanelled mediator, the terms and conditions for empanelment, the code of conduct forempanelled mediators, the grounds on which, and the manner in which, empanelled mediatorsshall be removed or empanelment shall be cancelled and other matters relating thereto, shallbe such as may be specified by regulations.
(3) The panel of mediators prepared under sub-section (1) shall be valid for a period offive years, and the empanelled mediators shall be eligible to be considered for re-empanelmentfor another term, subject to such conditions as may be specified by regulations.

7 S.77 It shall be the duty of the mediator to disclose—
(a) any personal, professional or financial interest in the outcome of the consumer
dispute;
(b) the circumstances which may give rise to a justifiable doubt as to his independence or impartiality; and
(c) such other facts as may be specified by regulations.

by the disputing parties or the mediator itself as specified in *section 78*[8]. *Section 79*[9] clearly lays down that the mediator must have due regard to the rights and obligations of the parties, usages of trade, circumstances leading to dispute and principles of natural justice. *Section 80*[10] requires the mediator to send the settlement report to the concerned commission mentioning the issues so settled, whether all or any, signed by the parties and if the dispute could not be resolved within the stipulated time, i.e. three months, then a report for the same shall be sent. Lastly, *section 81*[11] requires the concerned commission to pass an order within seven

8 S.78- Where the District Commission or the State Commission or the NationalCommission, as the case may be, is satisfied, on the information furnished by the mediator oron the information received from any other person including parties to the complaint andafter hearing the mediator, it shall replace such mediator by another mediator.

9 S.79 (1) The mediation shall be held in the consumer mediation cell attached to theDistrict Commission, the State Commission or the National Commission, as the case may be.
(2) Where a consumer dispute is referred for mediation by the District Commission orthe State Commission or the National Commission, as the case may be, the mediator nominatedby such Commission shall have regard to the rights and obligations of the parties, the
usages of trade, if any, the circumstances giving rise to the consumer dispute and such other
relevant factors, as he may deem necessary and shall be guided by the principles of natural
justice while carrying out mediation.
(3) The mediator so nominated shall conduct mediation within such time and in suchmanner as may be specified by regulations.

10 S.80 (1) Pursuant to mediation, if an agreement is reached between the parties withrespect to all of the issues involved in the consumer dispute or with respect to only some ofthe issues, the terms of such agreement shall be reduced to writing accordingly, and signedby the parties to such dispute or their authorised representatives.
(2) The mediator shall prepare a settlement report of the settlement and forward thesigned agreement along with such report to the concerned Commission.
(3) Where no agreement is reached between the parties within the specified time or themediator is of the opinion that settlement is not possible, he shall prepare his reportaccordingly and submit the same to the concerned Commission.

11 S.81 (1) The District Commission or the State Commission or the National Commission,as the case may be, shall, within seven days of the receipt of the settlement report, passsuitable order recording such settlement of consumer dispute and dispose of the matteraccordingly.

days of the receipt of the report and if the issues have been settled in part, then order shall only be passed for such issues and the rest of the issues shall be heard accordingly.

D. Analogous Provisions of Mediation

The provisions for mediation have been incorporated in various statutes and imbibe a different essence with respect to the nature and object of the statute. Under *section 89*[12] *of the Civil Procedure Code, 1908 (CPC)*, mediation has been included as one form of ADR

---

(2) Where the consumer dispute is settled only in part, the District Commission or theState Commission or the National Commission, as the case may be, shall record settlement ofthe issues which have been so settled and continue to hear other issues involved in suchconsumer dispute.
(3) Where the consumer dispute could not be settled by mediation, the DistrictCommission or the State Commission or the National Commission, as the case may be, shallcontinue to hear all the issues involved in such consumer dispute.

12 S.89- Settlement of disputes outside the Court.—(1) Where it appears to the Court that there existelements of a settlement which may be acceptable to the parties, the Court shall formulate the terms ofsettlement and give them to the parties for their observations and after receiving the observations of theparties, the Court may reformulate the terms of a possible settlement and refer the same for :—
(a) arbitration;
(b) conciliation;
(c) judicial settlement including settlement through Lok Adalat: or
(d) mediation.
(2) Were a dispute has been referred—
(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act,1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred forsettlement under the provisions of that Act;
(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisionsof sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all otherprovisions of that Act shall .apply in respect of the dispute so referred to the Lok Adalat;
(c) for judicial settlement, the Court shall refer the same to a suitable institution or person andsuch institution or person shall be deemed to be a Lok Adalat and all the provisions of the LegalServices Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalatunder the provisions of that Act;
(d) for mediation, the Court shall effect a compromise between the parties and shall follow suchprocedure as may be prescribed.]

mechanism, the effect to which is being delivered under *section 21*[13] *of the Legal Services Authority Act, 1987*. Since a consumer dispute is a civil matter, thereby attracts the jurisdiction of both, a civil court as well as the commissions under the Act and thus, an anomaly arises that as to which forum the matter will be referred to. Going by the rule of *Generalis Specialibus Non Derogant*,it is clear that whenever a special law has been enacted with regard to a particular concern like consumer disputes in the case in hand, it will supersede the general law in that regard.

Also, the *Arbitration and Conciliation Act, 1996* provides for mediation in a slightly different manner. Under *section 30*[14], if a settlement has been arrived by virtue of *section 73*[15], then the arbitral

13 S.21- Award of Lok Adalat—
(1) Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-free paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870 (7 of 1870).]—1[(1) Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-free paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870 (7 of 1870).]"
(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.

14 S.30- Settlement—
(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.
(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.
(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

15 S.73- Settlement agreement—

tribunal can terminate the arbitration proceedings and if the parties do not object, can record the settlement in the form of an arbitral award. However, in **A. Ayyasamy v. A Paramasivam[16],** the court clearly stated that arbitration cannot be approached as the matter exclusively deals with consumer dispute and will fall within the ambit of legislation enacted in that behalf. *Thus, in matters relating to consumer disputes, the mediation cell so referred in the Act will have the jurisdiction to decide and the rules followed for the same will be that as framed by the NCDRC or the Central Government, as the case may be and not the High Court Rules which being the rule-making authority for court-annexed mediation under section 89 of CPC.*

E. Advantages of Mediation

Most of the advantages can be inferred from the initial part of the submission regarding ease in procedural complications, effective communication, low-cost procedure, non-binding nature of settlement which means that any of the parties can switch to formal proceedings before the concerned commission by refusing to settle the issues through mediation and no scope for appeal against settlement; thus, a party cannot unnecessarily drag another party for years through filing for appeal or review.

In addition to the above, Online Dispute Resolution (ODR) mechanism has been launched by NITI Aayog in association with Agami

(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.
(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.
(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.
(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

16 (2016) 10 SCC 386

and Omidyar Network India. In this meeting where judges were also called, Justice A.K. Sikri clearly upheld the significance of ODR which is an online-ADR or a pre-litigation mediation. He said that in the world of digitalization where everyone is indulged in online transactions with e-commerce companies, ODR has become the exigency of time. In the beginning, petty disputes could be referred to ODR and gradually, commercial and property disputes will also become suitable.[17] This shows the growing faith in mediation.

I. A MUCH EARLY STEP: MEDIATION

The parliamentarians have certainly come up with an idea to redress consumer disputes in a more effective and efficient manner but the same is susceptible to various challenges which may have not come in open due to a short span of time elapsed since the date of enactment, i.e. 2019. Hereinbelow are listed some of the issues and challenges to mediation under the Act which are plausible to be encountered in future.

- **Jurisdictional Ambiguity**

Section 37[18] of the Act provides that where a matter has come before the district commission, it can ask the parties to give their consent in writing within five days for the matter to be referred to mediation. Now, the challenges that arise here are firstly, the complainant has to approach the district commission and then only his matter could go for mediation and the same is also not necessary as the discretion lies with

17 See NITI Aayog, Agami and Omidyar Network India, available at:https://niti.gov.in/catalyzing-online-dispute-resolution-india (last visited on February 22, 2021)

18 S.37 (1) At the first hearing of the complaint after its admission, or at any later stage, ifit appears to the District Commission that there exist elements of a settlement which may beacceptable to the parties, except in such cases as may be prescribed, it may direct the partiesto give in writing, within five days, consent to have their dispute settled by mediation inaccordance with the provisions of Chapter V.
(2) Where the parties agree for settlement by mediation and give their consent inwriting, the District Commission shall, within five days of receipt of such consent, refer thematter for mediation, and in such case, the provisions of Chapter V, relating to mediation,shall apply.

the commission. Secondly, according to *section 34*[19], the jurisdiction of such district commission will be invoked with regard to the place where either the opposite party resides or carries business or where cause of action has arisen or the complainant resides or works for gain. This creates an issue for the complainant as if he approaches the commission having jurisdiction over his place of residence and the defendant resides or carries business in a place far from the place of such commission, it will create a sense of tension between the parties even before the beginning of mediation proceedings and the same could directly hamper the settlement. For instance, where the defendant has to come from a far-off place to attend the mediation proceedings for which he has to incur various expenses relating to transportation or accommodation and this will frustrate him to not to negotiate on any issue, thereby turning the object of mediation futile. Also, ODR mechanism may not be relied in such cases as it is a completely new initiative with alongside digital challenges like lack of accessibility, understanding and a well-codified legislation or notification of its use and can only be used when both the parties are equally compatible with respect to its application.

19 S.34 (1) Subject to the other provisions of this Act, the District Commission shall havejurisdiction to entertain complaints where the value of the goods or services paid as consideration does not exceed one crore rupees:Provided that where the Central Government deems it necessary so to do, it mayprescribe such other value, as it deems fit.
(2) A complaint shall be instituted in a District Commission within the local limits ofwhose jurisdiction,—
(a) the opposite party or each of the opposite parties, where there are more thanone, at the time of the institution of the complaint, ordinarily resides or carries onbusiness or has a branch office or personally works for gain; or
(b) any of the opposite parties, where there are more than one, at the time of theinstitution of the complaint, actually and voluntarily resides, or carries on business orhas a branch office, or personally works for gain, provided that in such case thepermission of the District Commission is given; or
(c) the cause of action, wholly or in part, arises; or
(d) the complainant resides or personally works for gain.
(3) The District Commission shall ordinarily function in the district headquarters andmay perform its functions at such other place in the district, as the State Government may, inconsultation with the State Commission, notify in the Official Gazette from time to time.

- **Unscrupulous Outcomes**

It is highly expected that mediation will lead todesired results by bringing parties on the same parlance for settlement but such may not be the case. In the recent past, in the case of **Baglekar Akash Kumar v. More Megastore Retail Ltd.**[20], wherein the megastore was charging Rs. 3 for carry bags which bear the logo of the store and the same was contended to be an unfair trade practice under the Act as firstly, they are using the consumers as their advertising agent and over the top, charging them as well to purchase such bags. The DCDRC held that defendant to pay Rs. 15,000 to the complainant as compensation and to sell all the carry bags bearing the logo free of charge and charges could only be taken for such carry bags which do not have logo upon them. If this case would have been shifted for mediation, had the results been same. In my opinion, the mediator would have certainly asked the defendant to lessen the rates for logo-bearing carry bags from Rs 3 to Rs 1 or 2 or to provide the complainant with a lump sum amount of may be Rs. 5000-Rs. 10,000 as compensation. This actually deviates from the actual object of the Act as though the consumer may have been compensated for the immediate wrong so caused to him but the actual unfair trade practice has not stopped and is still in practice in some or the other manner.

- **Undemarcated Boundaries**

There have been no guidelines regarding which all cases could be referred for mediation. In the recent case of **Tata Motors Ltd. v. Anonio Paulo Vaz and Another**[21], wherein the dealer, Vistar Goa sold a 2009 model car under the guise of 2011 model and complainant held both, manufacturer as well as the dealer, liable for the unfair trade practice. However, the Supreme Court finally held that since it was the case on a *principal-to-principal* basis, the manufacturer cannot be made liable for the fault unless the knowledge regarding the same is proved on his part and thus, only the dealer is liable. Again, if this matter would

20 Consumer Case No. 310/2019
21 Civil Appeal No. 574/2021

have come before the mediation cell, most probably, the manufacturer and the dealer would have jointly or severally compensated the complainant or had made repairs in the car or replaced the car. But if we had reached at such probable decision, a precedent exempting the manufacturer's liability in such cases would have not come out, thereby leaving behind the scope for interpretation.

Also, matters which involve substantial amount of money could not be referred to mediation like property disputes, where there is direct involvement of documents and an equal probability of forging the same. In fact, the recent notification of the Central Government of 2020, whereby *Rule 4(c)*[22] states that matters involving fabrication of documents or forgery or fraud or impersonation or coercion shall not be sent for mediation and though, a property matter might not prima facie involve any such issue but there is a high probability that such issue might arise at a later stage during the proceedings. Further, as per the notification of NCDRC of 2020, *Rule 11(4)*[23] states that the mediator is not bound to follow provisions of CPC and the Indian Evidence Act, 1872 which means that if a document has been produced during the proceedings, it could be deemed to be genuine due to the non-binding requirement of testing its authenticity. This ultimately reduces the scope of mediation as only cases involving petty issues could be sent which have their own disadvantages as discussed previously.

- **Adoption of Opt-In model**

Under the Act, we have adopted the Opt-In Model which means that it is not an obligation to approach mediation, neither upon the mediator nor the parties, alike the settlement so reached in mediation. This reduces the degree of judicialization in the procedure and negates its importance to certain extent. As opposed to the Indian Model, Italy and Hong Kong relies on the *Opt-Out Model*, whereby the disputants

22 4(c)- cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion;

23 11(4)- The mediator shall be guided by the principles of natural justice and fair play but shall not be bound by the provisions of the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872)

have to first exhaust the option of mediation and in case of its failure, the case could be sent for formal adjudication. Also, under *section 12-A*[24] *of the Commercial Courts Act, 2015*, Opt-Out Model has been provided whereby the parties need to first exhaust pre-institution mediation and if a settlement is being meted out, it will have the same status as of an arbitral award under *section 30 of the Arbitration and Conciliation Act, 1996*.

CONCLUSION

In my opinion, mediation under this Act is not suitable to deal with all kind of consumer disputes. Seeking to the far-reaching implications

24 S.12A- Pre-Institution Mediation and Settlement—(1) A suit, which does not contemplate any urgent
interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of preinstitution mediation in accordance with such manner and procedure as may be prescribed by rules made
by the Central Government.
(2) The Central Government may, by notification, authorise the Authorities constituted under the
Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.
(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the
Authority authorised by the Central Government under sub-section (2) shall complete the process of
mediation within a period of three months from the date of application made by the plaintiff under
sub-section (1):
Provided that the period of mediation may be extended for a further period of two months with the
consent of the parties:
Provided further that, the period during which the parties remained occupied with the pre-institution
mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963
(36 of 1963).
(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced intowriting and shall be signed by the parties to the dispute and the mediator.
(5) The settlement arrived at under this section shall have the same status and effect as if it is an
arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act,
1996 (26 of 1996).]

of mediation in the Act, there is a necessity to frame certain guidelines through an order or notification which shall formulate that firstly, which all cases could be referred to mediation with alongside requirements for those cases where bulky amounts are involved, secondly, to bring further ease in the alleged jurisdictional issues, rules shall be made for the parties, especially the adverse party, to approach a forum which is practicable for such party, thirdly, Opt-Out Model shall be adopted for instilling more confidence in mediation and lastly, the ODR mechanism shall be made more reliable by laying down guidelines in that behalf in order to make it more widely-known and set up online institutions in more number of cities to increase the scope of accessibility.

DR. UNANZA GULZAR*

* Assistant Professor, School of Law, The NorthCap University can be reached @ unanzagulzar@gmail.com

Hindu Female Intestate Succession: An Epitome of Discrimination

Abstract

In Hindu Families, female members have been historically discriminated in regards to succession as well as inheritance. For ages, both males and females had separate traditions regarding to inheritance of property based on their marital status. However, things changed and fortunately, after the year 2005 when the Hindu Succession Act was amended and got rid of all injustice which was based on inheritance. It has since then been observed that the married women still faced injustice when it came to inheritance and the author through this article would bring to light the injustices and the constitutional implications of such provisions and what effect the amended law has brought on the society.

***Key Words**: Inheritance, Succession, Hindu Marriage Act, Female Intestate*

Introduction

In India, property rights concerning females are governed by various legal as well as few social frameworks, wherein institutions are subject to modification, which are frequently influenced by various patriarchal and gender norms and a variety of socioeconomic and political forces. Parliament has responded to the growing need to legislate on property rights as a result of the constitutional obligations of equality and abolition of discrimination under Articles 14 and 15 of India's Constitution, as well as the Directive Principles, which states that the state shall make sure that both genders are treated equally. Because of the strong hold of tradition, even while introducing significant reforms, legislators made concessions in some areas, particularly around the inferior position of women, and in doing so sacrificed the uniformity that had been one of the primary goals of enacting this law.

'Succession' in legal parlance refers to the transfer of legal rights from one generation to the next, or more simply the passing of legal

rights from one generation to the next. The term 'Intestate' refers to the death of a person without leaving a will, and in such a case the devolution of property is governed by personal laws, which implies that these laws will have an underlying religious influence and will be in accordance with older patriarchal family structures. Early in the history of Hindu society, the socio-economic contexts recognized property as a part of a collective stock known as Joint Hindu Family Property; and the Mitakshra School of law has concentrated on formulating rules for succession of such joint holdings only, rather than other types of property. Throughout the centuries, Hindu society has seen significant changes and advances, which have resulted in the formation of individual holdings, which are commonly referred to as self-acquired property. Persons who die intestate are entitled to the devolution of Hindu family property as well as the property which was acquired by the person themselves, according to the provisions of the current legislation. On the other hand, the manner in which property of a Hindu female gets devolved has legislative and judicial gaps, which has resulted in ambiguities that have, in turn, resulted in judicial precedent that is anti-gender equality. This is primarily because when the aforementioned act was enacted, the then legislature could not have anticipated a time in the future when women would acquire property on their own in their individual right. The Hindu Succession Act, 1956, also controls the non-testamentary succession of Buddhists, Jains, and Sikhs in the same manner as it does Hindus. The Hindu Succession Act was a first of its kind to give absolute ownership rights to women in all kinds of property. Section 14 of the Act talks about woman's property, which has aspects of both moveable and immovable property that she owns as well as property that she has gained through her own efforts. It makes no distinction between property that has been inherited and property that has been bought. It also includes any such property acquired via "*inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or*

by purchase or by prescription, or in any other manner, and also any such property held by her as stridhana".

The aforementioned legal notion is exercisable under Sec.15 and Sec.16 of the amended act of 2005, in which female acts as a coparcener and in respect of property, she has undivided stakes in Mitakshara Coparcenary Property.

Decoding The Legislative Text Of Hindu Succession Act, 1956

Section 15(1) mentions:

"(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16, —

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother."

This implies that apart from inheritance if any property is received by a Hindu female from the abovementioned persons on account of a gift, will or prescription etc. then it will fall under the category of section 15(1).This points out that if a Hindu female has received gifts from her own parents, will be treated differently under Sec.15(1) instead of Sec.15(2), i.e., will not be classified as her inherited property.The expanded interpretation is that inheritance from only parents, including husband as well as the father-in-law is restricted and not from any other family member then it will be covered under section 15(1).[1]A female's self-acquired property is also included within the domain of section 15(1) and is considered as her 'general property'.

The rules of succession between the heirs are split under Section 16 into five distinct categories. However, if no heir is present from any of the five entries, then government through escheat takes the property.

1 Balasaheb v. Jaimala AIR 1978 Bom 44

Entry (a)*-sons and daughters, sons and daughters of a predeceased son or daughter i.e., grandchildren, and the husband*

Section 16 says, these heirs in the same entry shall succeed onto the property equally.The striking difference which can be inferred and underlined between a male intestate and a female intestate from the section is, in case of a female intestate preference has been given to her husband over her parents. On the other hand, when male from Hindu religion dies intestate, the property he held would be devolved as per Section 8 of the act where heirs comprise wife and children of the Hindu deceased and the mother gets a share of the same which implies that a female intestate's husband is preferred over her parents and she owes it only to her husband at the end of it.

Entry (b) *- Heir of Husband*

If there are no heirs present that are listed in entry (a), then the property of the intestate will devolve upon heirs of husband. This entry is based on the assumption that the property belonged to her husband and therefore, the inheritance of such property will be according to the rules laid in section 8 which deals with succession of property of Hindu Male dying intestate.[2]It is interesting to expand on the figurative that this entry (b) builds that the relatives of the husband are 'near in relation' to her own blood relations such as father, mother or brother. A female's natal relationships are relegated to a lower category in comparison to her relatives from her marriage that is her in-laws.

This is a realistic example of how on every nook and corner, patriarchal flag-bearers affirms that women are subjugated to men. What is crucial to note here is, quite opposite of the above, when a male dies intestate, his wife's relatives are considered too remote to inherit his property which sharply points out the gender bias and discrimination in the law.

Entry (c)*–Provision relating to parents of female who is now deceased*

2 SeethalakshmiAmmal v MuthuVenkataramanaIyenagar AIR 1998 SC 1692

Parents of a female intestate are in line to receive her property if no heir is present from the above two entries. However, a step parent that is a step father/mother is not included in this entry but nevertheless an adoptive parent is included.

Entry (d) *- Heir of the father*

It is assumed that the property belonged to the father and thus, succession will be determined by Section 8 which deals with succession to the property of a Hindu Male. Thus, it will be deemed that the father died immediately after the Female Hindu.

Entry (e) *- Heir of the mother*

It is assumed that the property belonged to the mother and thus, succession will be determined by Sec 15 & 16.

The heirs of the mother will include step father, uterine-bloods, grandparents and other maternal relations.

Specific Property

Section 15(2)(a) reads as

"*(2) Notwithstanding anything contained in sub-section (1), —*

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father;"

Section 15(2) (a) is an exception to Section 15(1).

This clause governs the property which is specifically inherited from parents and should not be received by the Hindu Female through gift or will. But what if, say for an example, 'X' female receives 'Y' property from her parents and sells the same for some use. From the remaining amount, bought another property 'Z'. Whether this property could be considered under Sec 15(2)? Court held that this property will not be covered under Sec15(2). One can ponder, if we change the identity of the property then application of Sec 15(2) gets restricted and has no application.

Further, it says, if the property was inherited from father or mother and no other relative then succession to heirs is according to the following two categories:

Category (1): *Sons, daughters, sons and daughters of predeceased son or daughter*

In a situation where the deceased does not have any child i.e., sons or daughters then the property will pass onto the heirs which fall in the next category i.e., heirs of intestate's father.[3] The husband will not be the part of the same as he will be excluded from getting the shares of the property. If there are no children then the property will revert back to her father's heirs.

Category (2) - *Heirs of the father*

This category only deals with heirs of the father and not the father or mother. Assuming a situation in which property has been inherited from mother but still mother will not get any share and cannot succeed over the same property. This is a major flaw in the legislation because it doesn't take into account the alive status of both the parents.

Section 15(2) (b) deals with succession of property inherited by the female intestate from husband or father-in-law.

"(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

Analyzing above, one gets the idea and intention of the legislature to create of preference.[4] This displays the conservative mindset of the legislators that the notion exists that property can pass in hands only through male lineage and that females have ownership only till their lifetime and upon their death, it must go back to the male lineage which it originally belonged to. This implies temporary ownership of Hindu female and no identity of her own to hold the property. Such source-

3 Radhika v Ahgnu (1996) 2 HLR 244 (SC)
4 S.R. Srinivasa and Ors. v S. Padmavathamma (2010) 5 SCC 274

based rules of succession are not present in section 8 for a Hindu Male intestate. The following case is an illustration of source of the property forming the basis of its succession.

Bhagat Ram v Teja Singh[5]

In this case, the property of a female Hindu who had initially received the property from her mother was involved in the succession of the property of the woman. Following the inheritance of the property, one of the sisters passed away without leaving any offspring to the other sister. Under Section 15(2), the other sister was entitled to the property as her "father's heir" (a). The property was claimed as an heir by the dead sister's husband's brother in accordance with Section 15(1)(b).The first issue being whether the property would pass on to her father's legal heirs or to the legal heirs of her deceased husband?

In these matters, courts are generally of the opinion that the property which originally belonged to deceased's parents, it should pass on to the same hands. Court delivered that as per section 15(1)(b), the devolution of the property in case of no children of the deceased, will depend upon the source of the said property in question. Father's legal heirs would get the property, if that property has been inherited by the deceased from her parents.

Coparcenary Interest Acquired By A Hindu Female

In joint Hindu family, every individual forming the part of the family is said to be the member but at the same time every member cannot be called to be a coparcener. A coparcener is one who possesses inheritance rights of ancestral property as per the Act. Women could not become coparcener, nor could they demand a share in ancestral property, this was the primary problem with the act. But with the amendment in Hindu Succession Act, 2005, daughters were also provided equal coparcenary rights as compared to sons. The old long discrimination done against daughters was tried to be compensated by allowing women to get the equal share as compared to the sons. These properties remain

5 Bhagat Ram v Teja Singh (2002) 1 SCC 210

for the devolution within the coparcener[6]. This coparcenary right is acquired by birth and though it is originated from side of her father. Thus, property coming to the hands of the female Hindu through coparcenary rights will devolve according to section 15(1) and not Section 15(2). Much prudent judicial precedents have improved the status of women in terms of them holding rights in property. The Supreme Court in Vineeta Sharma vsRakesh Sharma[7] overturned the previous decisions Dannamavs Amar &PrakashvsPhulwati and held that daughters are also having the same share of right over the ancestral property as sons and that too since their birth, irrespective of the father's death. This does not affect their rights over the ancestral property thereby clarifying the ambiguity over application of 2005 amendment and made daughters an equal coparcener to hold property.

SELF-ACQUIRED PROPERTY BY A HINDU FEMALE:

Property which is self-acquired is that property which a person owns or acquires by his own exertion without taking the assistance of the family funds with their own skill and merit. The devolution of self-acquired property's a grey area full of ambiguities but judicially has been guided by Section 15(1). However, undesirable outcome has been observed by application of section 15 in the case of ***Om Prakash v. Radhacharan.***[8] The facts of the case :Narayani Devi, who is a Hindu girl became a widow at the age of 15 when her husband died immediately after three months of their marriage. She was tossed out of her matrimonial home. She never returned to her husband's family and none from her matrimonial family ever inquired about her. She went to back to her natal home and was educated by her parents. Narayani became independent and secured a job. After 42 years of working, she died without a will that is she died intestate leaving behind money in her bank account and property in her name. Such a property was self-

6 Abhinit Verma and Krishna Kant Choudhary, WOMEN EQUAL SHAREHOLDERS IN HINDU JOINT FAMILY, WITH SPECIAL REFERENCE TO THE CASE OF - VINEETA SHARMA VS RAKESH SHARMA & ORS, 8, Int. J. of Adv. Res., 167-170, ISSN 2320-5407

7 Vineeta Sharma vsRakesh Sharma (2020) 9 SCC 1.

8 Om Prakash v. Radhacharan(2009) 15 SCC 66

acquired and not inherited. The case is disputed between the mother and brother of Narayani and her in laws.

It will be Section 15(1) that will apply in the instance of "self-acquired property,". The Hindu Succession Act does not prohibit a woman from making a will or executing a testament. According to them, they cannot make a decision based on feelings of pity or sentimentality. The Court will have to construe Section 15(1) in a way that was not envisaged by the Legislature if the appellants' argument is adopted. Marriage and unmarried Hindu women now have equal rights in the issue of property, according to legislation passed by the Parliament. Court interpreted in the literal sense by ignoring the facts of the case.

When we move towards courts, the first and foremost idea in our minds is to get justice but, in this case, court arrogantly ignored its duty to provide justice, by not giving importance to, the very crucial and material facts that property of the deceased Narayani was self-acquired and not even single contribution was made by the husband's family towards her education as well as in her career perspectives. How can one claim from hers self-acquired property, whom they had not given any support in the time of distress? As we say, rights and duties go hand in hand, here husband's family denied their duty but were claiming their right as soon as Narayani dies and to everyone's surprise court agrees to this and affirms the long-standing stance of this gender bias society to neglect the natal families of females.

INTERNATIONAL OBLIGATIONS UNDER CEDAW

One of the core principles of CEDAW is the requirement to eliminate and prevent gender discrimination. The Indian parliament ratified this convention in 1993 after India became a signatory in 1980 for the purpose to remove the widespread discrimination again women and to commit to ensure measures to eradicate this social evil. The apex

court has ruled that the government and its organs have an obligation to fulfill India's international commitments. [9]

Though the Constitution of India has provided an exhaustive framework through fundamental rights and DPSPs for the development of human personality and elimination of discrimination, the Supreme Court has ruled that international conventions add urgency and teeth to the process by which these principles and rights can be put into effect immediately. Therefore, as mandated by fundamental rights under Art.14 and 15, it is an obligation of the state to remove all impediments and outlaw all forms of gender-based discrimination. International Covenants also speaks the same regarding discrimination happening with women all across the borders. Article 2(f) along with other Articles of CEDWA asks the State to take appropriate steps, by framing laws in order to get away with gender based discriminatory practices which can also include striking down the present regressive laws, regulations; customary practices are discriminatory against women.[10]At this junction, it is pertinent to bring into light that the commitment under CEDAW extends to enabling gender equality in all personal laws as well and that makes it imperative to alter the personal laws to make room for gender equality.

The Hindu Succession Act 1956 has several provisions and multiple gaps that perpetuate discrimination rather than removing it and many a judicial precedent have acknowledged this evident discrimination that the statute prescribes. According to the Hindu Law Committee's findings, women have a poorer socio-economic standing than males, and that ages old customary Hindu Laws continue to perpetuate this subjugation. It has been determined by the Bombay High Court that Hindu Succession Act denies equality to women by discriminating against them, but that the discrimination is justified on the grounds of

9 Vishaka&Ors.v. State of Rajasthan &Ors. [(1997) 6 SCC 241], Apparel Export Promotion Council vs. A.K. Chopra (MANU/SC/0014/1999), GithaHariharan and Ors.vs. Reserve Bank of India and Ors. (MANU/SC/0117/1999)

10 MadhuKishwar&Ors. v. State of Bihar &Ors.,(1996) 5 SCC 125

preserving of family connections[11]In certain cases, this unfairness towards women is so ubiquitous that it may be discovered just by reading a copy of the legislation passed by the legislature. Particularly problematic are the rules, laws and regulations governing property succession amongst members of a Joint Hindu family, which are complex and difficult to understand. There is a strong suspicion that this prejudice is so pervasive and systemic that it has disproportionately impacted women.[12]

CONCLUSION

Property is a key metric to determine the socio-economic position of an individual in the society and traditionally, women have been deprived of the right to own property thereby directly harming the socio-economic status of, half of the population i.e., women, in the society. Throughout history, legislature's motive was to safeguard and prioritize property rights of a family at whose helm is always a man and thus, women were made to be on the lower pedestal when it comes to rights. Yet, law relating to property rights of women has waited long enough to even acknowledge the idea of women having ownership rights in property and accruing property in their own capacity. At present, the law can be called gender-neutral but being gender neutral is not enough and the gender neutrality of law is in fact maintaining the status quo to an extent that the current status of law is protecting gender discrimination. The Hindu Succession Act, 1956 has become more gender equitable than ever before yet lacks precision in unequivocally giving equality to women. It is safe to analyze that the present act is unfair if not unconstitutional and violates India's international commitment to remove gender discrimination. The legislature holds the key to eliminating this inequality and bringing uniform rules of succession of property of Man & Woman will be the touchstone of improving the subservient position of women in our society. It is for the legislature to

11 SonubhaiYeshwantJadhav v. BalaGovindaYadav AIR 1983 Bom 156

12 Law Commission of India, 174th Report on Property Rights of Women: Proposed Reforms under the Hindu Law, (2000)

design a non-discriminatory scheme of devolution keeping a male and female at par as a positive affirmation in the direction leading towards gender equality.

"Every form of societal discrimination on the grounds of sex, apart from being unconstitutional, is an antithesis to a society built on the tenets of democracy".[13]

"The egalitarian bluestocking that the Hindu society may have become, in consonance with the constitutional mandate, it has still left untouched perhaps the last discriminatory corner of the Hindu Society which has otherwise come of age and which would have to be looked upon as wanting in an equal society."

— Justice Dalvi

Dr. Suman Yadav*

13 Mojekwu v Mojekwu (1997)7 NWLR (pt 512) 228

* Assistant Professor, Faculty of Law, University of Delhi.

National Educational Policy-2020 and its implementation: with Reference to Gujjar and Bakerwal Tribe

Abstract:

The National Educational Policy-2020 is the third educational policy brought by the government of India to bring sweeping changes in the country's education system to increase literacy. The old academic structure 10+2 was replaced by a 5+3+3+4 academic structure starting from age 3 to 18. There will be no hard and fast rules relating to individual curricula, and a student is free to choose the subjects with some compulsory subjects, skills, etc. Gujjar and Bakerwals, the nomadic tribes of Jammu and Kashmir, keep moving from one place to another and, accordingly, not being able to get proper education. This paper aims to study the potential impact of the new education policy on the education of Gujjar and Bakerwal.

Key Words: *Potential Impact, New Education Policy, Gujjar, Bakerwal, Right to Education.*

Introduction:

Education in the modern-day advanced and scientific world is not a privilege confined to some privileged class. Instead, it is a fundamental right and a basic human right available to all without discrimination based on caste, colour, creed, sex, religion, or place of birth. Education as a human right means that the right to education is guaranteed to all without any discrimination on any ground whatsoever, that the state has a legal obligation to respect, protect and provide the right to education and that the state can be made legally accountable for the violation or deprivation of right to education.

Education is both a human right in itself and a means for the effective realisations of other human rights. It is a fundamental right without which it would be difficult rather impossible to enjoy any other human or fundamental right. The government at the Central and Local levels has taken various steps to realise the right to education fully. The tribal people live a different set of lives full of poverty, illiteracy, and ignorance; they live in the hilly areas either cut off from the developed part of society or poorly connected with the developed part. In Jammu

and Kashmir, there are 12 schedule tribes as per the Constitution (Schedule Tribe) Order (Amendment) Act, 1991. Gujjars and Bakerwal are the two among the 12.

Most of the Gujjars and Bakerwal's live nomadic or semi-nomadic lives, moving from one place to another, searching for pasture's for their livestock, which is incompatible with an essentially sedentary structure of the education system in India, resulting in that large number of the tribal population in J&K never received formal education. Even for those who have adopted a sedentary lifestyle, nothing substantial has changed as their literacy rate is very low. Gujjar and Bakerwal's lives are filled with poverty, illiteracy, bad conditions of life, etc. On the other hand, they have a distinct language, culture, and way of life; all these factors add to the low literacy rate of Gujjar and Bakerwal.

Right to Education as a fundamental Right:

There was nothing in part III (Fundamental Rights) of the Constitution dealing with the right to education except Articles- 28 and 29 dealing with some aspects of education. On the contrary, certain Articles in Part IV (Directive Principle of State Policy) dealt with the right to education-Article 41, 46 and most notably Article 45. Article 45 of the Constitution, as it originally was, lays down that, within a period of ten years, the State shall make provisions for free and compulsory education for all children until the age of 14 years. Therefore, education for children of this age group should have been made free, at the latest by 1960. However, only meager efforts were made by state to pass laws according to Article 45. Article 41 talks about that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, education, and public assistance in case of unemployment, old age, sickness and disablement, and other cases of undeserved want. Article 46 says that the State shall promote with special care the educational and economic interests of the weaker sections of people and in particular of the Scheduled caste and Schedule Tribe and shall protect them from social justice and all forms of exploitation.

The Supreme Court in *Mohini Jain v. State of Karnataka*[1] was asked to decide that, is there a 'right to education guaranteed to the people of India under the Constitution.

The court held that the "right to education is concomitant to the fundamental rights enshrined under part III of the Constitution. The State is under a Constitutional mandate to provide educational institutions at all levels for the benefit of citizens". Talking about the obligation of the State to provide free education, the bench observed:

"We hold that every citizen has a right to education under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through-state owned or state-recognized educational institutions. When the state government grants recognition to the private educational institutions it creates an agency to fulfill its obligation under the Constitution. The students are given admission to the educational institutions-whether state-owned or state-recognized in recognition of their 'right to education' under the Constitution. Charging capitation fee in consideration of admission to educational institutions is a patent denial of a citizen's right to education under the Constitution."

In *Mohini Jain case* the Supreme Court took an expansive view by holding that the state is under an obligation to provide the education to the citizens at all level and accordingly the state should provide the adequate number of higher educational institutions as are required.

The decision of the Supreme Court in *Mohini Jains case* was challenged in *Unni Krishnan v. State of Andhra Pradesh*[2] and the Supreme Court held that the citizens of this country have fundamental right to education only up to 14 years of age. The court observed:

"That the citizens of this country have a fundamental right to education. The right flows from Article 21. This right is, however, not absolute. Its contents and parameters have to be determined in light of Articles 45 and 41. In other words, every child/citizen of this country has a right to free education until he completes 14 years. Thereafter his right to education is subject to the limits of economic capacity and

1 AIR 1992 SC 1858
2 AIR 1993 SC 2178

development of the state. The obligation created by Articles 41, 45 and 46 of the Constitution can be discharged by the state either by establishing institutions of its own or by aiding, recognizing and/or granting affiliation to private educational institutions."

So the expansive view taken by the Supreme Court in *Mohini Jains Case* has been circumscribed so far age is concerned and it was declared that right to education is a fundamental right till the child completes the age of 14 years.

The Supreme Court in *Unni Krishnan v. State of Andhra Pradesh*[3] made observations with regard to Article 45, that, "a time limit was prescribed under this Article. Such a time limit is found only here, if, therefore endeavor has not been made till now to make this Article reverberate with life and articulate with meaning, we should think the court should step in. The state can be objected to ensure a right to free education of every child up-to the age of 14 years". What was supposed to be achieved within 10 years could not be done until the Constitution (Eighty-Sixth Amendment) Act, 2002 was passed. By way of this amendment a new Article (21-A) was inserted in fundamental rights. Under Article 21-A it was provided that the state should provide free and compulsory education to all children of the age of six to fourteen. Now by virtue of Article 21-A, right to free and compulsory education is a fundamental right and if the state fails to provide education as mandated by Article 21-A, any person can move to the Supreme Court or to High Court for enforcement under Article 32 and 226 of the Constitution respectively.

The Right of Children to Free and Compulsory Education (RTE) Act, 2009, is consequential legislation envisaged under Article 21-A laying down mechanism for the free and compulsory elementary education for all children up to the age of 14 years.

Gujjars and Bakerwal:

Some historians believe that the Gujjars are the original inhabitants of India, while others believe that they originally belonged to central Asia, and due to some disturbances in central Asia, they migrated to

3 AIR 1993 SC 2178

India[4]. There is a difference of opinion regarding the origin of the Gujjarin Jammu and Kashmir. Some believe that Gujjars are the Descendent of Dravidian and have come here in the ancient past[5]. A. N. Bhardwaj, claims that Gujjars who have been living in Jammu and Kashmir State are immigrants and migrated from the western parts of the country due to unavoidable circumstances and political disintegration. During those days, they entered the state through different routes. Some of their clans came via Basoli, Sujanpur and Shahpur area by crossing river Ravi and some families entered through the mountain regions of Rawalpindi and Hazara. Besides, a significant influx entered through the line of Gujrat and Gujaranwala who crossed Nowhera and Scattered all over the Hills of Rajouri and Poonch[6].The majority of the Gujjars inhabit remote areas cut off from the general population and mostly in hilly areas, where modern amenities are not available. Most of the Gujjar profession is Cattle grazing and supply the cattle produce be it milk, ghee, etc., to the general people. Generally, the Gujjars used to live in the Kaccha houses known as Kotha in the local language; however, the Kaccha houses were now replaced by the Pacca houses during recent years. They speak the Gojri language, which is almost linked with the Rajasthani language and dialect. The Gujjars in Jammu and Kashmir possess a tall personality with Jewish features, and their dress is conventional, which is nearer to the Pushto peoples of Pakistan.

The Gujjars can be divided into three main sub-groups based mainly upon the occupation they follow. Firstly, Gujjars' sedentary or settled group, whose main occupation is land cultivation and are settled in permanent villages at plains bordering the foothills. Secondly, the semi-settled Gujjar cultivate the land with pastoralism. They cultivate the land, and during summer, they move to the upper reaches. The third group consists are of those who are fully nomadic or pastoral, and they migrate from Jammu to Srinagar and vice versa.

---

4 K.D. Maini, Poonch- The Battle Field of Kashmir, 41 (Gulshan Books, Srinagar, 190001 Kashmir 2012)

5 Dr. Bashir Ahmad Dabla, Ethnicity in Kashmir, 27 (Jay Kay Book Shop, Srinagar, 190001, 2009)

6 A. N. Bhardwaj, History and Culture of Himalayan Gujjars, 93 (Jay Kay Book House, Jammu Tawi, 180001, 1994)

Bakerwals are the offshoot of Gujjars. They are a nomadic tribe, wandering from one place to another in the higher reaches, searching for fodder for their livestock. They mainly rear goats and sheep and have a fleet of horses to carry their essentials with them. They migrate from the Jammu region to Kashmir during summers and then migrate back to Jammu during winters. Initially, they used to rear goats (Bakries) and therefore were known as Bakerwal (one who rear goat).

K.D. Maini in his book Poonch-The Battlefield of Kashmir, gives the account of how Bakerwal Tribe originated. K.D. Maini claims while relying on the book "Tarikh-e-Gurjar", written by Rana Ali Hassan Chowhan, that during the beginning of the 17th century, when Mughals governed Kashmir, Gujjars had strengthened their position under the leadership of Ahmad Sultan Awan and tried to revolt against the Mughals. In 1619 AD, Emperor Jhangir and his carvan started travelling from Lahore to Kashmir through the Mughal road. Ahmad Sultan and his army stopped the carvan and forced the Jahangir to return to Lahore without entering Kashmir. This was not acceptable to the Mughals, and accordingly, in the spring of 1620 AD, the Mughal forces were moved towards Kashmir, and Ahmed Sultan was defeated. After that, the Jehangir Ordered the killing of Gujjars and confiscating their property. Upon this, the Gujjars left their native places and took shelter in the mountains along with their livestock. Instead of settling at any particular place, they remained shifting from one place to another due to the terror of Mughal. Later on, some among them settled in some specific area, and others remain moving from pasture to pasture in search of grazing land for their livestock, and this sect of Gujjar is known as Bakerwal[7].

Whatever the history of Gujjar and Bakerwal may be, the fact is that most of them are living nomadic life and are poor and illiterate. This can be illustrated by the fact the literacy rate of India as per census 2011 is 73%, and for Scheduled Tribes, at the national level, it is 59%. The literacy rate of Jammu and Kashmir as per the 2011 census is 67.16%, and for Scheduled Tribes of Jammu and Kashmir, it is only 50%.

7 K.D. Maini, Poonch- The Battle Field of Kashmir, 42-43 (Gulshan Books, Srinagar, 190001 Kashmir 2012)

National Educational Policy-2020:

On July 29th, 2020, the government announced a new education policy involving sweeping changes. This is the third education policy brought by the government to raise the Indian education standard. The fundamental principles laid down under the policy, which will guide both the education system at large as well as the individual institutions within it, are; recognizing, identifying and fostering the unique capabilities of each student, according the highest priority to achieving foundational literacy and numeracy by all students by grade 3, no hard separation between science and art and curricular and extra-curricular activities, multidisciplinary and a holistic education across the science, social science, art humanities, emphasis on conceptual understanding rather than learning for exams, promoting multilingualism and the power of language in teaching and learning etc. The main features of the new policy as for as elementary education is concerned are as:

I. The new policy lay down that the existing 10+2 structure in schools will be modified with a new pedagogical and curricular restructuring of 5+3+3+4 covering age 3-18. There will be Foundational Stage in two parts that is 3 years of Anganwadi/Pre-School + 2 years in primary school in grade 1-2 both together covering ages 3-8, Preparatory Stage with grade 3-5, covering ages 8-11, Middle Stage with grade 6-8 covering ages 11-14 and Secondary Stage with grade 9-12 in two phases i.e., 9 and 10 in the first stage and 11 and 12 in the second stage covering age 14-18[8]. Currently, children in the age group of 3-6 are not covered in the 10+2 structure as class 1 begins at age 6. In the new 5+3+3+4 structure, a strong base of early Childhood Care and Education from age 3 is also included[9]. So we can say that now free and compulsory education starts from the age 3.

II. One of the primary goals of the schooling system must be to ensure that children are enrolled in and are attending school. There are two overall initiatives that will be undertaken to bring children who have dropped out back to school and to prevent further children from dropping out. The first is to provide effective and sufficient

8 National Education policy 2020, Ministry of Human Resource Development, government of India, p. 11

9 *Id.* at 7

infrastructure so that all students have access to safe and engaging school education at all levels from pre-primary school to Grade 12. The second is to achieve universal participation in school by carefully tracking students, as well as their learning levels, in order to ensure that they (a) are enrolled in and attending school, and (b) have suitable opportunities to catch up and re-enter school in case they have fallen behind or dropped out[10].

III. The medium of instructions until at least grade 5, but preferably till Grade 8 and beyond, will be the home language/mother tongue/local language/regional language and for that high quality textbooks, including in science, will be made available in home language/local language. Thereafter the home language/local language shall continue to be taught as a language wherever possible. This will be followed by both public and private schools[11].

IV. While students must have a large amount of flexibility in choosing their individual curricular, certain subjects, skills, and capacities should be learned by all students to become good, successful, innovative, adaptable and productive human beings. These skills include scientific temper and evidence based thinking; creativity and innovativeness; sense of aesthetic and art; oral and written communication; health and nutrition; physical education, fitness, wellness and sports etc.[12]

Under the new education policy the formal education will now start at the age of 3 as there will be a Foundational Stage in two parts: three years of Anganwadi/Pre-School + 2 years in primary school in grade 1-2, both together covering ages 3-8. The new policy also states that the fundamental goal of schooling must be to ensure that the child is enrolled in school and is attending the school and have suitable opportunities to catch up and re-enter school in case they have fallen behind or dropped out. So we can say that the new policy is dedicated towards curtailment of dropout rate and universal access to education. The new policy also mandated that the medium of instruction shall be mother tongue at least up to grade 5 and preferably till grade 8th. Further

10 Id. at 10
11 Id at page 13 and 14
12 Id at 15

the students must have a large amount of flexibility in choosing their individual curricular, certain subjects, skills, and capacities should be learned by all students to become good, successful, innovative, adaptable and productive human beings. These skills include scientific temper and evidence-based thinking; creativity and innovativeness; a sense of aesthetic and art; oral and written communication; health and nutrition; physical education, fitness, wellness and sports.

Potential Difficulties in Implementing New Educational Policy with Regard to Gujjar and Bakerwal:

When we come to implementing the new policy, as far as the tribal people in general and Gujjar and Bakerwal, in particular, is concerned, it will not be easy. A significant number of Gujjar and Bakerwal live a nomadic life, wandering from one place to another. As per the new education policy, the foundational stage will start from the age of three, consisting of five years, three years of Anganwadi and two years of primary schooling. How a Gujjar or Bakerwal child may be admitted at the age of three to any Anganwadicentre as the children of these tribes move along with their families to the higher reaches in search of pastures for their livestock. Does this mean that the government will start mobile Anganwadicentre's for the Gujjar and Bakerwal children, just as the government has mobile schools?

Equally is the problem of instructions in the mother tongue, no doubt that the child best understands if instructed in the mother tongue, but we need the teachers and literature in the mother tongue. So far as the Gujjar and Bakerwal's are concerned, they speak *Gojri,* and as per the new education policy, they are to be instructed in *Gojri* at least till 5th grade. But the problem is that we do not have enough *Gojri* speaking teachers, nor do we have the literature available in *Gojri*.

The new education policy lays down that there will be greater flexibility in choosing the individual curricular, but at the same time, all students should learn certain subjects, skills, and capacities to become good, successful, innovative, adaptable and productive human beings. These skills include scientific temper and evidence-based thinking; creativity and innovativeness; a sense of aesthetic and art; oral and written communication; health and nutrition; physical education, fitness, wellness and sports. To implement these things, we need a sound

infrastructure that is very difficult to provide to the schools located in hilly areas with no or poor road connectivity and not enough space to accommodate the infrastructure. Furthermore how we will provide such an infrastructure to the mobile schools (Mobile schools are those schools which shift with these Gujjar and Bakerwal, they generally have a tent, which can be easily, assembled and detached and carried from one place to another)

Conclusion:

The new education policy is compatible with the sedentary structure of education. The Gujjars and Bakerwal's are primarily nomadic, so there will be significant challenges to implement the new educational policy with regard to them effectively. The government needs to take special and extra measures to educate the tribal people in general and Gujjar and Bakerwal, in particular. So far as the implementation of the new education policy till elementary level is concerned, the following suggestions are suggested:

1. The staff of Mobile Schools should be increased as most of the mobile schools consist of only one teacher and thereafter, the mobile schools may be given the responsibility of Anganwadicenters as well. This will serve the twin purpose, one the better education as the staff strength will be more and second the government need not establish theAganwadicenters.

2. The government should recruit more and more *Gojri* Speaking teachers for the areas where Gujjar and Bakerwal are in majority and for Mobile Schools.

3. The government should take steps to prepare the literature in the *Gojri* language.

4. The infrastructure of the schools, primarily located in the hilly areas, should be strengthened as the infrastructure in these schools is very poor.

Shahnawaz Sadiq[*]

[*] Research Scholar, USLLS, GGSIPU, New Delhi. E.mail. Shahnawazparry676@gmail.comContact No. 6005024225, 9622415143.

"Correctness of the 50% ceiling limit on Reservation under the Constitution"

Abstract

The notion of 'Reservation' may be viewed in the context of historical wrongs that have happened over the years. Indian society has a distinctive cultural structure. This civilization is primarily organised into classes, which are known as castes. When a few castes or classes did not receive adequate resources as a result of the caste system, they were unable to advance through time. They were subjected to a great deal of exploitation and injustice. Social inequality resulted from this unfairness. As a result, several constitutional provisions exist to promote socioeconomic equality in our society. The concept of reserving is purchased in order to help the poor and oppressed. Our constitution includes a provision for reservation in order to provide socioeconomic fairness to the underprivileged class. Following the adoption of the Constitution of India, the governmentof India began its attempt to grant reservation to backward classes in order to fulfil their pledge.

Reservation is an intentional step done by the government to provide fair chances. Positivediscrimination of the government refers to the policy and planning of the government whereby the governmental apparatus attempts to correct historical wrongs by actively taking efforts to secure access to employment and education opportunity for the underprivileged class. Basically the idea of reservation is a positive discrimination of the state in India to provide equality to the unequal. As a result, we might consider positive discrimination to be something that protects people from the current consequences of previous prejudice. Although positive action policies are contentious in essence, they are prevalent in some form or another. Gender quotas, ethnic, religious, and caste quotas are examples of positive discrimination.

The Indian Constitution commits to and mandates positive discrimination. The right to equality is guaranteed under the Indian Constitution. The principle of equality requires that no one be prejudiced against because of their caste, creed, class, and gender, place of birth, race, or religion. In the legal sense, everyone here is

equal. The preamble to India's constitution ensures fairness and equality of opportunity and treatment.

Key Words: *Reservation, Equality, 50% Ceiling Limit, Constitution, Democracy, Discrimination, Supreme Court, Judicial Precedent, Amendment.*

Despite the fact that the Indian constitution framers emphasised on the right to equality, as it is being considered as that "equality is one of the magnificent corner-stone of Indian Democracy"[1] , but for the sake of treating equals alike and unequal's not equally initially there had been no particular dispensation for distinct social strata. Nevertheless, such situation did not remain there for too much time, with the implementation of the firstconstitutional amendment; the entire dynamic has changed, as specific dispensations for different social strata were created, while allowing reservation in education and employment. And it became a significant weapon for the progress of socioeconomically disadvantaged groups.

Part III of the Indian constitution deals with basic rights. This section comprises Articles 14[2], 15[3], 16[4], 17[5] and 18[6] of the Indian

1 Thommen J. In Indra Sawhney v UOI, AIR 1993 SC 477

2 Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place ofbirth.

3 Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place ofbirth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

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

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially

constitution, which guarantee the right to equality. Part IV of the constitution addresses the Directive Philosophy of State Policy, which serves as the state's guiding principle. Article 46[7] of the Constitution states that the state must take special care of the educational and economic interests of the poorer sections.

---

and educationally backward classes of citizens or for theScheduled Castes and the Scheduled Tribes

4 Equality of opportunity in matters of public employment

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

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination

5 Abolition of Untouchability Untouchability is abolished and its practice in any form is forbidden The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law

6 Abolition of titles No title, not being a military or academic distinction, shall be conferred by the State No citizen of India shall accept any title from any foreign State No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State Right to Freedom

7 Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation

Articles 14, 15, and 16 of the Constitution contain a litany of reservations. The principle of equality is guaranteed in India's constitution's preamble. Articles 14, 15, and 16 demonstrate this devotion. These articles contain a reservation clause under which the state can take positive path to accomplish equity.

Moreover the contemporary reservation system was developed by the Supreme Court of India's ruling. It all commenced with Champakam Dorairajan case[8], in which the court ruled that reservations were illegal. This decision resulted in the first amendment to the constitution. the scope of reservation has gradually grown since then and right from day one, as Judiciary has given its best not just to protect the rights given of the socioeconomically disadvantage groups but also to expand such rights in every possible way.

Various case laws have been dealt there after regarding the question of how and to what extent reservation can be granted and different ceiling limits were set up the apex court at different times, but among all other cases it was the ruling set up in the Indra Sawhney[9] case stands out as the landmark case in the field of Reservation, in 1990, this was the case where 50% ceiling limit was put by the court in granting the reservation and even today same precedent is being followed by the courts, as on the basis of Mandal Commission report, the government ordered that 27 percent of government positions be reserved for other backward classes, providing a creamy layer among them. This order was challenged on the basis that it breaches the fundamental structure of the constitution. This order was sustained by a 6:3 majority of the Supreme Court's nine-judge panel. The court overturned the government's decree to reserve 10% of government positions for economically disadvantaged groups within the upper classes. The court also ruled that the amount of reserve shall not exceed 50%. The court reasoned that in exceptional

8 AIR 1951 SC 226
9 AIR 1993 SC 477, 1992 Supp 2 SCR 454

circumstances, such as when persons living in rural or far-flung locations require special care due to their unique circumstances, this norm can be eased. However, in such circumstance, the state must use extreme prudence. The court upheld the ruling established in Balaji[10] and Devadasan[11] and overturned the Vasanth Kumar[12] case. The court emphasised that paragraph (4) of article 16 refers to sufficient representation rather than equitable representation. The 50 percent criterion shall apply exclusively to reservations, not to relaxations, concessions, or exemptions granted to backward classes. The court also ruled that the "carry forward rule," under which empty positions are carried over to the next year, is legal as long as it does not exceed a 50 percent threshold.

Thus the Apex court has made it plain in its legal ruling that the government can establish reservations as long as they do not exceed 50 percent, as the same precedent was upheld in various judicial rulings including in one of the most recent case[13] as well.

And the apex court has used the same rationale to overturn a Maharashtra government ruling that granted quota to the Maratha community. As an Act[14] in 2018 was approved by the Maharashtra government. In fact, the law provided 16% reservations for Marathas in public services and higher education, ultimately increasing the overall reservation to more than 50 percent, which violates the ceiling limit of 50% set in the case of Indra sawheny[15], the Supreme Court ruled that there are no extraordinary circumstances that may reasonably support the Marathas reservation beyond a 50 percent ceiling limit, and thus the Supreme Court struck down the Maharashtra State Reservation for socially and Educationally Backward Classes (SEBC) Act, 2018.

10 1963 AIR 649
11 1964 AIR 179
12 1985 AIR 1495
13 Chebrolu LeelaPrasad V state of Andhra Pradesh (CA No. 3609 of 2002)
14 Socially and Eductionally Backward Classes (SEBC) Act, 2018
15 AIR 1993 SC 477

Reservation can be found in the Indian constitution under various articles, ranging from seats being reserved for employment in government services[16] to special arrangements being made to promote the interest and welfare of socially and educationally backward classes of the society[17], or for that matter even seat can be reserved for SC/ST in legislature[18] etc.

Now before moving into the correctness of the 50% reserve ceiling, we need to state what the 50% rule is, that implies that reservations cannot be made in excess of 50% of the population, and anything beyond 50% would violate the equal rights granted under the Constitution, but the 50% limit is not imposed by any law but rather by the Supreme Court, therefore is obligatory on all the authorities, nevertheless the rationale behind this concept is that while protecting or advancing the interest of social strata class, we cannot effort to get carried away with that and violate the basic principle of the equality, and it is by largely accepted as the constitutional prohibition and any reservation beyond 50% would liable to be struck down.

Though the Judgement in Indra Sawhney Case has clearly laid down that the percentage can be increased in exceptional circumstances only, we can say that the Reservation, as an intensive kind of security should be restricted to a minority of seats, and phenomenon of the equality needs that the reservation should not exceed the 50% limit in any form, even though the constitution has not explicitly mention such limit.

As they state that no power or right is absolute therefore it should be exercised reasonably and fairly, hence same thing applies on the power conferred under article 16(4) for reservation, which makes it

16 Article 16 (4)
17 Article 15 (4)
18 Article 330

necessary to set a limit or cap on such power, this is what makes the 50% limit very much reasonable and necessary for granting reservation in appointments or posts.

The basic motive behind the reservation in the appointments or posts of backward class is the betterment or advancement of that class, but that never mean while in promoting one class, crush the rights of other class, as the law itself talks about the adequate representation of a particular class in employment, I think the 50% ceiling is something which provides the room for adequate representation without violating the constitutional rights of the other class as well.

More over if the granting of reservation is kept unlimited it will surely make mockery of the entire system as the appointment under reserved category without any limit will take the meritocracy to cleaners which might lead to the downfall of the administration in the long run, point is we surely need to lift the backward class of our society but we cannot effort to let our system being degraded while doing so which means that at a particular stage we cannot neglect the merit at all in appointments, so this is what makes it necessary to put a limit on the reservation.

Also the more scope we will kept for the reservation it will lead us to the group identities or group politics only, firstly the individual brilliance while appointment will be made to bite the dust only as the system will be wholly and solely busy in appointing on the basis of group identities only, secondly the India being such a diverse country having so many class on the basis of castes, keeping the reservation criteria uncontrolled or unchecked might become the political tool, which might be used against the interest of the same class to whom reservation benefit has been provided by the constitution, by exploiting or showingdaydreams to such class just for the sake of the gaining votes in elections.

Nevertheless via 103rd amendment to the constitution, Article 15 and 16 were amended and provide 10% reservation in favour of economically weaker sections apart from SC's, ST's, and OBS's and it obviously breaches the 50% ceiling limit, and ultimately A series of petitions have been filed against the amendment, alleging that it contradicts the fundamental framework of the constitution. The Supreme Court, led by Justice SA Bobde, determined that the petition contained a "matter of law," thus it was assigned to a five-judge constitutional bench, so the apex court might overturn this particular amendment if itimpairs the core structure of the Constitution.

I can conclude it with that The principle of equality is a fundamental tenet of the constitution. The purpose of reservation is just to raise the backward class up to the same standard as the other class, thus 50% cap on reservation is absolutely needed and reasonable,in order to maintain the balance between downtrodden and uplifted category, all we need to do is just to clear the confusion of the reasonableness of the 50% ceiling, while describing the same explicitly in public, also there is a need to struck out the well to do sections from any reserved class, so that the benefits of the reservation can reached to that person to whomit is actually meant to serve.

Touseef Hamid*
Imran Ahad**

* LLM student at National Law University, Mumbai, specialising on constitutional and administrative law.
Author for Correspondence Email: touseef680.th@gmail.com
** Lecturer, Kashmir Law College

Protection against Environmental Crimes in India: An Overview.

Abstract

Environmental crime refers to any criminal activity that has a negative impact on the environment resulting in the loss of lives and property. These types of offenses may be committed by a person, the general public, or business establishments. In terms of the motivation for these crimes, the spectrum is enormous. On the one hand, businesses are so focused on making money that they forget about the effect their actions on the environment; on the other hand, the general public is still unaware of the practices that contribute to environmental crimes.This research paper focuses on crimes that are against environment, with a close emphasis on legalaspect focusing upon statutes, laws and policies in India, relating to environmental protection and prevention.

Key Words: *Environment, crimes, environmental harm, environmental protection.*

Introduction

Nature has undergone remarkable changes as a result of scientific development and advancement, as well as the growing global population. These changes have disrupted green norms, shattered the balance between mankind and the natural world, and resulted in a slew of issues concerning Mother Earth.[1] The natural resources have the capacity to nourish and bear the burden of humanity's needs.[2] When these resources become overburdened as a result of excessive human activity, the delicate balance between mankind and the mother earth that is required for human survival is disrupted. As a result, environmental

---

1 P.Leelakeishnan,*EnvironmentallawinIndia*01 (LexisNexisButterworths,NewDelhi,2ndedn., 2002).

2 I.A.Khan,*EnvironmentalLaw*03(CentralLawPublication, Allahabad,2ndedn.,2002).

crimes become aproblem.[3]When it comes to the relationship between the climate and human rights, the United Nations says:

"Everyone has a right to live in a pollution free environment".[4]

Those who deplete or kill natural resources are, in the end, committing a crime against humanity. Enviro-crime is the "wolf at the door of modern man." Giving your family a better tomorrow, i.e. a green, clean, and fresh world, is the purest way to show love.[5]Human beings are both creators and destroyers of their ecosystems, which provide them with physical nourishment as well as opportunities for intellectual, legal, societal, and spiritual growth. In the long and winding history of the human race on this planet, a point has been reached where, thanks to the rapid progression of scientific and technological advances, a human being has gained the power to alter his environment in countless ways and on an unprecedented scale.[6]As a result, the natural world, including air, water, soil, trees, animals, micro-organisms, rivers, lakes, and mountains, is negatively impacted by the man-made environment, as well as the rapid advancement of science and technology through numerous innovations and discoveries. Industries (particularly chemical factories), atomic energy production, actual forests, excessive use of fossil fuels, and an increase in quality of life resulting in exponential population growth have all had negative effects on the human environment.[7]

On the one hand, the unbridled pursuit of scientific and technical advancements has given humanity an unbridled scope to exploit natural resources without regard for environmental concerns. Furthermore, advanced industrialization has given rise to a plethora of environmental

3 N.S.Kamboj,"PopulationGrowthPrimeCauseof EnvironmentalPollutionanditsLegalControl inIndia"XXII*IBR*(1995).

4 Inthehistoricdeclarationofhumanrightsattheconclusionofthe57th SessioninGeneva.

5 D.B.N. Murthy, *EnvironmentalAwarenessand Protection: A Basic Book on Environmental Studies*149 (Deep&DeepPublicationsPvt. Ltd.,NewDelhi,2008).

6 SatishC.Sahastri,*EnvironmentalLaw*09(EasternBookCompany, Lucknow,3rdedn.,2008).

7 *Ibid.*

crimes and health hazards. Unrestricted forest clearing, unsanitary conditions, waste removal, shelter, safe and fresh water, air pollution, acid rain, and other problems have arisen as a result of industrialization and urbanization. It has also resulted in ozone depletion and the "green house" effect. All of this had a negative impact on both the human world and the animal kingdom.[8]

Environment and Crime

The scope of today's environmental crimes is expanding. This has resulted in unfavourable changes in the physical, chemical, and organic properties of air, water, soil, trees, rivers, lakes, and animals, among other things. Human mismanagement of natural resources, industrialization, and agricultural production have resulted in a number of ecological issues such as contaminated air, water, soil, and noise, as well as destruction through deforestation and water logging, which have harmed humans and their ecosystem.[9]Over the last four decades, there has been a growing international concern about the civic health consequences of environmental crimes. The World Health Organization (WHO) estimates that a fifth of all illnesses and syndromes afflicting humanity today are caused by excessive exposure to enviro-disasters.[10] Most of theseenviro-related diseases, however, are difficult to identify and may be acquired during childhood and become apparent later in life. Inadequate solid waste management is a major source of environmental crime and deprivation in many countries, especially in developing countries.Many of these countries lack solid waste laws, regulations, and appropriate waste collection facilities, including those for hazardous waste. This waste may be noxious, contagious, unbearable, poisonous, or radioactive. Depending on the level of waste materials regulation in a

8 *Id.*at 10.

9 I.A.Khan,*op.cit,*at04.

10 NjorogeG.Kimani,EnvironmentalPollutionandImpactson PublicHealth:Implicationsofthe Dandora Municipal Dumping Site in Nairobi, Kenya, UNEP, available at:http://www.unep.org/urban_environment/PDFs/DandoraWasteDump-ReportSummary.pdf, (accessedon12thApril,2014).

country, such waste materials can be dumped in an unrestricted manner, segregated for reprocessing, or simply burned. Due to the potential for waste materials to pollute soil, air, water, food supplies, and vegetation, poor waste regulation poses a significant challenge to the well-being of the nation's people, especially those living adjacent to dumpsites. Weak waste removal and disposal results in enviro - degradation, ecological disruption, and serious threats to civic health.[11]

Constitutional Provisions for Environment Protection.

India has inherited a tradition of peace, nonviolence, justice, and compassion. In the past, the climate was an integral part of everyday life and was intertwined with religion. Religious teachings, social and political norms, and economic policies viewed man as a part of nature rather than as a moulder or superior to it. Air, water, earth, animals, plants, and humans are all the work of one supreme entity, God.[12] As a result, the basic ethics of their actions with each other was to live in harmony with each other because it was well understood that each of them is dependent on the other, and loss or damage to the other is the destruction of themselves, and is complementary to each other.As a result, interdependence, communal living, and strong contact with one another and the world became the true foundations of human existence. The wisdom of the Vedas, Hindu philosophical values, and moral doctrine taught the lesson of coexistence between man and his world, which later became a part of people's everyday lives.[13]The above-described philosophy of peaceful coexistence with nature is mentioned in the Indian Constitution in some form or another. To uphold its wholesomeness, our Constitution is a full text. When debating environmental contamination, we should look at our Constitution and see what laws are in place to discourage and protect against it. Although,

11 *Ibid.*

12 SatishC.Shastri,*EnvironmentalLaw*08(EasternBookCompany ,Lucknow,4thedn.2012).

13 *Ibid.*

when our Constitution was first written, no such clause was included, and the word "climate" did not appear anywhere in the document.

However, there were some incidents of environment which were there in the original draft constitution such as:

"Improvement of public Health[14]*,organization of agricultural and animal husbandry on modern and scientific lines*[15]*and protection of natural monuments from spoiled,disfigurement,etc."*[16]

Article 47 of the Constitution is of specific importance as it provides that

"The state shall regard the raising of the level of nutrition and the standard of living of its people and improvement of public health as among its primary duties."[17]

Environmental protection and preservation are fundamentally intertwined with public health advancement because public health cannot be guaranteed in the absence of a safe environment. It demonstrates that our forefathers were acutely aware of environmental issues.[18]However, after two and a half decades of long journey of the Constitution, the significant development occurred in 1976, four years after the Stockholm Conference, when the Constitution (Forty-second Amendment) Act, 1976, was passed by the Indian legislature and for the first time provisions relating to environmental protection were incorporated by inserting a new provision, Article 48A. The 42nd Amendment also added a new clause to Article 51A in the form of "Fundamental Duties." Article 48A directs the state to "protect and develop the environment," and Article 51-A (g) imposes a constitutional obligation on Indian people to:

"*Protect and improve the environment and have compassion for living creatures*".

---

14 ConstitutionofIndia,art.47.
15 *Ibid*,art48.
16 *Ibid,*art.49.
17 SukantaK.Nanda,*EnvironmentalLaw*82(CentralLawPublications, Allahabad,4thedn.,2015).
18 *Ibid.*

This clearly demonstrates that the Indian Legislature has reverted to old conventional principles. The terminology used in the Articles clearly demonstrated that the principles of justice, coexistence, respect for nature, and nonviolence have been recognized by the Constitution.[19]The Indian constitution has unique provisions for environmental conservation. It imposes a constructive obligation on both the state and people to protect and improve the environment.[20] The preservation of the environment is also implied in our preamble since it refers to the socialistic pattern of life and substantive justice, which means that the natural environment belongs to all and that the right to live in a pollution-free environment is inherent in that definition.

Environmental Crimes and key issues and challenges in India.

India has taken the lead in amendment to its Constitution that allows the state to protect and improve the environment to safeguard public health,forests and wildlife.The state government has drawn the lines of authority and jurisdiction. Article 253of the Constitution gives the government of the Union ample powers to enforce laws for any part of India in relation to treaties concluded with another country or decisions taken by an international organization. For internal environmental issues, the Constitution establishes a division of legislative powers between the Union and the States.This was done through the creation of three jurisdiction all in its:Union, State and Concurrent."[21]

Article48- A displays a growing recognition of humans around the need to keep the surroundings from pollutants,particularly in city areas.Smoke, commercial waste, dangerous fumes from car exhaust and other combustion engines are harmful to human's fitness and properly-

19 TheConstitutionofIndia (42nd Amendment) Act, 1976receivedtheassentofthePresidentofIndiaon16/12/1976.

20 *Ibid.*

21 The Environment (Protection)Act1986,IndianLawInstitute, NewDelhiIndia(1992)byP.M. Bakshi.

being and clog the atmosphere. Conservation of forests and reforestation via afforestation has long been identified in India as being of high-quality significance with regard to rain and to keep away from soil erosion,depriving it of the forests that defend it. Conservation of wildlife is considered necessary for the “conservation of ecological balance".

Article48-A rightly emphasizes the fact that the state must seek not only to look after but also to get better the environment.Article 51 requires the State to promote respect for international law and the obligations deriving from the treaties in the relations between organized persons. Therefore,in view of the variety of international treaties, legal obligations and the treaties referred to in Article51(c),read in conjunction with the provision of specific treaty,canal so serve to strengthen the hands of the judge for conservation. The Constitution(42nd amendments) inserted Part IV -A in the Indian Constitution. This new part prescribes some fundamental duties for the citizens of India. The only article in this part, Article51-A ,specifies ten fundamental duties.”[22]The Indian Constitution imposed a joint responsibility on the country; and each citizen of India to defend and enhance the natural environment. As per the view of Ranganath Mishra,J-

"*The protection of the environment and the maintenance of ecological balance is not concerned is a task that should not be assumed only by the government,but also by citizens. This is a social obligation and to remind every citizen that It is their duty fundamental principle* enshrined in Article51-A, of the Constitution.

Having recalled Article48-A and Article51-A(g),the High Court of Himachal Pradesh concluded that one of the most innovative parts of the Constitution is that the jurisdiction conferred by writing the Supreme Court underArticle32 and all the higher jurisdictions referred to in

22 Environmentalpollutioncandamagemonumentsof countrywideimportance,whose protection is a kingdomresponsibilitybelowArticle49oftheConstitution.Articlefortynineoft heDirectiveonthe conceptsofcountrypolicyestablishesthedutyoftheStatetodefendmonuments, placesandadgetsof nationalimportance.

Article 226.In these provisions,the judges have the power to issue any direction or order or injunction, including written in the nature of habeas corpus, mandamus, prohibition,quo- warranto and certiorari ,as appropriate.This has paved the way for one of the most effective and dynamic mechanisms for environmental protection, namely, public interest litigation. PartIII of the Indian Constitution contains fundamental rights. These rights were included in the Constitution after long debates in the Constituent Assembly."[23]

The Supreme Court has the power to issue instructions or orders,including orders,writs(under Article32) depending upon the case,or the execution of one of the rights conferred by this part.A new judicial notion has arisen in the case of Maneka Gandhi. The Supreme Court interpreted that the right to life and personal rights include the right to a healthy climate, which was implicit in Article 21. The conflict between development needs and environmental protection has been the most contentious issue before environmental courts. Intriguingly, the case of Dehradun Cave, which paved the way for the right to a healthy climate, is also linked to this continuing conflict. "The sentences in the case of Dehradun quarries were allowed under Article 32 of the Constitution and concerned the closure of a number of quarries based on the fact that their management was threatening the area's ecological stability. Life is impossible without clean drinking water; one of the features of the right to life under Article 21 of the Constitution is the right to healthy drinking water." Industrial establishments in and around residential settlements are another source of concern, especially as industries that are not in line with development plans intensify.

23 Baxi,U.(1982).TheCrisisoftheIndianLegalSystem. AlternativesinDevelopment:Law.Stranger Journalism.

Conclusion

Environmental conservation has long been regarded as a sacred practise in India, and environmental values have always been a part of Indian philosophy. Men have a responsibility, according to the Vedas, to "develop and protect his environment." The Vedic polity understood that human life needed a balance of air, water, soil, vegetation, and human life in order to live in its entirety on mother earth. The member nations of the United Nations vowed to take appropriate measures to protect and strengthen Mother Earth following the 1972 UN Conference on Human Environment. The 42nd Amendment to the Indian Constitution was enacted as a result of this declaration. Article 48-A was amended to include “the state to protect and develop the environment, as well as to safeguard the country's forests and wildlife,” as one of the directive principles of state policy. The people must protect and develop the natural environment, including forests, lakes, rivers, and wildlife, as well as have respect for living creatures, according to Article 51-A (g). The Constitution's seventh Schedule was also altered as a result of the 42nd Amendment. Forest was originally included in the State List (List II), Entry 19 as a subject. Since India had no consistent policy in place for the preservation and enhancement of forests, the issue was moved to the Concurrent List (List III), allowing both the Union Parliament and state legislatures to pass environmental legislation.The Parliament's power to enact decisions is restricted, and only for a limited period of time. According to the general language of Article 253, “Parliament has the power to enact on all subjects related to the conservation and preservation of natural resources” following the Stockholm Conference in 1972.The 42nd Amendment, which included Articles 48-A and 51-A (g), marked the start of Indian environmental law. Environmental law encompasses the following topics. Several laws have been passed in India in order to enhance and preserve natural heritage. Nonetheless, judicial activism in the 1980s and 1990s fueled attempts to "protect and conserve natural resources." The Indian judiciary has taken a proactive role in preserving and developing the natural environment, as well as spreading environmental consciousness among Indian people, thanks to

the power of judicial review and the constitutional scheme of judicial independence. Finally, each Indian citizen must determine what level of living he or she will accept and how much pollution he or she will tolerate. Many people are choosing to combat pollution, as shown by the increasing number of lawsuits filed on environmental issues.

Mehak Hamid*

* LLM, Amity University, Noida.